File No. CT-2016-003

CANADA COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an Application by CarGurus, Inc. for an Order pursuant to section 103.1 granting leave to make application under sections 75, 76 and 77 of the *Competition Act*.

BETWEEN:

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

BOOK OF AUTHORITIES OF THE RESPONDENT, TRADER CORPORATION
(Response to Application for Leave Pursuant to Section 103.1)

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21.	Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: September 18, 2014) at §4.2.1.
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In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make application under section 75 of the Competition Act

Audatex Canada, ULC, (applicant) and CarProof Corporation, Trader Corporation, and Marktplaats B.V., (respondents)

Denis Gascon Chair

Judgment: December 16, 2015
Docket: CT-2015-010

Counsel: Donald B. Houston, Julie K. Parla, Jonathan Bitran, for Applicant, Audatex Canada, ULC
Adam Fanaki, for Respondent, CarProof Corporation
Michael Koch, for Respondent, Trader Corporation
Davit Akman, for Respondent, eBay Canada Limited

Subject: Corporate and Commercial; Criminal

Headnote

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Atlantic Engraving Ltd. v. LaPointe Rosenstein (2002), 2002 FCA 503, 2002 CarswellNat 3749, 23 C.P.R. (4th) 5, (sub nom. *Atlantic Engraving Ltd. v. Rosenstein)* 299 N.R. 244, (sub nom. *Atlantic Engraving Ltd. v. Rosenstein)* 236 F.T.R. 159 (note), 2002 CAF 503, 2002 CarswellNat 6010 (Fed. C.A.) — referred to

Audatex Canada, ULC v. CarProof Corporation (2015), 2015 Comp. Trib. 13, 2015 CarswellNat 5700 (Competition Trib.) — referred to

B-Filer Inc. v. Bank of Nova Scotia (2005), 43 C.P.R. (4th) 37, 2005 CarswellNat 4014 (Competition Trib.) — considered

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Barcode Systems Inc. v. Symbol Technologies Canada ULC (2004), 29 C.P.R. (4th) 554, 2004 CarswellNat 1227, 2004 Comp. Trib. 1 (Competition Trib.) — considered

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Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority (2011), 2011 Comp. Trib. 17, 2011 CarswellNat 5279 (Competition Trib.) — referred to

Broadview Pharmacy v. Pfizer Canada Inc. (2004), 2004 CarswellNat 5890, 2004 Comp. Trib. 23 (Competition Trib.) — considered

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Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — referred to

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1991), 38 C.P.R. (3d) 25, *(*sub nom. *Chrysler Canada Ltd. v. Director of Investigation & Research)* 129 N.R. 77, 1991 CarswellNat 1118 (Fed. C.A.) — referred to

Construx Engineering Corp. v. General Motors of Canada Ltd. (2005), 2005 Comp. Trib. 21, 2005 CarswellNat 7062 (Competition Trib.) — considered

Forest Ethics Advocacy Assn. v. National Energy Board (2014), 2014 FCA 88, 2014 CarswellNat 960, 2014 CAF 88, 2014 CarswellNat 2660 (F.C.A.) — referred to

Mazhero v. Canada (Industrial Relations Board) (2002), 2002 FCA 295, 2002 CarswellNat 1990, 2002 CAF 295, 2002 CarswellNat 3025, 292 N.R. 187 (Fed. C.A.) — referred to

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Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2011), 2011 FCA 188, 2011 CarswellNat 2032, 2011 CarswellNat 2033, 419 N.R. 333, 2011 CAF 188 (F.C.A.) — referred to

Nadeau Poultry Farm Limited v. Groupe Westco Inc. (2008), 2008 Comp. Trib. 6, 2008 CarswellNat 6997 (Competition Trib.) — considered

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77, *(*sub nom. *National Capital News Canada v. Milliken)* 2002 Comp. Trib. 41, 2002 CarswellNat 4487 (Competition Trib.) — followed

Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc. (2004), 2004 CarswellNat 5888, 2004 Comp. Trib. 21 (Competition Trib.) — considered

Sears Canada Inc. v. Parfums Christian Dior Canada Inc. (2007), 2007 CarswellNat 1610, 2007 Comp. Trib. 6 (Competition Trib.) — referred to

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1177057 Ontario Inc. v. Wyeth Canada Inc. (2004), 2004 CarswellNat 5889, 2004 Comp. Trib. 22 (Competition Trib.) — considered

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***Denis Gascon Chair*:**

I. Overview

1 On October 1, 2015, Audatex Canada, ULC ("Audatex") applied to the Competition Tribunal, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34 (the "Act"), for leave to bring a refusal to deal application under section 75 of the Act. If leave is granted, Audatex seeks an order under subsection 75(1) of the Act directing CarProof Corporation ("CarProof"), Trader Corporation ("Trader") and Marktplaats B.V. ("Marktplaats") (collectively, the "Respondents") to accept Audatex as a customer and to supply Canadian automobile listings data to Audatex on usual trade terms.

2 On November 6, 2015, each of CarProof, Trader and Marktplaats filed written representations in response to Audatex's leave application. Further to an order issued on October 29, 2015, the Tribunal granted leave to CarProof and Marktplaats to file affidavit evidence, along the terms and conditions set out in such order, as part of their representations in writing.

3 On November 17, 2015, Audatex filed a reply, which included reply affidavit evidence as well as written representations. Audatex had not sought leave from the Tribunal to file additional affidavit evidence. The issue of the admissibility of that reply evidence will be dealt with below in Part II.D of these reasons.

4 In support of its application for leave, Audatex submitted an affidavit sworn on October 1, 2015 by Mr. Gabor Toth, the Chief Financial and Operating Officer of Audatex (the "Toth Affidavit"). In its reply, Audatex also added affidavits sworn on November 17, 2015 by Mr. Jason Brady, the Senior Vice President, General Counsel and Secretary of Audatex's parent company Solera Holdings Inc. (the "Brady Affidavit") and by Mr. Alberto Cairo, Chief of Staff for North America of Solera (the "Cairo Affidavit"). With their respective responses, CarProof submitted an affidavit sworn on November 5, 2015 by Mr. Paul Antony, Chairman of the Board of CarProof (the "Antony Affidavit") and Marktplaats submitted an affidavit sworn on November 5, 2015 by Mr. Scott Neil, Director, Commercial Business with eBay GmBH (the "Neil Affidavit").

5 Pursuant to subsections 103.1(1) and (6) of the Act, and subject to the ruling below, the Tribunal has relied on these affidavits and the written representations of the parties in deciding this application for leave.

6 Audatex claims that it has provided sufficient credible evidence to satisfy the Tribunal that there is a reasonable possibility that its business is directly and substantially affected by the Respondents' refusal to deal, and that such refusal could be the subject of an order under section 75 of the Act. CarProof, Trader and Marktplaats collectively seek an order denying Audatex leave and dismissing the application, with costs, as Audatex has failed to provide sufficient credible evidence for each of the requirements set out in sections 75 and 103.1(7) of the Act. They further invite the Tribunal to exercise its discretion to refuse to grant leave, in accordance with subsection 103.1(7).

7 For the reasons that follow, I am not satisfied that Audatex has met its burden under subsection 103.1(7) to apply for relief under the refusal to deal provision of the Act. Audatex's application for leave shall therefore be dismissed.

II. Background

A. The Parties

a. Audatex

8 Audatex is an Alberta corporation that provides data and software solutions to Canadian automobile insurance companies and automobile repair shops in order to streamline the accident claims process, both for estimating the cost of repairs and for calculating market values of automobiles. As part of the business Audatex describes as its "primary business", it offers two services to its customers: "total loss valuation" and "partial loss estimating". Audatex's affiliate, Audatex North America, Inc. ("Audatex North America"), provides similar services in the United States.

i. Total loss valuation services

9 Audatex's total loss valuation services refer to the determination of the market values of damaged automobiles for its insurance company customers. In order to provide these services, Audatex relies on Canadian automobile listings data. These automobile listings data are information about an automobile that is contained in an advertisement listing an automobile for sale. Such advertisements almost always include the year, make and model of the automobile, as well as the asking price. Mileage, features, transmission type and colour of the automobile, amongst other details, are typically also included in automobile listings data. Automobile listings data is the product for which Audatex is seeking an order to supply.

10 When an automobile is damaged in an accident, Audatex reviews automobile listings data for advertisements of automobiles that have similar characteristics as the damaged automobile and are within a close geographic proximity. Using proprietary algorithms, Audatex generates a total loss valuation for the damaged automobile. Audatex then prepares a report for the insurance company which includes information from the listings that underpin the total loss valuation (the "Valuation Report"). The total loss valuation generated by Audatex is a criterion by which insurers determine if it is preferable to make repairs to an automobile or, if the repair cost is greater than the market value of the automobile, to provide the policyholder with the total loss cash value.

ii. Partial loss estimating services

11 Audatex's partial loss estimating services refer to automobile repair estimates offered to both its insurance company customers and its repair shop customers. The partial loss estimating services do not require the automobile listings data in question.

12 In terms of revenues, the Toth Affidavit reports that approximately one-quarter of Audatex's revenues in its "primary business" originates from its total loss valuation services provided to insurance company customers. One-third comes from its partial loss estimating services sold to those insurance company customers. The remaining 45% of Audatex's revenues is generated by automobile repair shops purchasing its partial loss estimating services.

b. The Respondents

13 CarProof is headquartered in Ontario and its principal business is the sale of detailed vehicle-history reports (the "VHRs"). As stated in the Antony Affidavit, these VHRs are used by car sellers and buyers to obtain detailed information about a vehicle's past.

14 In order to prepare its VHRs, CarProof uses various sources of data as inputs. These include "damage repair estimates" provided by repair shops following an accident. Audatex, HyperQuest, Inc. ("HyperQuest") (an American affiliate of Audatex) *[CONFIDENTIAL]* all collect this estimate repair data as part of their respective insurance business. CarProof purchases this estimate repair data through licenses obtained from Audatex North America *[CONFIDENTIAL]*.

15 As a by-product of its VHR business and as an additional source of revenue, CarProof also sublicenses some of the data it sources to other industry participants.

16 Another important source of data used by CarProof for its VHR business is automobile listings data. As it does for the estimate repair data, CarProof licenses automobile listings data from numerous sources in the United States and Canada, including Trader and Marktplaats. The Antony Affidavit states that *[CONFIDENTIAL]*. However, as it does with other sources of data, CarProof looks to use automobile listings data as an additional source of revenues through sublicensing some of this data to other industry participants. CarProof has never supplied automobile listings data to Audatex.

17 Trader is based in Canada and owns the Canadian websites www.autotrader.ca and www.autohebdo.net (collectively "AutoTrader"). AutoTrader offers online automobile classified advertisements services that, for a fee, allow anyone to list an automobile for sale. In the course of its business, Trader has licensed certain automobile listings data to Audatex North America pursuant to an agreement called the "Data Licensing Agreement" (the "Trader Agreement"). The Trader Agreement terminated in August 2015 and is no longer in force.

18 Marktplaats is headquartered in Amsterdam and operates the www.kijiji.ca website ("Kijiji"). Kijiji is an online classified advertisements service that allows dealers, for a fee, and anyone else, for free, to list an automobile for sale. Vehicle advertisements are live on Kijiji and publicly available for only a limited time. However, *[CONFIDENTIAL]*. The Neil Affidavit indicates that Marktplaats refers to that *[CONFIDENTIAL]* as the "Confidential and Proprietary Listing Data". Marktplaats has recently entered into a data licensing agreement with CarProof regarding its Confidential and Proprietary Listing Data. *[CONFIDENTIAL]*. The Neil Affidavit attests that Audatex has never been a customer of Marktplaats.

B. The Relevant Facts

19 Audatex complains that it no longer has access to the AutoTrader and Kijiji automobile listings data from Trader and Marktplaats. In September 2009, Audatex North America had entered into the Trader Agreement, pursuant to which Audatex received Canadian automobile listings data from Trader. It had a *[CONFIDENTIAL]*, which automatically renewed for additional *[CONFIDENTIAL]* terms unless either party gave at least *[CONFIDENTIAL]* notice of termination prior to the end of the current term. On March 24, 2015, Trader sent Audatex North America a letter advising of its termination of the Trader Agreement, effective on August 31, 2015. Since that date, Audatex no longer receives automobile listings data from Trader. The Toth Affidavit states that the reason for terminating the Trader Agreement was because Trader had concluded a long-term, exclusive agreement to provide its Canadian automobile listings data to CarProof.

20 With respect to the Kijiji automobile listings data, the Toth Affidavit indicates that Audatex had been using a computer script to access specific, relevant vehicle valuation information from Kijiji's online site. Audatex never had a formal supply agreement with Marktplaats. Starting in November 2014, Audatex unsuccessfully attempted to enter into an agreement with Marktplaats for access to Kijiji's Canadian automobile listings data. In July 2015, Kijiji requested that Audatex cease its practice of accessing data on Kijiji, which Marktplaats qualified in the Neil Affidavit as being "data scraping" and contrary to Kijiji's terms of use. The Toth Affidavit confirms that Audatex complied with Marktplaats' request. After that, and as discussed in more detail in the Brady Affidavit, Audatex continued discussions with CarProof for the possibility of an agreement to access Kijiji's automobile listings data. These were ultimately unsuccessful. The Toth Affidavit attests that, in August 2015, Audatex learned that Marktplaats had already entered into an exclusive supply agreement with CarProof with respect to Kijiji's automobile listings data.

21 Audatex claims that access to AutoTrader's and Kijiji's Canadian automobile listings data is vital to its business. According to the Toth Affidavit, Audatex generated over *[CONFIDENTIAL]* Valuation Reports in the 2015 fiscal year and, since its algorithm requires at least *[CONFIDENTIAL]* comparable automobile listings in order to generate each

Valuation Report, Audatex requires access to approximately *[CONFIDENTIAL]* Canadian automobile listings per month. Without access to either AutoTrader's or Kijiji's Canadian automobile listings data, Mr. Toth says that Audatex is not able to have a sufficient number of "new" listings per month, causing the Valuation Reports *[CONFIDENTIAL]*. This, according to Mr. Toth, severely restricts Audatex from continuing to provide its total loss valuation services.

22 According to Mr. Toth, Audatex has recently procured Canadian automobile listings data from three different companies; *[CONFIDENTIAL]*. However, these listings combined fall *[CONFIDENTIAL]* short of the monthly new listings required by Audatex to continue to operate its total loss valuation services. In August 2015, Audatex also entered into negotiations with Boost Motor Group, but it was advised that Boost had entered into a long-term, exclusive agreement to provide automobile listing data to CarProof.

23 Audatex tried to negotiate a satisfactory sublicense agreement with CarProof to have access to the AutoTrader and Kijiji automobile listings data but no agreement was reached. The Toth Affidavit, the Brady Affidavit, the Cairo Affidavit and the Antony Affidavit contain details on the exchanges between the parties, on the contractual terms discussed and on the areas of disagreement. There is no need to elaborate on those negotiations for the purpose of this application. Suffice it to say that CarProof was seeking some contractual conditions from Audatex, perceived by Audatex to be over and beyond the terms governing the simple sublicensing of the automobile listings data. CarProof viewed these as forming an integral part of the agreement to be concluded with Audatex and reflective of the multifaceted nature of their business relationship. *[CONFIDENTIAL]*.

24 I also note that, in August 2015, CarProof instituted legal proceeding against HyperQuest in the United States, seeking access to HyperQuest's estimate repair data and alleging that HyperQuest reneged on an agreement it had entered with CarProof in July 2014.

C. The Parties' Arguments

25 Audatex argues that the refusal of CarProof, Trader and Marktplaats to supply the AutoTrader and Kijiji automobile listings data directly and substantially affects its business. The Respondents dispute that.

26 Audatex further claims that CarProof has purposefully and tactically concluded exclusive agreements with a number of suppliers of automobile listings data, including the key suppliers Trader and Marktplaats, and has thus eliminated competition in the supply of Canadian automobile listings data. These exclusive contracts have, despite Audatex's efforts, prevented it from negotiating access to such data going forward. While Audatex has been able to negotiate agreements for access to Canadian automobile listings data from a few smaller suppliers, it contends that it is unable to obtain adequate supplies of the product from other suppliers. Audatex pleads that it offered to meet and exceed CarProof's usual trade terms, but that CarProof was focused on extracting unconnected concessions from Audatex and its affiliates in the United States as a condition to providing Audatex with Canadian automobile listings data. Furthermore, Audatex submits that it is willing to obtain Canadian automobile listings data from Trader and Marktplaats on usual trade terms, in accordance with the range of market values attributed to such data. Finally, Audatex submits that, if it is not able to compete effectively, Mitchell, described in the Toth Affidavit as Audatex's only material competitor, will lose its most important competitive constraint. Competition will thus be adversely affected in the total loss valuation and partial loss estimating services, as this market would be reduced to only one major competitor. For those reasons, Audatex argues that an order could be issued under section 75.

27 CarProof, Trader and Marktplaats respond that the product for which Audatex seeks relief is not the automobile listings data itself but a license to use the confidential and proprietary Trader and Marktplaats data. The Respondents only supply their automobile listings data through licenses and, based on the ratio in *Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321 (Competition Trib.), licenses are not products for the purposes of section 75 of the Act as they are not in "ample supply". Trader and Marktplaats further argue that Audatex's claimed inability to obtain adequate supplies is due to the allegedly anti-competitive conduct of CarProof, not a lack of competition among suppliers. CarProof says it has been more than willing to sublicense available automobile listing

data to Audatex on fair and reasonable terms consistent with industry practice, and claims that its negotiations with Audatex reflect the complex relationship between the parties and the ubiquity of multi-faceted value exchanges in the industry. The Respondents also submit that Audatex does not provide information regarding the size of the downstream market which it claims will be affected by the refusal to deal, the size of Mitchell or its market power absent Audatex's participation, or the number and size of competitors in that market. Therefore, the Tribunal could not have reason to believe that an order could be issued under the refusal to deal provision.

28 The Respondents finally argue that the Tribunal should in any event exercise its discretion not to grant leave. Marktplaats states that Audatex's conduct in scraping the Kijiji website should disentitle it from applying for an order under section 75, as it would compel Marktplaats to do business with a party that knowingly violated its rights by breaching the Kijiji terms of use. Marktplaats also claims that Audatex was the author of its own misfortune due to its apparent failure to act timely to secure a license from Marktplaats (and other licensors). In their view, the Tribunal should not permit the private application process under section 75 to be used as a mechanism for ineffective or unsuccessful competitors to interfere in the competitive process.

D. The Reply Affidavit Evidence

29 There is disagreement between the parties on the admissibility of Audatex's reply affidavit evidence as part of this application for leave.

30 On behalf of the Respondents, CarProof requests that the Brady Affidavit and the Cairo Affidavit filed as part of Audatex's reply be struck from the record. CarProof claims that Rule 120 of the *Competition Tribunal Rules*, SOR/94-290 (the "Rules") only contemplates that a person may serve a reply, not a "reply record", at the leave application stage. Contrary to Rule 115 (which expressly allows an applicant to file affidavit evidence) or to Rule 119 (which allows a respondent to file such evidence with leave of the Tribunal), Rule 120 does not contemplate the filing of additional affidavit evidence as part of a reply by an applicant for leave. Relying on the order issued by Mr. Justice Blanchard in *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2008 Comp. Trib. 6 (Competition Trib.) ("*Nadeau Reply Order*") at para 4, CarProof contends that a reply must be limited to legal argument, excluding additional affidavit evidence.

31 Audatex replies that Rule 120 specifically provides for an applicant for leave under section 103.1 to serve a "reply" and that, unlike Rule 119, Rule 120 does not require the applicant to seek leave to include affidavit evidence in the reply. Audatex contends that the right of reply granted by Rule 120 would be meaningless if it did not permit an applicant, by way of reply evidence, to respond to factual allegations made by a respondent. Audatex states that the *Nadeau Reply Order* predates Rule 120 and refers to *B-Filer Inc. v. Bank of Nova Scotia* [2005 CarswellNat 4014 (Competition Trib.)], CT-2005-06, where the applicant was permitted to file reply affidavit evidence. Audatex pleads that no unfairness or injustice would be caused to CarProof by allowing the reply affidavit evidence and that the right of an applicant to file non-repetitive reply evidence responsive to factual allegations is well-established. Audatex also claims that striking the reply evidence would unfairly and unjustly deny Audatex the right to reply to the Respondents' factual representations, as well as depriving the Tribunal of valuable evidence on which to make its determination.

32 I disagree in part with Audatex and conclude that some portions of the reply affidavit evidence cannot be allowed and must be struck.

33 Rule 120 simply provides that "[the] person making an application for leave under section 103.1 of the Act may serve a reply on each person against whom an order is sought (...)". Contrary to the language used in Rules 115 and 119, no reference is made to affidavit evidence or even to the possibility of seeking leave for it in the context of a reply. Audatex's claim that Rule 120 provides for the right to file an entire reply record, encapsulating a reply affidavit, is without merit. In the context of applications for leave, filing an affidavit in reply is contemplated neither explicitly nor implicitly by the Rules. In fact, given the express language found in Rules 115 and 119, the only reasonable interpretation of Rule 120 is that no reply affidavit evidence is to be submitted. This, in my view, is consistent with the nature of an application for leave under section 103.1 of the Act, which is meant to be a summary process (*Barcode Systems Inc. v.*

Symbol Technologies Canada ULC, 2004 FCA 339 (F.C.A.) ("*Barcode FCA*") at para 19). Audatex's unilateral filing of affidavit evidence with its reply is therefore not permissible under the Rules.

34 I do, however, mention that Rule 2 permits the Tribunal to "dispense with, vary or supplement the application of any of [the] Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and consideration of fairness permit". Audatex could therefore have sought permission from the Tribunal, under Rule 2, to file reply affidavit evidence by way of a motion. Alternately, Audatex could have addressed a more informal letter to the Tribunal, as per the requirements of Rule 81. Audatex did not. It just decided to file a reply record.

35 Audatex defends its position by invoking that the "general right of an applicant to file non-repetitive reply evidence which is responsive to the factual allegations of a respondent is well established". In the context of summary processes like an application for leave under section 103.1 of the Act, this is only partly correct. The exercise of such a "right" requires permission. By analogy, I refer to applications under Part V of the *Federal Court Rules*, SOR/98-106 (the "FCR"), where no "right" to file reply affidavit evidence is contemplated after parties submit their respective affidavits. Applications governed by Part V of the FCR are summary proceedings meant to be dealt with without delay. Pursuant to Rule 312 of the FCR, a party (whether an applicant or a respondent) needs to obtain leave of the Federal Court in order to file additional affidavits. In the exercise of its discretion, the Court will consider factors such as whether the evidence sought to be adduced was available when the party filed its initial affidavits or could have been available with the exercise of due diligence, whether the evidence will assist the Court and serve the interest of justice, and whether the evidence will cause substantial or serious prejudice to the other parties (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 (F.C.A.) at para 6; *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503 (Fed. C.A.) at paras 8-9). Since a party must put its best case forward at the first opportunity, the discretion of the Court to permit the filing of additional material should be exercised with great circumspection (*Mazhero v. Canada (Industrial Relations Board)*, 2002 FCA 295 (Fed. C.A.) at para 5).

36 In my view, in the context of a summary process like an application for leave under section 103.1 of the Act, these principles apply even more forcefully.

37 That being said, it is important to step back and consider CarProof's request to strike Audatex's reply affidavit evidence in the context of this particular application for leave. In this matter, the Tribunal has allowed CarProof and Marktplaats to file affidavit evidence, as part of their respective responses, limited to certain specific and discrete facts meeting the exception contemplated by Rule 119(3) (*Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 13 (Competition Trib.) ("*Audatex Affidavit Order*") at para 16). In the case of CarProof, it was in relation to "[the] alternative sources of data available to Audatex within the industry; the proprietary and confidential nature of the data that Audatex seeks to license; and the terms on which CarProof has made the data available to Audatex and Audatex' alleged unwillingness to meet the relevant terms of trade" (*Audatex Affidavit Order* at para 28). In the case of Marktplaats, it was limited to "the confidential and proprietary nature of the data Audatex is seeking to license from Marktplaats; and the data licensing agreement between CarProof and Marktplaats" (*Audatex Affidavit Order* at para 29).

38 In those circumstances, and bearing in mind the principles set out above, I believe that, pursuant to Rule 2, the Tribunal could have supplemented the application of Rule 120 and allowed Audatex to file reply affidavit evidence to respond to this specific factual evidence. While Audatex should have asked the Tribunal permission to do so prior to or at the time of filing its reply affidavit evidence, I am satisfied that the Tribunal can exercise its discretion to consider the application of Rule 2 at this stage. However, Audatex's reply affidavit evidence could only be allowed to the extent that it is responding to the factual evidence filed by CarProof and Marktplaats and for which specific, tailored leave has been granted by the Tribunal. This is what Audatex did for most of its reply evidence, but this is not the case for those paragraphs of the Cairo Affidavit dealing with Audatex's substantial harm and the effect of not having the listings data on Audatex's business. The Respondents made written representations about this issue but neither the Antony Affidavit nor the Neil Affidavit provide factual evidence on Audatex's business. I therefore cannot conclude that the portions of the Cairo Affidavit dealing with this matter constitute proper reply evidence in the context of these proceedings. I further

note that the Cairo Affidavit does not specify whether this additional evidence of harm was available or could have been available to Audatex before it filed its application on October 1, 2015.

39 As a result, the following portions of Audatex's reply evidence (and the corresponding portions of its Memorandum of Fact and Law relying upon such evidence) cannot be accepted on the record and will not be considered by the Tribunal: paragraphs 15 to 19 of the Cairo Affidavit. However, given that the remaining portions of the Cairo Affidavit, as well as the entire Brady Affidavit, respond to new factual evidence filed by CarProof and Marktplaats, I will exercise my discretion to allow that evidence to be part of the record in this proceeding.

40 I have one final comment. In these proceedings, the request to file affidavit evidence in response was not made by way of a formal motion. Instead, CarProof and Marktplaats both sent letters to the Tribunal outlining the topics they wished to address in their affidavit evidence. Such a process is perfectly in line with Rule 2, and the Tribunal accepted it. However, by doing so, the Tribunal did not have much detail on the actual contents of the affidavits intended to be filed. Going forward, it would be helpful for the Tribunal if respondents seeking leave to file affidavit evidence in response to an application for leave file, along with their request, a draft of the affidavit evidence they seek to produce. In this case, that would have allowed the Tribunal to better and more quickly assess whether the contemplated evidence fell within the principles and guidance set out in the *Audatex Affidavit Order*. Similarly, if an applicant seeks leave or permission from the Tribunal, under Rule 2, to file reply affidavit evidence, it would be helpful for the Tribunal to have a draft of the affidavit evidence intended to be produced. Such reply affidavit evidence will typically have to be limited to the issues covered in the respondent's affidavit evidence.

III. Analysis

A. The Leave Test

41 Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 of the Act. It reads as follows:

> **103.1**(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.
>
> **103.1**(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

42 The test to be followed on an application for leave in refusal to deal cases was first articulated by Madam Justice Dawson in *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41 (Competition Trib.) ("*Milliken*") at para 14. It was subsequently adopted by the Federal Court of Appeal in 2004 in *Barcode FCA* when it considered an appeal of the Tribunal's decision to grant leave. The test has been followed since then by the Tribunal in section 103.1 matters. Pursuant to this test, the Tribunal must determine two elements: whether the application for leave is supported by sufficient credible evidence to give rise to a *bona fide* belief that 1) the applicant is directly and substantially affected in its business by the refusal to deal; and 2) the practice in question could be subject to an order under section 75. There is no dispute between the parties that this is the test to be applied in this leave application.

43 In *Barcode FCA*, the Federal Court of Appeal further noted that leave applications are to be dealt with summarily and that, when determining whether to grant leave, the Tribunal's role is a screening function based on the sufficiency of evidence advanced (*Barcode FCA* at para 24). The evidence is looked at on a scale which is less than the balance of probabilities (*Barcode FCA* at para 17). However, it is not sufficient that the evidence shows a mere possibility that the business may be directly and substantially affected. The standard of proof requires the "existence of reasonable grounds for a belief" (*Milliken* at paras 9-10).

44 While the test is a lower standard of proof than proof on a balance of probabilities, "it is important not to conflate the lower standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application" (*Barcode FCA* at para 18). As Mr. Justice Rothstein said in that decision, the refusal to deal required is not "simply a refusal by a supplier to sell a product to a willing customer" (*Barcode FCA* at para 18). It has to meet the elements mapped out in section 75, and these must all be addressed by the Tribunal before granting leave.

45 With respect to the first part of the test under subsection 103.1(7) (being "directly and substantially affected by a refusal to deal"), the terms "directly" and "substantially" should be given their ordinary meaning. For the "substantial" component, terms such as "important" are acceptable synonyms to considering whether there has been a "substantial" impact, which is ultimately assessed by reviewing the circumstances at issue (*Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), aff'd (1991), 38 C.P.R. (3d) 25 (Fed. C.A.) at para 64). In the *Nadeau* decision on the merits, Mr. Justice Blanchard specified that "the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on its business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way" (*Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 (Competition Trib.) ("*Nadeau Final Order*") at para 131, aff'd 2011 FCA 188 (F.C.A.)). The "direct" component has not been interpreted, but its ordinary meaning calls for a close nexus between the refused supply and the impact on an applicant's business.

46 Turning to the second part (whether the refusal "could be the object of an order"), all the elements of the refusal to deal set out in subsection 75 (1) of the Act must be addressed (*Barcode FCA* at para 18). In order to grant leave, the Tribunal must be satisfied that "each of the elements set out in subsection 75(1) could be met when the application is heard on the merits" (*B-Filer Inc. v. Bank of Nova Scotia*, 2005 Comp. Trib. 38 (Competition Trib.) ("*B-Filer Leave*") at para 53). The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding and, "[a]s long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by [the Federal Court of Appeal]" (*Barcode FCA* at para 19).

47 At the leave stage, the question of whether the reviewable conduct "could" be subject to an order is being considered in an application which is not supported by a full evidentiary record (*Used Car Dealers Assn. of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 (Competition Trib.) ("*Used Car Dealers*") at para 32). Madam Justice Simpson added in *Used Car Dealers* that, in applying this part of the test and considering if an order is possible, "hard and fast evidence" is not required on every point and that "reasonable inferences may be drawn where the supporting grounds are given and circumstantial evidence may be considered" (*Used Car Dealers* at para 34).

48 Subsection 75(1) of the Act sets out five elements to be met for a refusal to deal under that provision. It reads as follows:

> **75**.(1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> > (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (b) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (c) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
> >
> > (d) the product is in ample supply, and
> >
> > (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

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

75.(1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

49 If there is insufficient evidence dealing with one of the elements of subsection 75(1), leave cannot be granted (*Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority*, 2011 Comp. Trib. 17 (Competition Trib.) ("*Gray*")). In that case, a "bald statement of belief" about adverse impact on competition in the market (such as simply stating that the termination of supply will result in reduced competition), without any supporting evidence, was not considered sufficient by the Tribunal, and therefore leave was not granted (*Gray* at para 13). In brief, if an applicant for leave fails to provide some cogent evidence to demonstrate that each element of subsection 75(1) could be met, leave will be denied.

50 I add one other remark. While sections 75 and 103.1 provide for a private right of action for refusals to deal, they are part of the Act and must be considered in the context of this legislation and what it aims to protect and accomplish. As Mr. Justice Rothstein said in *Barcode FCA*, "[the] basic purpose of the *Competition Act* as described in subsection 1.1 is 'to maintain and encourage competition in Canada' and the purpose of section 75 is in furtherance of that objective" (*Barcode FCA* at para 14). He elaborated on that point further in his reasons, restating the purpose of the Act to maintain and encourage competition and adding that "[i]t is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition" (*Barcode FCA* at para 23).

51 In *Barcode FCA*, Mr. Justice Rothstein was more specifically referring to the requirement of paragraph 75(1)(*e*) of an adverse effect on competition in a market. However, I note that the overarching concern about the competition and market-related dimension of the refusal to deal provision is also reflected in the language of paragraph 75(1)(*b*) requiring that the inability to obtain adequate supplies result from "insufficient competition among suppliers of the product in the market". Insufficient competition has been held to mean that the competitive conditions in the market for the supply of the product must be the "overriding reason" that adequate supplies are not available (*Canada (Director of Investigation*

& Research) v. Xerox Canada Inc., [1990] C.L.D. 1146 (Competition Trib.) at para 83; *Nadeau Final Order* at para 229; *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2011 FCA 188 (F.C.A.) at para 61).

52 Both of these components of section 75 (i.e., paragraphs 75(1)(*b*) and (*e*)) reflect the fact that the provision is not there to arbitrate private contractual disputes relating to the supply of a product in circumstances where the refusal to deal does not result from insufficient competition and does not have a market impact.

B. The Requirement of Direct and Substantial Effect

53 I now turn to the first part of the test: whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe Audatex's allegations that it is directly and substantially affected in its business by a practice referred to in section 75. There are two dimensions to this requirement: a direct and substantial effect on Audatex's business, and a causality link with the Respondents' alleged refusal to deal.

54 It is well-established that the business to be considered on a leave application pursuant to section 75 of the Act is the entire business of the applicant, not simply the product line affected by the refusal to supply (*Sears Canada Inc. v. Parfums Christian Dior Canada Inc.*, 2007 Comp. Trib. 6 (Competition Trib.) ("*Sears*") at para 21). The substantiality of the effect must therefore be measured against that whole business. In addition, the case law developed by the Tribunal in applications for leave has also reflected the fact that the effect to be looked at and considered is the impact attributable or linked to those entities whose supply is being refused. Subsection 103.1(7) indeed refers to the applicant being directly and substantially affected "by the practice".

55 I have assumed, for the purpose of this decision, that Audatex is "directly" affected in its business by the Respondents' refusal but, for the reasons that follow, I am not satisfied that Audatex has provided sufficient credible evidence to give rise to a *bona fide* belief that it is or may be substantially affected in its business by the Respondents' refusal to supply automobile listings data. I instead find that Audatex has failed to submit sufficient non-speculative, cogent evidence to give me reasonable grounds to believe that the impact of the refusal on its total loss valuation and partial loss estimating services could reasonably be considered to constitute a "substantial" effect, even if only its "primary business" were considered.

a. Audatex's evidence

56 Audatex claims that its business is directly and substantially affected now that it is not able to receive the AutoTrader and Kijiji automobile listings data from either CarProof, Trader or Marktplaats. The Toth Affidavit describes them as the only sufficiently large sources of data to enable Audatex to produce *[CONFIDENTIAL]* Valuation Reports for its customers. In essence, Audatex contends that the refusal to supply affects the entirety of its total loss valuation services where the automobile listings data is needed and that, as described in the paragraph below, it also impacts its partial loss estimating services and thus the totality of its "primary business".

57 Paragraphs 42 to 45 of the Toth Affidavit summarize Audatex's allegation of substantial harm:

> **42** Given the need for current automobile listing data and the insufficiency of Audatex's other data sources, Audatex's total loss valuation service will soon begin to experience significant performance issues if access to sufficient Canadian automobile listings data is not restored.
>
> **43** As Audatex's performance dips below the accepted service levels in its customer agreements, its customers will be able to terminate their contracts. Additionally, the uncertainty of the situation will likely cause Audatex's customers who are in the contract renewal process to reconsider staying with Audatex. In fact, **[CONFIDENTIAL]**. Audatex is concerned that the current situation will negatively impact those negotiations.
>
> **44** Once Audatex can no longer provide the total loss valuation service, all revenues and profits generated from it will be lost. As set out in Exhibit "3", Audatex's total loss valuation service, which generates approximately one-

> quarter of its revenues and profits will rapidly decline to zero as Audatex can no longer meet the mandated service levels in its customer agreements. Given that Audatex's insurance company customers are able, and I believe will in all likelihood want, to cancel their partial loss estimating service upon cancelling or losing their total loss valuation service, I expect that a further one-third of Audatex's revenues and profits will also be severely impacted. Finally, without any insurance company customers themselves using or mandating automobile repair shops to contract with Audatex, I believe the remaining revenues and profits, derived from automobile repair shops, will also steadily shrink.
>
> **45** In other words, Audatex's entire business is in jeopardy.

58 The Toth Affidavit specifies that access to sufficient Canadian automobile listings data is critical to Audatex's business, and that Audatex requires access to approximately *[CONFIDENTIAL]* Canadian automobile listings per month for its total loss valuation services (of which approximately *[CONFIDENTIAL]* would be new listings). The Toth Affidavit adds that its recently procured listings from *[CONFIDENTIAL]* together represent a monthly shortfall in the order of *[CONFIDENTIAL]* on new listings.

59 According to Mr. Toth, Audatex's total loss valuation services represent approximately one-quarter of the revenues and profits from its "primary business", and the Respondents' refusal will affect all of this line of business. In addition, these services are said to be inextricably linked to Audatex's partial loss estimating services. The Toth Affidavit describes the close link between these two services by saying that the vast majority of Audatex's insurance company customers use both services. *[CONFIDENTIAL]*, those who do not use both services use only the total loss valuation services. Referring to Audatex's agreements with two insurance company customers, the Toth Affidavit specifies that the customers purchasing both services do so pursuant to a single bundled contract which allows them to terminate the entire contract if Audatex fails to provide either of the services at the agreed upon service levels. As it is easier to deal with one service provider for both total loss valuation and partial loss estimating services, Mr. Toth expects that Audatex's insurance company clients can and would, in all likelihood, terminate use of Audatex's services altogether if it cannot provide a total loss valuation service. The Toth Affidavit attests that this will result in a further loss of approximately one-third of Audatex's revenues and profits.

60 The Toth Affidavit then adds that, if an insurer drops Audatex as a supplier, the incentive for automobile repair shops dealing with that insurer to remain with Audatex is weakened, if not completely eliminated. Mr. Toth expects that, with the loss of insurer clients, Audatex's automobile repair shops will have less incentive to remain customers, thereby dissipating Audatex's remaining revenues and profits in its partial loss estimating services. The Toth Affidavit refers to Audatex's Repair Shop Template in that respect. As a result, the Toth Affidavit claims that the entirety of Audatex's "primary business" is directly and substantially affected by CarProof's refusal to deal. Mr. Toth further states that without automobile listings data from AutoTrader and Kijiji, insurance companies and their policy holders will question the legitimacy of the Valuation Reports, and have a lack of confidence in the Valuation Reports' conclusions. The Toth Affidavit refers to *[CONFIDENTIAL]* in relation to that issue.

61 In essence, the Toth Affidavit asserts that Audatex will be directly and substantially affected in its business in two phases. First, the refusal will impact its total loss valuation services where the automobile listings data are directly used. Second, the detrimental impact will expand to its partial loss estimating services even though the automobile listings data are not needed for those. I will review these two claims in turn.

b. The effect on Audatex's total loss valuation services

62 The refusal to supply complained of by Audatex relates to one product, the automobile listings data. The Toth Affidavit indicates that this input is only used in Audatex's total loss valuation services, which is one of its lines of business. In order to determine whether there is sufficient credible evidence to have a *bona fide* belief that Audatex may be directly and substantially affected in its business by the alleged refusal to supply automobile listings data from the

Respondents, the Tribunal must thus first consider the evidence on the magnitude of the supply being refused and the impact of the refusal on Audatex in the context of its overall business.

63 The Toth Affidavit states that Audatex is engaged in the supply of "data and software solutions" to insurance companies and automobile repair shops. The Toth Affidavit then attests that:

> **13** 55% of Audatex's revenues from its automobile accident claims business are from insurance company customers, including independent appraisers, with revenues from the automobile repair shops making up the balance. 40% of Audatex's insurance company revenues are generated from its total loss valuation services. In other words, with respect to total revenues from Audatex's primary business, approximately one-quarter is made up of insurance company customers with respect to total loss valuation services, one-third is made up of insurance company customers with respect to partial loss estimating services, and 45% is made up of automobile repair shops with respect to partial loss estimating services [...].
>
> (emphasis added)

64 The financial figures referred to in the Toth Affidavit are limited to Exhibit 3 containing one page entitled "PnL By Line of Business" for the year ended June 30, 2015. It refers to total revenues of approximately *[CONFIDENTIAL]* from *[CONFIDENTIAL]*, and distinguishes between Partial Loss and Total Loss. The percentages mentioned in the Toth Affidavit are drawn from the figures in Exhibit 3. The Toth Affidavit speaks of Audatex's "primary business", but I observe that there is no indication as to what this "primary business" represents in Audatex's "data and software solutions" business, and what its share is in the overall business of Audatex. There is no other reference, in the Toth Affidavit (or in the Brady and Cairo Affidavits), to figures or financial statements relating to Audatex's total business.

65 In other words, the Toth Affidavit does not provide clear evidence on the total business of Audatex or on the relative place of its "primary business" in Audatex's supply of data and software solutions. I further note that the "approximately one-quarter" reference used by the Toth Affidavit to reflect the proportion of its "total loss valuation" services is in fact 22% (i.e., 40% of 55%). This 22% figure indeed corresponds to the ratio of the total loss valuation business from its insurance company customers and independent appraisers to the total revenues of *[CONFIDENTIAL]* reported on the P&L statement attached to the Toth Affidavit at Exhibit 3. When the *[CONFIDENTIAL]* revenue stream is excluded, that proportion is identified as 23% in Exhibit 3. But there is no indication as to what this "approximately one-quarter" (or in fact 22-23%) of Audatex's "primary business" would actually be as a proportion of Audatex's overall business.

66 Furthermore, I observe that "approximately one-quarter" (or 22-23%) represents the totality of Audatex's total loss valuation services. The Toth Affidavit does not provide information on the actual supply of AutoTrader and Kijiji automobile listings data lost by Audatex from Trader, Marktplaats and/or CarProof, or on the proportion of Audatex's total purchases of automobile listings data represented by the Respondents. The Toth Affidavit only states that, until recently, Audatex relied "primarily" on the AutoTrader and Kijiji listings data. The Toth Affidavit does not describe the total AutoTrader automobile listings data that was supplied by Trader (when Audatex had the Trader Agreement with it) and that it lost at the end of August 2015. As to the Kijiji automobile listings data, the Neil Affidavit states that Audatex never was a customer of Marktplaats, and there is also no information regarding the magnitude of Kijiji automobile listings data that Audatex had access to with its "computer script" prior to the notice it received in July 2015 to cease using the Kijiji data. The only financial figures provided reflect Audatex's revenues for the entirety of its total loss valuation services. It is therefore not possible for the Tribunal to tell precisely what is the refused supply of AutoTrader and Kijiji automobile listings data actually required for Audatex's total loss valuation business.

67 The Toth Affidavit however says that Audatex requires *[CONFIDENTIAL]* automobile listings data per month. It further estimates that AutoTrader posts 1.1 million listings per month and Kijiji 760,000 listings. Arguably, the Tribunal could deduct from these figures that supplies from the Respondents "could" account for about *[CONFIDENTIAL]* of Audatex's total supply of automobile listings data, assuming Audatex had indeed used all the potential supply available from these two sources. Based on this information, the lost supply of the AutoTrader and Kijiji automobile listings data

could represent about *[CONFIDENTIAL]* of Audatex's total loss valuation business, which is itself only approximately one-quarter (22-23%) of the total revenues of its "primary business".

68 I note that, in its reply submissions, Audatex did not clarify the issue of its "primary business" or the proportion represented by its total loss valuation services in its overall business, despite the arguments made by the Respondents in their responses and raising concerns about the information provided by Audatex on the magnitude of its business. This is evidence that only Audatex could have provided. I appreciate that there will inevitably be incomplete information on some topics at the application for leave stage (*Used Car Dealers* at para 32). However, sufficient and credible information on the applicant's own business and on the proportion represented by the suppliers refusing to supply are fundamental and basic elements needed by the Tribunal in order to be able to have a *bona fide* belief of a direct and substantial effect pursuant to subsection 103.1(7) of the Act.

69 I pause to point out that this type of evidence was typically available to the Tribunal in those cases where it decided to grant an application for leave under section 103.1 of the Act. In *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2008 Comp. Trib. 7 (Competition Trib.) ("*Nadeau Leave Order*") for example, the evidence of substantial effect was found sufficient by the Tribunal. The applicant had provided figures showing that the exact supply held by the respondents represented 48% of the overall chicken processing business of the applicant. This allowed the Tribunal to have a reliable measure of the impact of the intended cut-off in supply, which had not yet occurred in that case. In the current case, the evidence does not clearly indicate to the Tribunal the proportion of the supply represented by the Respondents in Audatex's total loss valuation business, and what the total loss valuation business represents within Audatex's total business (over and above its "primary business"). The only figure the Tribunal has is the "approximately one-quarter" (in fact 22-23%) for Audatex's total loss valuation services.

c. The effect on Audatex's partial loss estimating services

70 Audatex also claims that, even though the automobile listings data supplied by the Respondents is only used for its total loss valuation services, and that these total loss valuation services only account for approximately one-quarter (22-23%) of its "primary business", the refusal will also impact its partial loss estimating services which account for the remaining 77-78% of its "primary business". These partial loss estimating services are sold to both insurance company customers (33%) and to repair shops (45%). Since the automobile listings data refused to Audatex is not used as input for Audatex's partial loss estimating services, sufficient credible evidence needs to be adduced to illustrate how the refusal to supply may end up impacting this other line of business representing three times the revenues generated by Audatex's total loss valuation services.

71 Relying on Audatex's Master Services Agreements with the *[CONFIDENTIAL]*, which both contemplate the provision of total and partial loss services as a single bundle, Mr. Toth states that all of Audatex's business with insurance companies, whether total loss valuation or partial loss estimating services, will be affected by the refusal to deal. The Toth Affidavit speaks of some insurance company customers purchasing both types of services through a single bundled contract which "allows them to terminate the entire contract" if Audatex fails to provide both services. Then, the Toth Affidavit adds that "frequently", its repair shop customers are mandated to deal with Audatex through the insurance company customers. So, if an insurer drops Audatex as a customer, Mr. Toth "expects that the automobile repair shops will begin providing notices of termination". The Toth Affidavit later refers to "automobile repair shops generally" selecting a service provider based on insurance company preferences. From that sequence of events, the Toth Affidavit draws the conclusion that "Audatex's revenue from both total loss and partial loss services is jeopardized if it can no longer access sufficient Canadian automobile listings data to provide total loss valuation services".

72 Audatex relies on this evidence from the Toth Affidavit to claim that the refusal to supply will affect the totality of the partial loss estimating services provided to insurance company customers (representing one-third of its "primary business") as well as the totality of the partial loss estimating services provided to repair shop customers (representing 45% of its "primary business"). Repair shop customers do not use Audatex's total loss valuation services.

73 I am not persuaded that this constitutes sufficient credible evidence to support a *bona fide* belief that Audatex may be "directly and substantially" affected in its other line of business of partial loss estimating services to insurance customers and even less so, to repair shops. I cannot find in the Toth Affidavit the elements to allow the Tribunal to have reasonable grounds to believe that the refusal to supply automobile listings data could have such an impact on a line of business which represents more than three-quarters of Audatex's "primary business" and where the refused automobile listings data are not required. Apart from the scenarios described by Mr. Toth, there are no examples or circumstantial evidence supporting the allegations being made.

74 The Toth Affidavit states that "it is simpler and more efficient to deal with one service provider for both total and partial loss estimating services", but Mr. Toth does not offer credible supporting evidence on that connection. No evidence from insurance company customers has been adduced on this point. The Toth Affidavit only relies on the contractual language referring to the bundled package. There is also no reference to experiences of insurance company customers having terminated their whole contract or threatening to do so because of poor performance or other issues in one of the two services. Similarly, no evidence was provided with respect to past experiences of contract terminations by insurance company customers and their effect on the partial loss estimating services purchased by repair shops. Neither is there evidence adduced regarding the incentive for automobile repair shops dealing with a specific insurer to remain with Audatex only as long as such insurer deals with Audatex; or regarding situations where repair shop customers have raised this prospect as a reason to terminate their business with Audatex.

75 I agree with the Respondents that Audatex's allegations in respect of its partial loss estimating services are based on speculation. I find that the Toth Affidavit relies on a complex chain of cascading assumptions that are based on what might occur in the future with respect to Audatex's business other than total loss valuation services, with no credible evidence in support. The allegations are essentially based on an interpretation of certain contractual provisions. The Toth Affidavit contains no evidence from insurance company customers expressing concerns that the lack of AutoTrader or Kijiji automobile listings data could impact their partial loss estimating business. As CarProof pointed out in its submissions, Mr. Toth does not identify a single insurance customer (or repair shop customer) that has threatened to terminate its agreement with Audatex, despite the fact that Audatex no longer receives supplies of automobile listings data from AutoTrader and that it can no longer use its computer script to access the Kijiji automobile listings data. Similarly, with respect to the allegation that automobile repair shops generally select a service provider based on insurance company preferences, there is no specific evidence of a repair shop having such a practice or stating an intention to terminate on that basis.

76 It is of note that the partial loss estimating services account for 77-78% of Audatex's "primary business" (according to Exhibit 3 of the Toth Affidavit), and the automobile listings data which form the basis of Audatex's complaint are not required as supply for that business. To support an allegation that the refusal to supply such data would affect this line of business to the point where it is substantially affected and that Audatex's whole business is in jeopardy would require more than the general assertions contained in the Toth Affidavit.

77 It bears underscoring that, at the leave application stage, the evidence only needs to show a reasonable possibility that Audatex's business may have been directly and substantially affected. However, with respect to the effect on Audatex's partial loss estimating services, I find that the evidence adduced by Audatex only amounts to a mere possibility and is speculative. In a situation like this where the contemplated detrimental effect of the refusal to supply is through a series of indirect events affecting a line of business which accounts for the vast majority of Audatex's "primary business", I am not satisfied that Audatex's evidence is sufficient.

d. Conclusion on direct and substantial effect

78 The Tribunal is essentially left with an alleged impact on Audatex's total loss valuation business. Even if the Tribunal were to accept that all of Audatex's total loss valuation services business can be considered to be directly affected by the Respondents' refusal to supply automobile listings data (despite the fact that these supplies only account for a portion

of the automobile listings data used by Audatex in that business), and even if the Tribunal were to accept that Audatex's "primary business" represents its total business (despite unclear evidence about that), I am not persuaded that, overall, the figures and evidence provided constitute sufficient credible evidence to allow the Tribunal to reasonably believe that Audatex may be directly and substantially affected in its business.

79 Audatex's own evidence indicates that the total loss valuation services at issue represent only about one-quarter (or in fact 22-23%) of Audatex's total revenues in its "primary business". And, as mentioned above, the evidence on the effect on the remaining partial loss estimating services is at best speculative. This, in my opinion, is insufficient to establish that Audatex could be affected in an important or significant way by the alleged refusal. An effect of this magnitude does not rise to the level of substantial effect typically considered sufficient by the Tribunal to grant applications for leave under subsection 103.1(7).

80 In the reasons allowing the application for leave in the *Barcode* case, evidence was provided that a receiver had been appointed for all the property, assets and undertakings of Barcode and 50% of employees had been laid off in the business directly affected by the refusal to supply (*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1 (Competition Trib.) at paras 14-16). In *B-Filer Leave*, the Tribunal was satisfied with the applicants' evidence that they could be substantially affected in their business because 50% of their revenue was dependent on the banking services provided by the respondent (*B-Filer Leave* at para 54). In *Nadeau Leave Order*, the evidence showed that the supply of live chickens provided by the respondents accounted for 48% of the applicant's whole business and that the anticipated refusal to supply would have a direct impact on the applicant's production of processed chicken. In *Used Car Dealers*, the affidavit showed that the specific business at stake and supplied by the respondent accounted for more than 50% of the applicant's net income (at para 31).

81 Conversely, in *Construx Engineering Corp. v. General Motors of Canada Ltd.*, 2005 Comp. Trib. 21 (Competition Trib.) ("*Construx*"), leave was denied. Madam Justice Simpson concluded that "Construx' evidence did not provide sufficient information about its business and the impact of the Policies on its business" (at para 8), and that the Tribunal could not asses the significance of the sales of the product purchased from the respondent, even though there was a general statement that they accounted for 38% of total sales over a given period. Madam Justice Simpson noted several deficiencies, including an absence of evidence on the nature or volume of transportation products sold, total annual sales, and what the losses from the respondent meant for the whole enterprise (*Construx* at paras 5, 8).

82 In *1177057 Ontario Inc. v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22 (Competition Trib.) ("*Broadway*"), leave was denied by Mr. Justice Blais as the losses claimed were "speculative and undocumented" (*Broadway* at para 21). In that case, the applicant feared a loss of customers because "they will not be able to fill multiple prescriptions including the respondent's products" (*Broadway* at para 21). But no figures were provided to show the impact or potential impact of the loss of the respondent's products and no evidence was presented to support the assertion that not filling all the prescriptions for a given patient will mean not filling any. The leave applications in *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24 (Competition Trib.) at paras 23-24, *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23 (Competition Trib.) at para 18 and *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 (Competition Trib.)at para 23 were all dismissed by Mr. Justice Blais for the same reasons: there was no direct and non-speculative evidence about the impact of the refusal on the applicant's business. In *Sears*, it was found that alleged harm such as the improved bargaining position of other brands was mere speculation, in the absence of evidence showing that it was based on the deponent's actual experience or comments to that effect made by personnel who worked for other brands (*Sears* at para 35).

83 I agree with Audatex that it is only required to provide "sufficient credible evidence" to satisfy the Tribunal that there is a reasonable possibility that its business may be directly and substantially affected by a refusal to deal. And I also agree with Audatex that it does not have to wait until harm actually occurs before bringing an application under subsection 103.1 of the Act (*Nadeau Leave Order* at para 25). But sufficient, cogent evidence is needed, even for anticipated harm. In *Nadeau Leave Order*, supply had not yet ceased, but there was nonetheless sufficient and measurable evidence of the anticipated effects of the refusal amounting to 48% of the business.

84 In the current case, the supply of AutoTrader and Kijiji automobile listings data to Audatex has already ceased, but the harm alleged by Audatex continues to be anticipated. There is no evidence of lost sales or lost revenues (whether in the total loss valuation or in the partial loss estimating business) even though Audatex has no access to the Kijiji automobile listings data since mid-July 2015 and to the AutoTrader automobile listings data since the end of August 2015, which are said to be "critical" for its business. In these circumstances, I am not satisfied that the evidence provided by Audatex rises to the level of sufficient credible evidence required to give the Tribunal a *bona fide* belief that Audatex may be directly and substantially affected in its business due to its inability to obtain automobile listings data from Trader, Marktplaats and/or CarProof. The evidence presented by Audatex is not sufficient at this time to meet the burden it carries to show a substantial effect.

85 I add that my conclusion would not have been different even if the struck paragraphs of the Cairo Affidavit had been admitted as part of Audatex's reply affidavit evidence. In my opinion, they would not have added sufficient credible evidence of harm to reach the "direct and substantial" threshold set forth in subsection 103.1(7) of the Act.

86 This finding is fatal to Audatex's application.

C. The Section 75 Factors

87 Since Audatex has failed to meet the requirement of "directly and substantially affected in the applicant's business", this first element of the section 103.1 test is dispositive of the leave application. In view of this conclusion, it is therefore not necessary to consider whether Audatex has adduced sufficient evidence to meet the second part of the test for leave, namely whether each of the elements of subsection 75(1) could be met and an order could be issued under the refusal to deal provision.

IV. Conclusion

88 The Tribunal concludes that the leave application is not supported by sufficient credible evidence to give rise to a *bona fide* belief that Audatex may be or is directly and substantially affected in its business by the refusal to supply of the Respondents. Accordingly, Audatex's application for leave to apply under section 75 of the Act is denied.

FOR THE ABOVE REASONS, THE TRIBUNAL THEREFORE ORDERS THAT:

89 Audatex's application for leave to apply under section 75 of the Act is denied.

90 The Respondents are awarded costs.

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2004 Comp. Trib. 1
Competition Tribunal

Barcode Systems Inc. v. Symbol Technologies Canada ULC

2004 CarswellNat 1227, 2004 CarswellNat 8148, 2004 Comp. Trib. 1, [2004] C.C.T.D. No. 1, 29 C.P.R. (4th) 554

In the Matter of an application by Barcode Systems Inc., for an order pursuant to section 103.1 of the Competition Act, R.S.C. 1985, c. C-34, granting leave to bring an application under section 75 of the Act

Barcode Systems Inc., (applicant) and Symbol Technologies Canada ULC, (respondent)

Lemieux J.

Judgment: January 15, 2004
Docket: CT2003008

Counsel: None given

Subject: Intellectual Property; Property; Corporate and Commercial

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — General principles

Commercial law --- Trade and commerce — Competition and combines legislation — Practice and procedure — Miscellaneous issues

Table of Authorities

Cases considered:

National Capital News v. Milliken (2002), 2002 Comp. Trib. 41 (Competition Trib.) — followed

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

s. 75 — referred to

s. 75(1)(e) — considered

s. 103.1(1) [en. 2002, c. 16, s. 12] — pursuant to

s. 103.1(7) [en. 2002, c. 16, s. 12] — considered

***Lemieux J.*:**

1 Barcode Systems Inc. ("Barcode") has applied to the Competition Tribunal (the "Tribunal") pursuant to subsection 103.1(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for leave to make an application under section 75 of that Act.

2 Barcode alleges Symbol Technologies Canada ULC ("Symbol"), a subsidiary of Symbol Technologies Inc. ("Symbol US"), is refusing to supply it with barcode scanners contrary to the provisions of section 75 of the Act and seeks an order, if leave is granted and appropriate findings are made by the Tribunal, that Symbol accept Barcode as a customer on the "usual trade terms" forthwith upon the issuance of such an order.

3 This application for leave is only the second such application to the Tribunal brought under the recent amendments to the Act providing for what has been termed as "a private access action" because the Commissioner of Competition (the "Commissioner") does not initiate the proceeding.

4 The first application for leave was decided by Justice Dawson in *National Capital News v. Milliken* (2002), 2002 Comp. Trib. 41 (Competition Trib.)("National Capital News"), a decision which I endorse entirely.

5 The test for the Tribunal granting leave is set out in subsection 103.1(7) of the Act. It provides as follows:

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

6 In this case, the practice that is complained of and that could be subject to an order under section 75 of the Act is Symbol's refusal to sell its products to Barcode after Symbol terminated its ten year relationship with Barcode in March 2003.

7 I make the following points about the Tribunal's test for granting leave.

8 What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

9 I make this observation because Symbol, in its vigorous opposition to leave being granted, described what, in its view, was a highly competitive marketplace and argued that Barcode had provided no evidence as to this requirement as described in paragraph 75(1)(*e*) of the Act.

10 As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

11 Justice Dawson in National Capital News, *supra*, described what kind of proof the Tribunal had to have before it in order to have "reason to believe". She concluded that

> ....the leave application [must be] supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in [its] business by a reviewable practice [the refusal to deal here], and that the practice in question could be subject to an order.

12 What this standard of proof means is that the applicant Barcode must advance sufficient credible evidence supported by an affidavit to satisfy the Tribunal that there is a reasonable possibility that its business has been directly and substantially affected because of Symbol's refusal to deal.

13 The Tribunal measures the evidence on a scale which is less than the balance of probabilities. It is not sufficient, however, that the evidence shows a mere possibility that Barcode's business has been directly and substantially affected by Symbol's refusal to supply.

14 Barcode's evidence was to the effect Symbol's refusal to supply, either directly or by preventing Symbol distributors or Symbol resellers from doing so, has now caused a substantial loss of revenues to the point where it, if continued, would force Barcode out of business. On December 19, 2003, on petition from the Royal Bank of Canada, an interim Receiver was appointed of all the property, assets and undertakings of Barcode.

15 Barcode states Symbol's actions also critically impacted its ability to perform its ongoing maintenance contracts.

16 Barcode asserts that, as of the filing of its application, 50 percent of its employees have been laid off.

17 Symbol filed written representations and affidavits to counter Barcode. Symbol outlines the reasons why it is not supplying Barcode with the Symbol products. Specifically it denies that Barcode's business has been substantially affected. It says Barcode has not been precluded from carrying on business by any actions attributable to Symbol.

18 Symbol states, if Barcode suffered any loss, it is because it breached its contract with Symbol or because of factors which have nothing to do with Symbol such as declining market conditions generally, increased competition from suppliers, exchange rate changes and Barcode's failure to meet usual trade terms with its current suppliers.

19 On an application for leave, it is not the function of the Tribunal to make credibility findings based on affidavits which have not been cross-examined. I note that the Act requires an applicant to support an application for leave by a sworn affidavit while, for a person opposing leave only written representations are contemplated.

20 These provisions confirm that the Tribunal's role when granting leave is a screening function simply deciding on the sufficiency of evidence advanced.

21 There may be situations, however, where it can be demonstrated that an applicant's evidence is simply not credible without engaging the Tribunal in weighing contested statements from opposing parties and the applicant. This is not the case here.

22 I close on a procedural point. Both Symbol and Barcode have sought leave to file additional material as a result of the limited right of reply granted by the Tribunal to Barcode, as an exception in the interest of justice.

23 In only exceptional circumstances will the Tribunal grant parties a right of reply in leave applications which are to be dealt with expeditiously.

24 The Tribunal sees no need to have additional evidence before it as proposed by Barcode or Symbol.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

25 The application for leave is granted.

26 The Tribunal is prepared to expedite the hearing of the application and invites the parties to communicate with the Deputy Registrar of the Tribunal for this purpose.

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2004 CAF 339, 2004 FCA 339
Federal Court of Appeal

Barcode Systems Inc. v. Symbol Technologies Canada ULC

2004 CarswellNat 3582, 2004 CarswellNat 4789, 2004 CAF 339, 2004 FCA 339, [2004] F.C.J. No. 1657, [2005] 2 F.C.R. 254, 134 A.C.W.S. (3d) 592, 327 N.R. 296, 34 C.P.R. (4th) 481, 4 B.L.R. (4th) 58

Symbol Technologies Canada ULC (Appellant / Respondent) and Barcode Systems Inc. (Respondent / Applicant)

Richard C.J., Létourneau, Rothstein JJ.A.

Heard: September 28, 2004
Judgment: October 7, 2004
Docket: A-39-04

Proceedings: affirming *Barcode Systems Inc. v. Symbol Technologies Canada ULC* (2004), 2004 Comp. Trib. 1, 29 C.P.R. (4th) 554, 2004 CarswellNat 1227 (Competition Trib.)

Counsel: Mr. Steven Field, Mr. Dave Hill, for Appellant/Respondent
Ms Lindy Choy, for Respondent/Applicant

Subject: Criminal; Intellectual Property; Property; Corporate and Commercial

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices

S ULC was Canadian subsidiary of US-based S Inc. — S Inc. was largest single manufacturer of bar code equipment in world — In 1994, B Inc. took over S ULC's distribution in Western Canada — In January 2003, S ULC informed B Inc. that B Inc. could no longer buy parts for S ULC products — In April 2003, S ULC informed B Inc. that S ULC would not accept purchase orders from B Inc. — B Inc. successfully applied for leave before Competition Tribunal pursuant to refusal to deal prohibition under s. 75(1) of Competition Act — S ULC appealed — Appeal dismissed — Standard of review is correctness — Threshold for obtaining leave under s. 103.1(7) of Act is sufficient credible evidence of what is alleged to give rise to bona fide belief by tribunal — Threshold is lower standard of proof than proof on balance of probabilities — B Inc. was substantially affected in its business due to its inability to obtain S ULC's products — If there were any facts in its affidavit that might meet requirements of s. 75(1)(e) of Act, benefit of doubt should work in favour of granting leave in order not to finally preclude B Inc. from its day before tribunal — B Inc.'s evidence was that, if S ULC continued to refuse to supply, B Ltd. would be forced into receivership — Tribunal member found that, on December 19, 2003, B Inc. was petitioned into receivership.

Commercial law --- Trade and commerce — Competition and combines legislation — Practice and procedure — Miscellaneous issues

S ULC was Canadian subsidiary of US-based S Inc. — S Inc. was largest single manufacturer of bar code equipment in world — In 1994, B Inc. took over S ULC's distribution in Western Canada — In January 2003, S ULC informed B Inc. that B Inc. could no longer buy parts for S ULC products — In April 2003, S ULC informed B Inc. that S ULC would not accept purchase orders from B Inc. — B Inc. successfully applied for leave before Competition Tribunal pursuant to refusal to deal prohibition under s. 75(1) of Competition Act — S ULC appealed — Appeal dismissed — Standard of review is correctness — Threshold for obtaining leave under s. 103.1(7) of Act is sufficient credible evidence of what is alleged to give rise to bona fide belief by tribunal — Threshold is lower standard of proof than proof on balance of probabilities — B Inc. was substantially affected in its business due to its inability to obtain S ULC's products — If there were any facts in its affidavit that might meet requirements of s. 75(1)(e) of Act, benefit of doubt should work in favour of granting leave in order not to finally preclude B Inc. from its day before tribunal — B Inc.'s evidence was that, if S ULC continued to refuse to supply, B Ltd. would be forced into receivership — Tribunal member found that, on December 19, 2003, B Inc. was petitioned into receivership.

Table of Authorities

Cases considered by *Rothstein J.A.*:

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77, *(*sub nom. *National Capital News Canada v. Milliken)* 2002 Comp. Trib. 41, 2002 CarswellNat 4487 (Competition Trib.) — followed

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3 (S.C.C.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

Pt. VIII — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — referred to

s. 75 [am. 2002, c. 16, s. 11.1] — referred to

s. 75(1) [am. 2002, c. 16, s. 11.1(1)] — considered

s. 75(1)(a) — referred to

s. 75(1)(b)-(e) — referred to

s. 75(1)(e) [en. 2002, c. 16, s. 11.1(2)] — referred to

s. 77 [am. 2002, c. 16, s. 11.2, 11.3] — referred to

s. 103.1(1) [en. 2002, c. 16, s. 12] — considered

s. 103.1(7) [en. 2002, c. 16, s. 12] — considered

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I
s. 13(1) [rep. & sub. 2002, c. 8, s. 130] — referred to

s. 13(2) — referred to

APPEAL by company of decision reported at *Barcode Systems Inc. v. Symbol Technologies Canada ULC* (2004), 2004 Comp. Trib. 1, 29 C.P.R. (4th) 554, 2004 CarswellNat 1227 (Competition Trib.) granting leave to complainant to make application to Tribunal against company for restrictive trade practices.

***Rothstein J.A.*:**

Introduction

1 This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act.

2 Barcode's application before the Tribunal is for an order under subsection 75(1) of the *Competition Act* requiring Symbol to accept Barcode as a customer.

3 In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

Facts

4 The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

5 In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

Relevant Statutory Provisions

6 Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the *Competition Act*, e.g. refusal to deal (section 75) and tied selling (section 77). By amendments to the *Competition Act*, 2002, c. 16, ss. 11.1-11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) of the *Competition Act* provides:

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.	103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

7 The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under sections 75 or 77 of the *Competition Act*. Subsection 103.1(7) provides:

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui

pourraient faire l'objet d'une ordonnance en vertu de ces articles.

8 The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
(*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

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

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

(*d*) the product is in ample supply, and

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

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

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut_:
a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
d) que le produit est disponible en quantité amplement suffisante;
e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

The Alleged Error of Law

9 Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(*e*).

10 Indeed, in his reasons, the member specifically finds that on an application for leave, the Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

> 8. What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

> 10. As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

Standard of Review

11 Subsection 13(1) of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

12 Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.) at paragraph 38.

13 This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

14 The basic purpose of the *Competition Act* as described in subsection 1.1 is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

15 Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness.

Analysis

The legal test in an application under subsection 103.1(7)

16 In *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Competition Trib.), Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

> Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.
>
> I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

17 The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

18 However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

19 The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

20 The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

21 The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicant's business" are essentially the words in paragraph 75(1)(*a*) and because there are no words similar to those in paragraphs 75(1)(*b*) to (*e*) in subsection 103.1(7), Parliament did not intend that each element in paragraphs (*b*) to (*e*) need be taken into account on a leave application.

22 I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(*a*). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(*b*) to (*e*) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

23 Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(*e*). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

24 Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross examination on the affidavit filed in support of the application for leave, there is no provision for

the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

25 Is there credible evidence to support a finding that there are reasonable grounds to believe that Symbol's refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

26 The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

27 On this point, paragraph 75(1)(*e*) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(*e*), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

28 The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of $20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

29 From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1).

Conclusion

30 For these reasons I would dismiss the appeal with costs.

***Richard C.J.*:**

I agree.

***Létourneau J.A.*:**

I agree.

Appeal dismissed.

4

2006 Comp. Trib. 42
Competition Tribunal

B-Filer Inc. v. Bank of Nova Scotia

2006 CarswellNat 6422, 2006 CarswellNat 7323, 2006 Comp. Trib. 42

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the Competition Act

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc., (applicants) and The Bank of Nova Scotia, (respondent)

Dawson J., L. Bolton Member, L. Csorgo Member

Heard: August 28 - October 6, 2006
Judgment: December 20, 2006
Docket: CT-2005-006

Proceedings: additional reasons at *B-Filer Inc. v. Bank of Nova Scotia* (2007), 2007 Comp. Trib. 26, 2007 CarswellNat 5893 (Competition Trib.); additional reasons at *B-Filer Inc. v. Bank of Nova Scotia* (2007), 2007 Comp. Trib. 29, 2007 CarswellNat 5892 (Competition Trib.)

Counsel: Michael Osborne, Sharon Dalton, Jennifer Cantwell, for Applicants, B-Filer Inc., B-Filer Inc. doing business as GPAY Guaranteed Payment and NPay Inc.
Paul Morrison, Lisa Constantine, Ben Mills, Tanya Pagliaroli, for Respondent, Bank of Nova Scotia

Subject: Corporate and Commercial; Evidence; Civil Practice and Procedure

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Miscellaneous offences

Refusal to deal.

Evidence --- Opinion — Experts — Expert reports — Admissibility

Whether necessary or helpful.

Civil practice and procedure --- Pleadings — Amendment — Grounds for amendment — To raise additional issues

On application for order under Competition Act.

Table of Authorities

Cases considered:

Air Canada v. Canada (Commissioner of Competition) (2000), 10 C.P.R. (4th) 195, 2000 CarswellNat 3874 (Competition Trib.) — followed

Air Canada v. Canada (Commissioner of Competition) (2002), 288 N.R. 113, 18 C.P.R. (4th) 31, 2002 FCA 121, 2002 CarswellNat 720, 2002 CarswellNat 4199, [2002] 4 F.C. 598 (Fed. C.A.) — referred to

Canada (Commissioner of Competition) v. Canada Pipe Co. (2003), 2003 Comp. Trib. 15, 28 C.P.R. (4th) 335, 2003 CarswellNat 4524 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Canada Pipe Co. (2006), 2006 FCA 233, 268 D.L.R. (4th) 193, 49 C.P.R. (4th) 241, 2006 CarswellNat 4554, 2006 CAF 233, 2006 CarswellNat 1763, 350 N.R. 291, [2007] 2 F.C.R. 3 (F.C.A.) — considered

Canada (Commissioner of Competition) v. Gestion Lebski Inc. (2006), 2006 Comp. Trib. 32, 2006 CarswellNat 6420 (Competition Trib.) — referred to

Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15, 2000 CarswellNat 3449 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 2001 FCA 104, 2001 CarswellNat 702, 269 N.R. 109, 199 D.L.R. (4th) 130, [2001] 3 F.C. 185, 2001 CarswellNat 2092, 11 C.P.R. (4th) 289 (Fed. C.A.) — referred to

Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 2001 CarswellNat 1905, 2001 CarswellNat 1906, [2001] 2 S.C.R. xiii, 278 N.R. 196 (note), 14 C.P.R. (4th) vii (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. Air Canada (1988), 32 Admin. L.R. 157, 1988 CarswellNat 666, 23 C.P.R. (3d) 160 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Air Canada (1988), 33 Admin. L.R. 229, *(*sub nom. *American Airlines Inc. v. Canada)* 54 D.L.R. (4th) 741, *(*sub nom. *American Airlines Inc. v. Canada)* 89 N.R. 241, *(*sub nom. *American Airlines Inc. v. Canada)* 23 C.P.R. (3d) 178, 1988 CarswellNat 676, 1988 CarswellNat 743, *(*sub nom. *American Airlines Inc. v. Canada)* [1989] 2 F.C. 88 (Fed. C.A.) — referred to

Canada (Director of Investigation & Research) v. Air Canada (1989), *(*sub nom. *American Airlines Inc. v. Canada)* 92 N.R. 320, *(*sub nom. *American Airlines Inc. v. Canada)* 23 C.P.R. (3d) 178n, *(*sub nom. *American Airlines Inc. v. Canada)* [1989] 1 S.C.R. 236, *(*sub nom. *American Airlines Inc. v. Canada)* 26 C.P.R. (3d) 95, 1989 CarswellNat 691, 1989 CarswellNat 874 (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd. (1995), 64 C.P.R. (3d) 216, 1995 CarswellNat 2684, 24 B.L.R. (2d) 20 (Competition Trib.) — referred to

Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289, 1992 CarswellNat 1630 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289, 1992 CarswellNat 1628 (Competition Trib.) — referred to

Canada (Director of Investigation & Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1, 1990 CarswellNat 1368 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83, 1990 CarswellNat 1372 (Competition Trib.) — considered

Canderel Ltd. v. R. (1993), *(*sub nom. *R. v. Canderel Ltd.)* 93 D.T.C. 5357, *(*sub nom. *Canderel Ltd. v. Canada)* [1994] 1 F.C. 3, *(*sub nom. *Minister of National Revenue v. Canderel Ltd.)* 157 N.R. 380, *(*sub nom. *Canderel Ltd. v. Canada)* [1993] 2 C.T.C. 213, 1993 CarswellNat 949, 1993 CarswellNat 1337 (Fed. C.A.) — followed

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — followed

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1990), [1990] 2 F.C. 565, 111 N.R. 368, 31 C.P.R. (3d) 510, 48 B.L.R. 125, 1990 CarswellNat 11, 1990 CarswellNat 683 (Fed. C.A.) — considered

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1991), *(*sub nom. *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd.)* 38 C.P.R. (3d) 25, *(*sub nom. *Chrysler Canada Ltd. v. Director of Investigation & Research)* 129 N.R. 77, 1991 CarswellNat 1118 (Fed. C.A.) — referred to

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1992), 42 C.P.R. (3d) 353, 138 N.R. 321, 92 D.L.R. (4th) 609, [1992] 2 S.C.R. 394, 7 B.L.R. (2d) 1, 12 Admin. L.R. (2d) 1, 1992 CarswellNat 4, 1992 CarswellNat 657 (S.C.C.) — referred to

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — followed

Reference re Firearms Act (Canada) (2000), [2000] 10 W.W.R. 1, [2000] 1 S.C.R. 783, 34 C.R. (5th) 1, 2000 SCC 31, 2000 CarswellAlta 517, 2000 CarswellAlta 518, 261 A.R. 201, 225 W.A.C. 201, 82 Alta. L.R. (3d) 1, 254 N.R. 201, 185 D.L.R. (4th) 577, 144 C.C.C. (3d) 385 (S.C.C.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Statutes considered:

Canadian Payments Act, R.S.C. 1985, c. C-21
Generally — referred to

Combines Investigation Act and the Bank Act and to repeal an Act to amend the Combines Investigation Act and the Criminal Code, Act to amend the, S.C. 1974-75-76, c. 76
Generally — referred to

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — referred to

s. 2(1) "product" — considered

s. 75 — referred to

s. 75(1) — considered

s. 75(1)(a) — considered

s. 75(1)(a)-75(1)(e) — considered

s. 75(1)(b) — considered

s. 75(1)(c) — considered

s. 75(1)(d) — considered

s. 75(1)(e) — considered

s. 75(3) — considered

s. 75(4) — considered

s. 79 — referred to

s. 79(1)(c) — considered

s. 92 — considered

s. 103.1 [en. 2002, c. 16, s. 12] — referred to

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I
Generally — referred to

s. 9(1) — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 202 — referred to

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17
Generally — referred to

Rules considered:

Competition Tribunal Rules, SOR/94-290
R. 47(1) — considered

Regulations considered:

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17
Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184

Generally — referred to

Words and phrases considered

substitutes

For the purposes of 75(1)(*a*) [of the *Competition Act*, R.S.C. 1985, c. C-34], products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

substantially

In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*) [of the *Competition Act*, R.S.C. 1985, c. C-34], as noted by the Tribunal in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), affirmed 38 C.P.R. (3d) 25, [1991] F.C.J. No. 943 (Fed. C.A.)] at page 23, "[t]he Tribunal agrees that 'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

trade terms

The applicants argue, correctly, that the expression "trade terms" is defined precisely and restrictively for the purposes of section 75 in subsection 75(3) [of the *Competition Act*, R.S.C. 1985, c. C-34.] For ease of reference that subsection provides:

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

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

. . .

The definition of trade terms is restricted and provides that the phrase "trade terms" "means", as opposed to "includes", the three things articulated in the definition.

competitiveness

The "competitiveness" of a market under both the abuse and merger provisions of the [*Competition Act*, R.S.C. 1985, c. C-34] refers to the degree of market power that prevails in that market.

adverse

. . . paragraph 75(1)(*e*) [of the *Competition Act*, R.S.C. 1985, c. C-34] does not differ from what is contemplated in paragraph 79(1)(*c*), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect [of the refusal to deal] must be adverse, while under other provisions the effect must be substantial.

From the plain meaning of the words used by Parliament, we find that "adverse" is a lower threshold than "substantial".

likely

> As for the requirement [under s. 75(1)(e) of the *Competition Act*, R.S.C. 1985, c. C-34] that the refusal to deal "is likely to have" [an adverse effect on competition in a market], at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition)*, [2000] C.C.T.D. No. 24 (Competition Trib.); affirmed [2002] F.C.J. No. 424 (Fed. C.A.), the Tribunal found that a relatively high standard of proof is required to establish the "likely" occurrence of a future event. The Tribunal found that the terms "likely" and "probable" were synonymous. On the basis of the plain meaning of the word "likely", and on the basis of the Tribunal's reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

Decision of the Board:

I. Introduction and Summary of Conclusions

1 The applicants assert that their former banker, The Bank of Nova Scotia, engaged in reviewable conduct by terminating its banking relationship with the applicants, and thus refusing to deal with them. This conduct is said to entitle the applicants to an order pursuant to subsection 75(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (Act). The applicants therefore request that the Competition Tribunal issue an order requiring The Bank of Nova Scotia to supply them with two specific banking services, bill payee services and bank accounts for deposit of e-mail money transfers, that the Bank formerly supplied to the applicants, and which it continues to supply to other banking customers.

2 In the reasons that follow, the Competition Tribunal finds that: [1]

1 We note that, where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

> (1) The applicants have failed to establish that they were substantially affected in their business, or precluded from carrying on business, due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
>
> (2) The applicants have failed to establish that they were unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
>
> (3) The applicants have failed to establish that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market; and,
>
> (4) Even if the applicants succeeded in establishing all of the constituent elements of subsection 75(1) of the Act, in any event this would not be a proper case for the granting of discretionary relief to the applicants because they are unable to comply with the contractual terms and conditions pursuant to which the banking services they seek are provided to customers of The Bank of Nova Scotia.

3 It follows that the application will be dismissed.

4 The issue of costs will be reserved. If the parties are unable to agree on costs, written submissions are to be filed with respect to costs. The parties are also to file submissions with respect to any required redactions in these reasons for the purpose of publishing forthwith a public version, all as described in more detail later in these reasons.

5 These issues arise in the following factual context. Unless otherwise noted, the following facts are not in dispute.

II. Background Facts

A. The Parties

6 The corporate applicants, B-Filer Inc. (B-Filer) and NPAY Inc. (NPAY), are federally incorporated and carry on business in Sherwood Park, Alberta. Their president and controlling shareholder is Raymond Grace. B-Filer carries on business under the name GPAY GuaranteedPayment (GPAY).

7 Effective December 10, 2002, NPAY entered into a joint venture agreement with UseMyBank Services, Inc. (UMB). The president, chief executive officer and founder of UMB is Joseph Iuso. The profits of the joint venture are split equally between the joint venture partners.

8 The Bank of Nova Scotia (sometimes Bank or Scotiabank) is one of the five major chartered banks in Canada.

B. The Nature of the Applicants' Business

9 The applicants describe their business as providing an Internet bank card debit payment service that allows customers to make purchases from participating Internet merchants with payments made directly from the customer's existing bank account (GPAY Services). The principal business of the applicants is the provision of the GPAY Services. The applicants receive all of their significant revenue from the joint venture.

10 Some of the services needed to provide the GPAY Services are provided by the joint venture partner, UMB. Together, the service provided by the joint venture is referred to as the UseMyBank Service. The joint venture agreement, Exhibit CA-2, delineates the responsibilities of the joint venture partners in the following way. UMB is to: provide facilitation services using existing banking payment systems; provide the front-end interface utilizing components from the NPAY website; direct buyers and sellers to the existing NPAY terms and conditions of use; and, bring on and direct all buyers and sellers who wish to use manual bill payment services to NPAY. NPAY (and through it B-Filer) is to: provide the processing, settlement and reconciliation of all payments processed by UMB; and, bring on and direct all sellers and buyers who wish to use automated bill payment services to UMB.

11 Mr. Iuso explained that UMB handles the marketing of the UseMyBank Service and the processing of the transactions through the banks. NPAY, and through it B-Filer, handles everything to do with the money, more specifically, the interface with the banks and the settlement with the merchants.

12 During the applicants' opening statement, through their counsel, they acknowledged, for the first time, that they operate a money services business, as that term is defined in regulations enacted pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (PCMLTF Act).

C. How the Use My Bank Service Works

13 The UseMyBank Service operates as follows:

(i) Online merchants that offer this payment mechanism display the UseMyBank icon on their websites.

(ii) A customer wishing to use the service selects UseMyBank as his or her payment option, and is then transferred to the UseMyBank website.

(iii) There, the customer selects his or her bank from a list of banks.

(iv) To continue, the customer must indicate that he or she has reviewed and agreed to the terms and conditions of use imposed by UseMyBank (whether or not the customer has read those terms and conditions).

(v) The customer then designates the bank account that he or she wishes to debit and enters the user identification and password they have previously established with their bank (together referred to as the customer's electronic signature). All of this is done on the UseMyBank website, which is protected through encryption.

(vi) UMB then uses the customer's electronic signature in order to enter into an online banking session on the customer's bank's website. In order for a bank to learn that its own customer is not conducting the banking session, the bank would have to look at the DP address of the communicating party. If it did this, the bank would see that the transaction comes from UMB. UMB states that the customer's electronic signature is not stored on its server, and the electronic signature never resides on the online merchant's server. While the electronic signature is on the UMB server, it is not encrypted.

(vii) During the course of the online banking session, UMB selects, based on the customer's instructions, which of the customer's bank accounts is to be debited and then directs the payment to GPAY. Where GPAY has bill payee status at the customer's bank (described in more detail below), GPAY is selected as a bill payee and the customer's payment is directed to GPAY as a bill payment. Where GPAY does not have bill payee status, UMB directs an e-mail money transfer (EMT) from the customer's account to one of GPAY's accounts. During the banking session, the UMB server also gathers information from the bank (such as the customer's name, address and telephone number), which GPAY uses for purposes that include the detection of fraudulent transactions.

(viii) Whether by EMT or bill payment, the money is immediately taken out of the customer's account by their bank, and the funds are placed in an internal bank suspense account.

(ix) UMB then notifies the merchant that there is a confirmation of payment. Later, GPAY receives the funds from the bank. Subsequently, GPAY pays the money to its merchant, deducting its fee.

14 Mr. Iuso stated that this type of transaction is "meant to be [a] real-time payment processing, like [a] credit card". He agreed that the joint venture can only offer what it describes as a real-time money transfer because UMB itself effects the transaction on behalf of GPAY using the bank customer's electronic signature. The joint venture cannot operate this money transfer business unless bank customers disclose their online banking password and bank identification number to it.

15 Of the transactions processed by the UseMyBank Service, 98% involve payments to "payment processor gateways" that have online gambling casinos for clients. Put more simply, the vast majority of the joint venture's business, 98% of it, is to transfer monies in order to fund online gaming accounts at casinos located outside of Canada.

D. The Banking Relationship Between the Applicants and The Bank of Nova Scotia

16 In August of 1999, Mr. Grace attended at the Sherwood Park branch of The Bank of Nova Scotia and opened a single, small business account in the name of B-Filer Inc. carrying on business as GPAY Guaranteed Payment. The Application for Business Banking Services form signed by Mr. Grace described GPAY's business to be one of "financial collection" and estimated the annual sales of the business to be $240,000 per year, with a total monthly deposit balance of $10,000. At that time, Mr. Grace signed and was given a copy of the Bank's Financial Services Agreement. This document set out the terms and conditions related to the operation of the business account.

17 Exhibits A-33 and A-34 reflect that Mr. Grace also applied in August of 1999 for biller status at The Bank of Nova Scotia. Once accepted, GPAY was listed by The Bank of Nova Scotia as a biller so that the Bank's customers could make online bill payments from their bank accounts to GPAY. Bill payee status is specific to each bank in the sense that, for example, Scotiabank deposit customers can only make online bill payments from their Scotiabank accounts to entities that have obtained biller status from The Bank of Nova Scotia. Similarly, for example, customers of the Royal Bank of Canada (RBC) can only make such payments to entities that have obtained biller status from RBC.

18 It is agreed that, in 1998 and 1999, GPAY obtained status as a bill payee from each of Canada's five largest chartered banks, as well as from the Alberta Treasury Branches (ATB) and the Fédération des caisses Desjardins du Québec. When the UseMyBank joint venture was launched in December 2002, GPAY used these bill payee facilities to operate the UseMyBank Service as described above. It is also agreed that, at all material times, the applicants maintained business

accounts at RBC. The significance of those accounts is that The Bank of Nova Scotia and RBC are the only two banks that permit EMTs to be deposited into small business accounts. The Bank of Nova Scotia does not permit EMT deposits into commercial accounts of entities that are not small businesses. EMT deposits are allowed into personal accounts.

19 In August of 2003, the Canadian Bankers Association forwarded to a number of banks an Internet alert with respect to the UseMyBank website. The alert originated from the Canadian Imperial Bank of Commerce (CIBC). The concern expressed was the potential for fraud that existed as a result of the disclosure of a bank customer's electronic signature. As a result of this notice, the Bank's security group initiated an investigation. While concern was expressed by representatives of the Bank about the risk posed by the disclosure of a customer's electronic signature, the Bank's response to the investigation was to contact all of its customers who had used the UseMyBank Service in order to warn them that they should not be disclosing their electronic signatures. This response was said by the Bank to reflect the low transaction volumes and low number of customers that were involved.

20 In December of 2003, GPAY lost the biller status that it held at the Toronto-Dominion Bank (TD), CIBC and ATB. As a result, thereafter, when UMB entered into banking sessions on TD and CIBC websites on behalf of a customer, instead of directing payment to GPAY through a bill payment, UMB would instruct that payment be made to GPAY by way of an EMT. These EMT payments were then deposited into the applicants' business accounts either at The Bank of Nova Scotia or RBC (because, as noted above, these were the only banks which permitted EMT deposits into business accounts).

21 Both RBC and Scotiabank impose limits on the sending and receipt of funds by EMT. For a send transaction, the limit is $1,000 per day and $7,000 over a 30-day rolling period. A recipient is limited to receiving $10,000 per day and $300,000 over a 30-day rolling period. The rolling limits are set by Acxsys Corporation. Acxsys Corporation, an incorporated for-profit division of the Interac Association, developed the e-mail money transfer service.

22 On April 15, 2004, Mr. Grace opened a second account at the Bank in GPAY's name. This account was a Money Master for Business (Money Master) account. Mr. Grace testified that this second account differed from the existing original account in that there was no bank charge levied for depositing EMTs. There was also no charge for transferring money from the Money Master account to the current account, so long as the transfer was done online. A fee of $0.65 per transaction was applied to EMT deposits made into GPAY's original current account.

23 Beginning sometime in 2004, the Bank's Sherwood Park branch began receiving notices that some transactions could not be posted into the applicants' account(s).

24 Mr. Woodrow, the Sherwood Park branch account manager for small business accounts, testified that, as a result of activity in the applicants' accounts, the branch learned in 2004 that, after 100 transactions occurred in a Money Master account, any remaining debits or credits were put into an unpostable suspense account. Mr. Woodrow further recalled that, through the latter part of 2004, unpostable reports showed that the applicants were exceeding the transaction limits on virtually a daily basis.

25 Mr. Grace agreed that transactions became unpostable after approximately 100 transactions, and agreed that the applicants encountered significant difficulty with this in 2004.

26 The reason for this increase in unpostable transactions was that, following the loss of biller status at CIBC and TD, for customers of those banks, payments to GPAY were effected by way of EMTs deposited into the applicants' accounts with The Bank of Nova Scotia.

27 As a result of the unpostable transactions, a number of new accounts were opened by the applicants at The Bank of Nova Scotia during the second half of 2004. Some accounts were opened by Mr. Grace personally at the Sherwood Park branch, while some were opened as a result of telephone calls Mr. Grace placed to the Scotiabank call centre. Exhibit A-35 summarizes the account openings, detailing the date an account was opened, the name of the account holder,

whether the account was opened through the branch or the call centre, and the number of accounts opened each day. Exhibit A-35 is reproduced, verbatim, here:

SUMMARY OF ACCOUNT OPENINGS

Date	Plaintiff	Branch	Call Centre	# of Accounts
August 6, 1999	B-Filer as GPay	[check]		1
April 15, 2004	GPay	[check]		1
June 11, 2004	GPay	[check]		6
October 7, 2004	B-Filer	[check]		5
November 15, 2004	NPay	[check]		15
February 25, 2005	B-Filer		[check]	30
March 1, 2005	NPay		[check]	1
March 3, 2005	NPay		[check]	22
March 8, 2005	GPay		[check]	10
March 9, 2005	GPay		[check]	17

28 Thus, it can be seen that, from April 2004 to March 2005, Mr. Grace caused 107 accounts to be opened at the Bank in the names of various applicants. Of the 107 accounts, 80 were opened in the period from February 25, 2005 to March 9, 2005.

29 Exhibit CA-69 shows the number of deposits the applicants made into accounts at The Bank of Nova Scotia in each month during the period from September 2003 to July 2006. Exhibit CA-62 depicts the amount of the deposits to Scotiabank accounts made each month from September 2003 to July 2006. In their Statement of Grounds and Material Facts, at paragraph 10, the applicants state that, from June 1, 2004 to May 31, 2005, they deposited approximately $9,929,881.17 into business bank accounts they held at The Bank of Nova Scotia.

E. The Termination of the Banking Relationship

30 As a result of being notified of the 15 new accounts opened in the name of NPAY on November 15, 2004, Ms. Parsons, manager of the Sherwood Park branch, became concerned about the number of accounts the applicants were opening. At a meeting with Ms. Gibson-Nault, manager of customer service at Sherwood Park, and Mr. Woodrow, she instructed Mr. Woodrow to find out from Mr. Grace why so many accounts were needed and why there were so many unpostable transactions. She also directed that no new accounts were to be opened for the applicants.

31 In February 2005, the branch became aware that Mr. Grace was opening accounts through the Scotiabank call centre. As a result, Ms. Gibson-Nault spoke to her contact person at the Bank's Shared Services operation who in turn referred her to the Bank's Security and Investigation division in Calgary. As a result of a conversation with a representative of that department, Ms. Gibson-Nault prepared and forwarded an Unusual Transaction Report. The Unusual Transaction Report referenced the number of accounts opened for GPAY, NPAY and B-Filer, the number of EMTs that exceeded the transaction limits so as to trigger unpostable transactions, and the aggregation and transfer of funds.

32 Also during February and March of 2005, the Bank received six complaints of fraudulent transactions concerning the applicants' accounts. Mr. Grace explained to Mr. Woodrow that these fraudulent transactions occurred because of one of two possible scenarios. In the first, a customer's account might be compromised by a rogue who would then conduct the transaction. In the second, a person, a spouse for example, would see a transaction on a bank statement and question it. The husband or wife who made the transaction would not wish to admit to it and so would deny the transaction (rather than admit to, for example, Internet gambling). In that instance, the transaction would be reported as fraudulent.

33 Receipt of the Unusual Transaction Report triggered an internal investigation at the Bank. Further information was sought from the branch by Bank officials in Toronto.

34 In a two-page memorandum dated March 29, 2005, which reviewed the chronology of events, Ms. Parsons and Ms. Gibson-Nault recommended termination of the banking relationship between the Bank and the applicants. The Bank says that, as a result of its internal investigation, it decided to accept the recommendation and to terminate its banking relationship with the applicants.

35 By a number of letters dated May 11, 2005, The Bank of Nova Scotia gave written notice to the applicants terminating the banking relationship, effective June 15, 2005. Each letter made reference to clause 12.2 of the Financial Services Agreement which provides that the Bank "may cancel any service to you without a reason by giving you thirty days' written notice". The termination was, in fact, delayed as result of proceedings the applicants brought in the Alberta Court of Queen's bench. After their request for an interim injunction was dismissed by that Court, the applicants' banking services were terminated by the Bank, and their accounts closed on September 28, 2005.

F. Interac Online

36 On or about May 5, 2005, the Interac Association announced the launch of Interac Online. The service was commenced in June 2005.

37 Interac Online is a service that also allows customers to purchase products or services through the Internet. If a customer, when on a participating merchant's website, selects Interac Online as the payment option, the customer is directed to an access page which displays the financial institutions that participate in Interac Online. Currently there are three: Scotiabank, RBC and TD. The customer then selects his or her financial institution and is directed to the online banking sign-on page of that financial institution. There, the customer inputs his or her electronic signature. The customer is then directed to a page where he or she selects the account to be debited and confirms the transaction.

38 Since June 2005, 32 merchants have accepted Interac Online as a payment mechanism.

G. History of this Proceeding and the Relief Sought

39 This proceeding is brought pursuant to the Tribunal's order of November 4, 2005, which granted the applicants leave to apply for relief under section 75 of the Act. The applicants seek an order requiring Scotiabank to supply them with Scotiabank "Biller Services" and "EMT Business Deposit Accounts". This is the first private application brought before the Tribunal as a result of the amendments to the Act made in 2002, which permitted such private proceedings.

40 On December 14, 2005, the Tribunal dismissed the applicants' request for interim relief.

III. Applicable Legislation

41 Subsection 75(1) of the Act contains the refusal to deal provision which is at issue. Subsection 75(1) provides:

> **75.** (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> > (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (b) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (c) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

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

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

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

42 Subsection 75(1) was amended in June 2002 to allow private access to the Tribunal when leave is granted under section 103.1 of the Act. The amendment made in 2002 also added paragraph (e) to the Act. This is the first case brought before the Tribunal since paragraph (e) was added to subsection 75(1).

43 For the purpose of this application, subsections (3) and (4) of section 75 are also relevant. Subsection (3) defines the phrase "trade terms", found in subsection 75(1), to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". Subsection (4) precludes the Tribunal from drawing any inference from the fact that the Commissioner has, or has not, taken any action in respect of the matter raised by the application. This provision has some relevance because, in January 2004, the Commissioner closed her investigation into the applicants' allegation that the refusal of CIBC, TD and ATB to allow GPAY to receive bill payments from their customers contravened sections 75 and 79 of the Act. The Tribunal has given no weight to the fact that the Commissioner's investigation was discontinued. The Commissioner did note that private access to the Tribunal might be available to the applicants.

44 Section 75 of the Act is set out in its entirety in Schedule A to these reasons.

IV. Onus and Standard of Proof

45 It is common ground among the parties that the applicants bear the onus of establishing each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act.

46 The standard of proof to be applied is the civil standard: proof on a balance of probabilities.

V. The Witnesses Presented by Each Party

47 Before turning to the substance of the analysis of subsection 75(1) of the Act and its constituent elements, it is helpful to identify the witnesses called by each party. A description of the general nature of the testimony they presented in chief is contained in Schedule B to these reasons.

A. The Expert Witnesses

48 Six individuals testified as experts before the Tribunal, two on behalf of the applicants and four on behalf of the Bank. The applicants' experts were Mr. Jack Bensimon and Dr. Lawrence Schwartz. The Bank's experts were Mr. Christopher Mathers, Dr. James Dingle, Mr. David Stewart and Dr. Frank Mathewson.

(1) The Applicants' Experts

49 With the parties' agreement, the Tribunal accepted Jack Bensimon as an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies.

50 With the parties' agreement, Dr. Lawrence Schwartz was qualified as an "expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

(2) The Bank's Experts

51 Christopher Mathers was tendered as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. His qualification to provide such opinions was accepted by the applicants.

52 Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was tendered and accepted as an expert "in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking" as set out in his report.

53 David Stewart is an attorney practicing in Washington, D.C. He was tendered, and accepted by the applicants, as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualifications to opine on matters relating to state law were put in issue by the applicants, but, after hearing examination and cross-examination on his qualifications, his expertise in this area was accepted by the Tribunal.

54 Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. His qualifications were conceded as an expert economist, with expertise in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

B. The Lay Witnesses

55 Twelve other individuals testified before the Tribunal.

56 The applicants called Mr. Joseph Iuso, Mr. Raymond Grace, Mr. Ryan Woodrow, and Mr. Darren Morgenstern. The Bank called Ms. Margaret Parsons, Ms. Sharon Gibson-Nault, Ms. Susan Graham-Parker, Mr. Colin Cook, Mr. Douglas Monteath, Mr. Robert Rosatelli, Mr. Ronald King, and Mr. David Jones.

(1) The Applicants' Lay Witnesses

57 Joseph Iuso is the President, Chief Executive Officer, and founder of UMB.

58 Raymond Grace is the President of both GPAY and NPAY.

59 Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts.

60 Darren Morgenstern is the owner of the Ashley Madison Agency, an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options".

(2) The Bank's Lay Witnesses

61 Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia.

62 Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch.

63 Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia.

64 Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia.

65 Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank.

66 Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia.

67 Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies.

68 David Jones is Director of Web Business at WestJet.

VI. The Elements of Section 75 and the Issues to Be Determined

69 Having set forth the necessary background facts, discussed the applicable legislation, the onus and standard of proof, and identified the witnesses tendered by the applicants and the Bank, we turn to the analysis of whether the applicants have met their onus to establish all of the required elements contained in subsection 75(1). Each element has been put in dispute by the parties. We deal first with paragraph 75(1)(*a*) of the Act.

A. Have the applicants established that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms?

70 There is no suggestion that the applicants have been precluded from carrying on their business. Thus, it is only necessary to consider whether they have been substantially affected in their business. At die outset, we must determine what test the Tribunal should apply in order to define the relevant product market under paragraph 75(1)(*a*). Before doing so, we note that both the applicants and the Bank addressed the issue of "usual trade terms" under paragraph 75(1)(*c*) rather than under 75(1)(*a*). We also address usual trade terms when we consider paragraph 75(1)(*c*).

(1) The Test to Define the Product Market

71 The parties disagree on the proper approach for defining the product market under paragraph 75(1)(*a*). In Dr. Schwartz's opinion, the correct approach is the hypothetical monopolist test. Dr. Schwartz stated that he favours this test because it generally avoids the problem of defining markets overly broadly. Dr. Mathewson defines the market based upon the approach adopted by the Tribunal in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), aff'd 38 C.P.R. (3d) 25, [1991] F.C.J. No. 943 (Fed. C.A.). In Dr. Mathewson's view,

"the operative principle is that other products are substitutes if the purchaser's business is not substantially affected by switching to these other services." Dr. Mathewson testified that he prefers this test because "[i]n refusal to deal cases, and the abuse cases events have already occurred. And so we do have evidence about how the market has responded. We don't have to be hypothetical. It seems to me if we're hypothetical, we're ignoring information; information that's at our fingertips, through the evidence of how the market has actually functioned. And thus the words, functional interchange in terms of substitution, are the operative words in my view."

72 We find that the proper test is that identified by the Tribunal in *Chrysler* and applied by Dr. Mathewson. We so conclude because this approach is consistent with precedent, and, in our view, is better suited to address the concerns of paragraph 75(1)(*a*) than the hypothetical monopolist test. Our reasons for these conclusions follow.

(a) Precedent

73 As the Tribunal noted at page 103 in *Canada (Director of Investigation & Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Competition Trib.), "[w]hile the process of product market definition is clearly founded on economic analysis, the question of the 'relevant' market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole."

74 The Tribunal had previously considered the proper approach to the definition of product market in the context of paragraph 75(1)(*a*) in *Chrysler*. There, the Tribunal wrote, at page 10, that:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies.
>
> [underlining added]

75 The Tribunal expressly rejected the expert evidence that market definition should be determined from the position of whether Chrysler, the respondent, had substantial market power. Indeed, the Tribunal found that a broad consideration of Chrysler's market power was not required when looking at any specific element of section 75 of the Act.

76 In *Xerox*, the Tribunal again found, at page 116, that the respondent's market power is not an element that need be established to obtain a section 75 order.

77 Since the Tribunal's decisions in *Chrysler* and *Xerox*, subsection 75(1) has been amended to include paragraph 75(1)(*e*), which requires a determination of whether the refusal to deal is having, or is likely to have, an adverse effect on competition in a market. Given this amendment, it is necessary to consider whether the addition of paragraph 75(1)(*e*) has changed the context and purpose of section 75 such that the test for markets articulated in *Chrysler* is no longer appropriate for the purposes of 75(1)(*a*).

78 In our view, while the addition of paragraph 75(1)(*e*) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(*a*). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(1)(*e*) need not be the market of concern in paragraphs 75(1)(*a*) and 75(1)(*b*), the market that best suits the particular context and purpose of 75(1)(*e*) can be separately considered when considering that paragraph of the Act. [2]

2 Paragraph 75(1)(*e*) refers to "a market" while paragraph 75(1)(*b*) refers to "the market". This suggests that while the market considered under 75(1)(*b*) is that which is defined in 75(1)(*a*), the market considered under 75(1)(*e*) need not be.

79 For purposes of clarity, we articulate the "*Chrysler* test" as follows: For the purposes of 75(1)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

80 In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*), as noted by the Tribunal in *Chrysler* at page 23, "[t]he Tribunal agrees that 'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

(b) The Appropriateness of the Chrysler Test

81 In our view, the *Chrysler* test is better suited than the hypothetical monopolist test to address the concerns of 75(1)(*a*) for two reasons. First, the *Chrysler* test deals directly with the particular person and the business at issue. Second, the *Chrysler* test deals with the effects of a refusal to deal on the affected business rather than the possible effects of a hypothetical price increase in the refused product. Contrary to Dr. Schwartz's opinion, in our respectful view, there is little risk of defining the market overly broadly because the test does not allow for the inclusion of substitutes that have a substantial effect on the business.

82 Both of these points are elaborated upon below.

(i) Particular Person and the Business at Issue

83 Dr. Schwartz testified that he relies on the hypothetical monopolist approach to market definition contained in the merger guidelines of the enforcement agencies in Canada and the United States. The *Merger Enforcement Guidelines* of the Canadian Competition Bureau (Bureau) indicate that "a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a sole profit-maximizing seller (a hypothetical monopolist) would impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger" (Canada, Competition Bureau, 2004, at paragraph 3.4). The *Merger Enforcement Guidelines* state, at paragraph 3.1, that "[t]he overall objective of market definition in merger analysis is to identify a set of buyers that could potentially face increased market power due to the merger."

84 However, for the purposes of paragraph 75(1)(*a*), what is of concern is not a set of buyers but a particular buyer. [3] The hypothetical monopolist test is capable of dealing with a particular buyer but doing so requires markets to be defined with reference to the characteristics of that buyer or to the particular locations of that buyer (see *Merger Enforcement Guidelines* at paragraph 3.9). In the case of 75(1)(*a*), since the only buyer of concern is the one that has been refused supply, in this case B-Filer, there is no need to define a relevant market with reference to the possible particular characteristics of that buyer. In our opinion, it is more appropriate to focus directly and immediately on the buyer that has been refused supply.

3 The Tribunal indicated in *Chrysler*, at page 10, that "[w]here products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers". We note that this statement was made specifically in the context of products that are purchased for resale. That said, the manner in which an output product may be altered as a result of a change in an input and the consequent impact it may have on demand by

the buyer's customers is always relevant to the extent that it affects the buyer's business. What is ultimately of concern under 75(1)(*a*) is the buyer of the product that has been refused.

(ii) Effects of a Refusal to Deal

85 The hypothetical monopolist test is ultimately concerned with exercises in market power. To determine the set of products and geographic areas over which a hypothetical monopolist would have market power, a system of determining which products and geographic areas have price constraining effects on each other is carried out. The mechanism is to ask whether a hypothetical monopolist over a postulated candidate market would be able to impose a significant and non-transitory price increase. If yes, the postulated market is not considered the relevant market, and the exercise is repeated with an expanded candidate market. According to the *Merger Enforcement Guidelines*, at paragraph 3.4, "[i]n most cases, the Bureau considers a five per cent price increase to be significant and a one-year period to be non-transitory."

86 Dr. Schwartz notes that a refusal to supply is akin to an infinite price increase. He is of the further view that defining markets based on switching observed in response to a refusal to deal, or an infinite price increase, is inappropriate because it can lead to overly broad markets because it can include products that were not good substitutes prior to termination. However, not only is the refusal to supply and the effect of the refusal on the business the concern of 75(1)(*a*), rather than the effect of a significant and non-transitory price increase, but the test used in *Chrysler*, as described above, does not run the risk of finding overly broad markets.

87 In Dr. Schwartz's view, "when the current product or service is withdrawn completely and no longer available for choice, it is not surprising or helpful to market definition to observe that the buyer chose another alternative." However, this is not the whole of the test. The use of alternatives by the refused business is insufficient to conclude that these alternatives are in the same product market as the refused product. The *Chrysler* test properly applied requires that the use of these alternatives not substantially affect the business at issue. If their use does in fact result in a substantial effect, and they are nonetheless included in the relevant market for purposes of 75(1)(*a*), the market would be overly broad. The correct application of the test does not allow for this possibility.

88 Consequently, for the above reasons, we conclude that the correct test for defining markets for the purposes of 75(1)(*a*) is the *Chrysler* test as we have articulated it at paragraph 79.

(2) The Relevant Product Market

89 Having determined the appropriate test for the determination of the product market, in our view, application of that test to the evidence before us leads to the conclusion that the relevant product market is comprised of biller status at the Bank and deposit accounts *[CONFIDENTIAL]* that allow for the deposit of EMTs. Our reasons for this conclusion follow.

90 The starting point of market definition for the purposes of 75(1)(*a*) is to determine a set of candidate substitutes for the products that have been refused. In this case, the two products that have been refused (and which the applicants seek) are biller status at the Bank and EMT deposit accounts at the Bank. Having determined the set of candidate substitutes, one then determines whether the use of the substitutes by the applicants results in a substantial effect on the applicants' business. If yes, the candidate substitute is not included in the product market.

91 The set of candidate substitutes raised by the applicants in regard to biller status at the Bank are (i) biller services at other financial institutions, and (ii) EMTs into deposit accounts (other than Scotiabank deposit accounts since these are unavailable to the applicants), without distinguishing between *[CONFIDENTIAL]* deposit accounts. The applicants argue that neither of these candidate substitutes is acceptable.

92 The Bank counters that "the relevant product market is at least as broad as the "Biller Services" of the five major chartered banks (it also includes the Biller Services of Alberta Treasury Branches and the Fédération des caisses Desjardins du Québec) and, in addition, includes EMT payments." Its expert, Dr. Mathewson, concludes that

"Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT *[CONFIDENTIAL]* deposit accounts."

93 We note that Dr. Mathewson did not opine or testify that biller services at other banks are part of the relevant market. Rather, he appears to conclude that it remains an open question due to a lack of evidence. We also note that Dr. Mathewson clarifies that EMT deposit accounts include *[CONFIDENTIAL]*.

94 For the purpose of our analysis we consider each of the following candidate substitutes for biller status at the Bank: [4]

4 Neither the applicants nor the Bank propose any candidate substitutes for EMT deposit accounts that are different to those proposed for biller status. Consequently, we do not separately consider candidate substitutes for EMT deposit accounts.

(i) Biller status at financial institutions other than Scotiabank;

(ii) EMT business deposit accounts at RBC; and,

(iii) *[CONFIDENTIAL]*.

95 In our analysis, we include a candidate substitute in the relevant product market if, and only if, in our opinion its use does not substantially affect the applicants' business. Both parties consider "substantially affected" in regard to the entirety of the applicants' business.

(a) Biller Status at Financial Institutions Other Than Scotiabank

96 The applicants contend that biller status at "banks that continue to provide that status to B-Filler is not a good substitute for biller status at Scotiabank. Biller status at those other banks allows B-Filer to process payments for those banks' depositors but does not allow it to process payments for Scotiabank depositors." Put more succinctly, the applicants argue that "[t]he fact that GPay has Biller Services from Royal Bank does not assist it in processing bill payments for customers of Scotiabank."

97 The applicants' argument is essentially that biller status at other financial institutions is not functionally interchangeable for biller status at Scotiabank. We accept this; however, it is hypothetically possible that the Bank's depositors could make use of existing bank accounts or open new bank accounts at other financial institutions where the applicants have biller status and use those accounts, such that the applicants are not substantially affected in their business. [5]

5 We note here that this contemplates switching, not directly by the applicants, but by the applicants' customers. This type of switching by the applicants' customers, however, would allow the applicants to make greater use of its bill payee status at other banks in order to serve customers who are, or originally were, Scotiabank depositors.

98 In Dr. Schwartz's view, this type of "shift is unlikely" due to additional inconvenience, additional record-keeping, and increased bank fees. As such, he states that "[i]t is more likely than not that the Scotiabank depositor would choose to bear the price increase that Scotiabank imposes on GPAY Service debit transactions than maintain dual accounts at separate financial institutions." Similarly, he finds it highly unlikely that Scotiabank depositors would close their Scotiabank accounts and switch to another financial institution.

99 In response, Dr. Mathewson finds that there is no hard evidence of any potential response by consumers: "As any consumer response to a price hike remains an open and unanswered empirical matter, a categorical conclusion which removes all other financial institutions from the market seems unwarranted."

100 We agree with Dr. Mathewson that consumer response is an open and unanswered question. Consequently, contrary to the Bank's position, due to this lack of information, we find that the relevant product market does not include biller status at other financial institutions. We now turn to the next potential substitute.

(b) EMT [Confidential] Deposit Accounts

101 In our analysis, we consider EMT business accounts at RBC *[CONFIDENTIAL]*.

102 Dr. Schwartz concludes that, in regard to the relevant market "in relation to the means of providing online debit payment to Scotiabank depositors", the market includes Scotiabank biller status but excludes business accounts that accept deposits by EMTs. He concludes this on the basis of the hypothetical monopolist test in that "it appears that if Scotiabank had raised the price of biller status to B-Filer by a small but significant amount, B-Filer would have borne this increase rather than switch to processing by way of EMTs because of the costs and disadvantages thereof in comparison to biller processing." While we find that the *Chrysler* test rather than the hypothetical monopolist test is the right one, costs and disadvantages of a candidate substitute are still relevant as these might result in a substantial effect on the business. Consequently, we consider the costs and disadvantages noted by the applicants.

103 The costs and disadvantages are said by the applicants to be:

(i) Scotiabank charges $1.50 to its depositors per EMT;

(ii) There is a maximum EMT transaction amount of $1,000 and a further aggregate limit of $1,000 per day per depositor;

(iii) There is a 30-minute holding period following an EMT during which a depositor may cancel the EMT;

(iv) Large volumes of EMTs can cause processing problems. There were processing problems with the Scotiabank accounts that the applicants used for processing EMTs; and,

(v) Receipt of EMTs is highly constrained in that only Scotiabank and RBC small business accounts can receive them, and there are daily, monthly, and annual limits on EMT deposits. The daily limit is $10,000.

104 In contrast, Dr. Mathewson concludes that "Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT *[CONFIDENTIAL]* deposit accounts." He acknowledges that there are differences between processing payments via Scotiabank biller services and EMTs, the primary differences being the $1.50 fee associated with EMTs, and the $1,000 per day limit on sending EMTs versus the $49,999 payment limit applicable to the Bank's bill payee service. He finds, however, that the effects of the use of EMTs *[CONFIDENTIAL]* by the applicants cannot be said to be substantial.

105 We agree with both Dr. Schwartz and Dr. Mathewson that there are differences between Scotiabank biller services and EMTs. The costs and disadvantages asserted by the applicants above are largely not in dispute, with the exception of the asserted disadvantage of the effective degree of constraint on the receipt of EMTs (item v above). With respect to the allegation that large volumes of EMTs can cause processing problems (item iv above), we find that there is no evidence to support this statement other than the evidence of the processing problems that the applicants experienced at Scotiabank. We find that the applicants did experience EMT processing problems in regard to the Money Master accounts that they held at Scotiabank but, on the totality of the evidence, the applicants failed to establish that large volumes of EMTs can cause processing problems more generally.

106 As noted above, the applicants claim that the receipt of EMTs is highly constrained. It is common ground that there are daily, monthly, and annual limits on the value of EMT deposits that can be received. Those limits are: $10,000 per day; $70,000 per seven day period; and $300,000 per thirty day period. Mr. Grace acknowledged that, since the Scotiabank termination, the applicants have been receiving EMTs, as at June/July 2006, into *[CONFIDENTIAL]*. Mr.

Grace agreed on cross-examination that the use of these *[CONFIDENTIAL]* accounts has associated with it a capacity to receive EMT deposits of *[CONFIDENTIAL]* annually, replacing the *[CONFIDENTIAL]* in capacity the applicants had at the Bank prior to termination. Not only does this represent a *[CONFIDENTIAL]* increase in deposit capacity, there is some evidence to suggest that this capacity may be greater. Mr. Grace testified that since June/July 2006 he has opened "a few more accounts". Dr. Mathewson also indicated in his report that "[t]here is no evidence on the record that indicates that there are any limits to the number of profiles under GPay's control for receipt of EMT transfers. GPay can increase its capacity to accept EMTs *[CONFIDENTIAL]*." This evidence was not disputed. Consequently, we do not find that "the receipt of EMTs is highly constrained" because of the receiving limits.

107 Of the differences asserted by the applicants between biller services and EMTs, listed at paragraph 103 above, we find these to be significant only if, as a result of the use of EMTs, the applicants' business is substantially affected. We turn now to the analysis of that issue.

108 The applicants claim that their business has been substantially affected in two ways. They say they have reduced growth in their revenues and they say there has been a fundamental change in their growth opportunities.

(i) Reduced Growth in Revenues

109 In regard to the claim of reduced growth in revenues, the applicants note that in the month following the Bank's termination, the applicants experienced a 48% (or $350,000) decrease in the dollar value of the transactions they processed as compared to the month in which the termination took place, i.e., September 2005. The applicants argue that since termination the monthly transaction value for Scotiabank has risen but not surpassed the level in September 2005. By comparison, the applicants assert that the value of transactions from the other five financial institutions have increased markedly since September 2005. In particular, the applicants argue that Bank of Montreal (BMO) dollar value transactions grew at roughly the same rate as those of the Bank prior to the Bank's termination. Since the time of the Scotiabank termination, the transaction values from BMO are said to have grown by 118% relative to September 2005, and by 169% relative to August 2005. By contrast, transaction values from Scotiabank are said to have fallen by 18% as compared to September 2005, and risen by only 13% relative to August 2005.

110 In his analysis of these same data, Dr. Mathewson notes that the value of Scotiabank transactions in September 2005 was anomalous. He finds, comparing the applicants' average monthly Scotiabank payments from the three month period June-August 2005 to the three month period April-June 2006, that GPAY's Scotiabank payments have now fully recovered their pre-termination levels.

111 In order to analyse these conflicting submissions, we first consider whether the use of EMT deposit accounts *[CONFIDENTIAL]* to effect transactions by Scotiabank depositors affected the applicants' business by reducing growth in the dollar value of the applicants' transactions. We then consider whether such use substantially affected the business.

112 For the reasons that follow, we conclude that, post-termination, the applicants did experience an initial decrease in the total dollar value of their Scotiabank transactions. We find this to have been the case regardless of whether the basis for comparison is September 2005, the month in which the termination took place, or some combination of the months immediately before the termination. Since the dollar value of transactions exhibit volatility from month to month (see Exhibits CA-62 and CA-69), absent further analysis it cannot be known what portion of the observed decline can be attributed to the Scotiabank termination. We find that it is possible that some portion of the observed decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions. This, however, might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions. We find, however, that, since the overall decline appears to be limited, and given the aforementioned data volatility, we are unable, on the evidence before us, to conclude what portion of the observed decline is attributable to the Scotiabank termination.

(1) The Applicants experienced an initial decrease in the total dollar value of their Scotiabank transactions post-termination

113 If September 2005 is used as the base for comparing subsequent monthly dollar values of Scotiabank transactions, then, as at July 2006, the applicants were yet to achieve similar transaction values.

114 However, we accept Dr. Mathewson's evidence that September 2005 was an anomalous month. The value of transactions in that month was 15.1% higher than the highest previous month (July 2005), or 29.8% higher than the average of the three previous months (June-August 2005). Month-over-month increases of this size are observed in the data: for example, the payment values of RBC transactions increased by 37.8% from July to August 2005, and the payment values of BMO's transactions increased 23.7% from August to September 2005. However, there is the evidence that one Scotiabank customer accounted for $141,159, or 20.7%, of the total value of September 2005 Scotiabank transactions. This individual's set of transactions also accounted for 63.4% of the total value of Scotiabank transactions that were over $1,000 in September 2005. The evidence is that in no previous month for which data are available (June 2004 to September 2005) were Scotiabank transactions for all individuals carrying out transactions over $1,000 even close to the value of transactions carried out by this one individual in September 2005. The closest monthly transaction total for all individuals who carried out transactions over $1,000 was $71,317.57 in August 2005. This is about half the value of the transactions carried out by this one individual in September 2005. Consequently, the evidence establishes in our view that the value of transactions carried out by this one individual in September 2005 was unusual. Since the individual accounted for 20.7% of total transactions in September 2005, we find the total Scotiabank transactions in September to be anomalously high.

115 Even if we had not found the Scotiabank September transactions to be anomalously high, we would consider comparisons to more than this one month to be informative.

116 If August 2005 is used as the base for comparing subsequent monthly dollar value of Scotiabank transactions, post-termination, the applicants had lower Scotiabank transaction values each month until and including January 2006. The percentage decline in transaction values comparing October 2005 (the month following termination) to August 2005 is 29.4%. If the three month average transaction value prior to September 2005 is the base for comparison, as was done by Dr. Mathewson, the applicants had lower Scotiabank transaction values each month until and including February 2006. The percentage decline in transaction values comparing October 2005 to the three month average of June-August 2005 is 32.9%.

(2) Since the dollar value of transactions exhibit volatility from month to month, it cannot be known absent further analysis what portion of the observed decline can be attributed to the Scotiabank termination

117 The business of the applicants is nascent with an established track record that only dates back to September 2003. While the business has exhibited steady, overall growth since that time, the value of transactions at individual financial institutions exhibit significant volatility including significant decreases in dollar value of transactions. For example, transaction values at RBC decreased 29.4% between October and November 2005. Scotiabank itself experienced a 15.7% decrease in the month-over-month value of transactions in the month prior to termination (July to August 2005).

118 We, thus, find that it is possible that some portion of the observed decline in Scotiabank transactions after September 2005 was attributable to causes other than Scotiabank's termination of the applicants' banking services.

(3) It is possible that some portion of this decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions

119 Mr. Grace testified on cross-examination (without giving the exact number) that as many as half of the Scotiabank customers who transferred more than $1,000 in September 2005 had accounts at more than one bank, and that there was one Scotiabank customer who used the applicants' service who opened a new account after September 2005 at a bank other than Scotiabank.

120 A table containing information on the applicants' top 20 customers by total paid in May 2006 indicates that one of these customers had bank accounts at Scotiabank and RBC. This customer had $65,815 in transactions at RBC and one $1,000 transaction at Scotiabank in that month.

121 While there is no direct evidence that any of the Scotiabank depositors who use the applicants' service availed themselves of other bank accounts in response to the Scotiabank termination, we infer from the above evidence that there was a possibility of such action for some unknown portion of Scotiabank depositors. Consequently, we agree with Dr. Mathewson that there is evidence to suggest that "[s]ome customers with an account at both a 'biller services bank' and an 'EMT bank' make GPay payments from both accounts, suggesting that the EMT limits on GPay payments at EMT banks need not have a large negative effect on the total value of GPay payments."

(4) It is possible that Scotiabank depositors availing themselves of other bank accounts might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions over the relevant period

122 Using September 2005 as the basis for comparison, we find that the applicants experienced a decline in the total dollar value of their transactions, that is, a decline in the total value of transactions processed through all financial institutions, up to December 2005. After that, for each month for which we have data, the total dollar value of the transactions was greater than the total dollar value of transactions in September 2005.

123 While we have found that September 2005 was an anomalous month in regard to Scotiabank transactions, there is no evidence to suggest this month was anomalous in regard to the applicants' total transactions, and no party suggested any such anomaly. Even though September 2005 was not generally anomalous, it is informative to compare total monthly values post-Scotiabank termination to periods in addition to September 2005. If the comparison is made to August 2005, the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005. If the comparison is made to the three month average of July-September 2005, it remains the case that the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005.

(5) Since the overall decline appears to be limited and given that the data exhibit volatility, we cannot conclude what portion of the observed decline is attributable to the Scotiabank termination

124 We cannot distinguish between decreases in the dollar value of Scotiabank transactions that are attributable to the Scotiabank termination and those that are attributable to other causes, including fluctuations for which there are no apparent explanations. Nor can we determine the portion of the decrease in Scotiabank transactions that might have been compensated for by Scotiabank depositors availing themselves of accounts at other banks.

125 As noted above, the applicants' business is a nascent one with little track record and with volatility in growth across financial institutions. In such situations, more analysis is generally required in order to help determine the effect of an inability to obtain supplies of a product.

126 Analyses that may have shed light on the above were not carried out by the applicants. Such analyses need not be restricted to regression analysis. In this regard, we note that Mr. Grace had the ability to specifically identify and name customers and identify whether they had accounts at more than one financial institution. However, no such evidence was submitted. We agree with Dr. Mathewson that such information would have been valuable. Information that might have proven helpful to the Tribunal includes information on the use of accounts at other banks by Scotiabank depositors to carry out GPAY transactions, any information on regular users who may have stopped using the applicants' services post-termination either permanently or for a significant period of time, or who may have decreased the size of their transactions post- termination. In this regard, information on the average size and distribution of transactions of Scotiabank depositors pre- and post-transactions may have been informative.

127 For the reasons described in the preceding paragraphs, we find that the applicants' business may not have been affected in regard to reduced growth in the dollar value of transactions due to their inability to obtain Scotiabank biller services and EMT business deposit accounts at Scotiabank. If they were affected, we find that the decline in the dollar value of transactions was temporary. The total dollar value of transactions processed on a monthly basis was as high as pre-termination (i.e., September 2005) by at least January 2006.

128 It is possible that the observed decline has had longer term ramifications in that the total value of transactions would have been higher even after December 2005 but for the Scotiabank termination. However, we find that there is insufficient evidence on this point. To indicate that, since Scotiabank termination, transaction values have grown at more rapid rates at other financial institutions, with particular comparison made to BMO, is insufficient to make this point because, as noted above, it is possible that Scotiabank depositors availed themselves of accounts at other banks to make their transactions. Moreover, we agree with Dr. Mathewson's analysis that growth in the applicants' transaction values at bill payee banks is not a good predictor of the growth rates from Scotiabank accounts. Dr. Mathewson compares the monthly growth rate of payments from Scotiabank accounts from January 2004 to August 2005 to that from BMO accounts over the same period. He carries out this comparison through the use of a simple linear regression. We are persuaded by his finding that the estimated coefficient on BMO accounts is statistically insignificant, which implies that growth in transaction values from BMO accounts are associated with zero changes in transaction values from Scotiabank accounts. We also note Mr. Grace's testimony on cross-examination that the applicants did not turn away any transactions post-termination, except in the first two days after termination. Despite this, it is possible that Scotiabank account holders wishing to carry out transactions with the applicants in amounts greater than $1,000 did not do so. We do not, however, have any evidence of this.

129 In considering whether the applicants were substantially affected in their business due to reduced growth, assuming that there was at least some initial impact, the evidence that the applicants turned away no transactions other than those over a two-day period is relevant. Moreover, the applicants have, without doubt, experienced considerable growth in their transactions since termination. On this last point, Mr. Grace testified on cross-examination that for the 2006 calendar year, he expected that the applicants would process more than $60 million in transactions. This expectation is an increase of about $28 million over the $32.2 million in transactions the applicants processed in 2005. The basis for Mr. Grace's projection is that, as of June 30, 2006, the applicants had already processed transactions ($29.4 million) almost equal to the value of the transactions they processed in all of 2005.

130 We also note that even if the applicants had experienced a temporary decrease in transactions, Mr. Grace testified that the joint venture earns about 6% on these in revenue, when earnings are calculated to include both foreign exchange and merchant fee revenues. If only merchant fee revenues are included, Mr. Grace testified that the joint venture's revenues are about 3% of the value of transactions. Once expenses are deducted, the remaining profit is split equally between the joint venture partners. The applicants adduced no evidence concerning the likely impact of any temporary reduction in growth in transactions on profit once all of the above calculations are taken into account.

131 For the reasons expressed above, we conclude that, on a balance of probabilities, the applicants have not been substantially affected in their business through reduced growth in revenues. We examine next whether they were substantially affected as a result of a fundamental change in growth opportunities.

(ii) Changes in Growth Opportunities

132 The applicants claim that the termination of their banking services by The Bank of Nova Scotia has substantially affected their business by fundamentally changing their growth opportunities. The applicants argue that they are substantially affected in their growth opportunities because of the $1,000 limit on EMT transfers from Scotiabank (as well as TD and CIBC). The applicants claim that this limitation prevents them from being a viable payment processor for major online merchants, effectively confining them to their present merchant customer base. The applicants concede that, to date, they have been unsuccessful in signing up any significant number of merchants, apart from online casinos

and, to a lesser extent, online dating sites. They attribute their initial lack of success to being a new business. They attribute their subsequent lack of success, at least in part, to the TD and CIBC terminations in December 2003, and also the subsequent Scotiabank termination in September 2005 that is the subject of this application.

133 Mr. Iuso testified that, prior to the termination of biller services by TD and CIBC in December of 2003 (and so prior to the imposition of the $1,000 transaction limit), UMB made marketing approaches to Grocery Gateway, 407 ETR, Air Transat, Red Seal Vacations, Soft Voyage, Rogers, Air Canada, WestJet, Hudson's Bay Company, Sears, Canadian Tire, Fido and LavaLife. None signed up for the UseMyBank Service. On the evidence before us, we find that the applicants' lack of success in gaining "major" online merchants prior to the termination of banking services by CIBC and TD in December 2003 is likely attributable to a variety of reasons. One reason may well be a lack of a track record as a new business. In this regard, we rely upon the evidence of Mr. Jones that his company, WestJet, would consider the length of time a potential supplier had been in business when considering alternate suppliers. At least one potential merchant client, the Government of Canada, advised that it would not use a payment mechanism that required a payor to disclose his or her confidential electronic signature to the payment service provider. The TD and CIBC terminations may have also played a role after December 2003. Again, we rely upon the evidence of Mr. Jones on this point. Mr. Jones' evidence is that WestJet would wish a payment processor to "handle all transactions", suggesting that once the applicants were limited in processing payments over $1,000 at even one bank, their services would become unattractive to a major merchant such as WestJet. This evidence is consistent with that of Mr. Iuso. He testified that, after the TD and CIBC terminations, the Use My Bank Service became less attractive to merchants that sold products or services valued at more than $1,000. The applicants adduced no evidence as to how the Scotiabank termination worsened this situation. Consequently, it is not clear how the Scotiabank termination exacerbated this pre-existing situation such that there was a "fundamental change" in the applicants' growth opportunities caused by the Bank's termination of banking services.

134 The applicants rely upon the Federal Court of Appeal decision in *Chrysler* to argue that the fact that other factors may have prevented the applicants from attracting major merchants initially does not mean that the applicants' forced reliance on EMTs after the Bank's termination has not substantially affected their business. In this regard, the Federal Court of Appeal wrote, at page 29, that:

> It is not a requirement of the provision that the refusal to trade and the resulting inability to obtain adequate supplies be the only factor substantially affecting the business: it is sufficient that it have a substantial effect whatever the impact of other factors.

135 We, of course, accept this to be a binding statement of legal principle. We take from this, that for the purposes of paragraph 75(1)(*a*), the factor of concern is an inability to obtain adequate supplies, and whether this has had a substantial effect on the business.

136 In the present case, we find that there is no evidence to suggest that the inability to obtain adequate supplies of Scotiabank biller services has substantially affected the applicants' business by fundamentally changing their growth opportunities.

(iii) Conclusion Regarding the Substitutability of EMTs [CONFIDENTIAL]

137 To summarize, we find that the use of EMTs *[CONFIDENTIAL]* by the applicants did not substantially affect the applicants in their business either in terms of revenue growth or growth opportunities. Consequently, we agree with Dr. Mathewson that, by application of the test established in *Chrysler*, deposit accounts *[CONFIDENTIAL]* that allow for the deposit of EMTs are in the same product market as Scotiabank biller services. *[CONFIDENTIAL]*.

138 *[CONFIDENTIAL]*. A substantial increase in the risk to a business can result in a substantial effect on that business.

139 *[CONFIDENTIAL]*.

140 *[CONFIDENTIAL]*.

141 *[CONFIDENTIAL]*.

(3) Conclusion in Regard to 75(1)(a)

142 In sum, in regard to 75(1)(*a*), we conclude that the appropriate test for defining markets is that found by the Tribunal in *Chrysler.* In this matter, we find, as a fact, that the relevant product market is biller status at the Bank and deposit accounts *[CONFIDENTIAL]* that allow for the deposit of EMTs. Upon termination of banking services by the Bank, the applicants replaced these services with EMTs into *[CONFIDENTIAL]* deposit accounts at other banks, such that, we find, they were not substantially affected in their business either from the perspective of reduced growth in revenues or a change in growth opportunities. It follows that they failed to demonstrate that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms as paragraph 75(1)(*a*) of the Act requires.

143 As noted above, the applicants are required to establish that they meet each requirement of subsection 75(1). Thus, the finding that the applicants were not substantially affected in their business as a result of the Bank's termination of banking services is fatal to the applicants' claim.

144 However, the parties adduced evidence relevant to the other requirements and made submissions with respect to the remaining requirements. In light of that, and in the event we are wrong in our conclusions with respect to paragraph (a), we continue with our analysis.

B. Have the applicants met the onus to establish that they were unable to obtain adequate supplies of the product because of insufficient competition?

145 As a matter of law, paragraph 75(1)(*b*) of the Act contains two requirements. First, there must be insufficient competition among suppliers of the product at issue. Second, the inability of the refused party to obtain adequate supplies of the product must result from that insufficient competition. In the present case, the material consideration is, in our view, whether the refusal of the Bank to provide the applicants with bill payee status and accounts to receive EMTs was because of insufficient competition.

146 This causal requirement was considered by the Tribunal in *Xerox*, cited above. There, the Tribunal concluded, at page 116, that insufficient competition must be the "overriding reason" for the refusal to deal. The Tribunal also considered that the "conduct of the complainant or the administrative burden or other costs placed upon a supplier" might well lead it to conclude that the inability to obtain the refused product did not result from insufficient competition, but "rather for objectively justifiable business reasons".

147 We agree that, as a matter of law, any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason.

148 Turning to the evidence before us, for the reasons that follow, we are satisfied, and find as a fact, that the Bank's decision to terminate the applicants' banking services was motivated by objectively justifiable business reasons. Those reasons were:

(i) The use of the UseMyBank Service required the Bank's depositors to violate their Cardholder Agreements. Irrespective of this, the disclosure of a customer's electronic signature exposed the Bank to legal and reputational risks;

(ii) The applicants at all material times failed to meet all of the obligations imposed upon them as a money services business by the PCMLTF Act and associated regulations. This put the Bank at regulatory and reputational risk; and,

(iii) The provision of accounts for EMT deposits to the applicants would likely result in the Bank violating Rule E2 of the Canadian Payments Association. This again posed regulatory and reputational risk to the Bank.

149 Each reason is considered in turn.

(1) The applicants require disclosure of each customer's electronic signature

150 As noted above, the applicants require disclosure of each customer's electronic signature. Mr. Iuso agreed on cross-examination that such disclosure gave UMB access to all of the banking services that are accessible online to that customer. This could include access to lines of credit, credit cards and all of the customer's bank accounts. Where, for example, the customer had not identified GPAY as a bill payee, UMB would do so on the customer's behalf.

151 The ScotiaCard Cardholder Agreement provides:

You are responsible for the care and safety of the card and your electronic signature. <u>You will keep your electronic signature confidential: secure from all persons without exception</u> and apart from the card at all times. You are liable for all card transactions incurred using your electronic signature.

[underlining added]

152 Advice provided to cardholders on Scotiabank's website, on a page dealing with the Bank's online security, is as follows:

Your Scotia OnLine password is confidential and must never be shared with any outside person or company, including:

. . .

• Services that collect your card number and password, or any other confidential information, to perform transactions on your behalf or to collect payment from you.

. . .

In divulging your password, you contravene the terms of your ScotiaCard Cardholder Agreement and you will be fully liable for any unauthorized access to your accounts and all associated losses arising from these disclosures.

153 These provisions, and other steps the Bank takes, as described in more detail by Mr. Rosatelli, reflect the importance to the Bank of keeping a customer's electronic signature confidential. We accept without reservation Mr. Rosatelli's evidence that:

(i) In the absence of face-to-face transactions and a signature, the password used in conjunction with the ScotiaCard number acts as the authentication of a customer.

(ii) This method of customer authentication is fundamental to the electronic banking system because it is what ensures the security of customer accounts.

(iii) If passwords are compromised, there would be a decrease in customer confidence in the electronic payment system.

(iv) The Canadian Payments Association reports that 20 million electronic payments are processed daily in Canada. Those payments account for approximately $164 billion being exchanged daily through the electronic network.

154 Confirmatory evidence of the importance of keeping electronic signatures secure was given by Ms. Graham-Parker and by the applicants' expert Mr. Bensimon. On cross-examination Mr. Bensimon agreed that a breach of confidentiality in respect of banking card customer passwords would result in a significant reputational and legal risk for the Bank.

155 The applicants argue that the evidence does not support the Bank's assertion that it is a breach of the Cardholder Agreement for a customer to voluntarily disclose his or her electronic signature because:

(i) The Cardholder Agreement "acknowledges and permits that there may be authorized uses of the cardholder's electronic signature by others".

(ii) The Bank became aware in 2003 that electronic signatures were being used in the UseMyBank Service, yet it continued to supply banking services to the applicants.

(iii) The Bank has not barred RBC from receiving bill payments from Scotiabank customers, despite the fact that RBC's account aggregation service, CashEdge, also requires disclosure of a customer's electronic signature.

156 We deal with each submission in turn. In our view, as a matter of law, the Cardholder Agreement, properly interpreted, does not authorize disclosure of a customer's electronic signature. In arguing the contrary, the applicants rely upon the portion of the Cardholder Agreement that deals with the cardholder's responsibility for account activity. That portion provides, in material part:

> You are liable for all debts, withdrawals and account activity resulting from:
>
> • Authorized use of the card by persons to whom you have made the card and/or electronic signature available.
>
> • Unauthorized use of the card and/or electronic signature, where you have made available for use the card and electronic signature by keeping them together or in such a manner as to make them available for use, until we have received notice of loss, theft or unauthorized use.
>
> You will not be liable for losses in circumstances beyond your control. Such circumstances include:
>
> • Technical problems and other system malfunctions.
>
> • Unauthorized use of a card and PIN
>
> • after the card has been reported lost or stolen;
>
> • the card is cancelled or expired or
>
> • you have reported the PIN is known to another person.
>
> You will be considered as contributing to the unauthorized use of the card and/or electronic signature and will be fully liable for all debts, withdrawals and account activity where:
>
> • The electronic signature you have selected is the same as or similar to an obvious number combination such as your date of birth, bank account numbers or telephone numbers.
>
> • You write your electronic signature down or keep a poorly disguised written record of your electronic signature, such that it is available for use with your card, or
>
> • You otherwise reveal your electronic signature, resulting in the subsequent unauthorized use of your card and electronic signature together.

157 In our view, this wording is insufficient to contradict the express admonition to keep the electronic signature confidential and secure from "all persons without exception". What the provision does is to make it clear that where the cardholder acts contrary to that obligation, the cardholder will be liable for all resulting transactions, whether specifically authorized or not.

158 Whether or not, as a matter of law, cardholders indeed breached the terms of the Cardholder Agreement when authorizing UMB to access their online accounts, the Tribunal, relying upon the evidence of Mr. Rosatelli, Ms. Graham-Parker, and Mr. Bensimon, concludes that the Bank viewed such conduct to pose a material risk to the security of its electronic banking system. The evidence of these witnesses is consistent with the alert issued by the Canadian Bankers Association, referred to above at paragraph 19.

159 Further support for the view that the Bank had objective and *bona fide* concerns with the applicants' mode of doing business is also found in the potential for fraud in the applicants' accounts. Mr. Grace acknowledged that one potential source of fraud in the applicants' accounts arises when an individual compromises a customer's confidential banking identification and then uses that information to perpetuate frauds through the applicants' accounts.

160 The legitimacy of the Bank's concern with respect to the potential for fraud is supported by a policy statement of the Canadian Payments Association, approved on December 1, 2004. There, the association noted:

> Fraud perpetrated in the on-line environment has the potential to profoundly impact consumers' financial well-being, create lasting negative public opinion of financial institutions and the payments system overall and to ultimately subject the payment system and its participants to possible legal challenges.

161 The Tribunal accepts the evidence of Messrs. Monteath, Rosatelli and King that the risk the Bank was exposed to as a result of the disclosure of its customers' electronic signatures (including the risk of fraud) constituted an objectively justifiable business reason that led the Bank to terminate the applicants' banking services.

162 As to the fact that the Bank learned in 2003 that some customers were using the UseMyBank Service and thus compromising their electronic signatures, we accept Mr. Rosatelli's explanation (which was not significantly impugned on cross-examination) that due to the relatively small number of customers and transactions, the Bank chose at that time to deal with the matter by communicating directly with each customer. Such a response does not, in our view, diminish the genuine and serious nature of the Bank's concern.

163 We acknowledge that the Bank's witnesses agreed that the Bank had not barred RBC from being a bill payee, notwithstanding the Bank's knowledge that RBC's CashEdge service requires disclosure of a customer's banking number and password. However, the evidence is unchallenged that the Bank has written three cease and desist letters to RBC with respect to the use of electronic signature, and that the Bank is searching for a technical solution so as to block the ability of Scotiabank customers to access their Scotiabank accounts through CashEdge. In those circumstances, we find that the Bank's knowledge of how CashEdge works is an insufficient evidentiary basis upon which to conclude that the Bank was not motivated by objectively justifiable business reasons when it relied upon the disclosure of confidential customer information as one reason for terminating the applicants' banking services.

(2) Ability to Meet Legislative and Regulatory Obligations

164 It is not in dispute that, in regard to money laundering and terrorist financing, the following legislation is applicable to the Bank and the applicants:

> (i) The PCMLTF Act (legislation that is primarily concerned with the disguising of illegitimate funds for use in criminal or terrorist financing);

> (ii) The PCMLTF Regulations, SOR/2002-184;

(iii) Financial Transactions and Reports Analysis Centre (FINTRAC) interpretative guidelines as they relate to the PCMLTF Act, which, among other things, set out the reporting and record-keeping requirements of financial institutions and money services businesses;

(iv) Office of the Superintendent of Financial Institutions (OSFI) guidelines, which, among other things, identify some of the steps that federally regulated financial institutions should take to assist their compliance with the various legal requirements related to deterring and detecting money laundering and terrorist financing.

165 The Bank argues that doing business with the applicants would result in the violation of the following regulations:

(i) The third party determination rule as contained at section 5.1 of FINTRAC Guideline 6G: this rule provides that when a bank determines its account holders are acting on behalf of a third party, the bank must keep a record that sets out the third party's name, address and the nature of the principal business or occupation of the third party. The Bank contends that its consequent record-keeping obligations would be beyond the scope and ability of its existing systems. In particular, the Bank contends that it would be obliged to keep the name, address, and principal occupation for all customers transferring funds to the applicants through the bill payment system, all of the banking customers sending EMTs to the applicants, and all the merchant clients to whom funds are directed. In regard to this last alleged obligation, the Bank argues that it would be impossible for it to do so since the applicants themselves do not have this information.

(ii) The PCMLTF Regulations and the Guidelines as they relate to money services businesses, in particular FINTRAC Guideline 6C which sets out the recordkeeping and client identification requirements of a money services business: the Bank argues that the applicants, who admitted to being a money service business only at the commencement of this hearing, are unaware of their consequent reporting and record-keeping obligations. The Bank also argues that the reports the applicants currently make to FINTRAC do not come close to meeting their obligations. In particular, the Bank argues that the applicants are non-compliant because they do not identify banking customers by reviewing an original piece of identification, do not keep a large transaction record when someone is transferring — either receiving or sending — $10,000 or more using the applicants' services, and do not meet their third party record-keeping obligations. The Bank argues that any failure of the applicants to meet their record-keeping obligations would prevent the Bank from complying with its own record-keeping obligations.

166 We begin consideration of the above and related issues by reviewing the evidence of the applicants' anti-money laundering expert. Mr. Bensimon provided his opinion that:

(i) The applicants' business is a money services business as defined in the regulations to the PCMLTF Act.

(ii) As a money services business, the FINTRAC rules require the applicants to conduct reasonable due diligence in verifying customer identity, to have appropriate compliance policies and procedures, and to develop, implement and maintain an effective anti-money laundering program.

(iii) The applicants had several anti-money laundering regulatory compliance gaps relating to the following: the lack of a designated compliance officer; the need for enhanced compliance policies and procedures; the need for independent testing of those policies and procedures; and, the need for an ongoing compliance training program.

(iv) The risks that the Bank is exposed to if it does business with the applicants include: deploying resources to regularly monitor the account for suspicious activity; ensuring the applicants have strong internal compliance controls to mitigate the risk of its employees abusing their access to customer bank card numbers and passwords; and taking reasonable steps to ensure the applicants are complying with FINTRAC requirements as a money services business.

(v) On balance, "the MSB [money services business] account of the Applicant represents a low inherent risk for the bank as far as AML [anti-money laundering] risk exposure is concerned."

167 Mr. Bensimon's opinion was, however, in our view, substantially modified on cross-examination. There he agreed that:

(i) In addition to complying with the PCMLTF Act and regulations, the applicants were obliged to follow other applicable guidelines as they relate to money services businesses.

(ii) Pursuant to Guideline 6C, the applicants had record-keeping and client identification obligations. (We note that Mr. Grace had acknowledged in cross-examination that he was not aware of what the reporting and record-keeping obligations of a money services business were.)

(iii) When the applicants transfer $10,000 or more to one of their merchant customers they are obliged to keep a large cash transaction record, identify the recipient and make a third party determination. (We note that there was no evidence that they do so.)

(iv) Mr. Bensimon had seen no evidence that the applicants complied with their obligation as to proper identification of an individual as articulated in section 4.4 of Guideline 6C.

(v) When the applicants send $10,000 or more out of Canada to a merchant customer, they are required to make a report to FINTRAC. (We note that Mr. Grace testified that such an obligation was only imposed upon the bank that transmitted the funds.)

(vi) For money that is being sent by the applicants to payment processors (which accounts for 98% of the applicants' transactions), the applicants are obliged to record the third party's name, address and principal business or occupation (i.e., to record information with respect to the party to whom the applicants' merchant customer is ultimately transmitting the funds). Mr. Bensimon saw no evidence that the applicants were compliant with this requirement. (We note that Mr. Grace acknowledged on cross-examination that he did not know where the money is sent after it is received by the overseas payment processors.)

(vii) A money services business should have general familiarity with the watch list of non-cooperative countries and territories published by the Financial Action Task Force on Money Laundering, particularly where the business is transmitting millions of dollars offshore. (We note that on discovery, Mr. Grace had testified that it did not matter to the joint venture in which jurisdiction a merchant management company was incorporated, and that he had never been provided with a copy of the watch list.)

(viii) The gaps he identified with respect to the applicants' anti-money laundering regime were consistent with a company or companies that really do not understand or take responsibility for their anti-money laundering obligations.

(ix) If a customer of the Bank did not accept that it was a money services business, and if the customer did not comply with its own anti-money laundering obligations, the Bank could not comply with its own record-keeping and reporting obligations.

(x) With respect to his opinion that the applicants posed a low risk to the Bank if it continued providing services to the applicants, Mr. Bensimon admitted that:

- In preparing his opinion, he had proceeded on the basis that the average transaction processed by GPAY was $82. He was unaware that RBC customers could transfer up to $100,000 at a time. This was a material consideration to his opinion.

• He was unaware that U.S. residents with Canadian bank accounts could use the applicants' service. This was a relevant factor he had not considered. The relevance was that the applicants would also have to contend with the U.S. anti-money laundering regime.

• He was not aware that, until his report was received, the applicants had denied that they carried on a money services business. This elevated the risk to the Bank.

• He was unaware that the applicants had not initially responded to the Bank's request for a copy of the joint venture agreement. Not having the joint venture agreement created an elevated risk exposure to the Bank.

• He was unaware that at times Mr. Grace had been unwilling to disclose the identity of the applicants' merchant customers to the Bank, and instead took the position that the Bank's interest should only be with what happens to the money flowing from the Scotiabank accounts. Mr. Bensimon agreed that Mr. Grace's position was contrary to the Bank's legislated obligation to have a verifiable audit trail.

• He did not know that the applicants had refused to produce to the Bank the contracts with their merchant clients. This provided an elevated risk exposure to the Bank.

• He was unaware that Mr. Grace had no idea where the money went after it was sent by the applicants to their merchant customers. This too provided an elevated risk exposure and cause for concern for the Bank.

• He was unaware that the applicants did not know who owned the payment processing companies to which the applicants sent funds, and did not know the actual business of the payment processors. This was a material gap in the applicants' anti-money laundering plan and it too elevated the risk to the Bank.

168 In our view, Mr. Bensimon's initial view that the applicants' business represented an overall low risk to the Bank was substantially discredited by the admissions he made during his cross-examination. As well, in our view, he confirmed the veracity of the Bank's concerns in regard to FINTRAC Guidelines 6C and 6G. We give particular weight to his admission that if a Bank's customer does not comply with its own anti-money laundering obligations, the Bank cannot comply with its record-keeping and reporting obligations.

169 The evidence of the Bank's anti-money laundering expert, Mr. Mathers, also confirmed the legitimacy and *bona fides* of the Bank's stated concerns. We found Mr. Mathers to be a knowledgeable witness. His opinion was cogent, consistent with the regulatory scheme, and was not significantly impugned on cross-examination.

170 We accept Mr. Mather's opinion that:

(i) Mr. Grace had provided false information to the Bank when he answered the money laundering question in the course of an account opening. When asked "And will this account be used to conduct business on behalf of someone other than the named account holder?" Mr. Grace had responded "No". (We note that on cross-examination Mr. Bensimon also agreed that this answer was incorrect.) This answer prevented the Bank from meeting its own obligations under the PCMLTF Act and Regulations.

(ii) The products and services of online gaming websites that offer casino gaming and sports wagering can be, and frequently are, used by criminals to launder the proceeds of crime.

(iii) The applicants' business model allows customers to transfer funds to unknown entities and, in part, entities that have not been vetted by the Bank. If the Bank allows such transactions to take place, it may be allowing inappropriate or illegal transactions in violation of the PCMLTF Act.

(iv) Because the applicants' merchant customers are not required to disclose sufficient information to comply with the PCMLTF Act requirements, and because no steps are taken to verify the accuracy of the information provided, the applicants and UMB are at risk of assisting money laundering.

(v) If the applicants operated accounts at the Bank, both UMB and its customers who used the service to transfer funds, would fall within the definition of a third party in the applicable legislation. As a result, the Bank would be obliged to comply with sections 9 and 10 of the regulations to the PCMLTF Act relating to client identification, third party determination and record-keeping (all as described in FINTRAC Guidelines 6C and 6G as discussed above). In order to comply with those provisions, the Bank would be obliged to obtain information and keep records about all of the applicants' customers, including: the banking customers' name, address, occupation (or the nature of their principal business); and, the nature of the relationship between the banking customer and the applicants.

(vi) The applicants are a very high risk banking client for any Canadian Schedule 1 Chartered Bank.

171 Mr. Ronald King, the Chief Anti-Money Laundering Officer for the Scotiabank group of companies also testified in regard to regulatory and legislative issues. His evidence was supported by the contents of the Bank's Anti-Money Laundering Handbook, the PCMLTF Regulations, and FINTRAC and OSFI Guidelines. The Anti-Money Laundering Handbook confirms, in our view, that the Bank takes its regulatory obligations seriously and demonstrates that the Bank has developed a standard approach to all businesses that seek its services. As much of Mr. King's evidence was grounded in the Handbook and the regulatory scheme, we accept it as being cogent and credible. As well, we were impressed by Mr. King's obvious knowledge of the regulatory environment, his professionalism, and the balance or fairness he showed in his evidence. His evidence was not significantly modified on cross-examination and we accept his evidence that:

(i) The design of the applicants' business model facilitates anonymity in that the applicants remit bulk payments to a third party which often is a money services business. Because the applicants do not transmit funds to the ultimate beneficiary, the audit trail is severed.

(ii) The Bank's Anti-Money Laundering and Anti-Terrorist Financing Handbook sets out the standards the Bank is expected to apply.

(iii) Even where a potential customer is a high risk customer, and not a restricted or prohibited customer, the Handbook requires that the Bank not enter into a banking relationship where the legitimacy of the source or ultimate destination of funds passing through an account cannot be determined.

(iv) There were a number of factors that caused the Bank concern about continuing a relationship with the applicants. In his words:

> They involve such things as the nature of the business model, that it involved offshore payments; the nature of the business model and that it seemed to have a high percentage of Internet gambling payments that were of grave concern to us. <u>It was also a concern that their process afforded anonymity to the remitter of the funds which would make it attractive and potentially something that could be abused by the money laundering — a person wishing to launder money. We were also concerned that the seeming weakness in compliance structure within UseMyBank would make it very difficult for them to effectively manage their risks or meet their compliance obligations</u>.
>
> [underlining added]

(v) In the course of the 2005 investigation the Bank conducted in connection with the applicants' business, it was the recommendation of the anti-money-laundering group that the Bank terminate its relationship with the applicants.

172 From all of this evidence, we take the following: the applicants were not compliant with their anti-money laundering obligations when the Bank decided to terminate the banking relationship; in consequence, the Bank probably could not,

and it believed it could not, discharge its own legislated and regulated compliance obligations. We, thus, find that the Bank was motivated by an objectively justifiable business reason, namely a concern that it would not be able to meet its regulatory obligations when it decided to terminate the applicants' banking services.

(3) Rule E2 of the Canadian Payments Association

173 Dr. James Dingle, a former Deputy Chairman of the Board of Directors of the Canadian Payments Association, testified in connection with Rule E2 of the Canadian Payments Association. His evidence was objectively grounded in the contents of Rule E2 and other Canadian Payments Association documentation, and was presented cogently and with consistency. Because of that, and his significant experience, the Tribunal found him to be a knowledgeable, credible and reliable witness. His evidence was not, in our view, diminished in any significant way on cross-examination. We accept his expert testimony that:

> (i) Pursuant to the *Canadian Payments Act*, R.S.C. 1985, c. C-21, the Bank must be a member of the Canadian Payments Association and must adhere to its rules. Those rules govern the exchange, clearing and settlement of various types of payment items.
>
> (ii) Rule E2 of the Canadian Payments Association, implemented February 3, 2005, deals with the exchange, clearing and settlement of electronic online payment items, including EMTs. Section 5(a) of the Rule states:
>
> > In all matters relating to the Exchange, Clearing and Settlement of Online Payment Items for the purposes of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation governing the treatment of personal and financial information.
> >
> > [...]
> >
> > For greater clarity, the Payor's [i.e. the banking customer's] personal banking information, such as but not limited to the authentication information (e.g., user identification and password) and account balance, shall not be made available at any time to the Acquirer and/or Payee [i.e. the applicants] during the On-line Payment Transaction session
>
> (iii) If the Bank were required to continue to offer banking services to the applicants, the Bank either would have to clear the EMTs received from other members of the Canadian Payments Association in breach of Rule E2, or not clear any of the EMTs transferred into the applicants' accounts at the Bank.
>
> (iv) Breach of Rule E2 would expose the Bank to both regulatory and reputational risk, including the risk of compliance proceedings for breach of Rule E2.
>
> (v) The Canadian Payments Association has defined a reputational risk as follows:
>
> > Reputational Risk is the risk of significant negative public opinion that results in a critical loss of funding or customers. This risk may involve actions that create a lasting negative public image of, or loss of public confidence in, the overall operations of a Financial Institution or the payments system...

174 The applicants do not appear to challenge this evidence. In closing argument they simply observe, correctly, that this rule, while applying to EMTs, does not apply to bill payments that are processed within the Bank. That is bill payments that move from the Bank's customer to the Bank's bill payee, without entering the Canadian Payments Association's Inter Member Network.

175 Messrs. Monteath, Rosatelli and King testified that the fact the applicants' business requires disclosure of customers' ScotiaCard number and password was one of the reasons the Bank decided to terminate the applicants' banking services. As set out above, we have accepted that evidence and found that to have been the case. Further, Dr.

Dingle's opinion provides objective, independent confirmation of the importance to the Bank of the protection of the confidentiality of its customers' electronic signature. His evidence supports the *bona fides* of the Bank's concern about the disclosure of its customers' private banking information and it goes to establishing to our satisfaction that the decision to terminate the applicants' banking services was based upon an objectively justifiable business reason.

(4) Other Business Justifications Raised by the Bank

176 The Bank also argues that the following objectively justifiable business reasons existed for terminating the applicants' banking services: the applicants' business is likely in breach of section 202 of the *Criminal Code*, R.S.C. 1985, c. C-46 (relating to illegal gambling) and it is probable that the Bank would in turn be in breach of the *Criminal Code* if it is required to provide accounts and services to the applicants; online gambling is prohibited by the laws of the United States and this too exposes the Bank to the risk of prosecution; and, the Bank is exposed to reputational risk and potential class actions because the applicants receive a profit on foreign exchange that they do not disclose to either the bank customers for whom they are agents, nor the payment processor companies for whom they are trustees.

177 We deal with the issue of U.S. law below in the context of the discretionary nature of the relief sought.

178 With respect to the effect of the *Criminal Code* and foreign exchange profit, we do not find the Bank's arguments to be as cogent as those discussed above. However, we do not find it necessary to reach any final conclusion with respect to these two arguments.

(5) Conclusion with Respect to Paragraph 75(1)(b)

179 In our view, the impact, or potential impact, upon the Bank caused by the disclosure of its customers' confidential banking information, and the related potential for fraudulent transactions in the applicants' accounts, the regulatory concerns we have found to exist, and the impact of Rule E2 are such that we are satisfied that the Bank's refusal to supply any services and accounts to the applicants was not due to insufficient competition among suppliers in the market. Rather, the termination of banking services was the result of objectively justifiable business reasons.

180 In concluding our analysis of this issue, we observe that we have been mindful throughout of the timing of the termination of the applicants' services in light of the launch of Interac Online. Aside from the coincidence of timing, we have found no evidence that would enable us to conclude that the existence or pending status of Interac Online was at all a relevant consideration when the decision was made to terminate the applicants' banking services. Rather, we find as a fact that the termination was done for valid business reasons.

C. Have the applicants established that they are able to meet the usual trade terms?

181 The Bank argues that the applicants are not able to meet the usual trade terms on which EMT accounts and/or bill payee services are offered. Specifically, the Bank argues that:

> (i) EMT accounts are only offered by Scotiabank to small businesses, and the applicants are not now, and at the time of termination were not, a small business.
>
> (ii) The applicants cannot comply with the terms of the Bank's Bill Payment Agreement.

182 The applicants argue, correctly, that the expression "trade terms" is defined precisely and restrictively for the purposes of section 75 in subsection 75(3). For ease of reference that subsection provides:

> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.
>
> 3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

183 In response, the Bank argues that restricting EMTs to small businesses, and the terms found in its Bill Payment Agreement are "reasonable technical and servicing requirements".

184 There are, in our view, two significant difficulties with this submission. First, it is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of a provision. Once a common meaning is found, one must then confirm that such meaning is consistent with the purpose and scheme of the Act. (See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at pages 324, 326-329; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pages 80-81.)

185 Dictionaries generally define the word "entretien" as "maintenance" or "upkeep". See, for example:

• *Le Robert & Collins Dictionnaire Français-Anglais — English-French* defines entretien as:

(a) (*conservation*) [*jardin, maison*] upkeep; *[route]* maintenance, upkeep; *[machine]* maintenance [...]

(b) (*aide à la subsistance*) *[famille, étudiant]* keep, support; *[armée, corps de ballet]* maintenance, keep [...]

(c) *(discussion privée)* discussion, conversation [...]" [4th ed., s.v. "entretien"]

• The *Larousse French English/ English French Dictionary* sets out the following definitions:

"servicing" *n.* 1. [of heating, car] entretien *m. 2* [by transport] desserte *f.*

"entretien" *nm.* 1. [maintenance] maintenance, upkeep [...] 2. [discussion-entre employeur et candidat] interview — [colloque] discussion [...] [2003 ed, s.v. "entretien" and "servicing"].

186 Thus, adopting the shared meaning principle of statutory interpretation, one could reasonably conclude that the terms "servicing" and "entretien" refer to the upkeep or maintenance requirements that a supplier imposes on a purchaser so as to ensure that proper services are available to the ultimate purchaser with respect to the product purchased. We find nothing in that interpretation that is *per se* inconsistent with the scheme or purpose of the Act.

187 However, that more restrictive interpretation would not, in our view, be broad enough to include the contractual type limitations that the Bank imposes upon its customers by, for example, restricting EMTs to small businesses.

188 Second, the more restrictive interpretation argued by the applicants appears to be consistent with the legislative history of the provision. We note, parenthetically, that the legislative history, Parliamentary debates, and similar material may properly be considered when interpreting a statute, so long as the history is relevant, reliable and not assigned undue weight. (See Reference re: *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783 (S.C.C.) at paragraph 17; and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paragraph 35.)

189 We find the following comments of the then Ministers of Consumer and Corporate Affairs to be relevant:

• On April 30, 1974, Herb Gray, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs with respect to Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl., 1974). The following was said with respect to "usual trade terms":

> Mr. Atkey: Another concern is with the term "usual trade terms", which appears in proposed Section 31.2(b) on page 16. You made reference in an earlier section to the fact that the "usual trade terms" demanded by a distributor or a manufacturer might not only include aspects of price, it might also involve aspects of technical services as a requirement.

Mr. Gray: That is right.

Mr. Atkey: You say that that would be a reasonable interpretation of the term "usual trade terms". Would you be willing to consider an amendment to specifically provide that that is what it means, because I would suggest there have been some concerns expressed that where distributors or manufacturers are concerned about selling their product or making it available to various retail outlets that service, the extent and the quality of service that is provided in respect to the sale of that product is sometimes as important, or more important, than the actual price, and there is a great fear abroad right now that the phrase "usual trade terms" only refers to price and if there was a broader definition I think it might allay some of those fears, so that the service element which I would suggest to you is of equal concern to the consumer today would be taken into account by the RTPC by virtue of statutory directives.

Mr. Gray: Frankly, I think the type of thing you are talking about is covered in the present wording of proposed Section 31.2(b):

> (b) ...is willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise...

> [underlining added]

However, I would be happy to receive suggestions from the Committee if it is felt that this could be further clarified.

I think one would have to be careful not to insert words that might be considered to be unduly remedying and would prevent the Commission from taking into account what might otherwise be considered to be acceptable definitions of the term "usual trade terms" but would not be covered by it. After all, one of the benefits that I think comes from using a form of civil jurisdiction is that there is the potential for flexibility in looking at the vast range of situations that can arise in an economy as complex as our own. But, as I say, I would be happy to have the views or the suggestions of the Committee on this.

[...]

Mr. Jarvis: [...] Can I go on, for a minute, to usual trade terms? Again, I will relate it to the furniture industry; I think it is a good example because it is a highly competitive industry and generally composed of small businesses even at the manufacturing level:

> Often a requirement of a furniture manufacturer is not only usual trade terms in respect of payment units of purchase.
>
> I do not know what "and otherwise" might mean, but it may mean the training of that retailer salesman by the manufacturer's marketing staff; it may mean an undertaking by the retailer to supply so many square feet of display room; it may also mean his undertaking to warehouse a certain number of units in various colours. My question is: in the opinion of the Minister and his officials, do the words "and otherwise" as purportedly they modify usual trade terms cover that type of conditions of sale, which is a vital thing in many consumer products?

Mr. Gray: In my view they could cover the type of things you mentioned provided, of course, that on the facts they are usual in that market, strictly as a matter of fact.

Mr. Jarvis: My question is dictated, Mr. Minister, because remembering the interpretation of many of these clauses at law, the words "and otherwise" are often taken — I forget the Latin maxim for this — *ejusdem generis*. I have not heard that since law school, *ejusdum generis*. In other words, the words "and otherwise" can only be taken within the context of respect of payment and units of purchase. You cannot go beyond that in a legal interpretation of those words. That is what I am afraid we might be faced with in so far as the Commission is concerned with the words "and otherwise" here.

Mr. Gray: I raised this with our legal draftsmen and they have told me this is not the case. As far as I am concerned, this is an area I am examining for possible clarifying amendment because I personally do not intend the clause to be interpreted in the *ejusdem generis* sense.

[Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 9, April 30, 1974, 2nd Sess., 29th Parl., p. 9:24-25, 9:31-32.]

• When André Ouellet, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs on December 3, 1974, he stated as follows with respect to the refusal to deal clause found in Bill C-2 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess., 30th Parl., 1974):

I should like also to remind you that many representations have been made to the effect that a manufacturer may legitimately claim the right to refuse to supply a customer if the latter is not in a position to distribute the product adequately from all points of view. We have therefore made an amendment to recognize this right. The commission will not be able to force a supplier to supply a customer if the latter does not satisfy all professional and other requirements that usually govern the marketing of the article concerned.

[...]

[Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 15, December 3, 1974, 1st Sess., 30th Parl., p. 15:12.]

190 The proposed provision underlined above was ultimately not enacted. This shows an intent to strictly limit what was meant by trade terms. The definition of trade terms is restricted and provides that the phrase "trade terms" "means", as opposed to "includes", the three things articulated in the definition.

191 We take from the debates set out above that the parliamentarians' attention appears to have been focused upon the situation prevailing between manufacturers and dealers. However, in subsection 2(1) of the Act, "product" is defined to include an article and a service. In our view, the case may be made that the restrictive definition of "trade terms" in subsection 75(3) of the Act is not appropriate where the product at issue is a service. For example, having regard to the use of the word "entretien" in the French version, it is at least arguable that in the context of the provision of services such as banking services the concept of "units of purchase" and "technical and servicing requirements" have little obvious application. Put another way, in the context of the provision of services, it may be unrealistic and not commercially sound to restrict "trade terms" to those relating to payment, units of purchase and the services that surround those units of purchase.

192 It may be that this is an issue that should be considered if amendments to the Act are contemplated in the future. For our purpose, in view of our findings with respect to paragraphs 75(1)(*a*) and (*b*), it is not necessary to reach a final decision on this point.

193 All of this is not to say that a failure by a person to meet other usual contractual terms that do not fall within the definition of trade terms is irrelevant. Such a failure may establish that the inability to obtain a product is not a result of "insufficient competition" within the meaning of paragraph 75(1)(*b*). It may also be relevant to the discretionary nature of the relief available under section 75. In the present case, we deal below with the Bank's restrictions upon EMT accounts and bill payee status when we discuss the exercise of discretion.

194 It is not necessary for us to consider, and we do not, whether the services are in ample supply as required by paragraph 75(1)(*d*). We do however wish to turn to the final required element found at paragraph 75(1)(*e*).

D. Have the applicants established that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market?

195 We address this requirement first by considering what is meant by "an adverse effect on competition in a market". We then consider whether the applicants have established that the Bank's refusal to provide them with bill payee status and EMT deposit accounts is having, or is likely to have, an adverse effect on competition in a market.

(1) The Meaning of an Adverse Effect on Competition in a Market

196 Because paragraph 75(1)(*e*) is new, we find it of assistance in interpreting the phrase "competition in a market" as used in paragraph 75(1)(*e*) to consider how paragraph 79(1)(*c*) of the abuse provisions of the Act has been interpreted. Paragraph 79(1)(*c*) requires consideration of whether the impugned conduct "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". This provision was considered by the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (F.C.A.), leave to appeal to the Supreme Court of Canada requested. There, at paragraph 36, the Federal Court of Appeal wrote:

> [t]wo aspects of the scope of paragraph 79(1)(c) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one [...].

197 The similar wording in 75(1)(*e*) in regard to time frames, albeit limited to two rather than three time frames, and the concern with the effect on competition also suggest, in our view, that the paragraph demands a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal.

198 Comparative analysis in regard to competition in a market requires consideration of relative competitiveness: "... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice ..." (See *Canada Pipe*, cited above, at paragraph 37). This relative comparative assessment was, as noted by the Federal Court of Appeal at paragraph 43, also articulated by the Tribunal in *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.); *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.) and *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Competition Trib.) (Nielsen).

199 The *Laidlaw* decision is particularly clear on this point. At page 346, the Tribunal wrote: "[...] the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence."

200 Thus, we conclude that paragraph 75(1)(*e*) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal. This raises the question of what is meant by "competitiveness".

201 The "competitiveness" of a market under both the abuse and merger provisions of the Act refers to the degree of market power that prevails in that market. In *NutraSweet*, cited above, the Tribunal wrote, in the context of a section 79 matter, (at page 47) that: "[t]he factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that [Nutrasweet] has market power. In

essence, the question to be decided is whether the anti-competitive acts engaged in by [Nutrasweet] preserve or add to [Nutrasweet's] market power."

202 In *Nielsen*, cited above, the Tribunal similarly noted, at pages 266 and 267, that: "to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen's market power."

203 In regard to mergers, the Tribunal indicated in *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.), at page 314, that:

> [i]n assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

204 This approach was confirmed in other merger decisions including *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Competition Trib.), rev'd 2001 FCA 104 (Fed. C.A.), leave to appeal to S.C.C. refused, [2001] 2 S.C.R. xiii (S.C.C.). There, however, at paragraph 302, the Tribunal took issue with whether a merger that merely preserved market power lessened competition.

205 Aside from the jurisprudence cited above, which indicates that a relative assessment of market competitiveness has to do with an assessment of market power, and how it may have changed, this is also suggested by the very nature of the various means by which firms compete.

206 Adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.

207 Product variety (including variety in terms of differing geographic locations in which the product is sold) in a market characterized by differentiated products is the most obvious potential factor that might be adversely affected in the absence of an exercise of market power. A business' product can be eliminated or made less commonly available through a refusal to deal without the remaining market participants exercising market power. However, in a market that remains competitive subsequent to a refusal to deal, the effect of the disappearance of one firm's product on consumers is negligible. This is the very nature of competitive markets: no single seller has any influence over price or any other factor of competition, including variety. In such a market, one less firm selling a product in a relevant market will either go unnoticed or will allow for a profitable opportunity for entry.

208 This is similarly the case in regard to the impact of a refusal to deal on price, product quality, and any other factor of competition. Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

209 We also note that both Dr. Mathewson and Dr. Schwartz assess the effect on competition as a result of the Scotiabank termination in terms of market power. Dr. Mathewson opined that "[i]n analyzing the potential effect on competition of Scotiabank's terminating GPay's banking services, consideration was given to the possible impact of termination on any hypothetical market power accruing to Scotiabank, in particular to its Interac Online Service." Dr. Schwartz meanwhile noted that the effect of the termination will be insufficient competition and, thus, likely higher merchant fees.

210 Thus, paragraph 75(1)(*e*) does not differ from what is contemplated in paragraph 79(1)(*c*), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect must be adverse, while under other provisions the effect must be substantial.

211 From the plain meaning of the words used by Parliament, we find that "adverse" is a lower threshold than "substantial". As for the requirement that the refusal to deal "is likely to have" such adverse effect, at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition)*, [2000] C.C.T.D. No. 24 (Competition Trib.); affd [2002] F.C.J. No. 424 (Fed. C.A.), the Tribunal found that a relatively high standard of proof is required to establish the "likely" occurrence of a future event. The Tribunal found that the terms "likely" and "probable" were synonymous. On the basis of the plain meaning of the word "likely", and on the basis of the Tribunal's reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

212 However, as noted by the Tribunal in *Hillsdown*, at page 314, one cannot consider the degree of any likely increase in market power without reference to the particular facts of a case (including consideration of any facts that may be relevant under section 1.1 of the Act). We now turn to that.

(2) The Effect of Scotiabank's Refusal to Deal

213 At the outset we observe that for the purpose of paragraph 75(1)(*e*), the market at issue need not be, and, in this case, is not the market of concern in paragraphs 75(1)(*a*) and (*b*). The market of concern under 75(1)(*e*) is the market in which the applicants participate. That said, we are satisfied that, in this case, that market need not be defined. We need first only decide whether Scotiabank's online debit product, Interac Online, and the UseMyBank Service are currently in the same market and/or are likely to be in the same market for future transactions. Absent such actual or expected competition, it is impossible for the refusal to deal to have an adverse effect on competition.

214 As we stated above, an adverse effect on competition requires that Interac Online's market power be created, enhanced or preserved. If the two services do not compete, and are unlikely to compete, any market power Interac Online may have will be unaffected by any impact a refusal to deal has on the UseMyBank Service. In this regard, we agree with Dr. Mathewson that "[f]or Scotiabank to enhance its market power (with respect to Interac Online) by weakening GPay, GPay must be an effective competitor to begin with, and it must be a more effective competitor than other suppliers of substitute services, such as credit cards. If these two things do not hold, then Scotiabank's refusal cannot increase any hypothetical market power."

215 We first address the issue of current competition and then turn to potential future competition.

(a) Current Competition

216 While the applicants concede that a difference between the two services is their respective merchant bases, they contend for the following reasons that Interac Online and GPAY compete:

(i) The UseMyBank Service and Interac Online are functionally nearly identical; and,

(ii) There is no technical or operational characteristic pertaining to the UseMyBank Service that would limit its use to online gaming.

217 In response to the applicants' submissions on functional substitutability, we note that while functional substitutability is often, if not almost always, a characteristic of products that are in the same product market, functional substitutability alone is not sufficient to support a finding that products compete in the same market. That said, we agree that the UseMyBank Service and Interac Online have at least the potential to compete for at least some subset of merchants. These merchants would have to be Canadian based because, as Mr. Rosatelli testified, Interac Online is only

available to such merchants. As to whether Interac Online and the UseMyBank Service currently compete in the same market, both expert economists agree that they do not. We accept that conclusion.

218 In Dr. Schwartz's view, as set out in his first report, "[t]he major effect on competition arising from Scotiabank's terminations relates to the future market for online debit payment service". In his second report, Dr. Schwartz notes that he agrees "with Professor Mathewson that the GPAY Service and Interac Online are not close "substitutes" currently (although Interac Online's merchants could switch because GPAY is functionally similar) because of the lack of overlap in their respective merchant bases." We agree that Interac Online and the UseMyBank Service do not currently compete and so are not in the same market.

(b) Future Competition

219 The only competition at issue is future competition. Further, it appears from the applicants' submissions that only a portion of that future competition is at stake: that is competition for merchants whose transactions include transactions that are over $1,000 (hereafter referred to as "high-value transaction merchants").

220 The applicants argued in their closing submissions that a major effect on competition "relates to the future market for online debit payment services. The various limitations that using EMTs impose on GPAY constrain its ability to participate in the growing online marketplace. The $1,000 cap that Scotiabank's termination imposes on payments processed by GPAY makes it unlikely to be adopted by major online merchants such as airlines. The limitations on EMT deposits will ultimately prevent GPAY from increasing its processing capacity."

221 Not all merchants are likely to find the $1,000 limit to be a constraint; for example, the applicants' witness, Mr. Morgenstern of the Ashley Madison Agency, testified that the agency's average ticket sale was $77 and the lifetime revenue per paid member was $147. Moreover, the applicants did not argue that they are constrained as a result of the Scotiabank termination in their ability to pursue merchants who are unlikely to find the $1,000 EMT limit to be a constraint. Consequently, in this decision, we limit ourselves to addressing the potential competition between the UseMyBank Service and Interac Online for high-value transaction merchants.

222 The applicants assert that the consequence of the $1,000 limit and the associated prevention of competition is likely higher merchant fees.

223 In response, the Bank argues that "[t]here is no evidence that the payment transfer limit of $1,000 per day for EMT transfers has had any impact on the Applicants' ability to attract main stream merchants. Rather, the evidence is that many merchant prospects declined to subscribe to the Applicants' service because of concerns about the fact that the Applicants' business is premised on disclosure of a banking customer's confidential Internet password and card number. Merchants do not wish to be affiliated with a payment processing service that operates in that manner." Consequently, the Bank contends that it is unlikely that Interac Online and the UseMyBank Service will ever compete, and so it is unlikely the refusal to deal will have an adverse effect on competition.

224 We find there is no evidence to suggest that the applicants are prevented from competing with Interac Online for high-value transaction merchants as a result of the refusal to deal. As such, the refusal to deal is not likely to have an adverse effect on competition.

225 In regard to this lack of evidence, Dr. Schwartz noted that "it is not important whether GPAY turns out to be successful or not; competition in the marketplace will decide its future success. The relevant question is whether Scotiabank's termination has an adverse effect on that competition." The applicants further argue that "the purpose of the *Competition Act* is to foster the competitive process, not to pick winners or losers. It may well be that GPAY will not succeed in attracting major merchants even if the cap is removed. But it is clear that with the cap in place, it is very unlikely that GPAY would be attractive to any merchant that regularly has transactions worth over $1,000."

226 We agree that the purpose of the Act is not to pick winners and losers, and, in particular, that the purpose of paragraph 75(1)(*e*) is not to determine whether one party has been wronged by way of a refusal to deal, but rather to determine whether as a consequence of that refusal there is or is likely to be an adverse effect on competition. While evidence on the likelihood of success of a particular participant in a market may not always be necessary for such a determination, we do find that evidence on the likelihood of participation is necessary. It is not sufficient merely to assert an intent to so participate.

227 We find that there is no evidence to suggest that the applicants are actively seeking new Canadian based merchants whose transactions would likely include transactions valued at more than $1,000. Nor is there evidence to suggest that the applicants would be actively seeking such merchants but for the Scotiabank termination. We take from Mr. Iuso's cross-examination that there is evidence to suggest that the applicants were seeking such merchants prior to the termination of biller services by TD and CIBC in December 2003. If the Scotiabank termination made a critical difference to whether such merchants continued to be sought, one would expect the applicants to have continued to pursue, at least to some extent, such merchants after the TD and CIBC terminations but not after the Scotiabank termination. As stated earlier in this decision at paragraph 133, there is nothing to suggest that the Scotiabank termination has in any way exacerbated a pre-existing situation.

228 *[CONFIDENTIAL]*.

229 To the extent that our finding may be incorrect and Interac Online and the UseMyBank Service would in fact likely compete for large-value transactions but for the refusal to deal, it remains to be shown that they are close competitors in that an important price constraining effect on Interac Online would come from the UseMyBank Service. Out of the possible set of competitors, including credit cards and electronic wallets (such as PayPal), Interac Online and the UseMyBank Service are arguably functionally the most similar but for the important caveat that the UseMyBank Service system requires the disclosure of confidential information. As noted above, not only is functional similarity insufficient to conclude that two products constrain each others' prices, an important functional difference could prove critical to a finding that they do not. We further note Dr. Mathewson's observation that virtually all Interac Online participating merchants accept credit cards. In this context, we observe that the questionable viability of Interac Online suggests the possibility that Canadian Internet merchants are satisfied with these payment means and that these means compete with Interac Online.

(3) Conclusion in Regard to 75(1)(e)

230 In sum, we find that since Interac Online and the UseMyBank Service are not currently in the same market and they are not, on a balance of probabilities, likely to be in the same market in the future in regard to large-value transaction merchants, the refusal to deal is not likely to have an effect on competition. Since the refusal is not likely to have an effect, it is not likely to have an adverse effect.

E. The Discretionary Nature of the Relief Sought

231 We have determined that the applicants failed to establish that they are substantially affected in their business due to their inability to obtain adequate supplies of a product. They also failed to establish that any such inability was because of insufficient competition among suppliers of the product, and, that the refusal to deal is having, or is likely to have, an adverse effect on competition. It follows that the application should be dismissed.

232 However, even if the applicants had succeeded in establishing all of the elements contained in subsection 75(1), we are satisfied that this is not a proper case for the granting of discretionary relief.

233 The discretionary nature of relief under section 75 was considered by the Tribunal in *Chrysler*, where the Tribunal identified a number of factors relevant to the exercise of that discretion. One factor identified by the Tribunal was the

reasons for the supplier's decision to discontinue dealing. In our view, this is the most relevant factor to the proper exercise of discretion in this case.

234 We have previously found that the Bank's refusal to deal was based upon the legal or reputational risks posed by the disclosure of the Bank's customers' electronic signature, the consequent likelihood of Rule E2 of the Canadian Payments Association being breached, and other regulatory concerns.

235 In our view, the above risks are legitimate and continue. It would neither be commercially reasonable nor consistent with the purpose of the Act to require the Bank to provide banking services to the applicants when to do so would expose it to such risks.

236 Further, while the applicants seek biller status and EMT deposit accounts, we are satisfied that they do not comply with the reasonable terms that the Bank imposes upon all of its customers as a condition for receipt of those services. In that circumstance, it would be unreasonable to require the Bank to deliver services other than on the commercially reasonable terms it generally imposes.

237 In respect of biller status, the conditions found in the Scotiabank Electronic Bill Payment Service Agreement include the following:

> (i) The bill payee shall not require Bank customers to divulge their ScotiaCard number and/or personal identification number, and/or electronic signature.
>
> (ii) The services provided cannot be used, directly or indirectly, to conduct or act on behalf of a money services business.

238 The applicants have conceded that they cannot operate their business without bank customers disclosing their confidential banking password and bank card number, that they operate a money services business, and that they act on behalf of other money services businesses. They cannot, therefore, comply with the terms of the Bill Payment Service Agreement.

239 We acknowledge that the terms of this agreement have been significantly amended since the applicants first received biller status at the Bank. However, we find that the Bank's amendment of this agreement was not done in any way to target the applicants. We reach this conclusion because we accept as truthful Mr. Rosatelli's evidence that: the agreement was redrafted in order to allow the Bank to comply with the regulations and additional reporting requirements associated with the new anti-money laundering regulations; the drafting of the new agreement began in late 2003 or early 2004 (significantly before the termination of the applicants' banking services); a number of existing bill payee companies have since been terminated by the Bank because they are not in compliance with the new agreement; and, a number of potential bill payee companies have been declined as a result of being unable to meet the terms of the new agreement.

240 With respect to EMT deposit accounts, the Bank's evidence that such accounts are only offered to businesses that meet its definition of a small business was not challenged. That definition is a business that does not exceed $5 million in annual deposits or $400,000 in monthly deposits, and does not exceed more than 150 transactions through its accounts in a month.

241 The reason for these limits was explained by Ms. Graham-Parker, who testified on cross-examination that commercial clients are larger than small businesses, are more complex, with more transactions and larger transaction amounts. EMTs in those circumstances are much harder to control, especially with "the number of employees that would need access". The existence of difficulty in allowing businesses to receive and send EMTs even into small business accounts is supported by the fact that RBC is the only other bank to allow this.

242 Mr. Grace admitted on cross-examination that the applicants are no longer a small business. They cannot, therefore, qualify for the accounts they seek on the terms the Bank generally imposes.

243 There is a final factor that militates against the exercise of any discretion in the applicants' favour, and that flows from the fact that about 50,000 Bank customers are residents of the United States. Mr. Iuso agreed that U.S. residents with Canadian bank accounts can and do use the UseMyBank Service, and the Bank has affiliated entities with assets in the U.S. These facts make relevant Mr. Stewart's opinion that:

(i) Online gambling violates both U.S. federal law and the laws of each of the 50 States.

(ii) The U.S. Justice Department had, in July 2006, arrested a British national and executive of an offshore online sports book when the executive made a stopover at a U.S. airport. The executive has since been indicted for violation of U.S. law by accepting bets from Americans.

(iii) Any business that knowingly permits its services to be used for the purposes of online betting by residents of the U.S. is at risk of being charged with illegally aiding and abetting Internet gambling.

(iv) If the Bank were to receive funds into its accounts held in the name of the applicants from American residents to be used for the purpose of online gambling, the Bank would be committing an offense in the U.S. and would be exposed to the possibility of prosecution.

244 Mr. Stewart's evidence was not diminished on cross-examination and we accept that requiring the Bank to provide banking services to the applicants would put the Bank at some risk for aiding and abetting acts that are in violation of U.S. law.

245 As a final observation on this point, during final argument the applicants tendered an extensive two-page undertaking to the Tribunal. The undertaking is attached as Schedule C to these reasons. In it, the applicants undertake, among other things:

(i) To comply with all applicable anti-money laundering legislation in Canada.

(ii) To submit to periodic audits (not more than annually) upon the request of the Bank, such audits to be conducted by a mutually acceptable anti-money laundering expert. They would remedy any differences found on the audit.

(iii) To remedy any deficiencies in their computer security procedures identified by any periodic computer security audit requested by the Bank.

(iv) Not to have biller status with respect to Bank customers not resident in Canada.

(v) To block payments to online casinos or their management companies where the applicants are able to determine that the account holder is resident in the U.S.

246 As the undertaking was presented only in final argument, there was no evidence with respect to, for example, the feasibility of not having bill payee status with respect to the Bank's U.S. resident account holders, or to the feasibility of blocking certain online payments. Further, the timing of the presentation of the undertaking does, at least, suggest that the undertaking implicitly recognizes the legitimacy of the Bank's concerns about these matters.

247 Given the timing of the presentation of the undertaking, and the lack of an evidentiary underpinning for it, we are not inclined to give any weight to it. Our view in this regard also recognizes some degree of prior recalcitrance on the part of the applicants that, in our view, casts at least some doubt on whether the undertaking would be effective. We refer here to the applicants' refusal until their opening statement before us to acknowledge that they are a money services business, and the position they took in this litigation with respect to the relevance of Bank inquiries that were relevant to money laundering and other regulatory concerns.

248 In sum, the undertaking does nothing to change our view that this is not an appropriate case for the granting of discretionary relief.

249 We now turn to the reasons for two evidentiary rulings that were dealt with in writing and to certain procedural and closing remarks.

VII. The Ruling in Respect of the Proposed Evidence of Stanley Sadinsky

250 Rule 47(1) of the *Competition Tribunal Rules*, SOR/94-290 (Rules) requires every party who intends to introduce expert evidence to serve an affidavit of each proposed expert on the other party at least 30 days before the commencement of the hearing. Pursuant to this rule, and the Tribunal's scheduling order, the Bank served the affidavit of Professor Stanley Sadinsky upon the applicants.

251 In response, the applicants filed a notice of motion, in advance of the commencement of the hearing, in which they sought an order declaring Professor Sadinsky's affidavit to be inadmissible, and awarding them costs. By the agreement of the parties, the motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the Tribunal's final reasons, providing that the affidavit would not be admitted in evidence as the evidence of an expert witness. The issue of costs was reserved until the Tribunal generally addresses costs. What follows are the reasons for that ruling.

252 After setting out his qualifications, the documentation he had reviewed and the facts that were relevant to his opinion, Professor Sadinsky swore that:

> 14. In the balance of the Affidavit, I provide my expert opinion with respect to the following overarching issue, namely, whether Scotiabank would be in breach of the *Criminal Code* if it were required to provide banking services to the Applicants. In considering this opinion, it is first necessary for me to consider two preliminary issues:
>
> > (a) Is it illegal for Canadians located in Canada to place bets with off-shore internet gambling sites?
> >
> > (b) Is the activity being conducted by the Applicants and their joint venture partner, UseMyBank, in breach of the provisions of the *Criminal Code*?

253 It was the position of the applicants that this opinion was inadmissible because opinion evidence concerning the interpretation and application of domestic law is inadmissible in Canadian courts on the ground that it fails to meet the requirement that, to be admissible, expert evidence must be necessary to assist the trier of fact (see *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.) at page 20).

254 In response, the Bank argued that the applicants had failed to cite any authority to support the assertion that the principles articulated in *Mohan* apply to Tribunal proceedings. The Bank submitted that the rules of evidence that apply in court proceedings do not apply in proceedings before an administrative tribunal unless expressly prescribed. The Bank asserted that, for administrative tribunals, relevant expert evidence is admissible, subject to considerations of weight. Further, the Bank argued that, by failing to object to Professor Sadinsky's affidavit when it was filed and considered on the application for interim relief (and by instead producing at that time its own competing expert affidavit), the applicants had waived their right to object. Finally, the Bank argued that the exclusionary rule in *Mohan*, if applicable, did not apply to exclude Professor Sadinsky's affidavit because the Tribunal will admit expert evidence on matters of law when it is logically probative, helpful and will not cause prejudice. Professor Sadinsky's affidavit was said to be helpful because it serves to demonstrate the impact of pertinent provisions of the *Criminal Code* upon the Bank.

255 Each submission made by the Bank was considered.

256 As to the applicability of the rules of evidence with respect to the admissibility of expert evidence, the legislative history of the Tribunal reflects an intention to judicialize to a substantial degree the processes of the Tribunal. This is

reflected in the Tribunal's establishment as a "court of record" by virtue of subsection 9(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. C-19 (2 nd Supp.), the requirement that a judicial member preside over the Tribunal's hearings, and the presence of appeal rights to the Federal Court of Appeal as if a decision of the Tribunal was a judgment of the Federal Court. See, in this regard, the discussion of the Tribunal in *Canada (Director of Investigation & Research) v. Air Canada* (1988), 32 Admin. L.R. 157 (Competition Trib.) rev'd on other grounds (1988), [1989] 2 F.C. 88 (Fed. C.A.); aff'd [1989] 1 S.C.R. 236 (S.C.C.). In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1990), 111 N.R. 368 (Fed. C.A.); rev'd [1992] 2 S.C.R. 394 (S.C.C.) both the Federal Court of Appeal and the Supreme Court of Canada confirmed the Tribunal to be an inferior court of record.

257 Thus, in a number of decisions the Tribunal has applied the principles articulated by the Supreme Court in *Mohan* when considering the admissibility of expert evidence. For example, in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 (Competition Trib.) at paragraph 36, the Tribunal rejected expert evidence that consisted essentially of legal argument on the ground that the evidence was not necessary as required by the *Mohan* test. See also the rulings of the Tribunal on March 28, 2006 in *United Grain Growers Limited v. The Commissioner of Competition* and on May 9, 10, and 11, 2006 in *Canada (Commissioner of Competition) v. Gestion Lebski Inc.* [2006 CarswellNat 6420 (Competition Trib.)]

258 The Tribunal therefore rejected the Bank's assertion that, as an administrative tribunal, the Competition Tribunal is precluded from applying the principles of evidence that would apply to court proceedings. Such submission is inconsistent with the judicialized nature of this tribunal, and inconsistent with prior jurisprudence of the Tribunal dealing with the receipt of expert evidence. The fact that the Tribunal is directed in the *Competition Tribunal Act* to deal with proceedings before it "as informally and expeditiously as the circumstances and considerations of fairness permit" is, by itself, insufficient to preclude application of rules of evidence that have evolved, at least in part, so as to ensure fairness. This direction is, rather, consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate.

259 Having regard to Professor Sadinsky's characterization of the overarching issue and the two preliminary issues, as quoted above at paragraph 252, the Tribunal was satisfied that the opinion was in substance an opinion with respect to a matter of domestic law. Thus, the Tribunal was not satisfied that the opinion was necessary, as required by the *Mohan* test. The interpretation of domestic law is within the competence of the Tribunal's judicial members.

260 Alternatively, even if a more relaxed standard of admissibility was applied, the Tribunal was not satisfied that the evidence contained in the affidavit would be helpful. There is, apparently, no relevant jurisprudence on the points opined upon by Professor Sadinsky. He therefore couched his opinions in terms that "in my opinion, there is a very strong argument that...". Such views would not be sufficiently probative or helpful to warrant their admission into evidence.

261 With respect to the Bank's submission that the applicants had waived any right to object to the admissibility of the opinion, the Bank cited no authority to support the view that a failure to object to evidence on an interlocutory motion operates to preclude any objection at trial. Such a result is inconsistent with the fact that the admissibility of evidence is always a matter to be determined by the presiding judicial officer who may raise, on his or her own motion, concerns with respect to the admissibility of evidence.

262 For these reasons, the evidence of Professor Sadinsky was not received by the Tribunal.

VIII. The Motion by the Bank to Amend Its Response to the Amended Notice of Application

263 Prior to the commencement of the hearing, the Bank served the expert affidavit of David Stewart upon the applicants. In this affidavit Mr. Stewart opined that "off-shore on-line gambling violates both federal and state laws in the United States" and that "any business that knowingly permits its services to be used for the purposes of online betting by residents of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling."

264 In response, also prior to commencement of the hearing, the applicants sought an order declaring the affidavit to be inadmissible on the basis that it was not relevant to an issue pleaded by the Bank in its response. The Bank took the position that the affidavit was admissible, but it also filed a notice of motion in which it sought leave to amend its response to the applicants' amended application in two respects. The first was to amend paragraph 19 of the Bank's response to read as follows:

> 19. Scotiabank has serious and valid concerns about the legality of the activities of the "vast majority" of the users of the service provided by the Applicants. It is not willing to allow its facilities to be used for activities that could be illegal <u>in Canada, or in any other jurisdiction, in particular the U.S.A., where Scotiabank has a business presence and/or where residents of that jurisdiction have Scotiabank accounts that can be used to transfers *[sic]* funds using the Applicants' services</u>. The association of the Scotiabank brand with the activities of the Applicants could be interpreted by Scotiabank customers as an endorsement of the Applicants' service or suggest legitimization offshore on-line gambling.

265 The second, but unrelated, amendment sought (foreign exchange profit amendment) was to add as paragraph 21 to the Bank's response the following:

> <u>21. The Applicants state that they act as agent for the banking customer for the transfer from the banking customer's account to the Applicants' account through either the Bill Payment System or through EMT. The Applicants state they are a trustee of the monies received into their accounts for the merchant customers, who are the beneficiaries of these funds. The Applicants derive a profit on the conversion from Canada funds into U.S. funds of the monies transferred from the bank accounts of Canadian banking customers. The Applicants do not disclose the fact that they make a profit on the conversion of Canadian funds into U.S. Funds to either their banking customer principals or their merchant customer beneficiaries. Scotiabank cannot continue to offer banking services to the Applicants knowing that the Applicants are making an undisclosed profit in these circumstances.</u>

266 The parties filed written submissions and advised that they did not wish to make oral submissions. Accordingly, the Bank's motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the final reasons, granting leave to the Bank to amend its response as requested. Thus the evidence of Mr. Stewart would be relevant to the amended pleading and admissible. The issue of costs was reserved until the Tribunal generally addresses costs. These are the written reasons for that ruling.

267 In approaching the issues raised by the parties, the Tribunal assumed, without deciding, that the evidence of Mr. Stewart was not admissible in the absence of the requested amendment to paragraph 19. The issue then became whether the amendments should be allowed.

268 All parties agreed that the applicable legal principle was that articulated by the Federal Court of Appeal in *Canderel Ltd. v. R.* (1993), [1994] 1 F.C. 3 (Fed. C.A.) at pages 9 and 10. There, the Court wrote:

> [...] while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

269 With respect to the requested amendment to paragraph 19 to expressly plead a breach of American law, the Bank submitted that the amendment did not alter the nature of its defence but rather better particularized its pleading. The applicants responded that the amendment expanded the Bank's defence and that non-compensable prejudice would result if the Bank was allowed to amend its response.

270 The applicants filed no affidavit evidence establishing prejudice.

271 Paragraph 19 of the Bank's response, as originally filed, set forth its concerns with respect to potential illegality generally. Evidence filed by the Bank on the motion to amend established that the Bank's concern with respect to American legislation was not new, and ought not to take the applicants by surprise. This is seen from the fact that in response to the applicants' request for leave to bring this proceeding, Mr. Rosatelli had sworn an affidavit that stated that the Bank had branches and employees worldwide, that its securities traded on United States securities exchanges, and so the Bank was subject to a wide variety of American legislation.

272 Mr. Stewart's affidavit was served on the applicants in accordance with the timetable agreed to by counsel. When the applicants raised their concerns with respect to the relevance of the affidavit, the Bank offered the applicants an extension of three weeks in order to allow the applicants to obtain and file a responding affidavit.

273 Applying the principle that amendments should be allowed at any stage for the purpose of deciding the real questions and controversies, provided that the amendment does not result in non-compensable prejudice and would serve the interests of justice, it was the view of the Tribunal that the amendment would facilitate the admission of relevant evidence. Given that the applicants sought an order requiring the Bank to provide services to them, the interests of justice would not be served if the Tribunal considered making such an order without knowing whether the order would expose the Bank to criminal liability in the United States.

274 There was no evidence of non-compensable prejudice to the applicants and an adjournment could have been sought by the applicants to allow them to obtain any responding evidence.

275 In those circumstances, the Tribunal concluded that the interests of justice required that leave be granted to amend paragraph 19 of the Bank's response.

276 With respect to the foreign exchange profit amendment, the Bank again argued that the amendment simply particularized its defence. The applicants again argued that the Bank had known of the issue since June 22, 2006 so that the requested amendment was sought too late.

277 The Bank's evidence established that on June 22, 2006 the applicants delivered to it a supplementary affidavit of documents that disclosed the 2004 financial statements for NPAY and GPAY, that they were reviewed by counsel on June 24, 2006, after the Bank filed its response to the amended application on June 22, 2006, that Mr. Grace was examined on these documents on June 27 and 28 of 2006, and that, prior to the hearing, the Bank advised the applicants of the Bank's intent to assert at the hearing that the applicants could not make an undisclosed profit in their capacity as agent of the Bank's customers and trustee to the applicants' own merchant customers.

278 The amendment raised an issue that was seen to be relevant by the Tribunal and there was no evidence or proper articulation as to what prejudice would flow to the applicants if the amendment was permitted. The amendment was, therefore, allowed.

IX. The Chess Clock Procedure

279 This is the first proceeding in which the chess clock procedure with respect to hearing time management was employed by the Tribunal.

280 The process takes its name from the manner in which the length of play is timed in certain games of chess. Generally, parties are allocated a fixed amount of time in order to present their case and are then timed to ensure that they do not exceed their allotted time. A significant benefit that flows from this type of time management is that hearings will conclude in the time allotted. This better allows the parties to know in advance the cost of the hearing, and avoids the delay and additional expense caused by the extension of hearings beyond their original end dates.

281 In the present case, as part of the case management process, the parties agreed that each side would be given 45 hours in which to present their case. Specifically, each side had 45 hours for their opening statement, direct, cross- and

re-examinations, objections to evidence, oral motions, and closing argument. The parties' consent to this time allocation was embodied in a pre-hearing order of the Tribunal.

282 During the hearing, the court reporter kept track of the time expended by counsel. Each morning the parties received a statement of the time each side had expended up to the end of the prior day, expressed on both a daily and cumulative basis. The Tribunal advised that any dispute with respect to time allocation had to be raised immediately. There were no such disputes.

283 In the view of all members of the Tribunal, the procedure worked well. The presiding member is not confident that the hearing would have finished on time in the absence of the use of the chess clock procedure. We have recommended the procedure to other members of the Tribunal.

X. Directions to the Parties Regarding Public Reasons

284 These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, January 12, 2007 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

285 If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 19, 2007.

XI. Costs

286 The issue of costs is, as the parties requested, reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Friday, January 19, 2007, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree costs. If costs cannot be agreed, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

287 Once the issue of costs has been dealt with, an order will issue dismissing the application and dealing with costs as agreed or as determined by the Tribunal.

Schedule A

288 Section 75 of the *Competition Act*:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> > (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (b) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (c) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
> >
> > (d) the product is in ample supply, and
> >
> > (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

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

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

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

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

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Schedule B

The Applicants' Experts

Mr. Jack Bensimon

289 Jack Bensimon was an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies. Having reviewed the nature of the applicants' business, Mr. Bensimon confirmed that the applicants are operating a money services business as defined in the PCMLTF Regulations. Significant aspects of Mr. Bensimon's opinion were that:

(i) Overall, the risk posed to The Bank of Nova Scotia through the operation of the applicants' accounts is relatively low;

(ii) Notwithstanding, there are material gaps in the anti-money laundering policies and procedures of the applicants that need to be remediated as soon as possible; and,

(iii) The Bank was required, in his view, to take reasonable steps to ensure that the applicants had a basic framework of policies and procedures in place in order to meet the requirements of FINTRAC.

Dr. Lawrence Schwartz

Dr. Lawrence Schwartz was qualified as "an expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

In order to determine the relevant product market, the approach used by Dr. Schwartz was the hypothetical monopolist test. He did not prepare his report on the basis that the market referred to in paragraph 75(1)(*a*) of the Act was, or could possibly be, different from the market contemplated in paragraph 75(1)(*e*) of the Act.

In Dr. Schwartz's view, there were three product markets where an adverse effect on competition could occur as a result of the Bank's termination of the applicants' banking services. Dr. Schwartz was of the opinion this termination could result in an inadequate supply due to insufficient competition among suppliers. Those product markets were:

(i) The market for online debit payment service for Scotiabank depositors who purchase at merchant websites, consisting of the UseMyBank Service and Interac Online;

(ii) The market for merchants, where the applicants compete with Interac Online transaction acquirers to offer payment processing services; and,

(iii) In relation to the means of providing online debit payment to Scotiabank depositors, biller status at Scotiabank but excluding business accounts that accept deposit by EMTs.

In his initial report, Dr. Schwartz did not carry out an analysis as to whether the applicants' business had been substantially affected by the termination of banking services by the Bank. He disagreed with Dr. Mathewson's approach to this issue because the applicants' behavior after the banking services were terminated is not information to be considered in the hypothetical monopolist approach to market definition. However, even on the approach used by

Dr. Mathewson, Dr. Schwartz concluded that the applicants were substantially affected by the termination because GPAY's total payment value did not surpass its September 2005 level until January 2006. This suggested to him that GPAY's business from other banks did not offset the losses of payment volumes from Scotiabank depositors following termination. Scotiabank payment levels had not yet recovered to September 2005 levels up to and including the last month for which data are available.

The Bank's Experts

Mr. Christopher Mathers

Christopher Mathers was qualified as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. Mr. Mathers was of the opinion that the applicants, together with their joint venturer UMB, were operating a money services business.

Mr. Mathers described the three stages of money-laundering and the frequent use of online gaming sites to launder the proceeds of crime. He described some sample money-laundering mechanisms that could be applied to online gaming sites. He described an actual situation, recently identified by the Bank, where there was no apparent connection between the source of a Scotiabank customer's winnings and the online betting site where the winning wager was placed. Mr. Mathers provided comments with respect to Mr. Bensimon's report, described his own experience with offshore Internet casinos, and gave his view with respect to the risk posed to The Bank of Nova Scotia if it provides banking services to the applicants.

Dr. James Dingle

Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was qualified as an expert in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking as set out in his report. Dr. Dingle testified as to the purpose and importance of the regulatory mechanisms in place for Canadian banks and gave his view that the manner in which the applicants conducted their business was capable of eroding prudent behavior by bank depositors. He provided his view as to the regulatory risks to which the Bank was exposed as a result of the applicants' business model. Dr. Dingle spoke with respect to the development of Rule E2 by the Canadian Payments Association and gave his opinion that such rule would be breached if payments to the applicants pass through the clearing system. He gave his opinion with respect to the risks arising from the OSFI Guidelines on money laundering, the PCMLTF Act, the *Criminal Code*, and risks to which the Bank was exposed if it dealt with the applicants. He also spoke of the reputational risks to the Bank arising from unauthorized or fraudulent transactions.

Mr. David Stewart

David Stewart is an attorney practicing in Washington, D.C. He was accepted as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualification to opine on matters relating to state law was also accepted by the Tribunal. In Mr. Stewart's opinion, online gaming violates the United States federal law and the laws of each of the 50 states. In his further view, any business that knowingly permits its services to be used for the purpose of facilitating online betting by a resident of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling.

Dr. Frank Mathewson

Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. He was qualified as an expert in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

In order to determine the relevant product market, Dr. Mathewson applied the test first described by the Competition Tribunal in the *Chrysler* case. In respect of paragraph 75(1)(*a*) of the Act, he determined that the relevant market is biller services at Scotiabank and EMT deposits *[CONFIDENTIAL]*. In respect of paragraph 75(1)(*e*) of the Act, he opined that the UseMyBank Service and Interac Online are not in the same product market, and products such as credit cards and Interac Online e-wallets are likely to be closer substitutes for Interac Online than the UseMyBank Service.

The Applicants' Lay Witnesses

Mr. Joseph Iuso

Joseph Iuso is the President, Chief Executive Officer, and founder of UMB. He identified the joint venture agreement entered into between UMB and NPAY, and described the respective roles of UMB and the applicants. He explained the technical aspects of UMB pushing payment from a customer's bank account to GPAY's account, the security features in place at UMB, the fraud detection system UMB has in place and the steps taken by UMB to market its services to various merchants.

Mr. Raymond Grace

Raymond Grace is the President of both GPAY and NPAY. He testified with respect to his dealings with The Bank of Nova Scotia, including the various bank account openings, obtaining biller status, GPAY's experience with EMT deposits at The Bank of Nova Scotia (particularly the difficulty caused when payment items could not be posted to an account when the quantity of payments exceeded 100 transactions) and the termination of banking services. He confirmed the terms of the joint venture agreement between NPAY and UMB, and the responsibilities of his companies under the joint venture agreement. He described the banking services his companies enjoyed with other banks, as well as the termination of banking services by TD and CIBC. He described the relationship between the customer (the buyer of goods or services), the joint venture's client (the merchant or seller) and the joint venture, and how payment is effected to merchant clients. He described the nature of the security checks that the joint venture conducts in respect of the transactions and the joint venture's experience with fraudulent transactions. He explained how transactions were conducted when merchant clients were to receive monies in U.S. funds and the resulting foreign exchange profit. He described his involvement in marketing on behalf of the joint venture, his involvement in reporting transactions to FINTRAC, and how his companies deal with anti-money laundering concerns. Finally, he discussed the conduct of the joint venture's business since the termination of banking services by The Bank of Nova Scotia.

Mr. Ryan Woodrow

Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts. He testified with respect to the account opening procedure generally applicable for small business accounts, how that procedure was followed in August of 1999, October of 2004 and November of 2004 for the accounts of GPAY, B-Filer, and NPAY. He described the nature of the privileges associated with the accounts operated by the applicants, the transaction limits relevant to EMT payments and receipts, and the practical consequences of exceeding a certain number of EMT transactions per month. He also described the criteria the Bank applied in order to determine whether any particular venture was a small business. He testified about the decision not to open any more accounts for the applicants because they no longer qualified as a small business, and the subsequent inquiry concerning Mr. Grace and his accounts conducted by the head-office of The Bank of Nova Scotia in Toronto.

Mr. Darren Morgenstern

Darren Morgenstern is the owner of the Ashley Madison Agency, which is an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options". Since July or August of 2003, the Ashley Madison Agency has used UseMyBank as a payment option, in addition to credit card and direct deposit payment mechanisms. He explained that the decision to add UseMyBank as a payment option reflected the desire of his company to offer as many payment options as possible. Mr. Morgenstern testified that when his company adopted UseMyBank as a payment option there was an almost instant increase in its sales, so that now approximately 23% of all of Ashley Madison's Canadian online services are paid for through UseMyBank. In his experience, while credit card fraud is "rampant" in online transactions, his company has had little or no fraudulent transactions processed through UMB.

The Bank's Lay Witnesses

Ms. Margaret Parsons

Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia. She testified with respect to the organization of the branch, the Bank's criteria as to what qualified for service as a small business, and the concept of the "connection" between a small business or businesses and its owner/proprietor. She testified with respect to meeting with Mr. Grace when he first wished to open an account and that she referred Mr. Grace to Mr. Woodrow. She testified that she approved the documentation with respect to the opening of an account in the name of B-Filer, carrying on business as GPAY. She testified that she learned in March or April of 2004 of the number of items that were not postable to the applicants' accounts. She also explained that she learned in November of 2004 of the quantity of new account openings by the applicants and described her resulting concern that led to a meeting with Mr. Woodrow and another Bank employee, Ms. Sharon Gibson-Nault. As a result of the meeting she instructed Mr. Woodrow to find out "what [was] going on", specifically why there were so many items that could not be posted to the applicants' accounts and why the applicants were opening so many accounts. She also instructed Mr. Woodrow that there would be no further account openings for the applicants. Later, she learned that, while she was on vacation, Mr. Grace caused 30 new accounts to be opened through a telephone call centre and that a total of 80 new accounts had been opened in a two-week period. As a result, she and Ms. Gibson-Nault prepared a memorandum recommending that the Bank terminate its relationship with Mr. Grace and his businesses. Finally, she testified that when she made this recommendation she did not know what Interac Online was.

Ms. Sharon Gibson-Nault

Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch. She testified with respect to her responsibility to review new account openings, her experience in early 2004 with a number of transactions that could not be posted to the applicants' accounts, her concern in November of 2004 with the number of new accounts the applicants were opening and her resulting conversation with Ms. Parsons. She testified that while Ms. Parsons was on vacation, the issue of the significant number of new account openings was referred by her to the Bank's Shared Services operation and that an investigation was commenced. Finally, she testified as to her role in the recommendation made to terminate the Bank's relationship with the applicants.

Ms. Susan Graham-Parker

Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia. She testified with respect to the regulatory environment in which the Bank functions, and her view of the trust that such an environment engenders in banking customers. She testified with respect to the criteria for small business status at the Bank, and how the criteria applied on a per-connection basis. She described the nature of the Money Master accounts that the applicants operated. She explained the required due diligence at a branch when accounts were opened. She described the transaction limits for sending and receiving EMTs, and testified that for businesses that did not qualify as small businesses, there was no facility for receiving EMTs. She explained the process that is followed when an entity exceeds the small business criteria and how the customer is referred to commercial banking services. She testified with respect to a number of customer security issues, identifying the Scotiabank Cardholder Agreement and the obligation it imposes on customers with respect to the protection of their electronic signatures. She described other documents in which the Bank stresses this obligation to customers. She explained the process when a person holding a valid, written power of attorney seeks electronic access to accounts belonging to the principal. Finally, she expressed her view as to the Bank's concerns with respect to the nature of the business operated by the applicants and the Bank's concerns with the account aggregation service known as CashEdge.

Mr. Colin Cook

Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia. He testified as to the process followed when a customer is referred to commercial banking, the criteria that apply to determine when commercial banking services are appropriate, the account opening requirements for a commercial client, and he noted the non-availability of EMT facilities for commercial banking clients. He spoke of his involvement in the development of a project that would enable the Bank to better comply with its Know Your Customer requirements and the due diligence obligations upon the Bank in the ongoing business relationship with a client. He spoke about the flags that should alert the Bank to money laundering concerns, and the nature of the concerns raised by the applicants' business model and their manner of opening accounts. He spoke of the importance of trust in the banking relationship and the key elements of the Know Your Customer rule, identified the Bank's Anti-Money Laundering Handbook and described the Know Your Customer's Customer rule. He concluded by stating that in his view, the applicants would not be accepted as commercial banking clients of the Bank either as of the date of termination, or as of the date of the hearing.

Mr. Douglas Monteath

Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank. He testified as to the nature of the services provided by Shared Services, the involvement of Shared Services in the decision to terminate the applicants' banking services, the investigation that took place in 2005 into the applicants' business, the concerns that arose as result of that investigation and the factors that led the Bank to its decision to terminate the applicants' banking privileges.

Mr. Robert Rosatelli

Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia. He testified with respect to the significance of the ScotiaCard in electronic banking, described the two constituent elements of a customer's electronic signature, and the steps taken by the Bank to explain to its customers the significance of their electronic signature and the importance of keeping it confidential. He testified with respect to the function of the Interac Association, its network and the security features the network applies to a customer's electronic signature. He testified as to the Bank's efforts to enhance the security applicable to Internet banking, and the steps that the applicants had taken, in his view, to frustrate those enhanced security features. He reviewed the Bank's experience with respect to a number of fraudulent EMT transfers in the applicants' accounts. His testimony then went on to describe the role of CertaPay and Acxsys Corporation with respect to EMTs, the introduction by Acxsys of a 30 minute hold on EMT transactions, and the purpose of this hold. He reviewed the sending and receipt limits applicable to EMTs. Mr. Rosatelli also testified with respect to the development of Interac Online, how it functions from a customer's perspective, the flow of funds, the applicable transaction limits, how Interac Online differs from the UseMyBank Service, and the profitability to date of Interac Online. He identified the merchants that currently use Interac Online as a payment mechanism. He reviewed what is involved in obtaining bill payee status at the Bank, bill payee transaction limits, and he identified both the former and the current Bill Payment Service Agreements, explaining the purpose of the revision to the form of agreement. He described the flow of funds in a bill payment transaction and how, in his view, the applicants are not able to comply with the provisions of the new Bill Payment Service Agreement. Finally, he testified as to his involvement with respect to the applicants' banking services, the investigations of the applicants' accounts that occurred in 2003 and 2005 and the results of those investigations.

Mr. Ronald King

Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies. He testified about the historic money laundering legislative context in Canada, and how money launderers have in the past worked in order to avoid detection. He discussed the creation of the Financial Action Task Force, its annual listing of countries and territories that do not cooperate with anti-money laundering efforts, and the role of OSFI in anti-money laundering efforts. He identified and discussed a number of OSFI and FINTRAC Guidelines. He also described in some detail the Bank's Anti-Money Laundering Handbook, the Know Your Customer's Customer rule, the Bank's obligation to terminate banking relationships in certain circumstances, and the Anti-Money Laundering Handbook's provisions as they apply to money services businesses, unusual transaction reports and suspicious transaction reports. He discussed the role of the Bank's anti-money laundering group in the decision to terminate the applicants' accounts, and his money laundering concerns with the applicants' business. He concluded with comments on Mr. Bensimon's report and expressed his view that the applicants are not compliant with their own anti-money laundering obligations under the applicable legislation.

Mr. David Jones

David Jones is Director of Web Business at WestTet. He testified with respect to the average dollar purchase of WestJet tickets, the factors that his company would weigh when considering partnering with new payment providers, and his opinion that it would be a "non-starter" for WestJet to partner with an entity that admits that there are periods when the banking customer's password is not encrypted.

Schedule C

Undertaking

290 The applicants undertake that, as a condition of Scotiabank supplying bill payee status, associated bank accounts, and/or accounts for depositing EMTs:

A.

Money laundering

1. The applicants will comply with all applicable anti-money laundering legislation in Canada.

2. The applicants will remediate all deficiencies in their anti-money laundering procedures identified by Mr. Bensimon.

3. The applicants will provide copies of all written manuals, procedures, etc, relating to their anti-money laundering procedures to Scotiabank.

4. The applicants will provide the Scotiabank with a list of all current active Merchant Clients.

5. The applicants will provide the Scotiabank with copies of contracts with all new Merchant Clients and the associated industry code and due diligence.

6. The applicants will provide the Scotiabank with a report of the volume of funds sent to each Merchant Client on a frequency to be determined but not more than monthly.

7. The applicants will provide the Scotiabank with annual Financial Statements.

8. The applicants will not process funds where there is reason to believe the funds are destined for a country on the NCCT list.

9. The applicants will submit to periodic audits (not more than annually) upon request of Scotiabank, by an anti-money laundering expert acceptable to both the applicants and Scotiabank.

10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

B.

Computer security

11. The applicants will submit to periodic computer security audits (not more than annually) upon request of Scotiabank, by a computer security expert acceptable to both the applicants and Scotiabank.

12. The applicants will remediate any deficiencies in their computer security procedures identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

C. Blocking access by persons present in the United States

13. The applicants agree that they will not have bill payee status with respect to customers of Scotiabank that are not resident in Canada.

14. The applicants will block payments to online casinos or their management companies where it is able to determine from the account holder's profile on the Scotiabank online banking website that the account holder is resident in the United States.

General

15. Information provided to Scotiabank by the applicants or UseMyBank is provided on the condition that it be kept confidential by Scotiabank.

DATED AT OTTAWA, ONTARIO this 5th Day of October 2006

B-Filer Inc. Per: (s) Raymond Grace Raymond F. Grace, Pres.	NPAY Inc. Per: (s) Raymond Grace Raymond F. Grace, Pres.	B-Filer Inc cob GuaranteedPayment GPAY Per: (s) Raymond Grace Raymond F. Grace, Pres.

Application dismissed.

Footnotes

5

2005 Comp. Trib. 3
Competition Tribunal

Canada (Commissioner of Competition) v. Canada Pipe Co.

2005 CarswellNat 2348, 2005 CarswellNat 8138, 2005 Comp. Trib. 3, 40 C.P.R. (4th) 453

In the Matter of the Competition Act, R.S.C. 1985, c. C-34

In the Matter of an application by the Commissioner of Competition pursuant to sections 79 and 77 of the Competition Act

In the Matter of certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division

Commissioner of Competition, (applicant) and Canada Pipe, (respondent)

Blanchard J., Gervason Member, Reny Member

Heard: April 28, 2003 - September 2, 2004
Judgment: February 3, 2005
Docket: CT-2002-006

Counsel: John A. Campion, Donald J. Rennie, Graham M. Law, Catherine A. Lawrence, Nicole D. Samson, for Applicant, Commissioner of Competition
Kent E. Thomson, George N. Addy, James Doris, Edward Babin, Milos Barutciski, Anita Banicevic, Davit D. Akman, Charles Tingley, for Respondent, Canada Pipe

Subject: Corporate and Commercial; Criminal

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Abuse of dominant position

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Miscellaneous offences

Table of Authorities

Cases considered:

Canada (Commissioner of Competition) v. Canada Pipe Co. (2003), 2003 Comp. Trib. 15, 28 C.P.R. (4th) 335, 2003 CarswellNat 4524 (Competition Trib.) — referred to

Canada (Commissioner of Competition) v. Canada Pipe Co. (2004), 2004 Comp. Trib. 2, 29 C.P.R. (4th) 530, 2004 CarswellNat 1218 (Competition Trib.) — referred to

Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15, 2000 CarswellNat 3449 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. D & B Co. of Canada (1995), 64 C.P.R. (3d) 216, 24 B.L.R. (2d) 20, 1995 CarswellNat 2684 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd. (1992), 1992 CarswellNat 1628, 40 C.P.R. (3d) 289 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. NutraSweet Co. (1990), 1990 CarswellNat 1368, 32 C.P.R. (3d) 1 (Competition Trib.) — followed

Canada (Director of Investigation & Research) v. Southam Inc. (1995), 127 D.L.R. (4th) 263, 21 B.L.R. (2d) 1, 63 C.P.R. (3d) 1, [1995] 3 F.C. 557, *(*sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 1))* 185 N.R. 321, 1995 CarswellNat 708, 1995 CarswellNat 1312 (Fed. C.A.) — considered

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. (1997), 1997 CarswellNat 3120, 73 C.P.R. (3d) 1 (Competition Trib.) — followed

Canada Pipe Co. / Tuyauteries Canada Ltée v. Canada (Commissioner of Competition) (2004), 2004 CAF 76, 2004 CarswellNat 1616, 30 C.P.R. (4th) 429, 2004 FCA 76, 2004 CarswellNat 526 (F.C.A.) — referred to

R. c. Jolivet (2000), 2000 SCC 29, 2000 CarswellQue 805, 2000 CarswellQue 806, *(*sub nom. *R. v. Jolivet)* 144 C.C.C. (3d) 97, 33 C.R. (5th) 1, *(*sub nom. *R. v. Jolivet)* 185 D.L.R. (4th) 626, [2000] 1 S.C.R. 751, *(*sub nom. *R. v. Jolivet)* 254 N.R. 1 (S.C.C.) — considered

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 77 — pursuant to

s. 77(1) "exclusive dealing" [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — referred to

s. 77(1) "exclusive dealing" (b) [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45] — referred to

s. 77(2) — considered

s. 78 — referred to

s. 79 — pursuant to

s. 79(1) — considered

s. 79(1)(a) — considered

s. 79(1)(b) — considered

s. 79(1)(c) — referred to

s. 79(2) — referred to

s. 79(4) — referred to

s. 79(6) — referred to

Decision of the Board:

I. Introduction

1 The Commissioner of Competition (the "Commissioner") has brought an application under sections 79 and 77 of the *Competition Act* [1] (the "Act"), for an order against Canada Pipe Company Ltd. ("Canada Pipe" and the "Respondent"), acting through its division Bibby Ste-Croix ("Bibby"), prohibiting the Respondent from engaging in the practice of several specified anti-competitive acts leading to an abuse of dominant position, under section 79, as well as prohibiting the Respondent from continuing to engage in the practise of exclusive dealing under subsection 77(2) of the Act.

1 *Competition Act*, R.S.C. 1985, c. C-34.

2 The Commissioner alleges that the Respondent has brought about a substantial prevention or lessening of competition by abusing its dominant position in the supply and sale of cast iron Drain, Waste and Vent ("DWV") pipes, fittings and mechanical joint ("MJ") couplings in six Canadian regions: British Columbia, Alberta, the Prairies (Saskatchewan and Manitoba), Ontario, Quebec and Atlantic Canada (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland) (collectively the "Geographic Markets"). More specifically, the Commissioner argues that, through its Stocking Distributor Program, Canada Pipe creates, enhances and preserves the market power which it exercises in the three relevant product markets - pipes, fittings and MJ couplings - and in the Geographic Markets.

3 The Respondent is a Canadian company based in Hamilton, Ontario, which produces and sells a variety of products in Canada. Canada Pipe is a division of Ransom Industries, itself a division of McWane Inc., a company based in Birmingham, Alabama, which manufactures and sells ductile iron pipe, soil pipe, valves, hydrants and accessories. Canada Pipe acquired Bibby in April 1997.

4 Bibby manufactures cast iron DWV pipe and fittings, as well as other cast iron items which are not at issue in the present application. DWV products are used in residential, commercial and institutional buildings, and other structures, to carry waste and drain water from appliances and drains to sewers, septic tanks or other outlets. There are three types of DWV products: pipe, fittings and couplings.

5 The Stocking Distributor Program is a preferential rebate program whereby distributors of Bibby's cast iron DWV products obtain significant rebates and discounts in return for stocking only Bibby-supplied cast iron DWV products. However, these distributors are free to stock other companies' DWV products which are not made of cast iron.

6 In these reasons, the Tribunal makes the following findings: under section 79 of the Act, (i) there are three relevant product markets, and six geographic markets, and the Respondent substantially controls these markets; (ii) the Respondent is not engaged in a practice of anti-competitive acts; (iii) the Commissioner has not shown that the alleged anti-competitive acts have substantially lessened or prevented competition. Under section 77, (iv) the Stocking Distributor Program can be characterized as exclusive dealing; (v) Canada Pipe is a major supplier of a product in a market; (vi) there is insufficient evidence to show that the Stocking Distributor Program has impeded entry or expansion of firms, or that it is having any other exclusionary effect on the market, or that it has caused or is likely to cause a substantial lessening of competition.

A. Preliminary Comments

Purpose of the Abuse of Dominance Provision

7 The purpose of section 79 is to deal with firms that abuse their dominant position to restrain competition. As the Competition Tribunal (the "Tribunal") stated in *Canada (Director of Investigation & Research) v. D & B Co. of Canada*

> It is important in interpreting legislation to keep in mind the purpose of the legislature. What then is the purpose of ss. 78 and 79 of the Act? It is not controversial, and it was not disputed before me, that the sections are intended to deal with abuses by dominant firms. The government's explanatory guide summarizes the objectives of the provision:
>
>> Anti-competitive behaviour on the part of dominant firms imposes artificial restraints on the competitive process, impeding the market from efficiently allocating resources. In a healthy, dynamic economy, goods and services are supplied by the firms which can produce them most efficiently and adapt to the ever-changing demands of the marketplace. The proposed abuse of dominance provision will ensure that dominant firms compete with other firms on merit, not through the abuse of their market power. The provision is of particular importance for the protection of consumers, new entrants and, in particular, the small business community. [2]
>>
>> 2 Consumer and Corporate Affairs Canada, *Competition Law Amendments: A Guide* (Supply and Services Canada, December 1985) at 21.
>
> These sections were intended to rectify some of the problems which had made the previous criminal law offence of monopoly largely ineffective. These included the fact that there was nothing inherently criminal in the pursuit or maintenance of a monopoly, the high burden of proof required of the Crown to prosecute successfully in a criminal context, the focus of the section on "public detriment" rather than on the anti-competitive conduct and the lack of flexible remedies. [3]
>
> 3 (1995), 64 C.P.R. (3d) 216 (Competition Trib.)at 222-223.

Adverse Inferences

8 The Respondent has asked the Tribunal to draw negative inferences from the fact that the Commissioner has chosen to present some but not all the evidence she has gathered in preparing this case. The Tribunal has already dealt at length with the appropriateness of the test for the production of documents as being one of reliance rather than of relevance. (See *Canada (Commissioner of Competition) v. Canada Pipe Co.* [4] and *Canada (Commissioner of Competition) v. Canada Pipe Co.*. [5]

4 Reasons and Order respecting certain provisions of the *Competition Tribunal Rules*2003 Comp. Trib. 15 (Competition Trib.) (August 8, 2003).

5 Reasons and Order Regarding Respondent's Motion for Examination of Persons and Documents Pursuant to Paragraph 21(2) (d. 1) of the *Competition Tribunal Rules* and Regarding Scheduling Issues, 2004 Comp. Trib. 2 (Competition Trib.) (January 23, 2004); affirmed [2004] F.C.J. No. 358 (F.C.A.).

9 However, negative inferences are another matter drawn from the rules of evidence. The Respondent asks the Tribunal to draw a negative inference from the fact that not all of the relevant information obtained by the Commissioner pursuant to section 11 orders, notably from a number of industry participants, has been presented to the Tribunal. This information would have been relevant, according to the Respondent, to the issues of market definition, barriers to entry, and, in turn, to substantial lessening of competition.

10 The principle of adverse inference is explained as follows in *The Law of Evidence in Canada* by Sopinka, Lederman and Bryan:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.[6]

6 Sopinka et al. *The Law of Evidence in Canada Evidence in Trials at Common Law*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1999) at 297.

11 The principle applies not only to witnesses that are not called, but also documents or other material evidence, as stated in Wigmore on Evidence:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.[7]

7 Wigmore, JH. *Evidence in Trials at Common Law*, Vol. 2 Revised by J.H. Chadbourn (Boston: Lithe, Brown and Co., 1979) at 192.

12 In *R. c. Jolivet*,[8] Mr. Justice Binnie dealt with the principles of adverse inference, and said:

8 [2000] 1 S.C.R. 751 (S.C.C.).

> The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. *Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse:* United States v. Hines, 470 F.2d 225 (3rd Cir. 1972), at p. 230, certiorari denied, 410 U.S. 968 (1973); and the Australian cases of Duke Group Ltd. (in Liquidation) v. Pilmer & Ors, [1998] A.S.O.U. 6529 (QL), and O'Donnell v. Reichard, [1975] V.R. 916 (S.C.), at p. 929. [paragraph. 28] (our emphasis)[9]

9 *Ibid.* at paragraph 28.

13 In its earlier decision in respect to disclosure, the Tribunal ruled that the Commissioner was bound to disclose only the evidence she would rely upon, although other evidence in her possession may well be relevant. In our view, the conditions required for an unfavourable inference to be drawn against the Commissioner are not present in this case. Essentially, the Rules specify the disclosure obligations and the Commissioner is not required to disclose all relevant information. It therefore cannot be said that "the most natural inference, ...", as expressed by Wigmore above, can necessarily be drawn. Given the high volume of materials usually obtained by the Commissioner in her investigations, an equally plausible inference is that since all of the information is not required to be produced, it is simply not all produced. In the circumstances, where the Tribunal Rules dictate the Commissioner's disclosure obligations that now require the

Commissioner to produce only the information she relies upon, the most that can be inferred is that the information that has not been produced would not have been helpful to the Commissioner's case, not necessarily that it would have been adverse. More than speculation about the adverse nature of the undisclosed information is needed for an adverse inference to be drawn. In this case, the evidence and the Tribunal's Rules regarding limited disclosure do not support drawing a general adverse inference.

Witnesses

14 The hearing was held in Ottawa over the course of several weeks, from March 2nd to March 26th and from May 25th to June 4th 2004. Final submissions were made from August 30th to September 2nd, 2004, after which the Tribunal reserved its decision. The Tribunal heard from 3 expert witnesses and 27 lay witnesses. The expert witnesses were Dr. Thomas Ross, for the Commissioner, and Dr. Roger Ware, for the Respondent. Both are economists and university professors. As well, the Commissioner called Mr. Jozef Zorko, who is a senior architect with the firm Desnoyers Mercure in Montreal and a Building Code consultant with a specialty in specification of materials.

15 The parties argued about having Mr. Zorko recognized as an expert witness. The Respondent said that he was not an expert on economic or legal matters. More specifically, the Respondent argued that Mr. Zorko in both his report and his rebuttal report had considered the issue of the use of cast iron as opposed to plastic, a market definition issue, on which he was not qualified to give his opinion. Moreover, his testimony as to the building codes was largely based on a review of the legislation and code provisions. The conclusions to be drawn as to the use of materials because of legal or regulatory restrictions amounted to a legal issue which was for the Tribunal to decide. Counsel for the Respondent stated in his submissions, "many of the facts that he refers to, many of the conclusions that he reaches are clearly based on discussions he has had with others or documents he has reviewed. I think we established in cross-examination that he has conducted no scientific, technical or statistical studies, no surveys." [10]

10 Transcript at 15:2942, 23 March 2004.

16 The Commissioner argued that given Mr. Zorko's expertise as a Building Code Consultant, he was "entitled to provide an opinion on the scope and application of the Building Code and its effect on the content, design and construction of buildings." [11]

11 Transcript at 15:2899, 23 March 2004.

17 The Tribunal decided to allow Mr. Zorko's evidence:"..as a qualified architect specialized in building codes and based on his extensive experience, Mr. Zorko is entitled to give an opinion on the scope and application of building codes in Canada and their effects on the content, design and construction of buildings." [12]

12 Transcript at 15:3001, 23 March 2004.

18 There were also submissions with respect to Dr. Ware's expertise. The Commissioner objected to having Dr. Ware recognized as an expert, arguing that he had no expertise on building materials and code requirements, and therefore substitutability. The Respondent replied that Dr. Ware was being presented as an expert in economic matters, and notably market definition and the competitive behaviour of firms. Dr. Ware conceded in cross-examination that he could not speak as an expert on "regulatory constraints" and that these could have an impact on the use of building materials. [13]

13 Transcript at 26:5091, 3 June 2004.

19 The Tribunal ruled that Dr. Ware had the requisite qualifications to give opinion evidence on the subject matter raised in his Report, and that this opinion was necessary to assist the Tribunal. The Tribunal ruled during the hearing that it would determine the weight to be given to the expert opinion should the facts upon which the opinion was based not to be borne out by the evidence. [14]

14 Transcript at 25:4877, 2 June 2004.

20 Twenty-seven lay witnesses testified. They were involved in the following sectors of the DWV industry:

Manufacturers

For the Commissioner:

Mr. Gary Nagel, an ex-employee of Bibby

Mr. Russell Robert Demeny and Mr. James Warren Vanderwater, respectively President and Vice-president of Vandem Industries

Mr. Michael Promoli, President of Crowe Foundry

Mr. Peter W. Kirkpatrick, National Sales Manager for Fernco

Mr. Chris Vansell, Vice-president of Mission Rubber

Mr. Matthew O'Brien, ex-employee, Gates Rubber/Ideal

For the Respondent:

Mr. Thomas Leonard, Vice-President and General Manager of Bibby Ste-Croix

Distributors and buyers

For the Commissioner:

Mr. Roy Byrne, Vice-President, Crane Supplies

Mr. Robert Johnston, National Vice-President, EMCO

Mr. Claude Beaulac, Director General, Octo Purchasing Group

Mr. Paul Lachance, President and CEO, Wolseley

Mr. Mark Thomas Corriveau, Vice-President of Marketing and Purchasing, Wolseley

Mr. Gregory Donald Tester, General Manager, Nuroc

Mr. Richard H. Elliott, President, McKeough Supply Inc.

Mr. Jack Keon, retired Vice-President and General Manager, Niagara Plumbing

For the Respondent:

Mr. Giulio Iaboni, President, Sherwood Plumbing Supplies

Importers

For the Commissioner:

Mr. Marc Bouthillette, President, BMI Canada

Mr. David Kelm, Owner, Sierra Distributors

Mr. Jit Hiang Lim, President, New Centurion

Contractors

For the Commissioner:

Mr. William Kelly, Plumbing Contractor, William Kelly & Sons

Mr. Jim Bornhorst, Mechanical Contractor, Bornhorst Mechanical Inc.

Consultants

For the Commissioner:

Mr. Terry Vivyurka, Consulting Engineer

Mr. Scott Philips, Mechanical Engineer, Stantec Consulting Ltd.

For the Respondent:

Mr. Benoît Lagueux, Engineer, Régie du bâtiment du Québec

Mr. Charles Mark Surgeonor, retired Mechanical Plans Examiner, City of Winnipeg

Mr. Gary Wasyliw, Engineer, Manager of the Building Division, City of Regina

II. Background Facts

A. Dwv Products Industry

21 DWV products are essential components of residential, commercial, industrial and institutional buildings. DWV pipe, also referred to as soil pipe, is used to carry waste and drain water from appliances and drains, and to vent plumbing systems. There are three components to a DWV system: pipe, fittings and mechanical joint (MJ) couplings. Pipe, essentially tubes, comes in various diameters and lengths. Fittings join and re-direct pipes. MJ couplings mechanically join and seal DWV pipes together; they are primarily designed to couple pipes of the same material.

22 Pipes and fittings can be manufactured in a variety of materials, including cast iron, plastic, copper, asbestos cement, stainless steel and glass, whereas MJ couplings are made of rubber (or neoprene) and stainless steel. One of the main issues for the parties was determining whether all DWV products should be considered as forming a single market, or whether cast iron DWV products form a distinct market. The Tribunal notes that the Commissioner's expert, Dr. Ross, went even further and identified three distinct cast iron DWV product markets, namely, pipe, fittings and MJ couplings. We will return to a fuller discussion of this issue when we deal with the elements of section 79 of the Act. The following section discusses the characteristics and applications of the various products utilized in the DWV industry.

23 DWV products are bought by contractors either directly from manufacturers, or more often, from distributors who themselves have bought them from domestic or foreign manufacturers, or from importers. Contractors seek competitive prices from their suppliers, since the cost of materials is a major factor in winning a bid for a building contract.

24 The use of different materials for drain, waste and vent applications is constrained in Canada by various building and plumbing codes (provincial and municipal). The content of these codes is based on national standards. In effect, the provinces and territories have adopted as a minimum standard (which some jurisdictions might have made more stringent) the *National Building Code* and the *National Plumbing Code.* These codes provide for the materials to be used for purposes of safety and soundness. Different regulations will apply according to the size, use and occupancy of various buildings and installations.

25 Metal products, being non-combustible and having nil smoke development and flame spread ratings, can be used in virtually all construction. They include cast iron, copper and stainless steel. Copper and cast iron are the two most frequently used; stainless steel is more costly and used in specific contexts where corrosion is an issue. In terms of cost and ease of installation, copper is generally more advantageous in diameters of 65 mm or less, whereas cast iron is preferred for pipes and fittings of a diameter larger than 65 millimetres. This is confirmed by the testimony of Mr. Scott Philips, a Mechanical Engineer who works for Stantec Consulting Limited, a Building Consulting firm. [15]

15 Transcript at 14:2725-2726, 22 March 2004.

26 Other non-combustible materials are of limited use. For example, stainless steel is used in laboratory settings because it will not corrode, but it is expensive and thus not commonly used outside specific scientific or industrial applications; asbestos-cement composites are used in very large diameter pipes and, for regulatory reasons, only in Quebec and Ontario.

27 The Tribunal heard a great deal of evidence about the use of plastic pipe instead of cast iron pipe. Mr. Gary Wasyliw, Manager of the Building Division in the City of Regina and witness for the Respondent, presented a brief history of the introduction of plastics in the DWV industry. His testimony was essentially not contradicted by other witnesses:

> **MR. G. WASYLIW**: Well, very briefly, it was around some time in the early sixties when the first material, ABS, would've been introduced which could be used in smaller installations.
>
> Basically, any building that would not have the designation of "non-combustible construction", who was a combustible building, ABS piping could be used. It became very popular in housing very quickly at that point.
>
> However, in non-combustible construction, there was a performance criteria that would limit or exclude ABS from those applications. Sometime in about the late seventies, the PVC material was introduced. That material can meet the performance specifications of the Building Code aside from three applications that are excluded; the three applications being installation in the vertical shaft of the building, installation in the return air plenum of a non-combustible building, and the third component is installation in a high building, high building being a defined Code in the term [sic] that needs to be calculated on various factors. So PVC could meet those qualifications.
>
> At that time there was yet a fourth condition it could not meet because it was not a material that could penetrate a fire separation.
>
> About the late eighties — we estimate it to be about 1988 from materials we have in the office that are dated — there were fire stopping devices introduced. These were devices that could be applied to a PVC pipe wherever it would penetrate a fire separation that would then allow PVC into the next category of building. Those were the major advancements. The advancement that we've seen in the recent past has been the introduction of a type of pipe

designated as "XFR", which is a coating on a PVC pipe that lowers the flame and smoke rating of the pipe such that it can meet the performance criteria that is specified in the *Building Code*.

When that pipe has that designation, it can now be installed in the return air plenum as well as in the high building. The exemption for the vertical shaft does not come with a performance criteria so it still does not meet that application.[16]

16 Transcript at 24:4646-4647, 1 June 2004.

28 Some confusion in respect to the use of plastics in specific applications, e.g. vertical shafts in high-rise buildings, is linked to the definition of combustible as opposed to non-combustible construction. As stated by several witnesses, combustible material may be used in non-combustible construction provided the performance criteria of smoke development and flame spread ratings are met. This point is confirmed by Mr. Wasyliw.[17]

17 Transcript at 24:4654-4656, 1 June 2004.

29 As stated above by Mr. Wasyliw, the pipe used in vertical shafts must be made of non-combustible material; it is not a matter of performance criteria, as in the case of return air plenums and high-rise construction. The evidence shows that, for practical reasons, the material used is cast iron. In air return plenums and high-rise construction, plastic is gradually being accepted, according to Mr. Wasilyw, although as Mr. Zorko indicated in his expert testimony, the rate of acceptance throughout Canada is not uniform. Mr. Wasyliw explained that in the two high-rise constructions of that year in Regina, plastic DWV products had been used throughout the buildings, a new phenomenon attributable to the development of coated XFR pipe, which could meet all the performance requirements.[18] Since Mr. Wasilyw maintained that in vertical shafts, it was still compulsory to use non-combustible material, the Tribunal infers that in these two buildings either there were no vertical shafts, or that no DWV piping was installed within a vertical shaft.

18 Transcript at 24:4660, 1 June 2004.

30 Mr. Benoît Lagueux, also a witness for the Respondent, is in charge of the plumbing sector for the Standards Directorate of the Quebec authority (Régie du bâtiment) responsible for the enforcement of the *Building Code*. He also testified that the XFR piping system was meeting the performance criteria for use in air return plenums and high-rise construction, but not in vertical shafts, for the purposes of non-combustible construction.[19]

19 Transcript at 23:4616, 31 May 2004.

31 Mr. Philips, a witness for the Commissioner, testified that cast iron was the preferred material, because safety issues would not become a problem when it was used. The only problem with cast iron was possible corrosion if its use entailed corrosive waste (e.g. industrial or laboratory facilities). In his testimony, Mr. Philips, while highlighting the advantages offered by plastics to the contractors, nevertheless confirmed that cast iron is still the product normally used.[20]

20 Transcript at 14:2725-2727, 22 March 2004.

32 Cast iron continues to be the material of choice for some contractors and engineers because of its proven track record. This was confirmed by the evidence of Mr. Jim Bornhorst, Mechanical Contractor,[21] and Mr. Terry Vivyurka, Consulting Engineer,[22] who both testified for the Commissioner.

21 Transcript at 13:2682-84, 17 March 2004.

22 Transcript at 12:2448, 16 March 2004.

(1) Participants in the Industry

(a) Manufacturers

33 In Canada, there are at the present time two manufacturers of cast iron soil pipe and fittings: Bibby and Vandem Industries. Couplings are for the most part imported. Fernco Connectors Ltd. ("Fernco") manufactures couplings, but not mechanical joint couplings. Rollee Industrial Products (1987) Ltd. is the only Canadian manufacturer of MJ couplings, but is not a major player. The main manufacturers of couplings are Tyler Couplings, Anaco, Ideal and Mission Rubber in the United States, and Asian manufacturers based in China, India and Korea.

34 As earlier described, Bibby is a division of Canada Pipe which is a Canadian subsidiary of McWane Inc., a U.S. corporation based in Birmingham, Alabama. McWane Inc. owns a number of companies related to the soil pipe industry, notably Ransom Industries, the parent company of Tyler Couplings, Anaco Inc. and other soil pipe foundries, fitting foundries and rubber coupling manufacturers. Canada Pipe is the Canadian parent company of all Canadian companies belonging to McWane. Canada Pipe owns a number of foundries in Canada, but Bibby is the only one which produces soil pipe and fittings. Those items account for approximately 50 percent of its production tonnage. Bibby does not produce couplings. The couplings sold by Bibby are imported from Anaco or Tyler couplings, both sister companies situated in the U.S.

35 Canada Pipe purchased Bibby in 1997, as well as other foundries, from Gooding Investments, a company belonging to Dave Gooding. At that time, DWV cast iron pipe and fittings were manufactured in Canada by various foundries, all belonging to Mr. Gooding. In addition to the Bibby foundries (Ste-Croix and LaPerle, since closed), two other Gooding foundries were producing cast iron DWV products. They were Associated Foundry and Titan Foundry. Mr. Gooding sold the right of the last two foundries to manufacture cast iron; they have since ceased production of cast iron DWV products.

36 Vandem Industries was founded in 1997 by two former officers of Bibby, Mr. James Warren Vanderwater and Mr. Russell Robert Demeny. It concluded an agreement with the Crowe Foundry to start producing cast iron pipe. Vandem also imports and sells cast iron fittings and MJ couplings.

(b) Distributors

37 Distributors of DWV products buy from suppliers, either the manufacturer or an importer, and sell to the building, mechanical or plumbing contractors involved in construction or renovation projects. Distributors generally carry DWV pipe and fittings made of various materials. Cast iron DWV products represent only a small proportion of their inventory and sales. [23]

23 Mr. Roy Byrne, Vice-President, Crane Supply: Transcript at 4:812-841, 4 March 2004; Mr. Robert Johnston, National Vice-President, EMCO Transcript at 7:1374, 9 March 2004; Mr. Claude Beaulac, Director General, Octo Purchasing Group: Transcript at 8:1652-1653, 10 March 2004; Mr. Paul Lachance, President and CEO, Wolseley: Transcript 9:1755, 11 March 2004; Transcript at 9:1795, 11 March 2004; Mr. Richard H. Elliott, Mc Keough Supply Inc. Transcript at 11:2153, 15 March 2004.

38 There are in Canada three major distributors, all with a national presence: Wolseley Canada Inc. (formerly Westburne), EMCO Ltd. and Crane Supply. All three are customers of Bibby, although in the Western region, Wolseley no longer purchases from Bibby. There are as well small distributors, and distributors who belong to members of buying

groups, such as Octo Purchasing Group and Canaplus, in order to improve their bargaining power and obtain various advantages such as higher rebates or discounts.

(c) Contractors

39 For the most part, contractors buy from distributors the DWV products needed for construction projects on which they bid. The bidding process is highly competitive, and contractors will try to obtain the best price possible in order to make their bids attractive. Although contractors may have some leeway in deciding what material to use in construction, they will generally buy the type of DWV product that has been specified by the architect or the mechanical engineer.

(d) Importers

40 DWV products are imported into Canada from two main sources: the United States and the Far East, mainly China and India. Both Canadian manufacturers of pipe and fittings import couplings from the United States. Quality pipe and fittings can be obtained from Asia, but quality couplings from Asia are more difficult to find. All the importers who testified before the Tribunal had increased their imports since 1998. Dr. Ware, citing the Canadian International Merchandise Trade Data Base of Statistics Canada, asserted that imports of cast iron DWV pipe and fittings have increased significantly since 1998. The average annual volume of imports of cast iron pipe and fittings increased by 72 percent in the five-year period 1998-2002 in comparison with the 1993-1997 period. In terms of value, the increase is even more striking: annual average value of the same imports increased 122 percent from the 1993-1997 ($638,652) to the 1998-2002 period ($1,417,382). These figures must, however, be placed in the perspective of total sales of cast iron DWV products, which represent some 30 million dollars. In other words, as Dr. Ware admitted in cross-examination, imports have increased from 2.5 percent to 5 percent of total sales. [24]

24 Transcript at 27:5304, 4 June 2004.

41 Importers and distributors insisted on the importance of obtaining CSA approval to be able to sell pipe and fittings on the Canadian market. Dr. Ware, in both his report [25] and his oral testimony [26] indicated that obtaining CSA approval for a full line of fittings and pipe would cost approximately $50,000. This figure was not disputed by the Commissioner, and little other evidence was presented as to the cost. The only other information on cost came from Mr. David Kelm, of Sierra Distributors. He stated that registering fittings could be quite expensive, costing about $1000 per fitting, [27] which explained why an importer would not be willing to offer as complete an array of fittings as Bibby.

25 Expert Economic Report of Dr. Roger Ware (20 February 2004) exhibit R-24 at paragraph 101.

26 Transcript at 25:4956, 2 June 2004.

27 Transcript at 11:2378, 15 March 2004.

(2) Marketing

42 Distributors testified that in the industry, the incentive for buying from one supplier rather than another is usually offered in the form of volume rebates. Bibby's program, the Stocking Distributor Program, also offers rebates, but they do not depend on volume.

(a) Volume Rebates

43 Volume rebates are granted for the quantity purchased from a given supplier. Although they are not premised on exclusivity, they do reward exclusive buying indirectly, since the percentage of the rebate will usually increase with an increase in purchases. The distributors all agreed that volume rebates are the usual incentive offered to encourage purchase of DWV products from a given supplier, and that a volume rebate system clearly favours large distributors,

since their greater purchases will entitle them to a higher percentage rebate than the small distributor who can only claim the rebate allotted to a smaller purchase.

(b) Stocking Distributor Program

44 By contrast, the rebate offered to distributors under Bibby's Stocking Distributor Program ("SDP") does not change according to the volume of the purchases. Rather, the program rewards the exclusive stocking of Bibby cast iron products. Distributors can stock any other DWV product, but must buy all their cast iron products and MJ couplings for cast iron pipe only from Bibby to be entitled to rebates and discounts (the latter through a favourable multiplier). Variously described as exclusive dealing (by the Commissioner) or preferential dealing (by the Respondent), the SDP offers the wholesale distributors to whom Bibby sells its products a rebate program that rewards loyalty. If the distributor buys all its cast iron supplies and MJ couplings from Bibby, it is entitled to quarterly and yearly rebates, as well as a significantly lower price for items purchased through the application of a multiplier. The multiplier for pipe, for example, could be .55 for a stocking distributor, and .94 for a non-stocking distributor. Thus, at the time of purchase, the stocking distributor would pay 55 percent of the list price for pipe, while the non-stocking distributor would pay 94 percent of the list price. If the stocking distributor remained on the program for a full quarter, it would also receive a quarterly rebate. In 2002, for instance, the rebate was 7 percent on pipe, 15 percent on fittings and 9 percent on MJ couplings. Further, if it remains on the program for an entire calendar year, it receives the yearly rebate, which in 2002 was 4 percent on all products. If a stocking distributor leaves the program during a quarter, it loses the quarterly rebate and the annual rebate for the year to date. The distributor can restart the program in the following quarter, reinstating its right to the quarterly rebate and to the annual rebate for the remainder of the year. The multiplier is applied at time of purchase and is not reimbursable even if the distributor leaves the program. [28]

28 see Joint Book of Documents (JB)-1-11; JB-11-520; JB-15-803.

45 The multiplier and rebates will vary from one region to another. Because of the low margins on these products, the rebates represent a significant portion of distributors' profits. Although distributors are told that obtaining supplies elsewhere for any of the three products will jeopardize both their quarterly and yearly rebates, there have been instances in which Bibby chose to turn a "blind eye" to exterior purchases and paid the yearly rebate as part of a bargain to retain or gain a customer. For example, Wolseley bought products outside, but was paid the rebate in return for adding the B.C. region to the SDP. [29] Nuroc was bought by Wolseley in August 2003, but continued being supplied by Vandem until December 2003 without jeopardizing Wolseley's rebates. [30]

29 Transcript at 10:2001, 12 March 2004; Transcript at 10:2039-2940, 12 March 2004; Transcript at 2:212-213, 2 March 2004.

30 Transcript at 9:1782-1783, 11 March 2004.

46 To be part of Bibby's SDP, a distributor must make a minimum purchase. Mr. Elliott of McKeough Supplies testified that he was told by Bibby that he needed to make a purchase of at least 40,000 pounds to qualify as a stocking distributor. However, once that threshold is met, the rebates and the multiplier are the same in a given region, no matter the size of a distributor's purchase. This is in marked contrast to the usual system of volume rebates. Smaller distributors thus have an advantage with the SDP that they would not have with volume rebates and it allows them to compete by offering contractors the same prices as those offered by large distributors.

47 There are no signed contracts for the SDP. The distributor joins at any time, and receives quarterly and yearly rebates for each completed calendar quarter or year. The multiplier is applied at the time of the purchase, provided the distributor has committed to being part of the program. Except for losing the rebates, there are no penalties attached to opting out of the SDP.

III. Legislative Framework

48 The applicable statutory provisions are reproduced in Schedule A to these reasons.

IV. Issues

49 The Commissioner bears the burden of establishing each element in both subsection 77(2) and subsection 79(1) of the Act. It is clear, in both subsections, that the Tribunal must find each of the requisite elements for an order to issue. The burden of proof is the civil standard, that is, on the balance of probabilities. The Tribunal must weigh the evidence in order to determine if, on a balance of probabilities, the Tribunal is satisfied that each element has been established. Throughout, the burden is on the Commissioner.

50 The various elements that must be proven define the issues in this case. Under subsection 79(1), the Tribunal must find that:

a) The Respondent occupies a dominant position in the market. In this regard, the Tribunal must be satisfied that the Respondent exercises market power over a specific product market, in a specific geographic market. Thus, one important issue is the definition of the relevant product and geographic markets.

b) The Respondent has engaged in or is engaging in a practice of anti-competitive acts. Anti-competitive acts are defined by reference to section 78, which presents an illustrative but not exhaustive list of anti-competitive acts; and

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

51 Moreover, the issuing of an order is discretionary. The Tribunal must be satisfied that prohibiting the practice will enhance competition.

52 For the purposes of subsection 77(2), the Tribunal must find that:

a) The Respondent has engaged in exclusive dealing. In the instant case, this involves making a finding under paragraph 77(1)(b) that the Respondent has induced customers to refrain from dealing with a specified class or kind of product except as supplied by the Respondent, by offering more favourable terms of supply;

b) the Respondent is a major supplier of the relevant product;

c) the practice is likely to impede entry or expansion of a firm in a given market, or the introduction of a product or an expansion of its sales in the market, or have any other exclusionary effect; such that

d) competition is or is likely to be lessened substantially.

Again, the making of the order is discretionary.

V. Section 79 Analysis

53 Section 79 requires the Tribunal to make findings about market control, the practice of anti-competitive acts, and the substantial lessening or prevention of competition. Market control has been determined in previous decisions of the Tribunal by first determining the scope of the market. Thus our approach will be to first consider the market definition, then market control. Since we conclude that Bibby does have market power, we then examine whether one can find a practice of anti-competitive acts and if so, whether the practice leads to the substantial lessening or prevention of competition. We conclude that the impugned practices are not anti-competitive, and that the evidence is insufficient to find a substantial lessening or prevention of competition.

A. Paragraph 79(1)(a)-Market Control

(1) Product and Geographic Markets

(a) Commissioner's Submissions on Product and Geographic Markets

54 The Commissioner argues that it is not necessary to begin by defining the product market, because there is direct evidence of market power. This direct evidence will be discussed when we examine market control. Suffice it to say at this point that the Commissioner emphasizes the importance of market control in her approach to paragraph 79(1)(a), and deals with market definition as a means of supporting indirect evidence of market control, rather than as a necessary first step in determining the market. The Commissioner asked her expert to assume that there were no close substitutes for cast iron DWV products. Once market control was found, the Commissioner simply confirmed the existence of the market by indirect means, showing from the evidence that there were in fact no close substitutes.

55 The Commissioner assumes a *de facto* product market, i.e. cast iron DWV products. Although the Commissioner argues that there are three relevant product markets, her argument in respect to all three i.e. pipe, fittings and MJ couplings is the same. The Commissioner's main argument is that cast iron DWV products are not substitutable, i.e. DWV products made of other materials cannot replace cast iron DWV products in all applications. The Commissioner emphasizes the following factors: the non-combustibility requirements of building codes, the additional measures to be taken when using plastics, the health consideration linked to the use of asbestos pipes, the reduced noise of cast iron compared to plastic pipes, the durability of cast iron and the higher price of other metals. Based on these factors, the Commissioner argues that DWV products made of cast iron are not fully interchangeable with those made of other materials. At the present time, according to the Commissioner, there is no substitute for cast iron DWV products for certain applications, which explains their continued use in construction.

56 The Commissioner argues that by its conduct, Bibby is demonstrating that the relevant product market is cast iron products. Bibby lowered its prices in response to the entry of a competing manufacturer and of importers of cast iron. Bibby does promote the use of cast iron over other materials for DWV products, but its main target are other cast iron suppliers. The Commissioner submits that the SDP program is meant to encourage exclusive sourcing of cast iron products: it has no effect on sourcing of DWV products made of other materials.

57 Prices are also an indicator of competing products. The Commissioner concedes that the lack of price data for DWV products made from materials other than cast iron makes it difficult to analyze in detail the relationship between prices for different materials. Nevertheless, the Commissioner argues from the evidence that pricing for other products is independent of price movements in the cast iron products sector. Copper is significantly more expensive in the larger diameters and asbestos-cement and plastic pipe are much cheaper than cast iron pipe. The price discrepancy would tend to show, according to the Commissioner, that prices of other products do not discipline cast iron product prices, and thus, that DWV products made of other materials are not part of the same relevant market.

58 According to the Commissioner's expert, Dr. Ross, the evidence shows that there are in fact three relevant product markets: cast iron DWV pipe, fittings, and MJ couplings. After showing that cast iron products can be distinguished from other products in terms of uses, applications and prices, the Commissioner then submits that cast iron DWV products constitute three distinct product markets. Because of different cost considerations, different price pressures and various other competitive conditions, it is not appropriate, according to the Commissioner, to consider the DWV cast iron products as constituting a single market. Input and manufacturing processes vary, MJ couplings must be imported since there is no domestic production, various suppliers offer various choices, and not necessarily all three products. The Commissioner submits that the evidence shows that buyers would prefer to purchase the products separately, rather than as part of a system. This would indicate, from the Commissioner's reading of *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*,[31] that the products should be considered to be separate markets.

31 (1997), 73 C.P.R. (3d) 1 (Competition Trib.) (*Tele-Direct*).

59 On the issue of the geographic market, the Commissioner argues that the evidence shows that there are six relevant geographic markets (British Columbia, Alberta, the Prairies, Ontario, Quebec and Atlantic Canada), which differ markedly in terms of pricing and represent the regions Bibby uses for its marketing. In any of the geographic markets thus defined, Bibby has at least an 82 percent market share. The Commissioner argues that the absence of strong correlations in prices, even for identical products, between the six regions is evidence that they form six distinct geographic markets. The difference in prices is unrelated to transportation costs. Surprisingly, prices for Bibby pipe and fittings are consistently higher in Quebec, where they are made, than in British Columbia, in spite of the transportation costs.

(b) The Respondent's Submissions on Product and Geographic Markets

60 The Respondent submits that the first step in determining market power must necessarily be defining the relevant product market. Whereas the Commissioner considers the relevant product market as consisting of cast iron pipe and fittings, and MJ couplings, the Respondent submits that the product market is in fact much broader, and includes a range of products used for the same purposes, i.e. pipe, fittings and couplings made of various other materials including copper, asbestos-cement and plastic. This definition, if accepted, would decide the case. Since cast iron pipe, fittings and couplings represent only 11 percent of the DWV products market in Canada, Canada Pipe could not be said to be a dominant supplier.

61 The Respondent argues that the Commissioner, in presenting her case, made a fundamental mistake in not attempting to first delineate the relevant product market. Rather, the Commissioner asked Dr. Ross to assume that there were no close substitutes for cast iron for DWV applications and that the product market was cast iron DWV products. He proceeded on this basis to find market power, starting with Bibby's significant market share (in the 80 - 90 percent range).

62 The Respondent submits that, since Bibby competes with other products by promoting the use of cast iron rather than other materials, it considers the product market to be all DWV products, not just those made of cast iron. The main competition comes from plastics, which offer certain important advantages over cast iron, in particular price, lightness and ease of assembly.

63 Regarding the geographic market, the Respondent contends that the Commissioner has wrongly defined it by relying on the pricing in the various regions. Prices can vary according to the conditions in various regions, in which some products will be more or less in demand for many reasons, not all related to price. For example, asbestos-cement is allowed in certain drain applications in Quebec and Ontario, but its use is prohibited for all applications in other provinces. Different buyers have different preferences and contractors are subject to various rules. The paucity of evidence on the pricing for various other materials renders a comparative analysis with cast iron figures impossible. According to the Respondent, cast iron prices, on their own, are of little use in determining the geographic market, since the DWV market includes products made of other materials.

64 If, in the alternative, the market is to be defined as only cast iron, the Respondent submits that one needs to consider the fact that in Canada, cast iron DWV products are manufactured only in Quebec and Ontario. All other regions must bring in the pipe and fittings from elsewhere, either from within Canada, the U.S. or overseas. Moreover, MJ couplings are not produced in Canada, so they are imported. According to the Respondent, these factors support a wider geographic market than the six geographic markets advocated by the Commissioner. The Respondent submits the market is at the very least Canada-wide, if not wider, given that imports discipline prices in some regions.

(c) Tribunal's Analysis of Product and Geographic Markets

65 A "class or species of business" has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression "Canada or any area thereof" is to be understood as the geographic market, while "control" has been found to be synonymous with market power (*Canada (Director of Investigation & Research) v. D & B Co. of Canada* ;[32] *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.*[33] *Canada (Director of Investigation & Research) v. NutraSweet Co.*,[34] *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*.[35]

32 (1995), 64 C.P.R. (3d) 216 (Competition Trib.) (hereinafter *Nielsen* decision).

33 (1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (Competition Trib.) (*Laidlaw*).

34 (1990), 32 C.P.R. (3d) 1 (Competition Trib.) (*NutraSweet*).

35 (1997), 73 C.P.R. (3d) 1 (Competition Trib.) (*Tele-Direct*).

66 The Act does not specify how the analysis under paragraph 79(1)(a) of the Act is to proceed. However, in the above-mentioned cases, the analysis begins with a definition of the product market. This approach is also the one adopted by the Competition Bureau's (the "Bureau") *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "Guidelines"). Although the Guidelines have no binding effect on the Tribunal, they are useful in that they serve to indicate how the Bureau will proceed in an abuse of dominance case. At section 3.2.1 the Guidelines underscore the importance of defining the product market:

> This paragraph [79(1)(a)] 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. The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring.

67 The Tribunal restates the same principle in *Tele-Direct*, and adds that the exercise is also necessary for the purposes of section 77:

> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd. (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.), that "class or species of business" means product market and "control" means market power. ...
>
> A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market ... is likely to" have a number of detrimental effects.[36]
>
> 36 *Tele-Direct* at 33-34.

68 In determining the relevant product market one considers substitutability - in other words, whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. In *Tele-Direct*, the Tribunal cites the market definition set out in *Canada (Director of Investigation & Research) v. Southam Inc.*, [37] where the Federal Court of Appeal defines what is meant by substitutability:

37 [1995] 3 F.C. 557 (Fed. C.A.).

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes. [38]

> 38 *Ibid.* at paragraph 161.

69 No evidence was presented to the Tribunal in this case on the cross-elasticity of demand - whether increasing the price of DWV cast iron products would lead to an increased demand for DWV products made of other materials. Dr. Ware stated that the data available was insufficient to allow for such calculations. [39] Dr. Ross did not consider cross-elasticity, since his mandate was to determine market power and the anti-competitive effect of the SDP, while assuming that there were no close substitutes for cast iron. In that regard he said:

39 Transcript at 27:5232-5234, 4 June 2004.

> For the purposes of this affidavit I have been instructed to assume that there are significant applications for which the alternatives to cast iron DWV products are not close substitutes. For this reason then, I am assuming that DWV products not made of cast iron are excluded from the relevant product market. [40]

> 40 Expert Report of Dr. Thomas Ross (19 February 2004) exhibit A-11 at paragraph 41.

70 As indicated in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [41] cross-price elasticity is of limited value when several products may compete in the same market. The more relevant question is whether other products constrain the ability to raise the price of the target product:

41 (2000), 7 C.P.R. (4th) 385 (Competition Trib.).

> The more important limitation on the use of the concept of cross-price elasticity of demand to delineate markets is its indirect relevance to the exercise of market power. The definition of the relevant competition market does not depend on identifying particular substitutes in some pairwise fashion. Rather, the important question is whether, on a price increase by a firm, enough of its sales would be lost to all competing products, regardless of their number or identity, to make the price increase unprofitable. If this were the case, then a relevant competition market would not be found; that firm would not be able to exercise market power. A cross-elasticity estimate may identify a substitute and can be helpful in delineating a market, but it does not directly measure the ability of a firm to raise the price. [42]

> 42 *Superior Propane* at paragraph 61.

71 In the absence of direct evidence about price elasticity and given the importance of determining whether other products would constrain price increases of cast iron DWV products, the Tribunal considered the indirect evidence on the topics enumerated in the Guidelines.

The Views, Strategies, Behaviour and Identity of Buyers.

72 The evidence from distributors indicates a particular market for cast iron DWV products. Contractor requirements or building code specifications may dictate the choice of cast iron over other materials. According to the evidence, distributors stock a great deal more than cast iron DWV products.

73 Distributors buy cast iron products to satisfy their own clients' needs; clients in turn buy cast iron to meet specific requirements. The evidence of Mr. Elliott, President of McKeough Supply Inc. and a witness for the Commissioner, confirms this point and expresses the reluctance of buyers to wholeheartedly endorse plastics:

Examination-in-chief of Mr Elliott:

MR. R.H. ELLIOTT: I think there's still some trepidation in the marketplace about using PVC products on high rise-type projects or major institutional commercial-type projects.

It's just a product that seems to have had trouble moving forward very far in the Ontario — I mean, it certainly has grown but it's got some smoke issues and the flame issues and things like that.

And at one time — I don't even know what the rules are now but I believe, at one time, it couldn't be used in a building over six storeys high. I think that's changed now.

I'm not sure what the code is actually on the product now but it's — there's still been some reluctance in the marketplace by contractors to use.

So it doesn't come out on specifications very often and I guess that's what I'm leading up to.

We go by what's specified. When we get a tender request in from a contractor, generally, it's cast iron and copper DWV that's specified. [43]

43 Transcript at 11:2137-2138, 15 March 2004.

74 When options are provided to contractors by mechanical engineers, the evidence of some contractors was that they opt for cast iron for certain applications:

Examination-in-chief by counsel for the Commissioner of Mr. Bornhorst, Mechanical Contractor:

MR. J. BORNHORST: If it's a job designed by a mechanical engineer, he may specify that the underground may be plastic or cast iron. Someone may have their choice.

Or he may specify that certain portions of it to be done in plastic, certain portions to be done in cast, and that would go for above-ground installations as well. He would specify whether he wanted cast iron or plastics to be used, you know, code permitting.

And if it were design-build, we would have our choice of materials, code permitting again, to tell the owner which we prefer and why we'd prefer it.

MR. G.M. LAW: And typically, when you as contractor have your choice of materials, what materials do you use for drain, waste and vent?

MR. J. BORNHORST: Below ground, PVC; in crawl spaces, we would use PVC on occasion, the majority of the time; and for above ground, I would say above main floor installations, we would use cast iron. [44]

44 Transcript at 13:2681, 17 March 2004.

Trade Views, Strategies and Behaviour

75 The use of the various materials in DWV applications is regulated in a variety of provincial and municipal building codes, which are all based on the *National Building Code* developed by the Canadian Research Council. Mr. Zorko, an expert witness for the Commissioner, is a Building Code Consultant. He gave evidence both in his report and in oral testimony about the impact of the building codes on the use of materials in construction.

76 The major issue relating to the use of cast iron is the question of combustibility. In this regard, cast iron offers advantages that no other material can offer. Among non-combustible materials (metal, concrete and asbestos) it offers the best price (compared to copper, stainless steel), durability (compared to aluminum or concrete) and general safety (compared to asbestos). Mr. Zorko explained that in non-combustible construction, combustible materials may be used in certain buildings, provided various conditions are met (depending on the type of building). This is best illustrated by quoting article 3.1.5.15 of the *National Building Code:* [45]

45 *National Building Code* (1995 Edition).

3.1.5.15 Combustible Piping Materials

(1) Except as permitted by Clause 3.1.5.2.(1)(e) and Sentences (2) and (3), combustible piping and tubing and associated adhesives are permitted to be used in a building required to be of noncombustible construction provided that, except when concealed in a wall or concrete floor slab, they

a) have a flame-spread rating not more than 25, and

b) if used in a building described in Sub-section 3.2.6, have a smoke developed classification not more than 50.

(2) Combustible sprinkler piping is permitted to be used within a sprinklered floor area in a building required to be of noncombustible construction. (See also Article 3.2.5.14.)

(3) Polypropylene pipes and fittings are permitted to be used for drain, waste and vent piping for the conveyance of highly corrosive materials and for piping used to distribute distilled or dialyzed water in laboratory and hospital facilities in a building required to be of noncombustible construction, provided

a) the building is sprinklered throughout;

b) the piping is not located in a vertical shaft, and

c) piping that penetrates a fire separation is sealed at the penetration by a fire stop system that, when subjected to the fire test method CANCSI 15-M, "Standard Methods of Fire Test of Firestop Systems," has an FT rating not less than the fire-resistance rating of the fire separation.

77 Mr. Zorko then adds:

There are further indirect requirements relating to flame-spread and smoke developed characteristics restrictions in sentence (1) of article 3.6.4.3. - Plenum Requirements of the NBC [*National Building Code*], copy of which is provided within Exhibit D, for piping in horizontal service spaces (between floor and ceiling, or ceiling and roof) used as a plenum. The restrictions regarding materials used inside such plenums are the same as those specified in sentence 3.1.5.15. (1) quoted above. [46]

46 Expert Report of Mr. Josef Zorko (20 February 2004) exhibit A-10 at paragraph 8.

78 Mr. Zorko also discussed in his report the use of XFR piping in non-combustible construction. XFR pipe is made of PVC, but with an additional coating which, when exposed to flames, actually acts as a fire retardant. The flame spreading rating of XFR is 0, and smoke development is rated 35. In other words, XFR pipe can be used in almost all non-combustible applications, except in vertical shafts where all materials must be non-combustible.

79 Mr. Zorko is of the opinion that the acceptance of XFR pipe will be gradual, and not immediate. The installation requirements for the pipe is one drawback, since the protective coating must be stripped to allow exposure and assembly by bonding. The coating is then reapplied. Thus the fire-protection feature is highly dependent on field conditions, workmanship and the general level of knowledge which workers and contractors have of this material. Moreover, where non-combustible material is required, XFR pipe would still not be acceptable because it is essentially combustible.

80 Although Mr. Zorko does not exclude the possibility that eventually code requirements will be revised throughout Canada to allow a more general use of plastic piping materials, he expresses the view that, at the present time, the current regulatory restrictions favour and will continue to favour the use of cast iron for DWV applications.

81 On cross-examination by counsel for the Respondent, it was established that Mr. Zorko had in fact never used XFR pipe in a building design, nor had he spoken personally with anyone who had done so nor to any representative of the IPEX company. [47] Although knowledgeable about the *National Building Code*, Mr. Zorko did not have specific information about the degree of acceptance of the XFR product by authorities in provinces other than Quebec and Ontario.

47 Transcript at 16:3100-3107, 24 March 2004.

82 That being said, the Tribunal believes that the information provided by Mr. Zorko as to the preference for the use of cast iron in code restricted buildings, and the restrictions imposed on the use of plastic piping, notably in vertical shafts, is valid and significant. No information was provided as to the proportional use of cast iron compared to other materials, and especially plastic. The Tribunal therefore finds that in high-rise buildings, cast iron offers the advantage of meeting all requirement for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts.

End Use

83 Functional interchangeability appears in the Guidelines under the heading "End Use." It is important, in this respect, as the Tribunal pointed out in *Tele-Direct*, to take context into account:

> The criterion of functional interchangeability in end use should not be treated at such a high level of generality that it precludes objective yet contextual analysis. To say that, for example, automobiles and bicycles are in the same product market because they both provide a means of transportation would make the level of generality so high that no meaningful analysis could be performed as a result of it. Some consideration must be given to context. [48]

48 *Tele-Direct* at 41.

84 In both *Southam* and *Tele-Direct*, functional interchangeability is considered a critical element of the analysis. The Tribunal held in *Tele-Direct*:

> We conclude that consideration of functional interchangeability is essential in assessing indirect evidence of whether two or more products are in the same market. But this does not exclude other relevant evidence which may reinforce or undermine what functional interchangeability implies.[49]

49 *Ibid.* at 39.

85 DWV products are integrated into buildings. As explained elsewhere in these Reasons, different materials offer different advantages, and although there may be some overlap in use, there appear to be specific uses for different materials. The Tribunal heard a great deal of evidence about whether plastic pipe and fittings were directly competing with cast iron, thus forming a single market.

86 Cast iron offers advantages which plastic does not. Several witnesses noted the fact that cast iron pipes are less noisy than plastic pipes. Bibby itself uses that characteristic to convince buyers of cast iron's superiority. However, in cross-examining some witnesses, Respondent's counsel sought to bring out the fact that the plastic industry, and IPEX in particular, is trying to establish that plastic pipes are in fact comparable to cast iron pipes in terms of noise level. It would appear, from the whole of the evidence, that cast iron still offers a certain advantage in respect to noise. For now, we accept the evidence of those witnesses who spoke of the relative advantage of cast iron in terms of noise characteristics.

87 While plastic pipe is lighter and easier to handle and assemble, the evidence also shows that cast iron pipe can be disassembled more easily than plastic pipe, which can be assembled only once, since the elements, once glued together, cannot be taken apart. Cast iron is non-combustible and durable, thus meeting all requirements in building codes. Fire-proofing the site where a pipe goes through a fire-proof floor or wall requires only caulking in the case of a cast iron pipe, while it requires the installation of a special device when the pipe is plastic. Cast iron offers greater strength and load-bearing abilities, hence its widespread use in multi-level buildings. Finally, the low thermal expansion rate of cast iron is a significant factor in a country of temperature contrasts such as Canada. Cast iron pipe expands and contracts at a low rate, similar to that of other building materials such as steel, concrete and masonry.[50]

50 JB 6, Tab 239, p.11.

88 Dr. Ware, the Respondent's expert economist, presented evidence of the increasing importance of plastics in the DWV market. This evidence was based on research done by the Freedonia Group Incorporated, a company which studies market trends in various industry sectors. The report tendered in evidence[51] from Freedonia indicated the following: Freedonia is a U.S.-based company, established in 1985, which has published a number of studies covering such areas as building materials, chemicals, pharmaceuticals, plastics and many other industries. Each study includes information on growth markets, market shares, product analyses and forecasts as well as market analyses and forecasts. The study on the U.S. pipe industry, which was the subject of the report tendered in evidence, placed particular emphasis on plastic pipe. Information and data on the pipe industry were obtained from a variety of primary and secondary sources, including government, trade associations, publications, industry participants and online databases.

51 Expert Economic Report of Dr. Roger Ware (20 February 2004) Exhibit B - Tab 4.

89 The report that was presented to the Tribunal was actually an extract of a report published on Freedonia's website. The authorship of the report was unknown. The Tribunal notes that the information, whatever its value, deals with the situation of the pipe industry in the United States. In brief, the data indicate the increasing use of plastics in the construction sector and the corresponding decrease in the use of cast iron. Counsel for the Commissioner emphasized the point that although the report does state that plastics are becoming more and more prevalent in DWV applications, it also acknowledges that "... cast iron pipe will remain the material of choice in uses such as multi-story buildings because of the material's superior high pressure capabilities, sound deadening properties and flame resistance."[52] After reviewing

various documents, including the Freedonia material, and holding discussions with industry participants, Dr. Ware came to the following conclusion:

52 *Ibid.* Section VII - Drain, Waste and Vent Pipe, 1st page.

> I conclude that the industry has been characterized for four decades by a steady substitution of plastic DWV products for cast iron products, and that this trend is expected to continue. [53]

> 53 Expert Economic Report of Dr. Ware (20 February 2004) exhibit R-24 at paragraph 25.

90 No data similar to that in the Freedonia report were presented for Canada, since they were apparently unavailable, but various participants in the industry confirmed this trend of shifting to plastic DWV products in Canada. However, the Tribunal cannot know at what pace it is progressing, given the absence of concrete Canadian data. Moreover, it is probable that the different regulatory regimes have an impact on materials used in Canada for the same applications.

91 From the evidence heard, both from contractors and engineers, the Tribunal finds itself in agreement with the following statement found in Mr. Zorko's rebuttal report (in which Mr. Zorko disputes Dr. Ware's assertions that IPEX Inc.'s XFR line of products can replace cast iron in any type of construction):

> Although he is correct in stating that IPEX Inc.'s line of products is certified as compliant with the requirements applicable to combustible DWV piping materials used in buildings where non-combustible construction is required, Mr. Ware's [sic] here again fails to make the appropriate distinctions as to where this allowance exists and where it does not. Indeed, in the case of many types of buildings as well as in many types of systems configurations, not only contractors but owners as well are still obligated by Codes to use non-combustible piping materials, among which cast iron enjoys a distinct price advantage. The acceptance by building inspectors of fire-resistant coated PVC DWV systems that Mr. Ware mentions in closing, can not be understood as covering all and any building governed by the Codes as such acceptance can only extend to what is specifically allowed. [54]

> 54 Rebuttal Report on the Expert Economic Report of Dr. Roger Ware (27 February 2004) exhibit R-12 at paragraph 1.12.

92 The Tribunal accepts that cast iron offers the advantages mentioned above - strength, durability and lower noise level. Although plastic may eventually replace cast iron entirely, as predicted by Mr. Johnston from Emco, this has yet to happen, and cast iron continues to be in a class of its own:

> **MR. R. JOHNSTON:** ... It's a mature market at $34 million, declining 5 percent a year, which primarily is going to plastic-type material.
>
> Given our market share desire 20 percent of that, parallel to that, we supply what our customer asks us for and/or what is specified, ...
>
> That material — there is less of that material being consumed going forward and it's going — at some point, will be a crossover into plastic. [55]

> 55 Transcript at 7:1369-1370, 9 March 2004.

Physical and Technical Characteristics

93 As stated in the two previous sections, significant evidence was adduced that the physical and technical properties of the materials used for DWV products are very important to the ultimate buyers, i.e. engineers, contractors and builders, and that these properties differed widely.

94 Some materials are non-combustible, such as cast iron, copper, stainless steel and asbestos-cement. They also have specific characteristics. Cast iron is load-bearing and durable, but heavier and costlier than plastic. Copper is easier to bend than iron and in smaller diameters, has a better flow-through. In larger diameters, it offers no significant advantage over cast iron, but would be more expensive. Stainless steel's use is restrained by its cost; it is used only when necessary, where non-corrosive material is required, as in laboratory settings. Asbestos-cement is not allowed in building applications in any other province but Quebec and Ontario. Plastic is a combustible material, but recent improvements allow for its use in various industrial and commercial settings where before this would not be possible. Plastic offers many advantages over cast iron, including lower prices, lightness and ease of installation. Several witnesses indicated that the use of plastic was increasing. However, it still cannot replace cast iron in all its applications, nor does it offer the same characteristics.

95 There was considerable evidence to show that end users would have definite preferences for one material over the other. Insofar as cast iron was concerned, not only do building codes require the use of non-combustible material in some cases, there is also evidence that in older buildings, where cast iron had originally been used, the preference would be to continue with the use of cast iron.

Price Relationships and Relative Price Levels

96 According to the Guidelines,

> 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.

97 It is generally accepted that the test to determine whether two or more products are close substitutes will be whether they act to constrain prices. In this case, we have no evidence on the correlation of price movements between cast iron DWV products and products made of other materials. Bibby itself acknowledges the competition with cast iron products in its pricing policies. The evidence shows clearly that Bibby has reacted to the entry of new cast iron suppliers, whether manufacturer (Vandem) or imports (Sierra, New Centurion) by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices have increased since 1998. Although it is shown that Bibby monitors the prices for plastic DWV products, there is no evidence of the prices of plastic products having a disciplinary effect on the price of the cast iron products.

98 Both Mr. Wasyliw and Mr. Surgenor testified to Bibby's zeal in defending cast iron against the incursion of plastic. The evidence heard from Mr. Thomas Leonard, [56] Mr. Wasyliw [57] and Mr. Charles Mark Surgeonor [58] on the competition from plastics suggests that Bibby sought to show the advantages of cast iron over plastics, but not that Bibby modified its prices to compete with plastics.

56 Transcript at 19:3855; 3865-3866; 3893-3894; 3901; 25 May 2004; Transcript at 20:4058, 26 May 2004.

57 Transcript at 24:4650, 1 June 2004; Transcript at 24:4662-4664, 1 June 2004.

58 Transcript at 23:4567-4569, 31 May 2004.

99 Bibby's SDP agreement with the distributors includes a "marketing allowance", whereby the distributor may be rewarded for promoting (Bibby's) cast iron products. Ultimately, such an allowance will impact on the price paid by

distributors. However, this marketing allowance is of minimal value when compared to the value of rebates and the multiplier offered for stocking only Bibby's cast iron products.

100 As was stated in *Tele-Direct*, the intensity of the competitive response is an indicator of its true importance:

> The respondents submit that evidence of "broad competition" places all local media in the same product market. The respondents say that differences in the type or intensity of response to different "competitors" should not eliminate some "competitors" from the relevant market. We cannot agree. The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close substitutes. Substitutability, as pointed out in the *J.W. Mills* case quoted above, is always a question of degree. Differences in the intensity of the reaction to players admitted to be competitors by Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case. [59]

59 *Tele-Direct* at 66.

101 The competition with plastics appears to have had little effect on the prices of cast iron. Bibby devotes considerable effort to promoting the physical characteristics of cast iron products as compared to plastics, but these efforts do not lead to a reduction in price for cast iron products. From the evidence, it appears that the use of plastics is prevalent and increasing across the country. The prices of cast iron have not been decreasing with the increased use of plastics. Prices of cast iron DWV products have increased in Quebec and the Maritimes. They have decreased where Bibby has met cast iron competition - in Ontario with Vandem, in the West with importers. In other words, even though the Respondent claims that plastic is a competing material, there is no evidence that plastic products have had a constraining effect on prices of cast iron DWV products.

Substitutability

102 The experts on both sides agreed that there was a lack of data for calculating the elasticity of the demand, such that a direct measure of substitutability was impossible. The Tribunal does not have sufficient evidence to show whether consumers (in this case, distributors) would change their behaviour because of a rise in prices. In the present context, such an analysis is impossible, and not only because of a lack of data. The fact is that the choice to buy cast iron over other products is not only a matter of price; as seen earlier in these reasons, other important considerations come into play. From the evidence of Mr. Zorko and others, we find that for certain applications, such as in vertical shafts, non-combustible material remains the only acceptable material, which in practical terms means cast iron. In certain other applications, where considerations of safety and non-combustibility are paramount (based on use, occupancy, and height of building) the use of material other than metal will be constrained. For example, a sprinkler system may be compulsory or fire separation sealants will be required. The Respondent sought to convince the Tribunal that this situation was evolving, and that plastics in particular were offering true competition. On the evidence, the Tribunal is satisfied that for certain applications, cast iron has no economic substitute.

Three Product Markets or One

103 Dr. Ross opined, based mainly on an analysis of prices, that the cast iron DWV product market was in fact composed of three distinct markets - pipe, fittings and MJ couplings. For all three product markets, however, the allegations of the Commissioner are the same: the abuse of dominant position is occurring in all three product markets, the common factor is cast iron (MJ couplings are not made of cast iron but are used with cast iron), and the SDP applies to the three products. Dr. Ross based his opinion about distinct markets on the different pricing trends. These differences are no doubt at least partly due to the fact that the products do not all originate from the same source. Couplings are not made of the same material as pipe and fittings, and are not produced by the same manufacturers. Pipe and fittings can be produced by the same foundry, but not necessarily. The Tribunal finds, since all three products can be bought separately from different suppliers and the pricing trends for each appear independent, that there are three distinct product markets.

104 In respect to the geographic market, the issue turns on whether "...within Canada or any area thereof...," [60] there is sufficient competition to discipline prices. The price of the relevant product may act as an indicator of geographic market. If prices show homogeneity in a given region as compared to another region, each of these regions could be considered a separate geographic market; in an integrated geographic market, lower-price goods will simply move into the areas where higher prices are charged, thus providing effective price discipline.

60 79(1)(a) of the *Competition Act*.

105 When products are manufactured outside Canada, one can argue that the geographic market may extend beyond the boundaries of Canada. In *NutraSweet*, the fact that the entire supply of aspartame was imported was not the deciding factor in the Tribunal's determination of the geographic market. Instead, the Tribunal considered the prices charged for aspartame in both the EEC and Canada, and concluded that prices differed significantly. The Tribunal therefore found that Canada was a distinct geographic market for the purposes of evaluating the effects of NutraSweet's marketing practices.

106 Consumer behaviour is also an indicator of the geographic market. In *Laidlaw*, the Tribunal had to decide whether the Courtney-Comox-Cumberland area was part of the same geographic market as Campbell River for the provision of lift-on-board garbage collection and disposal service. Evidence showed that the extensive area between those two regions with very little population made the provision of service by the same provider unlikely. In other words, consumers in one area would not be likely to choose a provider operating in the other area. Thus, no price discipline was imposed by the operators of the other area. For this reason, the Tribunal held that the two areas formed distinct geographic market areas.

107 Dr. Ross, in his report, found that there were six relevant geographic markets, based on the regions which Bibby uses for marketing and pricing purposes. Given the great variation in prices from one region to the next, Dr. Ross concluded that different competitive forces were at work in the different regions, thus defining separate geographic markets. Dr. Ware stated that the relevant geographic market was Canada, perhaps even beyond, given the level of imports and the fact that products were not being produced everywhere in Canada, and thus had to be shipped from one region to another. Dr. Ware added, in the course of his examination-in-chief, that he believed that in fact the geographic market was not essentially relevant to market power in this case, since the broad features of the industry tended to be the same across Canada and the Commissioner was arguing market power in each of the six markets.

108 The Tribunal notes the very significant price differences from one region to the next, and concludes that this in fact does differentiate various geographic markets. Different forces appear to be at work in setting the prices of cast iron DWV products, notably when one compares the pricing situation in British Columbia to the one which prevails in Quebec or the Maritimes. As was stated in *Laidlaw*, the geographic market is determined by the area within which competition should occur:

> The general test for determining the geographic dimensions of a market is the same as that used to determine the product dimensions: identification of the universe of effective competition. That is, in so far as the relevant geographic dimensions are concerned, for the purposes of this case one asks what are the boundaries of the geographic area within which competitors must be based if they are to provide effective competition to Laidlaw. Effective competition means that the competitor provides a significant restraint on Laidlaw's ability to raise prices above the competitive level. [61]
>
> 61 *Laidlaw* at 316.

109 The evidence in the instant case shows that although Bibby has a national presence, its competitors generally do not. Thus, the disciplining effect on prices (or at least, a lowering of the prices) is felt in Ontario because of the entry of Vandem, while in the West, importers are causing prices to drop. The absence of significant cast iron competition in

Quebec and the Maritimes leads to high prices being maintained. Thus, different market forces are operating in the six regions, which would justify a finding that six different markets exist (although, arguably, Quebec and the Maritimes could be placed together, and, to a lesser extent, Alberta and British Columbia).

110 The Respondent argues that shipment movements and the importance of imports indicate a wider geographic market than regional-based markets as suggested by the Commissioner. Shipment movements from Quebec and Ontario to the rest of the country and imports from the U.S. and overseas support, according to the Respondent, defining a geographic market that could be Canada and could even be wider and include at least North America. However, given the very different forces operating in the different regions of Canada, the argument is not convincing.

111 Imports are properly included as products that compete in the cast iron DWV market. The evidence establishes that imports are interchangeable with domestic products and their presence in the market has caused prices to drop. Unlike the circumstances in *NutraSweet*, there is insufficient evidence before the Tribunal to consider whether the market extends beyond the borders of Canada. The only evidence received on prices in the U.S. is that prices are lower. Mr. William Kelly, who as a plumbing contractor imports cast iron DWV products for his business, indicated that he had different suppliers in Calgary and in San Diego (the two places where he runs his business), because the prices in the U.S. were lower, particularly in San Diego. [62] Within Canada, prices vary markedly between regions. The different regions react to their own competitive factors. The fact that the product is shipped from Quebec, from the U.S. or from overseas does not create one homogeneous market for Canada or a wider market extending beyond Canada. The evidence shows that cast iron DWV products are submitted to different market forces throughout Canada, as evidenced by the significant price variations from one region to the next. This fact alone argues for separate geographic markets.

62 Transcript at 14:2852, 22 March 2004.

d) Tribunal's Conclusions on Product Market and Geographic Markets

112 The evidence reflects a market that is changing because of the increasing importance of plastics in the DWV industry. We find the American data presented by Dr. Ware on plastics replacing cast iron of limited assistance in the Canadian context, given the impact of Canadian regulations on the choice of materials and the absence of statistical evidence showing a similar trend in Canada. From the evidence we have heard, however, plastics seem to offer a number of advantages to the construction industry and appear to be increasingly used. Nevertheless, the Tribunal is of the view that cast iron still plays a distinct role in the DWV industry, and it is treated as a separate market by distributors and contractors. More importantly, it is treated differently by Bibby itself, in its marketing and its pricing policies. In consequence, the Tribunal finds that the product market is the cast iron DWV product market, within which three distinct markets can be identified: cast iron pipe and fittings and MJ couplings. Because of the significant price variations in cast iron DWV products from region to region, we find that there are six distinct geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes.

113 Because of the findings that there are three product markets and six geographic markets, the Commissioner must show that Bibby controls the market in eighteen different markets, and has substantially prevented or lessened competition in those eighteen markets, through its practice of anti-competitive acts.

(2) Market Power

(a) Commissioner's Submissions on Market Power

114 The Commissioner's case for market power relies heavily on Dr. Ross's analysis of the direct evidence - i.e. evidence that Bibby has the ability to raise and maintain prices above competitive levels for a significant period of time. Dr. Ross never defines what the competitive price levels would be; rather, he postulates that the direct information on prices and margins leads to the conclusion that Bibby's prices are supra-competitive. More specifically, Dr. Ross relies on three elements of direct evidence to conclude that Bibby has market power in the relevant markets: 1) high profit

margins; 2) prices well above the landed prices of imports; and 3) Bibby's capacity to set prices, as shown by the high prices where no competition exists (Quebec and the Maritimes) and its capacity to lower its prices dramatically in the face of competition.[63]

63 Expert Report of Dr. Ross at paragraph 31.

115 There are as well, according to Dr. Ross, indirect indicators of Bibby's market power: Bibby's considerable market share and little or no sustained and successful entry for the last several years. His conclusions on this last point are summarized as follows:

> While imports have made inroads periodically, they have been met by aggressive responses from Bibby, and Bibby's market share remains very high. Similarly, Vandem has been trying to establish itself as a largely domestic competitor, but has had considerable difficulty.[64]
>
> 64 Expert Report of Dr. Ross at paragraph 32.

116 Dr. Ross is of the view that there are several barriers to entry. First, he states that it would be difficult to establish a new foundry, or adapt a current foundry to produce cast iron DWV pipe and fittings. Secondly, since there is excess capacity in the industry, the industry may not be likely to attract new investment. Adapting an existing foundry to produce DWV cast iron products could represent risky sunk costs. Given the fact that Bibby itself holds much of the excess capacity, it could use or threaten to use this capacity to produce large quantities to be sold at low prices.[65] In addition, although not a barrier *per se*, both parties agree that the cast iron DWV industry is a mature industry, not one in which one can expect great growth or innovation.

65 Expert Report of Dr. Ross at paragraph 68.

117 Thirdly, Dr. Ross maintains that imports face barriers of their own. Bibby is a well-established manufacturer, offering complete lines of products. Imported product lines may be less complete, and buyers may be wary of their quality and of the warranties attached. Fourthly, Bibby's vigorous response to entry by imports and by Vandem may have had a chilling effect on potential entrants. Finally, and most importantly, the SDP program is itself a barrier to entry: entrants, whether importers or manufacturers, have difficulty having access to the distributors, already tied into Bibby's loyalty program.

(b) Respondent's Submissions on Market Power

118 Canada Pipe's response to these arguments is that barriers to entry are low or non existent. The Respondent's first line of argument is that there can be no market power, since Bibby's market share, in a market which includes all DWV products, is only around 10%. If the product market is confined to cast iron, Bibby does not dispute the figures relating to its share of the cast iron DWV market,[66] although in cross-examination, some doubt was cast on Dr. Ross' calculations, since the market share for cast iron had been extrapolated from figures supplied by Bibby concerning all of its perceived competitors, including suppliers of plastic, copper and asbestos pipe and fittings.[67] That being said, the market share would still be irrelevant, according to the Respondent, since no barriers to entry exist.

66 Transcript at 27:5305, 4 June 2004.

67 Transcript at 18:3750-3753, 26 March 2004.

119 To support this argument, the Respondent relies on various examples of entry since the SDP came into effect. In his report, Dr. Ware specifically refutes Dr. Ross' allegations that it would be expensive to enter the market. In the case of an importer, it is a matter of finding a foreign supplier. No special equipment is needed to transport, handle or store DWV products. CSA registration is less than $50,000 to register a full line of pipe and fittings. A number of foreign manufacturers have already registered their cast iron DWV products with the CSA. [68]

68 Expert Report of Dr. Ware at paragraphs 100-101.

120 Various routes are available for the marketing of cast iron products, and Dr. Ware gives examples of each. Importers may act as distributors to the general contractors; such is the case for Sierra Distributors in British Columbia and Davcon in Alberta. Contractors may import directly, such as William Kelly in British Columbia. Distributors who are not now stocking cast iron DWV products may be encouraged to do so. This appears to have been the strategy of entry for Vandem, whose customers include wholesale distributors who are not clients of Bibby. Finally, distributors may opt out of Bibby's program and choose to buy imported cast iron DWV products, as has been the case for Wolseley, a major distributor of plumbing products, in Western Canada. [69]

69 Expert Report of Dr. Ware at paragraphs 102-104; paragraph 135 and footnote 83 page 51.

121 Dr. Ware also states that retooling an existing foundry would be a relatively inexpensive proposition; several Canadian foundries have excess capacity, and might be willing to partner with an entrant pipe and fittings producer. This was precisely the case for Vandem, which manufactures pipe at the Crowe foundry in Ontario. The only point on which both economists agree is the unlikelihood of greenfield entry, given the existing foundry capacity, the cost of starting up such a manufacturing process and the competitiveness of imports from Asian countries. [70]

70 Expert Report of Dr. Ware at paragraphs 105-108; Expert Report of Dr. Ross at paragraph 67.

(c) Tribunal's Analysis of Market Power

(i) Direct Approach

122 Market power is defined as the ability to set prices above competitive levels for a considerable period. The direct approach involves showing that prices are indeed above the competitive level. In *Tele-Direct*, for example, the Tribunal found that the very large accounting profits were a direct indication of market power. However, as was the case in *Laidlaw, Nielsen* and *NutraSweet*, this approach is not always feasible. If a market is monopolized or not perfectly competitive because of a trade restraint imposed by a major supplier, it may be difficult to determine what would be the relevant competitive benchmark. In such a case, an indirect approach can be taken, which will consider such indicia as market share, barriers to entry and customer countervailing power.

123 In his report, Dr. Ross stated that there was a significant amount of direct evidence in support of his claim that Bibby has market power, focussed in three main areas: high margins, prices substantially above import prices, and high prices absent competition, with the corollary of being able to significantly lower prices where competition occurs. Each of these will be considered in turn.

High Margins

124 When studied closely, Dr. Ross's presentation on high margins appears somewhat strained. The margins are based on cost of production (fittings and pipe) and do not include MJ couplings (which Bibby imports). In addition, the analysis is centred on margins, not profits. Dr. Ross cautions that marginal costs do not necessarily give us an exact idea of Bibby's profits, because the costs are extrapolated from Bibby data without complete information on how those

costs were established. We have no information on whether the costs include only variable costs, or also fixed costs.[71] However, the Tribunal is prepared to accept Dr. Ross' calculations of production costs and variable costs, from which he derives gross profit margins and contribution margins.[72] We note that the marginal costs are only based on the cost of production of pipe and fittings; they therefore exclude MJ couplings, which Bibby does not manufacture but imports from a sister company.

71 Expert Report of Dr. Ross at paragraph 17 and footnote 6.

72 Expert Report of Dr. Ross at Appendix 3, p.6.

125 We are not provided with any evidence as to how these margins compare to the margins of other cast iron DWV suppliers. *[CONFIDENTIAL]*[73] *[CONFIDENTIAL]*.[74] This shows that profits are important to an understanding of whether margins are excessive, in an economic sense.

73 Confidential Transcript at 2:12-14, 8 March 2004.

74 Confidential Transcript at 1:6, 5 March 2004.

126 In *Tele-Direct*, the Tribunal found that accounting profits of over 40 percent were a sufficient indicator of market power. The Tribunal did not accept the Respondent's argument that accounting profits could not be considered economic profits. The evidence established that Tele-Direct was paying 40 percent of its collected revenues directly to the telephone companies for which it published a directory. This, according to the Tribunal, was sufficient evidence of profit, and hence of considerable market power.

127 The evidence on profit margins in the present case is not as clear as it was in *Tele-Direct*. Whereas in the latter case Tele-Direct was able to consistently pay 40 percent of its revenues to the telephone companies, in this case margins vary from one region to the next. They are consistently high in Quebec and the Maritimes, but dip in other regions, to the point of being negative for considerable periods of time in Alberta, the Prairies and British Columbia.

128 Dr. Ware points out in his Rebuttal at paragraph 22 that Dr. Ross' analysis based on margins provides little evidence of market power in Ontario (where margins were sometimes low, but never negative), Alberta and BC, which together make up 75 percent of Bibby sales of cast iron DWV products in Canada. The margins are high and remain high in 25 percent of the market (Quebec and the Maritimes). They vary in the other markets, sometimes rising, sometimes dipping. They are considerably lower in fittings than in pipe, though we note that the data for fittings is incomplete.

129 When looking at the summary of gross profits margins, the numbers seem high, though negative in some cases, as stated above. Dr. Ross himself, in his report, cautions the reader as to the interpretation of these figures. Dr. Ross made his calculations based on limited data provided by Bibby, but cannot say how those costs were established by Bibby nor what they include. Moreover, he adds, even high margins do not necessarily lead to a conclusion of high economic profits, because the extra revenues (beyond marginal costs) might be necessary to cover fixed costs. Further, the Tribunal has no data on Bibby's ratio of fixed costs to variable costs.

Import Prices

130 In order to show that prices are above competitive levels, Dr. Ross attempts to compare Bibby's prices with import prices. According to Dr. Ross, two assumptions must be made: one, that the price of imports reflects their full opportunity costs, and two, their quality is equivalent to that of Bibby's products. Dr. Ross writes in his report that "imports may be between 30 and 50% less expensive than Bibby's products,"[75] an order of magnitude roughly similar to that of the margins calculated from Bibby's costs. Import prices can be seen, according to Dr. Ross, "as a bit of a

benchmark" [76] of Bibby's costs - if they were lower, then Bibby would stop producing and import as well. All this serves to confirm, states Dr. Ross, the high margins and the fact that Bibby's prices are supra-competitive.

75 Expert Report of Dr. Ross at paragraph. 20.

76 Transcript at 17:3498, 25 March 2004 (Ross examination in chief).

131 There are several problems in using import prices to lend support to Bibby's high margins. First, Dr. Ross gives us no raw data on import prices to support his assumption that import prices are "between 30 and 50%" lower than domestic prices. Dr. Ross was cross-examined on this very point by counsel for the Respondent. Dr. Ross indicated that he had obtained this information from Mr. Kelly. Yet Mr. Kelly's evidence was that imports were around 25 percent cheaper, and that this difference had decreased over the years. [77]

77 Transcript at 18:3728-3732, 26 March 2004.

132 Second, the calculation is based on the assumption of full opportunity costs and similar quality. Although some witnesses testified to the quality of Chinese products being similar to that of Canadian products, we have no evidence as to the pricing policy of Chinese sellers, who may be intent on penetrating the Canadian market and pricing at below full opportunity cost. The fact is, the Tribunal has insufficient evidence to decide whether the assumptions are valid and applicable.

133 Third, the conclusion that import prices can serve as a benchmark for Bibby's costs cannot be drawn from the evidence that we have before us. Dr. Ross' assumption is that the decision to continue to produce in Canada will necessarily be based on a comparison between import prices and production costs. Several factors come into play in deciding to continue producing pipe and fittings as opposed to importing them, including the cost of shutting down some production lines, workers' severance packages, the future value of Canadian currency, and the stability of supply coming from overseas. In other words, the decision to replace Bibby products with imports entails a great deal more than a simple, straight-forward calculation of the difference between the price of imports and the cost of production. Therefore, in the Tribunal's view, the price of imports cannot serve as a benchmark of Bibby's costs. Moreover, as stated earlier, there are no hard data provided as to the price of imports. In consequence, based on the evidence, the import prices cannot help confirm that Bibby's margins show supra-competitive prices.

Significant Variation in Prices and Ability to Lower Prices

134 According to Dr. Ross the third indicator that shows direct evidence of supra-competitive prices is the significant variation in prices between regions and the fact that Bibby has been able to meet competition head-on by lowering its prices. From Dr. Ross' report:

> ... the very significant differences in price levels for identical products across the country is one indication that Bibby is not pricing at competitive levels (in at least the higher price regions). This would not necessarily be true if the higher price regions were associated with higher costs, perhaps for transportation, but the information I have seen does not suggest this is the explanation.
>
> More strikingly, when we compare Bibby's prices in B.C. to the prices for the same products in Quebec (where most of them are made and transportation costs would be minimized) we find that, generally, prices are lower (sometimes much lower) in B.C. despite the greater distance from the production facilities. ...
>
> For some months, the prices in B.C. and Ontario are seen to be much lower (30% and more lower) than the prices for the same products in Quebec. Under such circumstances it is hard to see how prices, particularly in Quebec, can be at competitive levels. [78]

78 Expert Report of Dr. Ross at paragraphs 14-16.

135 The Commissioner submits that the capacity to lower prices shows that prices were supra-competitive to begin with. It also shows, according to the Commissioner, Bibby's market power. Dr. Ross gave statistical evidence to show that Bibby lowered its prices in the West in response to import entry. Dr. Ware cast some doubt on Dr. Ross' calculations. In Dr. Ross' model, the variable used to show the impact of imports was in fact, according to Dr. Ware, whether Westburne, the major distributor, was buying from Bibby or importing its supplies. Dr. Ware pointed out two deficiencies with this method: first, while Westburne was on the SDP in Alberta starting in July 1998, Dr. Ross assumed that the Alberta branch was importing throughout 1998; second, according to Dr. Ware, Statistics Canada figures relating to DWV cast iron imports are a more reliable measure of import activity than Westburne's participation in the SDP. Using Statistics Canada's figures, Dr. Ware showed that the movement of Bibby's prices in relation to imports was not statistically significant. [79] The issue was left unresolved.

79 Rebuttal Report of Dr. Ware (27 February 2004) exhibit R-12 at paragraphs 25-28.

136 Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbia and Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontario has exerted downward pressure on the prices in that province. No such movement is noted in Quebec and the Maritimes.

137 It is somewhat puzzling that Bibby offers no evidence to rebut the Commissioner's assertions of high margins. Dr. Ware and counsel for the Respondent certainly have shown the frailties of the Commissioner's position, but the Tribunal notes that no cost calculations are provided in response. It would have been within Bibby's power to present the true profitability of pipe and fittings sales. No such evidence is before us. We are left with Bibby's hefty margins and its significant ability to vary prices across the regions.

(ii) Indirect Approach

Market Share

138 As stated in *Laidlaw* and *Nielsen*, a large market share leads to a *prima facie* conclusion that the firm likely has market power. In order to establish market power, this conclusion must be supported by other findings on issues such as the existence of barriers to entry, the number of other competitors, excess capacity and the state of the market. Where barriers to entry are non-existent, even a very large market share will not support a finding of market power. In the case of cast iron DWV products, it would appear that the following barriers to entry should be considered: sunk costs, cost of entry, incumbent advantage and the Stocking Distributor Program.

139 The Tribunal must also review evidence of actual entry into the market, which would serve to negate the presence of barriers. Entry, of course, must be both effective and viable to be significant. In addition, the Tribunal must consider customer countervailing power and the state of the market.

140 The concentration of the market in Bibby's hands, through the various buy-outs, consolidations and marketing arrangements with American sister companies, has given Bibby an overwhelming share of the market. Evidence shows that Bibby controls between 80 and 90% of the market in cast iron DWV products. Market share can be a significant

indicator of market power, absent evidence of ease of entry for competitors (*Tele-Direct*). What needs to be considered, therefore, is whether the barriers to entry or other factors preclude other competitors from entering the market.

Barriers to Entry

Sunk Costs

141 Sunk costs, that is, costs that cannot be recovered if investment is made to enter the market and that attempt fails, can be a significant barrier to entry. Dr. Ross simply stated in his Expert Report [80] that given the fact that the industry already has excess capacity, establishing a new facility or refitting an existing foundry "could represent risky, sunk investments." He then added, "As sunk costs represent, to a considerable extent, the risk associated with entry into a new market, they are generally recognized to be an important type of barrier to entry." [81] Nothing further was added on the subject. No specific evidence was provided in relation to sunk costs. The Commissioner has consistently maintained in argument that to compete with Bibby would require significant investment in order to deliver a full line of products. The Commissioner has not explained why only larger full line suppliers could compete with Bibby, when the evidence clearly shows that successful entry was achieved by suppliers who did not carry full lines of products (New Centurion, Sierra, Ideal, Vandem).

80 Expert Report of Dr. Ross at paragraph 68.

81 *Ibid* at paragraph 68.

Cost of Entry

142 The cost for entering the market involves either refitting an existing foundry, or buying imported products. *[CONFIDENTIAL]* Mr. Vanderwater admitted in cross-examination that Vandem was the first new entrant in Canada in over thirty years in the manufacturing of cast iron pipe and fittings. It remains to be seen whether this entry will remain viable in the long term.

143 No figures were given for the cost of starting an importing business, save the cost of the CSA accreditation, which would be about $50,000. Obtaining the registration was a relatively easy process, although Mr. Marc Bouthillette from BMI thought the process had been rather slow, intimating that this might have been due to Bibby's representatives on the Board of the CSA, opposing the registration. [82] Nevertheless, the Tribunal heard evidence that a number of Asian foundries had obtained CSA approval without difficulty (Sino-Canwest Trading; [83] Sierra Distributors [84]). Costs of purchasing are probably recoverable, and the evidence from at least two importers, namely New Centurion and Sierra Distributors, was that no special equipment or facilities was necessary for this type of business. The viability of the current importers did not seem threatened; moreover, it appears that imports, according to Statistics Canada figures supplied by Dr. Ware, and not contested by the Commissioner, have steadily increased from 1992 to 2002.

82 Transcript at 12:2512, 16 March 2004.

83 Transcript at 6:1238, 8 March 2004 JB Vol. 7, Tab 308.

84 JB Vol. 14 Tab 718, Transcript at 6:1241, 8 March 2004.

Incumbent Advantage

144 Bibby is a well-known and well-established manufacturer. A new entrant would probably have difficulty competing with the quality and quantity of products Bibby is able to offer. The various distributors testified to the fact that Bibby

offered the full product line and that the quality of its products was certain, definitely factors in choosing a supplier. No other supplier has a strong national presence.

Stocking Distributor Program

145 As was pointed out in *NutraSweet*, the analysis in an abuse of dominant position case raises the question of how to determine control from the evidence when this same evidence includes the alleged anti-competitive acts and their effects:

> The structure of the section does, however, raise a question regarding how far it is necessary to go into the evidence on control since it may include an examination of the alleged anti-competitive acts and their effects. If all of the evidence is taken up here then the three principal elements in paras. (a), (b) and (c) of s-s. 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required. [85]

85 *NutraSweet* at 29.

146 The question arises here since the SDP is considered both as a barrier to entry to show market control and as the impugned practice which allegedly leads to an abuse of the dominant position. In its Guidelines, the Bureau specifically states that it may consider as a barrier to entry "the conduct allegedly engaged in by the dominant firm" (paragraph 3.2.1(d)). Thus, although the reasoning may appear circular, there is precedent for considering the impugned conduct as a barrier to entry.

147 Both Mr. Demeny and Mr. Vanderwater testified that Vandem has had difficulty expanding because a number of large distributors feel locked into the SDP program. Part of Bibby's strategy was certainly to use the SDP to ensure distributor loyalty, as shown by internal company memos as well as Mr. Leonard's testimony. Vandem and various suppliers testified to the fact that the SDP prevents distributors from considering other options for their stocking arrangements.

148 The witnesses from Vandem argued that the SDP was a barrier to entry. As conceded by Mr. Demeny in cross examination, [86] no evidence was presented of Vandem's business plans, financial forecasts, or sales projections. There appears to be no business strategy in terms of deploying a sales force. Yet even so, Vandem managed within four years to capture *[CONFIDENTIAL]* percent of sales in Canada. *[CONFIDENTIAL]* Given the caution with which the Tribunal views their testimony (for reasons discussed below) and given the absence of financial data *[CONFIDENTIAL]*, the Tribunal cannot conclude that for Vandem, the SDP was a barrier to entry. Entry was effective, as shown by the competitive prices in Ontario which followed Vandem's entry. It appeared viable, since Vandem captured *[CONFIDENTIAL]* percent of the market. The Tribunal is not in a position to make a more definitive finding on Vandem's viability, because the Commissioner has chosen not to provide further evidence on Vandem's financial situation. We cannot therefore conclude that Vandem is not a viable entrant.

86 Transcript at 5:1053-1060, 5 March 2004.

149 The Tribunal did not hear further evidence of the SDP as a barrier to entry. Some of Bibby's competitors spoke of the impact of the SDP on their operations (BMI, Fernco, New Centurion, Sierra). We will have occasion to consider this evidence when we deal with the SDP as an anti-competitive practice. From the evidence, the Tribunal is satisfied that the SDP has had an impact in the marketplace, but there is no direct evidence that would support the conclusion that it is a barrier to entry. We do have evidence of entry after the implementation of the SDP, as we shall see in the following section.

Actual Entry

150 The Commissioner's argument, that barriers to entry exist, is weakened by the presence of new entrants in the market. There have been new entrants since 1998, and as Dr. Ware writes in his report, these entries have taken various forms - whether manufacturing (Vandem), importing for distribution (Sierra and Wolseley) or importing directly for contracted work (Mr. Kelly). These new entrants provide a powerful counter-argument to Dr. Ross' contention that barriers to entry are preventing new entry. The fact that the new entrants have not been able to gain a larger share of the market is probably due to various factors, and it is rather misleading to conflate all geographic markets on this issue. The evidence shows that there is competition in British Columbia, with a resulting drop in prices. The evidence also shows that Bibby's share of the market in that province is decreasing, to the benefit of new competitors. In 1999, Bibby held 93 percent of the market, Sierra 1 percent; by August 2002, these figures are respectively at 82 percent and 7 percent. Vandem maintains a 5 percent of the market in Quebec from 1999 to August 2002, and approximately 6 percent for the same period in Ontario.

151 It is difficult to assess the significance of these new entries in the context of determining whether or not barriers to entry exist. In *Tele-Direct*, the Tribunal concluded that the entry of local directories was not significant because it had had no impact on prices. Tele-Direct had not reacted to these new entries, which showed that it did not perceive them as competitors. Tele-Direct had reacted to the entry of broadly-scoped directories, but the Tribunal declined to conclude from isolated entry that barriers had been shown not to exist.

152 Entry must be shown to be both effective and viable. In this instance, entry by various players, especially in the West and to a lesser extent in Ontario, has certainly had an effect on prices. From Bibby's reaction to these new entrants, it can be said that they are perceived as competitors. Thus entry has been effective where it has occurred. Its viability remains to be determined.

153 In Ontario, Vandem has been able to build itself a market since 1998. Its sales, according to the testimony of Mr. Demeny at the hearing, are in the range of *[CONFIDENTIAL]* dollars. Vandem has had some difficulty marketing itself to distributors that are on Bibby's SDP, but there are others who have been happy to give Vandem their business. One example was McKeough Supply Inc., which had ceased buying Bibby products in 1998. According to Mr. Elliott, President of McKeough, the firm had chosen not to become a stocking distributor because of the minimum purchase requirement of 40,000 pounds. Since then, they have become distributors for Vandem products, and their cast iron business had increased a great deal. Mr. Elliott admitted in cross-examination that the firm would have no trouble today meeting the 40,000-pound requirement, but he remains with Vandem. Vandem is also a preferred supplier of Canaplus, one of two major buying groups in Canada. Bibby does not appear as a preferred supplier on Canaplus' website. [87]

87 JB Vol. 25, tab 1228.

154 Mr. Kelm, owner of Sierra Distributors, testified that the SDP had prevented him from selling to distributors. However, he has been able to build Sierra's business by selling to contractors. At first, contractors were reluctant because Sierra could not supply all three products. However, it can now supply pipe, fittings and couplings. In the last few years, Mr. Kelm could have expanded his business but has chosen not to. He has been able to build a business of some $800,000 in sales without major capital investments. He rents a truck to unload the pipe and fittings from China that arrive by boat. He rents a yard to store the equipment before delivery to the contractors. Mr. Kelm has built up his sales of cast iron DWV products since 1998, the year the SDP was first implemented.

155 Another competitor for Bibby's business is New Centurion. Mr. Jit Hiang Lim, its President, testified that his company had started importing cast iron pipe and fittings in 1982, and was supplying Westburne until 1999. When Westburne decided to be supplied by Bibby, New Centurion suffered a deep loss. Nevertheless, since 2002, New Centurion is again supplying Westburne, which has been bought by Wolseley. The SDP did not prevent New Centurion from successfully competing for Wolseley's business.

156 There is therefore significant evidence that it is possible to enter the market successfully. However, we note that entry is limited as shown by Bibby maintaining a considerable market share.

Other Factors

Countervailing Power

157 Another factor to consider, in assessing the presence of market power, is whether customers (here, the distributors) have countervailing power. In the absence of competition, countervailing power is difficult to exercise, as the *NutraSweet* case illustrates: despite the tremendous economic power of both the Coca-Cola and Pepsi Corporations, because there were no alternate viable source of aspartame, NutraSweet could set the price. The Respondent argues that its customers do have countervailing power, and cites as examples Emco and Wolseley, which managed to get rebates even after obtaining cast iron DWV products from other suppliers while on the SDP.

158 It seems that distributors and contractors do have leverage, or at least are offered better bargains, in the face of competition. Mr. Kelm, from Sierra Distributors, gave evidence that contractors will attempt to get a better price from Bibby by presenting Sierra's list prices. Special deals were offered to Ontario distributors when Vandem appeared on the market, according to Mr. Elliot of McKeough Supply. The Octo Group in Quebec, did appear to have some bargaining power in their dealings with Bibby, to the extent that the group managed to negotiate an agreement that not all members of the group had to be part of the SDP program for SDP members to earn their rebates.

159 However, this countervailing power is weak. Despite the fact that large distributors profess to prefer a volume-based rebate, as opposed to a loyalty program, Bibby has maintained the SDP since 1998.

State of the Market

160 Witnesses on both sides agreed that the market for cast iron DWV products was a mature market, i.e. a market with little real growth potential. Even the complainant, Mr. Demeny, acknowledged this fact. [88] Such a market gives an advantage to the firm or firms already entrenched, as new investors will be reluctant to invest in a market with limited prospects. In this case, the Tribunal accepts that we are dealing with a mature market and that this constitutes a factor which may discourage more active entry.

88 Transcript at 6:1176, 8 March 2004; Transcript at 6:1289, 8 March 2004.

(d) The Tribunal's Conclusion on Market Power

161 The Tribunal is of the view that Bibby can and does exercise market control in the three product markets and the six geographic regions. The evidence provided by the direct approach was incomplete, since the high margins dealt only with two of the three products. For those two products, the Tribunal finds that Bibby is pricing above marginal cost. For all three products, Bibby's ability to lower prices indicates supra-competitive pricing. With regards to the indirect approach, the Tribunal finds that on balance the evidence indicates that Bibby has market power. The evidence on barriers to entry is not entirely conclusive. However, Bibby's large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that Bibby does control a substantial part of the cast iron DWV products market.

162 In the following two sections, the Tribunal will consider and determine whether there exists a practice of anti-competitive acts, and whether it has substantially lessened or prevented competition.

B. Paragraph 79(1)(b)-A Practice of Anti-Competitive Acts

(1) Commissioner's Submissions on a Practice of Anti-Competitive Acts

163 The Commissioner submits that the SDP is a practice of anti-competitive acts, implemented in order to eliminate and to restrict competition. According to the Commissioner, Bibby has locked in the vast majority of distributors of cast iron DWV products in the SDP. Once they are part of the program, it becomes so costly to withdraw from it that Bibby's competitors are unable to entice distributors to deal with them. It is the Commissioner's submission that because of Bibby's significant advantage as the entrenched firm with a very large market share, the SDP, by forcing distributors to buy all or nothing from Bibby, is an anti-competitive practice because distributors will not be willing to risk their source of supply and try the competitors' products. Bibby is the only supplier to carry a full product line, and therefore the only single firm able to answer all the distributor's needs. The purpose of the program is clearly, according to the Commissioner, to eliminate competition. The nature of the program is inherently anti-competitive, since it forecloses the possibility of entry.

164 Moreover, Bibby's acquisition strategy and the use of restrictive covenants form an integral part of its plan to eliminate competition. The Commissioner argues that Bibby acquires rival firms (or their inventory) in order to eliminate competition, and that the SDP then serves to further entrench its market power by forcing distributors to carry only its DWV cast iron products.

(2) The Respondent's Submissions on a Practice of Anti-Competitive Acts

165 The Respondent states that the acquisitions of Bibby and Cremco, which go back to 1997 and 1998 respectively, are statute-barred under the limitation provision found in subsection 79(6) of the Act, which states that no application under the abuse of dominance provisions may be made more than three years after the practice has ceased. Moreover, the acquisitions were discrete acts, based on sound business reasoning, and not part of a "practice." They were reviewed by the Bureau, who did not at the time question these mergers. The third acquisition, purchasing of BMI's inventory, was also done in 1998. Since that time, Bibby has not sought to acquire any competitor nor any new entrant.

166 The two agreements covering the acquisition of Bibby and Cremco included restrictive covenants, which the Respondent argues are standard business practice. The Respondent submits that they did not prevent Mr. Gooding, the former owner of Bibby, from building a foundry in China. Those restrictive covenants did not prevent the first new entrant in cast iron pipe and fittings manufacturing in over thirty years from entering the market. The two founding members of this new company, Vandem, were former executive officers of Bibby. One of those covenants expired in April 2004; the other will expire in June 2005. Finally, the agreement to buy BMI's inventory contained no restrictive covenant.

167 The SDP, according to the Respondent, cannot be considered anti-competitive. As a matter of fact, argues the Respondent, it is pro-competitive: it helps cast iron compete against other materials by encouraging wholesalers to stock it, and it encourages competition between wholesalers, by creating a more level playing field between small and large distributors, who are all entitled to exactly the same rebates, rather than the usual volume-based rebates. In doing so, the SDP is in fact carrying out one of the objects of the Act, which is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy."

168 The Respondent submits that the SDP is not a contract and does not lock in distributors. Distributors choose to remain in it because it offers them an economic advantage; if it did not, they would choose to exit, as Wolseley, a major distributor, has chosen to do. The program is based on rewards, not penalties. There are no liquidated damages and no long term commitment. Every January 1st, the distributor is free to choose other suppliers, without losing any of the previous year's advantages and rebates. Even switching suppliers during the calendar year brings minimum penalties. The distributor will lose his yearly rebate, and if within a quarter, the rebate for that quarter. By far the most important cost consideration is the multiplier, which is not lost when one withdraws from the program for purchases already made. For future purchases, presumably, the distributor has found a better deal elsewhere.

169 The Respondent argues that the program is not exclusive. Distributors are free to deal with other suppliers for DWV products made from materials other than cast iron. In addition, a distributor can always buy products from Bibby

without being a stocking distributor; the incentive to remain on the program is the lower price, but there is no threat of losing supply. Contrary to the Commissioner's assertions, argues the Respondent, the SDP has not prevented entry nor competition. Imports have increased since its implementation in 1998, the number of importers has increased, a new manufacturer has captured 10 percent of sales in Canada.

170 The Respondent further contends that there are valid business justifications for the SDP. Its purpose is to protect Bibby's investment in all product lines, by promoting cast iron to the wholesalers. The lower prices and rebates are advantageous to them, and help Bibby move its entire production. By increasing the sales of all cast iron products, Bibby can realize better efficiencies and lower its cost of production allowing it to continue to offer a full product line. Finally, the program prevents free-riding by competitors. Bibby alone promotes the use of cast iron over other materials, through lobbying efforts and research funding.

(3) Tribunal's Analysis of a Practice of Anti-Competitive Acts

(a) The Law

171 The term practice entails, as the Bureau explains in the Guidelines, more than an isolated act but may be one occurrence that is sustained and systemic, or that has had a lasting impact on competition. The more difficult task is defining an "anti-competitive act". Examples of anti-competitive acts are given in Section 78, but the Tribunal has stated in all abuse of dominance cases that this list is not exhaustive. In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market.[89] In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors.

89 *Nielsen* at. 257; *Laidlaw* at 333; *NutraSweet* at 34.

172 The Tribunal found a practice of anti-competitive acts in each of the cases mentioned above. In the section below, we review how the Tribunal has defined anti-competitive acts.

173 In *Nielsen*, the firm had contracts with all major grocery retailers and several drug retailers, including the largest, giving it exclusive access to their scanner data (provided by electronic scanning of the bar-code label at the check-out counter). The exclusivity provision in the contract stated essentially that the retailer undertook not to provide the data to anyone else. Nielsen paid the retailers for these data; some contracts provided that if the data were supplied to another company, Nielsen would pay less, and the retailer would be required to reimburse Nielsen for previous payments. The standard term of these contracts was five years. The Tribunal found that "[t]he unquestionable effect of the standard exclusivity provisions is to exclude all potential competitors from obtaining the retailer scanner data,"[90] and added that Nielsen could be presumed to have intended this effect. The Tribunal noted that the staggering of the contract renewals confirmed the intent to exclude potential competitors.

90 *Nielsen* at 259.

174 One obvious effect of the exclusivity provisions was to give Nielsen the ability to set the price at which a would-be entrant could obtain the data. The Tribunal found no efficiency rationale to justify the exclusivity clauses. They did not serve to improve scanner penetration or data quality, i.e. they did not create benefits that other firms would be able to appropriate. Nor did the exclusivity provide an advantage to retailers. Exclusivity simply made the data more valuable to Nielsen. There was evidence of a strategy to "lock-up" business in the face of potential entry, by obtaining long-term agreements (3 to 5 years) with customers. The Tribunal ruled that self-interest was not a valid business justification.

175 In *NutraSweet*, the Tribunal considered the contract between NutraSweet and its customers as a whole. There were a number of clauses in the contract which taken together had an exclusionary effect. The Tribunal refused, however, to consider each clause as an anti-competitive act.

176 In Canada, NutraSweet held the patent on aspartame until 1987. Thereafter, it negotiated exclusive supply and use agreements with its customers. One of the main components of its contracts was a "branded ingredient strategy," i.e. the very significant rebate it paid to its customers for displaying the NutraSweet logo and promoting NutraSweet aspartame in advertisements for their products containing aspartame. The rebate amounted to 40 percent of the price for NutraSweet brand aspartame. The contracts also featured a meet-and-release clause, whereby NutraSweet promised to match the price offered by any other competitor, or else the customer was free to buy from the competitor, and a most-favoured-nation clause, which guaranteed to certain customers that they were paying the lowest price available to any customer of NutraSweet.

177 The Tribunal held that it was the constellation of these clauses that exhibited an exclusionary purpose. The Tribunal saw little purpose in determining if each clause constituted an anti-competitive act. In finding that the contracts did have an exclusionary effect, the Tribunal stated that it was virtually impossible for a competitor to enter the market because of the many factors tying the buyers to NutraSweet. From a situation of monopoly created by the patent rights, NutraSweet had moved to a position of significant market share (95 percent) which it maintained through the exclusive use and supply clauses, the logo display and advertising allowances and the general reluctance of soft drink makers (by far the most important buyer of aspartame) to move away from NutraSweet if other soft-drink producers kept the logo on their labels.

178 In *Tele-Direct*, the Tribunal emphasized the difficulty that may arise when distinguishing competitive and anti-competitive behaviour. The distinguishing feature drawn from the examples given in section 78 is "purpose," in a broad sense:

> Competition, even "tough" competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.
>
> The Tribunal established in NutraSweet that the list of anti-competitive acts set out in section 78 is not exhaustive. The Tribunal held that the common feature of the acts included in section 78 is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary." The Tribunal's approach to assessing whether acts are anti-competitive was set out most recently in Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd:
>
>> ... in evaluating whether allegedly anti-competitive acts fall within s. 78, the tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market" ... The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition ... The decision in Laidlaw makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions ...(D & B, at 257). The Tribunal must determine the "purpose" of the act that is alleged to be anti-competitive. "*Purpose*" *is used in this context in a broader sense than merely subjective intent on the part of the respondent. As counsel for the Director pointed out, it might be more apt to speak of the overall character of the act in question*. [91]
>>
>> 91 *Tele-Direct*, at 179-180, quoting *NutrSweet* at 34 and *Nielson* at 222-223.
>>
>> [Our emphasis]

179 The Tribunal then reviewed a series of acts alleged by the Director to be anti-competitive, and assessed these acts for their effects on competitors in order to determine if they were truly anti-competitive. In assessing the acts, i.e., in determining if the act is, on balance, "exclusionary, predatory or disciplinary," relevant factors will include "evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence." In turn, the business justification is defined:

> A "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue. Further, the business justification must be weighed "in light of any anti- competitive effects to establish the overriding purpose", of the challenged act:
>
> > The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive. [92]
> >
> > 92 *Tele-Direct* at 180, quoting *Laidlaw* at 265.

180 In *Tele-Direct*, the Director alleged that one of the anti-competitive acts was Tele-Direct's refusal to include the independent directories for the purpose of obtaining a Tele-Direct commissionable account. If an agency placed advertising in an independent directory, that did not help them to qualify for the commissionable account; thus, the Director argued, agencies were discouraged from placing advertising in the independent directories.

181 The Tribunal rejected that contention, first because it did not believe the agencies would not act in the client's best interest rather than in their own narrow interest. Secondly, because the Tele-Direct directory is so widespread, it would almost always be the first recommendation of the agency, followed by an independent directory, if money was available. In other words, the act was not anti-competitive because it did not bring about the change of behaviour that was imputed to it.

182 The Tribunal also did not find that targeting entrants in response to competition was in itself an anti-competitive act. The Tribunal first considered whether the actions of Tele-Direct, in reacting forcefully to perceived competition, were helpful or harmful for the consumer (in this case, the advertisers). It came to the conclusion that the response to entry had clearly been to the advantage of the advertisers, by increasing quality and decreasing price. The question then became whether future entry would be precluded, so that the potential negative effect would outweigh the immediate benefits of competition. However, the Tribunal noted that the Director had provided no objective criteria to help it determine whether the conduct was beneficial or harmful. It was impossible to predict what the long term effects would be. The Tribunal thus summed up the difficulty:

> ... In effect, because of the absence of any criteria, the Tribunal is being asked by the Director to place itself in the shoes of a potential entrant with a view to assessing the credibility of the alleged "threat" being issued by Tele-Direct by its responses to entry. The Tribunal must determine whether the response in the initial markets in which entry occurred was so "overwhelmingly intense" that an entrant would be intimidated and future entry or expansion deterred. What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising). [93]
>
> 93 *Tele-Direct* at 200.

183 Given the difficulty of circumscribing the term "targeting" so as to not discourage desirable competitive behaviour, the Tribunal concluded that it could not find that Tele-Direct's response to entry, i.e. dropping prices and improving quality amounted to anti-competitive acts.

184 Another series of anti-competitive acts were alleged in regard to the way Tele-Direct refused to deal with consultants. The consultants' business in this context was to give advice to advertisers and help them reduce their Yellow Pages advertising costs, by reducing size, colour, etc. Obviously, their interest ran counter to that of Tele-Direct. The business justification of efficiency may not be entirely convincing; nevertheless, the underlying business justification of not helping the person who seeks to decrease one's sales is understandable and, was according to the Tribunal, acceptable. Thus, refusing to deal with the consultants was not an anti-competitive act. However, effectively precluding the advertisers from seeking advice of the consultant, by discriminating against advertisers who had done so, was an anti-competitive act. In that situation, there can be no business justification, because the negative impact on customers outweighed any advantage of business efficiency argued by Tele-Direct. Any statement or action to discourage advertisers from dealing with consultants was an anti-competitive act, because it led to an unsatisfactory result for the consumer, who was actively discouraged from exercising his freedom to choose the suitable level of service.

185 In *Laidlaw*, the Tribunal found that the cumulative effect of Laidlaw's acquisitions, the terms of its contracts and its aggressive use of threatened litigation amounted to anti-competitive acts. Customers were tied to long term contracts, and threatened with lawsuits if they wished to terminate the contract. The contract provided for automatic price increases. Laidlaw's pattern of acquisitions had effectively done away with any meaningful competition in certain regions of British Columbia.

186 The acquisitions were clearly made with the intent of setting up a monopolistic position and eliminating competitors. The Tribunal came to this conclusion by considering the frequency, timing and result of the acquisitions. In one region, the only two competitors were acquired within one day; in another region, the only three competitors were acquired within a period of five months. Laidlaw argued that the acquisitions were designed to achieve growth, a legitimate business purpose. The Tribunal found this explanation unconvincing, since it was clear that Laidlaw sought to be the only participant in the relevant markets.

187 The contracts Laidlaw concluded with its customers contained a number of clauses designed to lock in the client: a three-year term, an automatic roll-over provision, the inability to cancel the contract within two months of the end of the term, the significant liquidated damages and the exclusivity provision. Those terms effectively prevented a customer from accepting an offer from a competitor, unless the customer was careful to make arrangements prior to the final 60 days of the term. Entry was thus clearly difficult for would-be competitors.

188 From the case law, the following criteria emerge to help define anti-competitive acts: the Tribunal found binding contracts with heavy opt-out penalties (*Nielsen, Laidlaw)* to be anti-competitive, since would-be entrants were precluded from competing for locked-in customers; exclusivity clauses in such a setting were found to be an additional barrier to competition (*Nielsen*), which offered no economic advantage. A systematic acquisition policy (*Laidlaw*) to do away with all competitors, combined with an attempt to buy out other reluctant competitors was found to be anti-competitive; self-interest was not a sufficient business justification.

189 Aggressive pricing policies or making competitors less attractive for the customers were not found in *Tele-Direct* to be anti-competitive acts. Indeed, in that case, the Tribunal found that in the absence of criteria defining what made a practice anti-competitive, firms wanting to compete lawfully could be confused. What did lead to findings of anti-competitive acts in that case were actions that in the end harmed customers, by depriving them of a true choice, or harmed competitors because Tele-Direct was powerful enough to step in between competitors and suppliers. In other words, direct interference in business relationships, whether between competitors and customers or between competitors and suppliers were anti-competitive acts.

190 Clauses which encouraged customer loyalty were found to have an exclusionary effect in the context of a comprehensive contract that included exclusive supply and use provisions, as well as other provisions designed expressly to preclude competition, such as a meet-and-release clause (*NutraSweet*).

191 In contrast, the Tribunal has found that measures designed to enhance the competitive status of the firm such as an aggressive lowering of prices (*Tele-Direct*) are not anti-competitive acts. The Tribunal has stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if a practice does not appear to have an exclusionary effect or cause detriment to the consumer, it cannot be said to be anti-competitive. In the absence of objective criteria, defining anti-competitive behaviour too broadly would cause a chilling effect counter to the objectives of the Act.

(b) Alleged Anti-Competitive Acts

192 In the instant case, the Commissioner has alleged three practices of anti-competitive acts: the acquisitions, the restrictive covenants contained in the agreements related to these acquisitions, and the SDP.

(i) Acquisitions

193 In the instant case, Canada Pipe bought an important company, Bibby, as well as a number of other foundries, from a single owner, Gooding Investments. Bibby is a manufacturer whose foundries are all in the eastern part of the country. It then bought a rival, Cremco, an importing company operating mainly in the West. It also bought the inventory of a third company, BMI, a supplier of various plumbing products, whose owner was willing to sell its cast iron DWV inventory consisting of fittings. This last agreement contained no restrictive covenant; the first two did.

194 Since 1998, there have been no further acquisitions, yet new players have entered the market, and others have increased their sales. Bibby competes by lowering its prices and ensuring customer loyalty; its strategy since 1998 has not been to buy out the competition. The Tribunal is of the view that in such circumstances, and especially in contrast to Laidlaw's actions which were found to be anti-competitive, that Canada Pipe's acquisitions do not fit into a pattern of a "practice of anti-competitive acts."

195 In *Laidlaw*, the pattern of acquisitions was seen as, in itself, an anti-competitive act. The Tribunal stated that, notwithstanding the fact that mergers were covered by other provisions of the Act, there was nothing to preclude a consideration of the acquisitions under section 79, when they were clearly linked to an abuse of dominant position.

196 In the case at bar, the acquisitions occurred more than three years before the Commissioner applied for an order under section 79. It would seem, therefore, that the limitation provided in subsection 79(6) applies. Moreover, the acquisitions can be seen as a rational move in a market that, as both parties admit, is a harvest market in a mature industry. Witnesses from both sides confirmed that consolidation of foundries has been occurring steadily over the last twenty to thirty years; the trend is present in both the United States and Canada.

197 In *Laidlaw*, the Tribunal stated that acquisitions were not anti-competitive *per se*. There might exist business justifications for a company to seek to increase its presence by buying competitors or potential competitors. What made the act anti-competitive in the *Laidlaw* case was the fact that the acquisitions were clearly designed to create a monopolistic market. Laidlaw systematically bought out the competition in two regions, and attempted to buy emerging competitors.

(ii) Restrictive Covenants

198 The Commissioner alleges that the restrictive covenants are anti-competitive acts. By definition, restrictive covenants are meant to restrain trade. However, it is hard to regard them as a practice of anti-competitive acts. They are a normal part of business, and any agreement to sell a business usually contains a similar clause. Common law courts, as was stated in *Laidlaw*, will interfere with such covenants if they are deemed unreasonable. In *Laidlaw*, the restrictive

covenants, which applied to a 300-kilometre zone in an industry where competition is usually in a much closer radius, were found to be unreasonable. Even so, the Tribunal did not go so far as to say that they were anti-competitive, but merely that they were a further indicator of Laidlaw's intent to monopolize the market.

199 The agreement for the acquisition of BMI's cast iron fittings did not include a non-compete clause. Mr. Demeny from Vandem acknowledged that the non-compete clauses for the acquisition of the foundries constituted a reasonable measure for Canada Pipe to take to ensure that Mr. Gooding, after selling his business to Canada Pipe, did not reenter the market.[94] These clauses did not prevent Mr. Gooding from opening a foundry in China. Moreover, from Mr. Leonard's evidence, Bibby displayed good will in assisting the Crowe foundry when Vandem needed advice on how to set up a spinning machine to produce cast iron pipe. Finally, two of Bibby's former executive officers, Mr. Vanderwater and Mr. Demeny, are the founding officers and directors of Vandem. It is apparent on the evidence that Bibby did not make an issue of the fact that two of its former officers are now operating its direct competitor. In the end, the Commissioner has not shown, in the circumstances, that the restrictive covenants are unreasonable.

94 Transcript at 6:1181-1182, 8 March 2004.

(iii) The Stocking Distributor Program

200 By far the most important part of the Commissioner's case is the allegation that the SDP is a practice of anti-competitive acts. The Tribunal has no difficulty recognizing the SDP as a practice. The program is structured, organized and applied throughout Canada, albeit with some variations in the multiplier and rebates in the different regions. The various components of the program add up to a practice. The more difficult question is whether the SDP is anti-competitive.

201 The Commissioner argues that the program as a whole is anti-competitive, and more particularly, that the requirement for the wholesale distributors who are Bibby's customers to buy all of their cast iron DWV products from Bibby, is anti-competitive. Indeed, in the remedy sought, the Commissioner targets the exclusivity and full-line forcing aspects of Bibby's program.[95] The Commissioner seeks an order which would eliminate the loyalty program based on incentives to buy all three products exclusively from Bibby.

95 Commissioner's Final Submissions, paragraph 347.

202 The Commissioner argues that with its SDP program, the Respondent continues to entrench the market power it established through acquisitions by forcing wholesalers to deal exclusively with Bibby. The Commissioner maintains that this has significantly hampered entry or growth by Bibby's competitors.

203 To study the alleged anti-competitive nature of the SDP, the Tribunal considered four aspects of the issue: the contractual nature and binding effect of the SDP, its business justification, the impact of the SDP on Bibby's competitors and switching costs. Both economic experts agreed that switching costs were the determining factor in deciding whether the SDP was anti-competitive or not.

Contractual Nature of the Program

204 The Respondent argued that the program was not a contract, in that the distributors were free to join or leave at any time, without further consequences. The Commissioner submitted that the SDP agreement was a contract, tying the distributors to Bibby if they wanted to obtain their rebates.

205 There is no doubt that there is something of a contractual character to an agreement where both sides must perform their side of the bargain. There is offer, acceptance and consideration. That being said, the terms of the program are not onerous, as they were for example in *Laidlaw* or *Nielsen*.

206 At the beginning of every calendar year, distributors are free to terminate the arrangement, without any loss. Every quarter, they can review their participation. If they opt out, they will lose the rebate for the year to date. They can reinstate the program the following quarter. The terms are known and transparent, and all arrangements end with the calendar year, unless renewed. Thus, contrary to the situation in *Nielsen*, competitors will know when the distributors might be interested in switching, and contrary to *Laidlaw*, the conditions of exit are easy to manage. Again, there are no penalties or liquidated damages. The decision to remain or leave thus becomes a straight cost-benefit analysis, based on the future interest of the distributor.

207 In the Tribunal's view, the SDP does not pose a significant legal obstacle to changing suppliers. Distributors are attracted to the program because of the discounts and rebates it offers. Since these represent a significant part of the distributors' profits, the distributors naturally weigh their options very carefully before switching suppliers. They are, however, not prevented from doing so by reason of contractual constraints in the SDP.

Business Justification

208 One of the Respondent's main arguments in defence of the SDP is that it in fact encourages competition, by creating a level playing field for small and large distributors. Whereas most programs in the industry offer rebates based on volume of sales, the SDP pays the same percentage for rebates, whatever the size of the purchase (beyond a certain threshold quantity necessary to enter to the program, according to the evidence of Mr. Elliot from McKeough Supplies). The uniform rebate was seen, predictably, as a positive feature by small distributors and as a negative feature by large distributors, who claim that they must now compete against smaller distributors with lower overheads.

209 In support of its argument, the Respondent cites the Act, and especially section 1.1, which in describing the purpose of the Act includes the statement that the purpose is in part "...to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy ...". While the Tribunal acknowledges this to be an enunciated purpose of the Act, the Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance. Competition between distributors is not at issue. Rather, the case is about competition between Bibby and other suppliers of cast iron DWV products. The equitable characteristics of the SDP as it relates to distributors have little to do with whether Bibby is exercising its market power in a way that precludes competition between suppliers of the product. In consequence, this argument of business justification must fail.

210 Another business justification advanced by Bibby is the argument that the SDP allows it to maintain full product lines. There are in Canada other suppliers of pipe, fittings and couplings, but none able to offer, like Bibby, a complete array of products. Bibby argues that to be able to maintain a complete line of products, high volumes are necessary. Higher margins on high volume items allow Bibby to maintain production of less frequently sold items.

211 Mr. Byrne of Crane Supplies testified that Bibby was able to offer full lines of product, an important feature for the distributor, and Bibby has argued that to maintain that capacity, it had to be certain that it would be able to move a considerable volume. "Exotic" pipe and fittings, as Mr. Byrne called them, i.e., the pipe and fittings of unusual sizes used in small quantities, represent a small part of the market, but an essential component of any building. Witnesses agreed that Bibby is an important and reliable supplier that can fill any order for cast iron pipe and fittings. Bibby argues that to maintain this ability, it must generate high-volume sales and that the SDP promotes such volumes.

212 High-volume sales are also important in a business which is volume-driven, as Mr. Leonard, General Manager of Bibby, explained. Bibby argues that it needs the sales to ensure efficiencies and to lower its cost of production; the Commissioner did not challenge this assertion. The rebate structure provided for in the SDP does encourage distributors to deal with Bibby for all three products if they choose Bibby to supply one of them and in consequence Bibby's sales are increased. As was stated in *Laidlaw*, the self-interest justification is not sufficient. However, in this case, the Tribunal accepts, based on Mr. Leonard's evidence, that high volumes allow Bibby to maintain in inventory smaller, less profitable but nevertheless important products. As a result, items that are used less often remain available in the market. This

availability serves the interests of distributors and contractors, whether or not they belong to the SDP, and ultimately benefits the consumer. It is true that if bought outside of the SDP, these items are more expensive, but in any case, they would not have generated the bulk of the rebates or constituted the majority of items to which the multiplier would apply.

Switching Costs

Economic Evidence on Switching Costs

213 The Respondent argues that the SDP cannot be considered to be an exclusive dealing arrangement, since a distributor could still deal with Bibby without participating in the program. Dr. Ross indicated the this was a very rare occurrence, since numbers showed that over 98 percent of Bibby's sales were to its stocking distributors. It is noted that this figure relates to the three top sellers in pipe, fittings and MJ couplings, not to all of Bibby's sales. [96]

96 Expert Report of Dr. Ross at paragraph 96, and Appendix 3 to the Report, p.71.

214 The incentive structure of the program, argues the Commissioner, is one which induces exclusivity. The program rewards loyalty; those distributors who buy cast iron products from other suppliers lose their potential reward. In such a program, both experts agreed, the anti-competitive effect depends on switching costs.

215 In his report, Dr. Ware explains the two models whereby an exclusive dealing arrangement can be anti-competitive:

> ... there are two standard models in which exclusive dealing can be anti-competitive: - the *Aghion Bolton* model (AB) - this works by getting the buyer(s) to commit to an exclusive dealing contract with substantial penalties for a breach. The exercise of this penalty clause in the event that a low cost entrant appears provides a way of "taxing" the entrant to the benefit of the manufacturer. Bibby does not even have contracts with buyers, so they obviously could not have any such breach penalties. The Bureau may argue (in fact they appear to be doing so in 1.3, p. 80) that Bibby's rebates act as exactly this kind of "breach penalty". However, this claim does not bear close examination: at the end of every quarter, there are no "switching costs" in the form of rebates that would be foregone by a distributor in changing to a new supplier. That leaves the annual rebate, which is much too small to play a role like the Aghion-Bolton model, and in any case, at the end of every year, there are no annual rebate "switching costs" either. Thus, the markets for supply of cast iron products to distributors is completely contestable every quarter and certainly every year. Thus, this anti-competitive model of exclusive dealing contracts cannot apply to Bibby's relationships with distributors. (Aghion P. And Bolton P., "Contracts as a Barrier to entry", *American Economic Review* 77(3): 388-401, (1987)).
>
> -*Rasmusen, Ramsey and Wiley* (RRW)- (the "Naked Exclusion" model). In this model the manufacturer exploits a lack of coordination among buyers by getting some buyers to sign an exclusive agreement which effectively forecloses the market to entry by new suppliers. A feature of this model is that buyers are treated asymmetrically, some are under an exclusive contract, and some are not and must pay higher prices at the margin. There is no such asymmetry among Bibby's distributors-in any geographic "market" (say those defined by the Bureau) all distributors are treated the same. Thus this model cannot be applied to the Bibby circumstances. (Rasmusen, E., Ramseyer, J. And Wiley, J., "Naked Exclusion", *American Economic Review* 81: 1137-45(1991). [97]
>
> 97 Expert Report of Dr. Ware at footnote 78 at paragraph 117.

216 Dr. Ross stated that exclusive dealing could be efficient, then stated how exclusive dealing could hurt competition:

> Exclusive dealing is one of those vertical restraints that can represent an efficient arrangement between sellers (often manufacturers) and buyers (typically distributors), or an attempt to restrict competition at some level of the distribution chain. It can be efficient if it helps to protect certain kinds of investments firms make. For example,

> if a manufacturer invests a lot of resources into creating a certain type of product and marketing it extensively to bring people into its retailers' stores, it might worry that the retailers would then switch customers over to a rival manufacturer's copy-cat product that was developed at lower cost (because it was a copy) and not advertised. ... By forcing the retailers to stock the first manufacturer's product exclusively, their ability to switch customers is removed.
>
> Exclusive dealing can also have negative effects on competition. There are at least two principle [sic] mechanisms through which anti-competitive effects can be realized. ...
>
> [The first is collusion but it is not relevant] ...
>
> The [second] mechanism by which exclusive dealing can hurt competition is by disadvantaging or even excluding some competitors. [98]
>
> 98 Expert Report of Dr. Ross at paragraphs 86-88.

217 Dr. Ross goes on to explain [99] how, in his view, the SDP is anti-competitive since it raises a new entrant's costs, because in effect the new entrant must cover the distributor's switching costs, or more exactly, his mixing costs, by making up for the lost rebates:

99 Expert Report of Dr. Ross at paragraphs 89-104.

> The rebate components of Bibby's SDP provide, in fact, a very nice example of how contracts can serve as a barrier to efficient entry in the famous model by Aghion and Bolton [1987]. In their model, in order to leave its current supplier to give business to an entrant, the buyer must pay liquidated damages to the incumbent dominant firm. The required payment can be large enough that even an entrant pricing at a very low (i.e. marginal cost) level will not be able to induce buyers to switch. In the present case, the forgone rebates play the role of the liquidated damages since they are monies "owed" to the buyer by the incumbent which the buyer will forfeit if it buys from the entrant. [100]
>
> 100 Expert Report of Dr. Ross at paragraph 101.

218 According to Dr. Ross, the 100 % loyalty requirement and consequent rebate structure makes partial withdrawal from the program very costly. Dr. Ross is willing to concede that switching on the 1st of January entails no switching costs. Such behaviour, however, is very unlikely, according to him. There is no one single supplier to whom a distributor may turn to replace Bibby. Consequently, the distributor will only replace Bibby partially, losing all the potential rebates and the multiplier he would enjoy by staying with the program.

219 The cost of switching 100 percent of purchases is rather straightforward: nil on January 1st, approximately 4 percent of the cost of supplies bought in a given year if the switch is done at the beginning of a quarter, and an additional 7 percent of the purchases for a quarter or so if the switch is done during that quarter. According to Mr. Byrne from Crane Supplies, losing the rebate for the quarter entails losing only the portion of the yearly rebate related to that quarter, in the event the distributor comes back to the SDP for the remainder of the year. [101] In the Bibby documents describing the program, Bibby states that the year to date rebate will be lost if the distributor leaves the program, but that the program can be reinstated in the following quarter. [102]

101 Transcript at 4:756, 4 March 2004.

102 JB-1-11; JB-11-520; JB-15-803.

220 Both Dr. Ross and Dr. Ware offered calculations of what it would cost for a distributor to switch away from Bibby and use another supplier for its supplies. Dr. Ross concludes that the partial switching cost (he refers to a "mixing cost") is such that unless the customer is prepared to give 2/3 of its business to a competitor who is offering prices at 50 percent of Bibby's non-stocking prices (assuming rebates of 10 percent and a multiplier of .75), it is more economical to remain with Bibby. For a switch of 50 percent of the business to be worthwhile, the entrant would have to offer prices at 66 percent below full prices. Finally, even if the entrant gave the product away, the buyer would have to give the entrant more than a third of his business to make the switch attractive. [103]

103 Expert Report of Dr. Ross at paragraphs 102 and 103.

221 Dr. Ware counters by saying that the actual cost of enticing a client away from Bibby is rather low. At the beginning of every year, the competitor must simply match the multiplier price. At the beginning of each subsequent calendar quarter, the only cost is the annual rebate, currently at 4 percent.

222 The obvious difference is that whereas Dr. Ware bases his calculations on a total switch, Dr. Ross considers partial switching, or "mixing":

> **DR. T. ROSS:** The term "switching cost" in economics refers to the cost of moving your business from one supplier to another. Sometimes this is costs associated with retraining of employees, with penalty clauses and contracts if they exist or whatever. We call those "switching costs." Switching costs certainly do discourage people from switching. Where are the switching costs in the Stocking Distributor Program?
>
> Well, if by switching you're referring to 100 percent switching, that is, moving all of your business from one supplier, Bibby, to another, an entrant, then the switching costs are correctly characterized by Dr. Ware as just the rebates that you would lose by switching.
>
> So if you had accumulated a value of rebates because it's December and you're getting near a quarter and near a calendar year and you're getting ready for your rebate cheque, that would represent a switching cost prior to the end of the year. Fine, we agree on that.
>
> January 1st, though, you just receive your rebate cheques. There is no loss of rebates by moving your business to an entrant.
>
> However, you will have to fall out, drop out of the Stocking Distributor Program, if you move even partially. If you wanted to move only some of your business to an entrant, you have what you might call a switching cost, but I'm happy to re-label, if it's less confusing — I think Dr. Ware suggests a "mixing cost". Mixing your suppliers becomes very expensive.
>
> So if we want to reserve the term "switching" to talking about moving 100 percent of your business, I'm fine with that. And we'll use the term "mixing" for when you're going to switch less than 100 percent of your business.
>
> I agree on January 1st there is no switching cost, so defined, but I would argue that ... there is a mixing cost going forward if you want to mix your business. [104]
>
> 104 Transcript at 17:3511-3512, 25 March 2004.

223 As Dr. Ware notes, [105] the cost of mixing suppliers also arises in the context of volume rebates. When rebates are based on volumes, buyers will be entitled to rebates which will vary according to the volume bought. The percentage of the rebate will change as the buyer reaches certain milestones. If a distributor mixes suppliers, he is less likely to reach

with a given supplier the thresholds necessary to obtain higher rebates. Thus, as a number of witnesses agreed, volume rebates also encourage loyalty. [106]

105 Rebuttal Report of Dr. Ware (27 February 2004) at footnote 20 on page 18.

106 Transcript at 8:1661, 10 March 2004.

224 Dr. Ross says that it is not feasible for a distributor to leave the program entirely, because supplies will not be found elsewhere for the full three product lines. Since Bibby is the only company to offer the full product lines for all three products, it may be that the distributor who wants to supply the whole of a construction contract will have to buy from Bibby, even if he has chosen other suppliers for the majority of his pipe, fittings and couplings requirements. The rule of the industry seems to be that it is relatively easy to find 80 to 90 percent of the most commonly used products from a number of suppliers; the balance are more difficult to find, and Bibby would be the most likely to supply them. That supply would be bought at a higher cost if the distributor was not on the SDP.

225 Yet the distributors' evidence shows that it is possible for suppliers and contractors to be supplied outside the SDP for the majority of their supplies, with reliance on Bibby if necessary for items that are more difficult to find. From the economic evidence on switching costs, the Tribunal concludes that the Commissioner has failed to establish that switching costs would be a sufficient deterrent to prevent distributors from changing suppliers. The switching costs for changing suppliers entirely are negligible. This is acknowledged by both experts. The mixing cost hypothesis proposed by Dr. Ross is not convincing. Distributors say they will choose other suppliers if they are offered a better bargain, the benefits of which outweigh the mixing costs. It is true that Bibby's products are much more expensive if the distributor is not on the SDP (or does not have access to an alternative source of Bibby products as Wolseley in the Western region buying from its eastern counterpart or Octo members buying from SDP participants). Because of this, it is probable that distributors will move the majority or all of their purchases away from Bibby if they choose to rely on other suppliers. Indeed, this is confirmed by Mr. Lachance and Mr. Mark Thomas Corriveau from Wolseley. [107] As seen earlier, the evidence establishes that there exist other sources of supply for the most commonly used products. In other words, the Tribunal is of the view that mixing costs will not have the deterrent effect suggested by Dr. Ross. Practically, those mixing costs will be marginal and limited to the acquisition of "exotic" items available through Bibby.

107 Transcript at 9:1773, 11 March 2004; Transcript at 10:2014-2015, 12 March 2004.

226 Dr. Ross' argument is that mixing costs prevent "toe-hold entry." Small-scale entry is impossible, according to Dr. Ross, since new entrants cannot hope to gain part of the distributors' business. The Tribunal rejects this argument. Nothing prevents the distributor from seeking out *several other* suppliers, as is the case for Wolseley. Nor does the SDP prevent the new entrant from making arrangements with another supplier to offer a complete line in order to compete with Bibby's program, as Vandem has done with Mission Rubber and Ideal.

Distributors' Evidence on Switching Costs

227 The Tribunal heard evidence from several distributors and buyers about what switching costs meant for them. The three major distributors, Wolseley, Crane and Emco, had different reasons for remaining with Bibby. The two large buying groups, Octo and Canaplus, did not purchase their cast iron DWV products exclusively from Bibby. Certain small distributors were supplied by Bibby, others by Vandem or by importers.

228 Wolseley (formerly Westburne) is a very large distributor of plumbing supplies, and its operations are divided in two main regions: East (Ontario, Quebec and the Atlantic provinces) and West (Prairies, Alberta, British Columbia). In the East, Wolseley is a stocking distributor for Bibby. In the West, it has opted out of the program since April 2002.

The choice was based on a economic calculation: in the West, the price of imports is such that it is more economical for Wolseley to deal in imports.[108]

108 Transcript at 9:1773, 11 March 2004.

229 Mr. Corriveau stated that Wolseley had left the program in the West because of price erosion, i.e., Wolseley's benefit margins were too low. Wolseley has remained on the SDP in the East. When Wolseley bought Nuroc, an Ontario distributor, it forced Nuroc to leave Vandem, because for Nuroc to remain with Vandem would endanger the rebates for all the Ontario region. According to Mr. Lachance, it was an economic calculation, despite his misgivings at having to remain with a single supplier.[109] The Commissioner sought to present this as an example of the coercive nature of the SDP. Yet buying Nuroc was Wolseley's decision, not Bibby's. Once Nuroc entered the Wolseley fold, supplier decisions moved up the chain of command. Wolseley had to consider the economic consequences of breaching its agreement with Bibby. The conclusion might have been the same, with or without the SDP. If the supplier used by Wolseley offered better terms than the supplier used by Nuroc, Wolseley would certainly demand that Nuroc, which it now owned, change suppliers. The economic calculation might have been the same if Bibby offered a volume-rebate scheme.

109 Transcript at 9:1783-84, 11 March 2004.

230 Both Crane and Emco, the other two large distributors in Canada, are part of the SDP program. Speaking on behalf of Emco, Mr. Johnston testified that the decision to stay with the SDP was primarily motivated by the size of the market:

> MR. R. JOHNSTON: Our determination is based on the size of the market. It's a mature market at $34 million, declining 5 percent a year, which primarily is going to plastic-type material.
>
> Given our market share desire of around 20 percent of that, parallel to that, we supply what our customer asks us for and/or what is specified, for us to go out and find another supplier is not warranted.

(...)

> MR. D.J. RENNIE: Right, okay.
>
> So do I take it, sir, that there is no incentive for you to switch?
>
> You see no reason to switch given the existence of the program in the market as you see it today?
>
> MR. R. JOHNSTON: Based on how the size of the market is the prime driver to us.
>
> And what I mean by that, if the market was large enough then it would encourage us to search elsewhere in the world for product based on the returns we would get with added expenses.
>
> So it's a market size driven decision. (...) It's what we call a "harvest market".
>
> MR. D.J. RENNIE: A harvest market, and by that you mean what?
>
> MR. R. JOHNSTON: That material — there is less of that material being consumed going forward and it's going — at some point, will be a crossover into plastic.[110]
>
> 110 Transcript at 7:1370-71, 9 March 2004.

231 Mr. Johnston is saying that switching suppliers would not be justified given the state and size of the market. The reluctance to change suppliers, according to this witness, is not attributable to the SDP *per se*, but rather to the fact that it is not worth putting effort into changing suppliers because of the relatively small and eroding market for cast iron DWV products.

232 Mr. Byrne, testifying from Crane Supplies, stated that his company had weighed a number of factors before deciding not to switch. When specifically asked why Vandem had not been considered as a supplier, he replied that since Vandem simply did not seem to have sufficient inventory, Bibby would have continued to be a major supplier. Given the rebate program, the switch to Vandem was not worth the cost. [111] In such circumstances, the distributor clearly indicated that because of the loyalty program, he would move all of his business, or none. The loyalty program therefore weighs in the economic decision to remain with Bibby. We also learn from Mr. Byrne's evidence that another significant factor in the decision is the mistrust of Vandem as a reliable supplier.

111 Transcript at 4:802-03, 4 March 2004.

233 The Tribunal heard the evidence of Mr. Beaulac, the director general of Octo Group, one of two major buying groups in Canada, the other being Canaplus. Mr. Beaulac testified that not all members of his buying group who purchased cast iron DWV products were supplied by Bibby. Two important facts emerged from Mr. Beaulac's testimony. First, certain members of the buying group had balked at Bibby's insistence that all members of the buying group be part of the SDP in order to benefit from the rebates and discounts. As a result, Bibby's proposal of exclusive supply to Octo was ultimately not implemented. [112] Second, members of the buying group who are not part of the SDP can be supplied by members who do participate in the SDP. This shows some flexibility in the application of the SDP, in that non-participating members can benefit from lower prices than those offered to other distributors who are not part of the SDP and not members of the buying group. [113]

112 Transcript at 8:1668, 10 March 2004.

113 Transcript at 8:1666-67, 10 March 2004.

234 No witness from Canaplus appeared before the Tribunal. However, the Tribunal heard witnesses from two small distributors, both members of Canaplus. Mr. Elliott, from McKeough Supplies, and Mr. Jack Keon, from Niagara Plumbing Supplies. They both indicated that they bought cast iron pipe and fittings from Vandem. As for Canaplus itself, the only indication of its source of cast iron DWV products is the information which appears on its Website [114] which shows what companies are the approved suppliers of Canaplus. According to this information, an approved supplier has to supply at least five members of Canaplus. Under the "Cast Iron Soil Pipe and Fittings" heading, the only name that appears is Vandem Industries Inc.

114 JB Volume 25 Tab 1228.

235 Mr. Elliott from McKeough Supplies testified that his company did not buy cast iron DWV products from Bibby. They had ceased being supplied by Bibby in 1998, because of the requirement to buy at least 40,000 pounds of products. McKeough Supply had started buying from Vandem in the year 2000. It now buys a quantity of cast iron products well above Bibby's minimum requirement.

236 The Tribunal also heard evidence from Mr. Giulio Iaboni, President of Sherwood Plumbing Supplies, a small distributor who is part of the SDP program. According to Mr. Iaboni, the rebates offered make Bibby's program a profitable proposition. The structure of the rebates in the SDP allowed Sherwood Plumbing to compete with major distributors such as Emco or Crane. [115] Mr. Iaboni clearly stated that he kept Bibby as a supplier because its rebate

structure had been very profitable for him. [116] Mr. Iaboni indicated he had not considered Vandem as a supplier because he mistrusted its principals. [117] He would consider switching to imports if the rebate structure were altered to become a volume-based structure, since such a change would remove his ability to compete with the larger distributors. [118]

115 Transcript at 22:4483, 28 May 2004.

116 Transcript at 22:4481-4483, 28 May 2004.

117 Transcript at 22:4487, 28 May 2004.

118 Transcript at 22:4483, 28 May 2004.

237 The Tribunal concludes, on the issue of switching costs, that although the SDP is an attractive program for a distributor, it does not prevent the distributor from considering other options, or from purchasing elsewhere if it is more advantageous to do so. Distributors remain with Bibby for a variety of reasons, and notably because it is a reliable supplier and, in the case of large distributors, because the size of the market does not warrant searching for another supplier. The SDP is a factor in the decision, but both the economic and factual evidence on switching costs fail to establish that its purpose is predatory, exclusionary or disciplinary. It offers an attractive bargain to distributors, but it does not prevent other competitors from offering a better bargain, nor does it prevent distributors from switching to other suppliers. The switching costs were not demonstrated in economic terms to be significant. The Tribunal heard evidence of distributors staying with the program for reasons unrelated to the SDP and of distributors leaving the program without incurring switching costs.

The SDP's Impact on Competitors

Economic Evidence on the SDP's Impact on Competitors

238 The Commissioner argues that Bibby has further entrenched its dominant position by locking the distributors into a program that prevents other competitors from entering the market. Dr. Ross indicated that a loyalty program where loyalty is induced but there is no formal exclusivity, such as the SDP, will inhibit small-scale entry, but cannot stop a competitor from imitating the incumbent; the question therefore becomes whether such entry is possible. [119]

119 Expert Report of Dr. Ross at paragraph 76.

239 Dr. Ross is of the view that the SDP harms competition by deterring entry and by limiting the expansion of other suppliers. Large-scale entry may be difficult, mainly because there may be problems of credibility and reliability for the new entrant and buyers are unwilling to jeopardize their established relationship with the incumbent. Moreover, consumers (those who buy from the wholesale distributors) do not care whether the distributor offers variety or not, since the product is standard, and therefore provide no incentive to distributors to offer a variety of product brands. As well, the SDP discourages small-scale entry, according to Dr. Ross, since distributors will not be willing to split their purchases between Bibby and other new suppliers.

240 The Respondent submits that the SDP cannot be considered a barrier to entry, given that competition has increased since the program was first implemented in 1998. Dr. Ware pointed out that the SDP has not foreclosed access to distribution. It might modify the incentives for existing distributors, but entrants have other avenues: they can sell directly to contractors. They can set up their own distribution facilities, they can encourage distributors who do not sell cast iron DWV products to start selling them. All these avenues have been used successfully, according to Dr. Ware.

241 The Commissioner's arguments about the effect of competitors was based mainly on the mixing-cost issue which we dealt with earlier. As stated above, there was no economic evidence that mixing costs *per se* will prevent small-scale

entry; in fact, they have not. As to large-scale entry, the difficulties posed would seem related, from the evidence, both to the fact that Bibby has enjoyed a near monopoly because of the concentration and consolidation of the industry before the advent of the SDP and to the fact that DWV cast iron products form a mature market where little growth is forecast, thus discouraging major investment.

Competitors' Evidence on the SDP's Impact on Competitors

242 The Tribunal heard the evidence of various competitors who blamed the SDP as an obstacle to their continued expansion. These competitors included Vandem, the complainant and only other manufacturer of cast iron pipe and fittings in Canada, as well as the evidence of importers of MJ couplings and of cast iron pipe and fittings.

243 Mr. Vanderwater and Mr. Demeny from Vandem testified that they met with little success because of the loyalty program. The Tribunal, however, has cause to question the credibility of their testimony.

244 At the outset, the Tribunal notes that the major distributors were unconvinced of Vandem's capacity to service their needs. From the evidence, the Tribunal is of the view that the doubt would have subsisted even if Bibby had had a volume-rebate scheme in place. Further, the evidence provided by Mr. Demeny was severely tested on cross-examination. Mr. Demeny answered in chief that 75 to 90 percent of Vandem's sales were to the U.S. In cross-examination, he had to admit that in fact, over 70 percent of Vandem' s sales were to the Canadian market. [120] As well, the Commissioner provided no financial documents concerning Vandem's business situation - no business plan, no financial statements, no financing documents. We have no sales figures after the year 2000. What is known is that Vandem, in the space of four years, has captured 10 percent of sales in Canada and by 2002 had become profitable. Mr. Vanderwater testified that Vandem needed 15 percent of the market to remain viable, but given the paucity of financial information on Vandem's circumstances, the Tribunal has no way of knowing if whether Vandem is or will be viable. There is also evidence that Vandem's financial difficulties may well be unrelated to the SDP. Mr. Demeny testified that Vandem's sales had been hurt by the increasing value of the Canadian dollar as well as by the increase in the price of scrap metal.

120 Transcript at 6:1162-1169, 8 March 2004, Cross-examination of Mr. Demeny by Counsel for the Respondent.

245 Mr. Bouthillette from BMI products testified that once the SDP program was set up, it became much more difficult for BMI to sell the cast iron fittings it was importing from China to wholesale distributors in Canada. Starting in 1998, BMI was told by the distributors that Bibby's loyalty program would prevent them from buying from BMI in the future, despite the very good prices and the quality of service offered by BMI.

246 Mr. Leonard had apparently left the door open to negotiations should BMI ever decide to sell its inventory of cast iron fittings. In December 1998, [121] BMI sold its inventory to Bibby. No restrictive covenant was attached to the sale. [122] Mr. Leonard jokingly ("*à l'amiable*" is the term used by Mr. Bouthillette) said that he hoped BMI would never sell cast iron fittings again as long as he was on this earth, but no further measure was taken. Mr. Bouthillette explained that BMI had a choice in that it could opt to get out of the cast iron market and concentrate on its other strengths, if that was best for its clientele. [123]

121 JB vol. 7 tab 333.

122 Transcript at 12:2544, 16 March 2004.

123 Transcript at 12:2534, 16 March 2004.

247 In the West, the SDP had a clear impact on New Centurion, an importing company that sourced its products in China. Mr. Lim testified for New Centurion that Westburne, its main client, ceased ordering from New Centurion

because it had agreed to be part of the SDP program throughout the Western region (B.C., Alberta, the Prairies). In 2002, however, Wolseley (which had acquired Westburne) renewed its supply contract with New Centurion.

248 As far as another importer in British Columbia, Sierra Distributors, was concerned, its owner Mr. Kelm testified that the SDP had prevented him from dealing directly with the wholesalers. Instead, Mr. Kelm had found a niche market selling to plumbing contractors. Mr. Kelm reported being told by Mr. Leonard and Mr. Albert from Bibby that he would be allowed to be successful, to a point. He was told that if his enterprise became too considerable, Bibby would drop prices by 30 percent. Sierra Distributors, according to Mr. Kelm, has reached sales of some $800,000 a year. Mr. Kelm stated the company could have expanded, but he was satisfied with its present size. [124]

124 Transcript at 11:2257-2258, 15 March 2004.

249 While examining Mr. Kelm, counsel for the Commissioner led evidence relating to Bibby's competition strategy in regards to Sierra. The evidence concerns pricing and supply capacity. Mr. Kelm was told by Mr. Leonard and Mr. Albert that he should limit his growth, or else Bibby would drop its prices to cause him difficulty. In various exchanges between Bibby officials, reference is made to either dropping of prices or allowing Mr. Kelm to overextend himself, thus encouraging buyers to come back into Bibby fold because Sierra cannot supply them. [125] In other words, the tools Bibby uses to compete with Sierra are Bibby's ability to lower prices and its capacity to supply DWV products. These are related to Bibby's market power, which the Tribunal acknowledges.

125 Transcript at 11:2264-2310, 15 March 2004.

250 Mr. Peter W. Kirkpatrick of Fernco Connectors Ltd. also testified to the difficulties allegedly encountered by his company because of the SDP. Fernco is a manufacturer of flexible couplings, and an importer of MJ couplings. Mr. Kirkpatrick stated that wholesale distributors would not stock his MJ couplings because of the SDP. Were it not for this program, according to him, Fernco would be able to increase its sales by some $100,000 a year. [126]

126 Transcript at 11:2167-2168, 15 March 2004.

251 During the examination-in-chief, Mr. Kirkpatrick was asked whether in fact Fernco had the ability to supply the wholesale distributors. His answer was as follows:

> MR. G.M. LAW: Does Fernco have the capacity to sell to these larger wholesalers?
>
> MR. P.W. KIRKPATRICK: I would say, yes, we do but we would have to come to a more amicable arrangement with our current supplier. [127]
>
> 127 Transcript at 11:2168, 15 March 2004.

252 During the cross-examination, Mr. Kirkpatrick admitted that he had the ability to sell to Wolseley, and had in fact sold to Wolseley in the past.

253 Fernco is supplied by Ideal, an American company that attempted to enter the Canadian market through a company called Gates Canada. Mr. Matthew O'Brien, now with Grant Brothers Sales (an automotive company), testified that while working for Gates Canada he had tried to sell Ideal couplings to Canadian wholesalers, with little success, because of the SDP. In cross-examination, Mr. O'Brien stated that he had had no further contact with the DWV industry after August 2002, when he changed jobs. He did not dispute that Vandem was now selling Ideal couplings in Canada.

254 The Tribunal finds that the SDP has had an impact on competitors, as described by Mr. Bouthillette and Mr. Kelm. However, it has not prevented the entry of Vandem, nor the expansion of New Centurion or Sierra. The evidence establishes that Sierra has not expanded further essentially because its owner decided not to further grow the company and not necessarily because of the SDP. [128] Sierra has now expanded its line of products sufficiently to answer the needs of plumbing contractors. Such an option is open to other wholesale distributors, as is the case with New Centurion and Wolseley.

128 Transcript at 11:2257-2258, 15 March 2004.

255 Competing suppliers of MJ couplings have entered the Canadian market since 1998, both in the East and in the West. The SDP has had an impact on certain distributors who expressed no interest in changing suppliers. However, as shown by the evidence, this has not prevented Ideal from becoming the supplier of couplings associated with Vandem's pipe and fittings, nor has it prevented Wolseley from finding satisfactory sources of MJ couplings in the West. On the Canaplus Website, Fernco, Mission Rubber and Preper are listed as preferred suppliers. [129] Bibby does not appear on the list.

129 JB Vol. 25 Tab 1228.

(4) Tribunal's Conclusion on the SDP Being a Practice of Anti-Competitive Acts

256 The evidence in this case falls short of establishing the anti-competitive nature of the SDP. Although the terms of the program, as noted earlier, could be seen as binding on its participants, the SDP bears none of the characteristics that were found offensive in *Nielsen, NutraSweet* or *Laidlaw*. The terms are clear. The full commitment is for only a year. Non-performance by the distributor (buying outside) leads to non-performance by Bibby (rebates are not paid). However, this is not comparable to penalty clauses or liquidated damages that would be additional to non-performance of a contract. Moreover, the main advantage of the program, the multiplier effect, is provided as soon as the distributor enters the program, and is only taken away from the moment the distributor chooses to leave the program. The distributor does not have to reimburse the discount applied at time of purchase through the multiplier. This distinguishes the program significantly from the contracts in other abuse of dominance cases, where non-performance would lead to heavy penalties.

257 Although the rebate structure in the SDP is an inducement to exclusive dealing (see further the analysis under section 77), the Tribunal does not find in this case that the program has an exclusionary effect. In *NutraSweet*, buyers were tied to NutraSweet not only by the rebate inducement, but by the whole structure of the contract, including the exclusivity requirements (using only NutraSweet aspartame in a given line of products) and the meet-and-release clause, which effectively precluded competitors from ever offering a better bargain to the customers of NutraSweet. The same exclusionary purpose and effect cannot be attributed to the SDP.

258 In the instant case, rebates and the multiplier discount are premised on buying cast iron products exclusively from Bibby, but these represent only a financial incentive to adopt the SDP program. In *NutraSweet*, the logo allowance for label display and advertisement, which was worth some 40 percent of the purchase price, added significant complications to switching aspartame brands. Customers could not simply end the contract with NutraSweet. Changes had to be made to labels and promotional campaigns, and manufacturers were reluctant to lose the goodwill that might be associated with the NutraSweet brand. In the present case, there are no similar costs, nor is there an arrangement comparable to the meet-and-release clause. Competitors can offer, and have successfully offered, better bargains to sway buyers away from Bibby.

259 The Respondent's business argument that Bibby needs to sell a certain volume in all three products to be able to maintain full production of all product lines is valid. There are certainly recognizable advantages in having a reliable source able to manufacture and supply a full line of cast iron pipe DWV products for the Canadian market.

260 Further, the switching costs argument has failed to convince the Tribunal that the SDP is anti-competitive. There may be a certain cost linked to leaving the program partially, but the significant mixing costs predicted by Dr. Ross are, in the Tribunal's view, unlikely to be experienced. We agree with Dr. Ross that there could be significant mixing costs if a distributor were to leave the SDP and still continue to be supplied by Bibby for a large portion of its needs. The Tribunal is of the view that this is not likely to happen. The more likely scenario is that a distributor that leaves the program will be supplied elsewhere for its major purchases for which it obtained a better deal and continue to be supplied by Bibby for only the "exotic" components. In such circumstances the mixing costs are not as great. As most distributors explained, the decision boils down to a cost-benefit analysis: whether the distributor will benefit by switching to another supplier. The SDP does not prevent that cost-benefit analysis from being conducted nor from being acted upon if a more competitive supplier is identified. The evidence before the Tribunal shows that this has happened for both small and large suppliers (e.g. in the case of Wolseley and in the case of small suppliers which are part of the Canaplus buying group).

261 The most striking argument against the alleged anti-competitive effect of the SDP is the fact that it has not prevented entry nor competition in certain regions. The SDP has not prevented an increase in imports, nor has it prevented the emergence, for the first time in thirty years, of a new manufacturer of cast iron DWV products. For a practice to be found anti-competitive, it must have a negative effect on competition. As was stated in *Tele-Direct*, there has to be a link between the practice and its alleged anti-competitive effect. In the instant case, the link has not been established to the Tribunal's satisfaction. The Tribunal recognizes that entry may be difficult, but this appears unrelated to the SDP. Several other factors come into play: Bibby is a known manufacturer that offers a complete line of products; the market is not a growth market, thus limiting investment potential. Yet, it has been possible for competitors to match Bibby's prices and offer a reliable supply, to the point of making it an interesting proposition for distributors or contractors to change suppliers. This has occurred, notwithstanding the SDP, as illustrated by new entrants such as Sierra and Vandem, and by new arrangements such as Wolseley's change of suppliers.

262 For all of the above reasons, the Tribunal finds that the Commissioner has failed to establish that the SDP is a practice of anti-competitive acts.

C. Paragraph 79(1)(c)

263 The Tribunal, as stated above, is satisfied that Bibby does exercise market control. This can be traced to a number of factors and specifically to the fact that Bibby is the only Canadian supplier able to supply full product lines. The SDP is certainly an instrument that helps Bibby market its products, but the Tribunal is not satisfied that the SDP has been shown to be a practice of anti-competitive acts. If, however, the Tribunal has erred in this assessment, the Tribunal is also of the view that the SDP has not been shown to be a practice that has substantially lessened or prevented competition, for the reasons that follow.

264 The Tribunal has accepted the Commissioner's submission that there are three distinct product markets, and six geographic markets. Therefore, the Commissioner has the onus of establishing a substantial lessening or prevention of competition in eighteen separate markets. Yet the Commissioner has not established to the Tribunal's satisfaction that the SDP has led to substantial lessening or prevention of competition in any of these markets.

265 In Western Canada and in Ontario, which represent approximately 75 percent of Bibby's market, there is significant evidence of competitive pricing, notwithstanding the SDP. This competitive pricing is due to imports and to the emergence of a new manufacturer. Although imports still represent a relatively small portion of the cast iron DWV markets, they have been steadily increasing and have had a noticeable impact on prices of cast iron DWV products. In addition, a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect. There is clearly effective entry in the market by Vandem, as evidenced by the lowering of prices for cast iron DWV products in Ontario. As discussed earlier, in these reasons, its viability remains to be determined. It is the Tribunal's view, however, that the evidence shows that a number of factors, unrelated to the SDP, will bear on Vandem's future. In consequence, the Tribunal is of the view

that the SDP has not brought about a substantial lessening or prevention of competition for the Ontario and Western markets.

266 The Tribunal acknowledges that for Quebec and the Maritimes, which represent 25 percent of the market, prices appear not to have been constrained by competition. This, however, does not necessarily lead to a conclusion that the SDP has caused the lack of competition. The data provided by the Commissioner relate only to the period of time when the SDP was operating. Dr. Ross based his arguments concerning market power on pricing information covering the period of January 1998 to September 2003.[130] The Tribunal has no historical data which would allow it to measure the state of competition before and after the SDP came into effect. Canada Pipe bought the assets of Canada's only manufacturer of cast iron DWV products, the Gooding foundries, a well-established player with no significant rivals. As well, Bibby has been and continues to be the only producer of a full line of products. The Tribunal therefore finds that there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition.

130 See Expert Report of Dr. Ross at paragraph. 17 and Appendix 3, Section 1; the competitive effects of the SDP are also measured in terms of figures available for the 1998-2003 period see Expert Report of Dr. Ross at paragraphs. 113-116 and Appendix 3, Section 3).

267 Finally, the Tribunal is mandated by the Act to consider whether the impugned practice (the SDP) is a result of superior competitive performance. This point was not argued by the parties. Subsection 79(4) of the Act provides as follows:

> (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.
>
> (4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

268 The Bureau's Guidelines state that "[s]uperior 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. The Guidelines also provide:

> 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. (Enforcement Guidelines on the Abuse of Dominance Provisions, Section 5.3.2. Subsection 79(4) - "Superior competitive performance")

269 In the present case, there is no question that Bibby's Canada-wide distribution network, and certainly its "broader array of product offerings" give it an advantage over its competitors. The Tribunal has already recognized Bibby's ability to maintain a full line of products as a positive factor, which is consistent with "the sort of competitive dynamic" discussed in the Guidelines.

270 On considering the whole of the evidence, the Tribunal finds that there has not been a substantial lessening or prevention of competition attributable to the SDP. The Tribunal concludes that the Commissioner has failed to establish all of the required elements of subsection 79(1).

VI. Subsection 77(2) Analysis

271 In the instant case, the SDP is the main impugned practice under both sections 79 and 77 of the Act. This no doubt explains why the parties have chosen to deal only briefly with section 77 and have devoted the bulk of their submissions to section 79.

272 For an order relating to exclusive dealing to issue pursuant to Section 77, four elements must be established: 1) a reviewable practice which, for the purposes of this case is exclusive dealing, 2) by a major supplier, 3) an exclusionary effect in the market, and 4) the fact or likelihood of substantial lessening of competition.

A. Parties' Submissions on Subsection 77(2) Analysis

273 Both parties deal with section 77 only summarily. The bulk of the submissions were made under section 79. Both parties appear to adopt the position that if their case under section 79 is established, there is no further need to argue section 77.

1. Commissioner's Submissions on Subsection 77(2) Analysis

274 The Commissioner contends that the SDP is a practice that induces distributors to deal exclusively with Bibby for their supplies of DWV cast iron products. The SDP only applies to cast iron products, and thus has no impact on any other type of DWV products. Bibby's position as a major supplier, according to the Commissioner, is established by the fact that Bibby has a market share in excess of 80 percent in all relevant markets, is the only supplier that can supply the full line of the three relevant products, and supplies all major distributors in Canada with the exception of Wolseley in the West. Moreover, the SDP is widespread in the applicable market, since the evidence showed that over 90 percent of Bibby's sales of DWV cast iron products are sold through distributors who are part of the SDP.

275 The Commissioner submits that the test for substantial lessening of competition is the same under section 77 as under section 79, as was stated in *NutraSweet*, and therefore simply refers the Tribunal to her section 79 arguments on lessening and prevention of competition.

2. Respondent's Submissions on Subsection 77(2) Analysis

276 The Respondent argues that exclusive dealing is a reviewable practice, not one that is unlawful *per se*. For this reason, section 77 is structured so that it is insufficient to simply make a finding of exclusive dealing; the other elements are equally important.

277 The Respondent submits that exclusive dealing can be found only if the relevant product market is cast iron DWV products, which the Respondent denies vigorously. The product market is much wider, and thus the SDP cannot be covered by paragraph 77(1)(b); for the same reason, Bibby cannot be considered a major supplier and the SDP is not "widespread" in the market, since the latter is composed of all DWV products.

278 In the alternative, the Respondent argues that even if the relevant product market is cast iron DWV products, the SDP has not been shown to have an exclusionary effect or to result in a substantial lessening of competition.

B. Tribunal's Analysis and Conclusion

279 The Tribunal is of the view that under the definition given at 77(1)(b), the evidence is sufficient to conclude that the SDP is indeed a practice of exclusive dealing. Through the SDP, Bibby induces its customers to refrain from dealing in a specified kind of product except as supplied by Bibby. Distributors on the SDP program are precluded from stocking other cast iron DWV products if they want to obtain their rebates and be entitled to an advantageous multiplier. In addition, there is no difficulty in finding that Bibby is a major supplier, given its large market share.

280 For the Tribunal to make an order prohibiting the exclusive dealing practice, it must find that the practice is likely to impede entry of a firm or introduction of a product or to have some other exclusionary effect, such that competition is or is likely to be lessened substantially.

281 We have concluded under section 79 that the SDP is not an anti-competitive practice because we found insufficient evidence to show that the SDP in itself had an exclusionary effect. In *NutraSweet*, the Tribunal stated that the test for substantially lessening of competition was essentially the same in sections 79 and 77:

> The effect on competition of exclusivity and the related contractual terms,... have been discussed thoroughly in the context of section 79. Since the fundamental test of substantial lessening of competition is the same in both sections of the Act, the same conclusions apply. [131]

131 *NutraSweet* at 56.

282 For the same reasons therefore as in our analysis under section 79, we find that the Commissioner has failed to establish that the exclusive dealing practice impedes or is likely to impede entry of a new competitor or have any other exclusionary effect, and has failed to establish that it has lessened competition substantially. The Tribunal therefore concludes that the Commissioner has not shown under section 77 that the SDP is a practice that has substantially lessened competition.

VII. Conclusion on the Application

283 The purpose of the *Competition Act*, as stated in section 1.1, is to "maintain and encourage competition in Canada." The Tribunal must ensure that its decisions and orders do not have a negative effect on competition. The jurisprudence of this Tribunal clearly establishes that aggressive competition in the marketplace is not *per se* anti-competitive.

284 In the final analysis, the Tribunal found that the purpose of the SDP was not shown to have an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. In weighing the conflicting evidence, and particularly the absence of significant switching costs, the Tribunal applied its expertise and concluded that the SDP is not a practice of anti-competitive acts.

285 In an abuse of dominance case with allegations of exclusive dealing, such as the case at bar, the burden of establishing the various elements under sections 79 and 77 of the Act properly rests with the Commissioner. In the instant case, the Commissioner has failed to discharge her evidentiary burden to show that the SDP has or is likely to substantially lessen or prevent competition. She has also failed to establish to the Tribunal's satisfaction that the Respondent is not competing in the marketplace on merit and is abusing its market power through a practice of anti-competitive acts. As a result, the Commissioner's application under sections 77 and 79 of the Act for an order against Canada Pipe Company Ltd. is dismissed.

VIII. Costs

286 At the hearing, the Respondent indicated that it would wish to make further submissions on costs. If there is no agreement on costs, the parties may address the Tribunal in writing in accordance with the following schedule:

> 1. the Respondent shall serve and file its written submissions on costs, if any, not to exceed ten pages, and a draft bill of costs within 10 days of the date of these reasons;
>
> 2. the Commissioner shall, within 10 days of the filing of the Respondent's draft bill of costs, serve and file her written submissions on costs, if any, also not to exceed ten pages;

3. the Respondent shall serve and file its reply, if any, not to exceed five pages, within five days of the filing of the Commissioner's submissions.

IX. Order

287 The Tribunal orders:

1. The application is dismissed.

2. The decision on costs is reserved. The Respondent shall file its draft bill of costs and the parties shall make submissions on costs, if any, in accordance with paragraph 286 of these reasons.

X. Directions to the Parties

288 In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons, if any, in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Tuesday February 8, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday February 11, 2005.

APPENDIX A

Competition Act, R.S. 1985, c. C-34.

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

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

"exclusive dealing" means

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

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

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

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

. . .

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

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

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

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

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

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

. . .

(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.

. . .

(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.

(2002, c. 16, s. 17.)

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits

77. (1) Les définitions qui suivent s'appliquent au présent article.

« exclusivité »

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client:

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,

(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa *a*)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas.

(...)

(2) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que l'exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d'un produit sur un marché ou très répandues sur un marché, auront vraisemblablement:

a) soit pour effet de faire obstacle à l'entrée ou au développement d'une firme sur un marché;

b) soit pour effet de faire obstacle au lancement d'un produit sur un marché ou à l'expansion des ventes d'un produit sur un marché;

c) soit sur un marché quelque autre effet tendant à exclure,

et qu'en conséquence la concurrence est ou sera vraisemblablement réduite sensiblement, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de pratiquer désormais l'exclusivité ou les ventes liées et prescrire toute autre mesure nécessaire, à son avis, pour supprimer les effets de ces activités sur le marché en question ou pour y rétablir ou y favoriser la concurrence.

79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante:

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de

prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

(...)

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

(...)

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.

(2002, c. 16, s. 17.)

Footnotes

6

2006 CAF 233, 2006 FCA 233
Federal Court of Appeal

Canada (Commissioner of Competition) v. Canada Pipe Co.

2006 CarswellNat 1763, 2006 CarswellNat 4554, 2006 CAF 233, 2006 FCA 233, 268 D.L.R. (4th) 193, 350 N.R. 291, 49 C.P.R. (4th) 241

Commissioner of Competition, Appellant and Canada Pipe Company Ltd./Tuyauteries CanadaLtée, Respondent

A. Desjardins J.A., G. Létourneau J.A., J.D.D. Pelletier J.A.

Heard: February 7-8, 2006
Judgment: June 23, 2006
Docket: A-106-05

Proceedings: reversing *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 2005 Comp. Trib. 3, 40 C.P.R. (4th) 453, 2005 CarswellNat 2348 (Competition Trib.)

Counsel: Mr. Randall Hofley, Ms Leslie Milton, for Appellant
Mr. Kent Thomson, Mr. James Doris, Mr. Charles Tingley, for Respondent

Subject: Corporate and Commercial; Criminal

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Abuse of dominant position

Company was one of few pipe producers in Canada — Company created loyalty rewards program — Commissioner believed that loyalty program was anti-competitive action under Competition Act — Competition Tribunal determined that loyalty program was not anti-competitive — Commissioner appealed — Appeal allowed; new hearing ordered — Issues were questions of law and proper standard was correctness — Test under s. 79(1)(c) of Act is whether relevant markets would be more competitive in past, present or future, but for impugned practice — Whether competition is lessened as contemplated by s. 79(1)(c) is relative and comparative assessment — Tribunal erred in considering test under s. 79(1)(c) of Act, by not applying "but for" test — Tribunal better placed to determine issues of competitiveness — Tribunal erred in stating that impugned act must be shown to decrease competition or cause detriment to consumer in order to be anti-competitive under s. 79(1)(b) of Act — Focus of s. 79(1)(b) is intent to engage in anti-competitive act, and detriment to consumer is not relevant consideration — Tests under ss. 79(1)(b) and 79(1)(c) of Act are distinct and tribunal erred in conflating them — Tribunal applied improper test in determining that loyalty program had valid business objective — Tribunal did not consider whether reason existed for program which was not anti-competitive — Tribunal erred in applying same test to s. 77(2) of Act as s. 79(1)(c).

Table of Authorities

Cases considered by *A. Desjardins J.A.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 2001 FCA 104, 2001 CarswellNat 702, 199 D.L.R. (4th) 130, 269 N.R. 109, [2001] 3 F.C. 185, 2001 CarswellNat 2092, 11 C.P.R. (4th) 289 (Fed. C.A.) — considered

Canada (Director of Investigation & Research) v. D & B Co. of Canada (1995), 64 C.P.R. (3d) 216, 24 B.L.R. (2d) 20, 1995 CarswellNat 2684 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd. (1992), 1992 CarswellNat 1628, 40 C.P.R. (3d) 289 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. NutraSweet Co. (1990), 1990 CarswellNat 1368, 32 C.P.R. (3d) 1 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. (1997), 1997 CarswellNat 3120, 73 C.P.R. (3d) 1 (Competition Trib.) — considered

Concord Boat Corp. v. Brunswick Corp. (2000), 207 F.3d 1039, 57 Fed. R. Evid. Serv. 774, [2000] 1 Trade Cases 72,836 (U.S. C.A. 8th Cir.) — considered

Gravel & Lake Services Ltd. v. Bay Ocean Management Inc. (2002), 2002 FCA 465, 2002 CarswellNat 3388, 2002 CAF 465, 2002 CarswellNat 3886, 298 N.R. 369, 234 F.T.R. 320 (note) (Fed. C.A.) — referred to

Naguib v. R. (2004), 2004 FCA 40, 2004 CarswellNat 150, (sub nom. *Naguib v. Minister of National Revenue)* 317 N.R. 88, [2004] 2 C.T.C. 215, 2004 D.T.C. 6082 (F.C.A.) — referred to

Perka v. R. (1984), [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1, 55 N.R. 1, [1984] 6 W.W.R. 289, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, 1984 CarswellBC 823, 28 B.C.L.R. (2d) 205 (S.C.C.) — referred to

R. v. Keegstra (1995), 29 Alta. L.R. (3d) 305, 39 C.R. (4th) 205, 180 N.R. 120, 98 C.C.C. (3d) 1, 124 D.L.R. (4th) 289, 169 A.R. 50, 97 W.A.C. 50, [1995] 2 S.C.R. 381, 29 C.R.R. (2d) 256, 1995 CarswellAlta 172, 1995 CarswellAlta 411 (S.C.C.) — referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

SMX Shopping Centre Ltd. v. R. (2003), 2003 FCA 479, 2003 CarswellNat 3940, 2004 D.T.C. 6013, 2003 CAF 479, 2003 CarswellNat 4356, [2004] 2 C.T.C. 48, (sub nom. *SMX Shopping Centre Ltd. v. Minister of National Revenue)* 314 N.R. 365 (F.C.A.) — referred to

"*Tordenskjold*" *(The) v.* "*Euphemia*" *(The)* (1908), 41 S.C.R. 154, 6 E.L.R. 90, 1908 CarswellNat 57 (S.C.C.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — considered

s. 51(1)(b) — referred to

s. 77 — considered

s. 77(1) "exclusive dealing" — considered

s. 77(1) "exclusive dealing" (b) — considered

s. 77(2) — considered

s. 77(2)(a) — considered

s. 77(2)(b) — considered

s. 77(2)(c) — considered

s. 78 — considered

s. 78(1) — considered

s. 79 — considered

s. 79(1) — considered

s. 79(1)(a) — considered

s. 79(1)(b) — considered

s. 79(1)(c) — considered

s. 79(4) — considered

s. 96 — referred to

APPEAL by Commissioner of Competition from determination reported at *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 2005 Comp. Trib. 3, 40 C.P.R. (4th) 453, 2005 CarswellNat 2348 (Competition Trib.), finding that incentive program was not anti-competitive practice.

***A. Desjardins J.A.*:**

1 This is an appeal from a decision of the Competition Tribunal ("Tribunal"), dated February 3, 2005, dismissing the application by the Commissioner of Competition ("Commissioner" or appellant) under sections 77 and 79 of the *Competition Act* (reported as 2005 Comp. Trib. 3). The Commissioner sought an order against Canada Pipe Company

Ltd. ("Canada Pipe" or respondent), to prohibit the respondent from engaging in the practice of several purported anti-competitive acts leading to an abuse of dominant position under section 79, as well as to prohibit the respondent from continuing to engage in the practice of exclusive dealing under section 77. This case also involves a cross-appeal by Canada Pipe, which is dealt with in separate reasons.

2 This is the first time this Court has the opportunity to consider the tests for exclusive dealing and abuse of dominant position established respectively by sections 77 and 79 of the *Act*. Both of these provisions, generally speaking, authorize the Tribunal to make orders prohibiting a dominant firm from engaging in conduct that has had, is having or is likely to have the effect of substantially lessening competition. While the *Act* has been in force since 1986, and the Tribunal has elaborated its perspective on the requirements of sections 77 and 79 in several cases, these provisions have not to date been interpreted by any Canadian court.

3 The conduct at issue in this case consists of a "loyalty rebate" program offered by the respondent and known as the Stocking Distributor Program (SDP). Under the SDP, distributors of the respondent's cast iron drain, waste and vent (DWV) products obtain significant rebates and discounts in return for stocking only cast iron products produced by the respondent. These distributors are free to stock other companies' DWV products which are not made of cast iron.

4 According to the Commissioner, Canada Pipe is a dominant firm with respect to the product markets relevant in this case. Furthermore, the Commissioner asserts, the SDP constitutes both a practice of exclusive dealing with exclusionary effects and a practice of anti-competitive acts, and it is likely to have the effect of substantially lessening competition in the markets for DWV products by impeding the entry and expansion of competitors. The respondent contends, by contrast, that it exercises no market power in relation to the relevant product markets, when the latter are properly defined. Moreover, according to the respondent, the SDP is neither exclusionary nor anti-competitive, but rather is a voluntary, non-exclusive, incentive-based program which encourages competition between DWV distributors, is compatible with competition on the merits between suppliers and is supported by valid business justifications.

5 The Tribunal dismissed the Commissioner's application, based upon the following findings. With respect to the alleged abuse of dominant position under section 79, the Tribunal held that: (i) there are three relevant product markets, and six geographic markets, and the respondent substantially controls all these markets; (ii) the Stocking Distributor Program (SDP) is a practice, but does not qualify as an "anti-competitive act"; and (iii) the Commissioner had not demonstrated that the SDP had substantially lessened or prevented competition. With respect to the allegation of exclusive dealing contrary to section 77, the Tribunal found that: (i) the SDP can be characterized as a practice of exclusive dealing; (ii) the respondent is a major supplier of the products in the relevant markets; and (iii) there was insufficient evidence to establish that the SDP had impeded entry or expansion of firms, or that it is having any other exclusionary effect on the market, or that it has caused or is likely to cause a substantial lessening of competition.

6 The Commissioner appeals from the Tribunal's decision.

7 Broadly stated, the appeal challenges two aspects of the Tribunal's conclusions: first, the finding with respect to substantial lessening of competition for the purposes of both sections 77 and 79, and second, the finding concerning exclusionary effects under section 77 or anti-competitive acts under section 79. The cross-appeal by Canada Pipe, which concerns the Tribunal's conclusions as to the definition of the relevant product markets and the issue of market power for the purpose of paragraph 79(1)(a), is discussed in separate reasons, as stated earlier.

8 In order to facilitate the reading of these reasons, I include the following table of contents:

Table of Contents	**Para.**

I. Facts

9 The respondent is a Canadian company based in Hamilton, Ontario, which produces and sells through its Bibby Ste-Croix division ("Bibby") cast iron drain, waste and vent (DWV) products. DWV products are used in a wide variety of structures to carry waste and drain water, and to vent plumbing systems. There are three components to a cast iron DWV system: pipe, fittings and mechanical joint (MJ) couplings (collectively, "DWV products").

10 There are currently two domestic manufacturers of cast iron DWV products: Bibby and Vandem Industries ("Vandem"). Bibby manufactures cast iron DWV pipe and fittings, and imports MJ couplings from its sister companies in the United States. Vandem, which was founded in 1997 (according to the Tribunal; the respondent claims it was 1999, but little turns on this fact) by two former officers of Bibby, manufactures DWV pipe and imports fittings and couplings. The only Canadian manufacturer of MJ couplings is Rollee Industrial Products (1987) Ltd., but it is not a major player. In addition, there are a limited number of other Canadian importers of cast iron DWV products, who generally import from the United States and the Far East (mainly China and India). Imports of cast iron DWV products for all of Canada, including imports by Bibby and Vandem, represented 5% of total sales in 2002. The respondent is the only company in Canada that manufactures and sells a full range of cast iron DWV products.

11 Distributors buy DWV products from the suppliers (either manufacturers or importers), and in turn sell to the building, mechanical or plumbing contractors involved in construction or renovation projects. Distributors generally carry DWV pipe and fittings made of various materials; cast iron DWV products usually represent only a small proportion of their inventory and sales. In Canada, there are three major distributors, all with national presence: Wolseley Canada Inc., EMCO Ltd, and Crane Supply. There are also small distributors, some of whom are members of buying groups in order to improve their bargaining power and obtain volume discount advantages.

12 Contractors buy DWV products from distributors for construction projects upon which they bid. The bidding process is highly competitive, and contractors will try to obtain the best price possible in order to make their bids attractive. Although contractors may have some leeway in deciding what material to use in construction they will generally buy the type of DWV product that has been specified by the architect or mechanical engineer.

13 The SDP was introduced by Bibby in January 1998. In contrast to the volume-based rebate programs typical in the industry, the SDP is premised on exclusivity, not the volume of purchases. Under the SDP, distributors of Bibby's DWV products obtain quarterly and yearly rebates as well as significant point-of-purchase discounts, in return for stocking only Bibby-supplied cast-iron DWV products. These distributors are free to stock other companies' DWV products

which are not made of cast iron, but must purchase all three cast iron DWV products exclusively from the respondent. There are no signed contracts for the SDP: distributors can join at any time, and receive the quarterly and yearly rebates for each completed calendar quarter or year. Distributors who choose not to participate in the SDP are permitted to purchase products from Bibby, albeit at higher prices. There are no restrictions on the resale of cast iron DWV products purchased by distributors who participate in the SDP.

14 The SDP discounts consist of point-of-sale discounts (for example, 55% of list price for stocking distributors, compared to 94% for non-stocking distributors), as well as quarterly and annual rebates (in 2002, the quarterly rebates were 7, 15 and 9 percent on pipe, fittings and MJ couplings respectively, and the annual rebate was 4 percent for all products). The point-of-sale discount and the rebates vary from one region to another. Any distributor can participate in the SDP, so long as a threshold minimum purchase is made; once this threshold is met, the rebates and discounts are the same for the given region, regardless of the size of the distributor's purchase. As a result, the SDP allows small- and medium-sized distributors to access the same prices as large distributors. The discount is applied at the time of purchase, so long as the distributor has committed to participating in the program, and is not reimbursable even if the distributor leaves the program. Except for losing the rebates, there are therefore no penalties attached to opting out of the SDP.

II. Legislative Framework

15 Three legislative provisions govern the issues to be decided in this appeal, namely sections 77, 78 and 79 of the *Act*. These sections set out the various elements that must be proven by the Commissioner to establish exclusive dealing and abuse of dominant position, and provide some relevant statutory definitions.

16 With respect to an alleged abuse of dominant position, the requisite elements for an order are described in subsection 79(1):

> **Prohibition where abuse of dominant position**
>
> 79. (1) Where, on application by the Commissioner, the Tribunal finds that
>
> > (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> >
> > (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> >
> > (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.
>
> **Ordonnance d'interdiction dans les cas d'abus de position dominante**
>
> 79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante:
>
> > a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
> >
> > b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
> >
> > c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,
>
> le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

17 Subsection 79(4) further specifies that possible superior competitive performance must be considered in making the requisite determination under subsection 79(1) concerning competition:

Superior competitive performance

79. (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.

Efficience économique supérieure

79. (4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

18 The term "anti-competitive act", which is a requisite element pursuant to paragraph 79(1)(*b*), is not defined in the *Act*. However, section 78 provides, under the heading "Definition", a non-exhaustive illustrative list of eleven anti-competitive acts:

Definition of "anti-competitive act"

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

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

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the 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.

Définition de « agissement anti-concurrentiel »

78. (1) Pour l'application de l'article 79, « agissement anti-concurrentiel » s'entend notamment des agissements suivants:

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent;

j) à l'égard des exploitants d'un service intérieur, au sens du paragraphe 55(1) de la *Loi sur les transports au Canada*, les agissements précisés à l'alinéa (2)*a*);

k) le fait pour l'exploitant d'un service intérieur, au sens du paragraphe 55(1) de la *Loi sur les transports au Canada*, de ne pas donner accès, à des conditions raisonnables dans l'industrie, à des installations ou services essentiels à l'exploitation dans un marché d'un service aérien, au sens de ce paragraphe, ou de refuser de fournir ces installations ou services à de telles conditions.

19 With respect to exclusive dealing, a statutory definition is provided in sub-section 77(1):

Definitions

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

"exclusive dealing" means

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

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

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

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

Définition

77. (1) Les définitions qui suivent s'appliquent au présent article.

« exclusivité »

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client:

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,

(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa *a*)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas.

20 Sub-section 77(2) sets out the elements required to be proven for an order to issue with respect to a practice of exclusive dealing:

Exclusive dealing or tied selling

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

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

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

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

Exclusivité ou ventes liées

77. (2) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que l'exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d'un produit sur un marché ou très répandues sur un marché, auront vraisemblablement:

a) soit pour effet de faire obstacle à l'entrée ou au développement d'une firme sur un marché;

b) soit pour effet de faire obstacle au lancement d'un produit sur un marché ou à l'expansion des ventes d'un produit sur un marché;

c) soit sur un marché quelque autre effet tendant à exclure, et qu'en conséquence la concurrence est ou sera vraisemblablement réduite sensiblement, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de pratiquer désormais l'exclusivité ou les ventes liées et prescrire toute autre mesure nécessaire, à son avis, pour supprimer les effets de ces activités sur le marché en question ou pour y rétablir ou y favoriser la concurrence.

21 A parallel structure and logic is readily apparent between the requisite elements for exclusive dealing under ss.77(2) and abuse of dominant position under ss.79(1). First, both provisions require an initial determination that the firm in question occupies a position of dominance: subsection 77(2) refers to a "major supplier of a product in a market", while paragraph 79(1)(*a*) requires that "one or more persons substantially or completely control... a class or species of business". Second, both provisions call for the identification of a particular type of conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of ss.77(2), and a practice of anti-competitive acts in the case of ss.79(1). Third, both provisions require a finding of actual or likely substantial lessening of competition.

22 While I would not conclude that the legal tests applicable under these two provisions would necessarily produce identical results in all cases, this parallel structure suggests that an overlapping analysis is to be expected.

III. Issues

23 This appeal raises the following four issues:

(A) For the purposes of paragraph 79(1)(*c*), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?

(B) For the purposes of paragraph 79(1)(*b*), did the Tribunal err in its determination with respect to whether the SDP constitutes an "anti-competitive act"?

(C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?

(D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market?

24 I will address each of these issues in turn. As the analysis of each issue depends heavily upon the Tribunal's particular findings and approach, I will summarize the Tribunal's decision in the context of my analysis of each question.

IV. Analysis

25 Before proceeding to an analysis of the issues listed above, a preliminary observation concerning analytic methodology and evidentiary limitations in the competition law context might be helpful. Each of the legislative provisions governing this appeal define a series of elements that must be proven in order to ground the particular order that is sought; if any of these elements is not established, the Commissioner's application must fail. Both section 77 and section 79 specify three distinct elements, and each of these elements is at issue in the appeal or cross-appeal in this case.

26 The multi-element structures of sections 77 and 79 suggest that the applicable legal tests consist of several discrete sub-tests, each corresponding to a different requisite element. Indeed, this interpretation appears necessary to give effect to the "well-accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage" (*R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at para. 28; see also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 27). Each statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant.

27 The difficulty arises, however, when the necessary distinct sub-tests are examined in light of the available evidence in a given case. In the abuse of dominance context, the economic concepts upon which the legal tests are based often cannot be readily extracted from the available evidence. For example, in many cases the foundational concept of market power cannot be established directly; instead, one must look to relevant indirect indicators. However, these indirect indicators are often relevant with respect to more than one element. As a result, the same evidence - for example, concerning barriers to entry, or market share - is potentially and unavoidably relied upon at several points in the analysis, in respect of different requisite elements. In its first abuse of dominance case, *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.) [*NutraSweet*], the Competition Tribunal noted that this difficulty "is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required" (p. 28).

28 However, it is important that the correct approach to the overlapping use of supporting evidence in the competition context be properly understood, so as to avoid the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests. Although a particular piece of supporting evidence may be employed as an indirect indicator in respect of more than one element, the elements themselves must remain conceptually distinct. I will return to this point in my analysis of the questions at issue in the appeal at bar.

(A) For the purposes of paragraph 79(1)(c), did the Tribunal err in its determination with respect to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially?

29 I begin my analysis with the issue of substantial lessening of competition for the purposes of paragraph 79(1)(*c*), for it is on this question that I am most clearly convinced that this Court's intervention is required. My conclusion in this regard follows directly from an interpretation of the governing statutory language. In short, I have concluded that the Tribunal erred in law in its analytic approach with respect to the legal test applicable under paragraph 79(1)(*c*).

30 Before this Court, the appellant argued that the Tribunal erred in law in its interpretation of paragraph 79(1)(*c*) and failed to apply the correct legal test. The appellant argued that the statutory language - and in particular the use of the relative concept "lessening" - mandates an assessment of the effect of the impugned practice on competition in the relevant markets, which can only be properly accomplished by comparing the competitiveness of the relevant markets in the presence and absence of the impugned practice. The appellant submitted that the correct legal test for assessing competitive effects therefore involves a "but for" analysis: would markets - in the past, present or future - be substantially more competitive *but for* the impugned practice? Or, in other words, *but for* the impugned practice, would markets be characterized by greater price competition, choice, service or innovation than exists in the presence of this practice? The Tribunal thus erred, the appellant contended, in that its assessment of substantial lessening of competition focussed virtually exclusively on the narrow question of whether the SDP prevented entry or switching of suppliers, or in other words, whether a substantial level of competition continued to exist in the relevant market. Rather, the Tribunal should

have considered the broader question of whether the SDP impeded or hindered the competition that would otherwise exist if the program were absent from the market.

31 In response, the respondent submitted two main arguments challenging the Commissioner's proposed "but for" test. First, the respondent argued that the "but for" test was a "novel approach", which the Commissioner had never before advocated before the Tribunal, either in this case or in prior proceedings under section 79. As a result, the respondent contended, the appellant is precluded from introducing this new argument at the appellate level. In this regard, the respondent cited this Court's comments in *Gravel & Lake Services Ltd. v. Bay Ocean Management Inc.* (2002), 298 N.R. 369, 2002 FCA 465 (Fed. C.A.) at para. 8, *SMX Shopping Centre Ltd. v. R.* (2003), 314 N.R. 365, 2003 FCA 479 (F.C.A.) at para. 32, and *Naguib v. R.* (2004), 317 N.R. 88, 2004 FCA 40 (F.C.A.) at para. 7 for the proposition that a new argument may not be raised for the first time on appeal if the responding party would be prejudiced by having had no opportunity to adduce evidence that could, if accepted, defeat the argument. In this case, the respondent maintained that the record contains little or no evidence to establish the likely characteristics of the necessary hypothetical "but for" market. Moreover, Canada Pipe would have argued its case very differently had it had notice at the Tribunal level of the Commissioner's new "but for" test; in particular, it would have retained experts to model the hypothetical comparator markets that would exist "but for" the SDP.

32 Second, or in the alternative, the respondent asserted that the Tribunal adopted the correct, well-established approach in its determination under paragraph 79(1)(*c*), and properly considered all relevant factors. The Tribunal reached its conclusion by carefully exercising its considerable expertise in appraising and weighing the relevant factors, and the respondent argued that since its conclusion on this question of mixed law and fact was not unreasonable, this Court should not interfere.

33 Although initially appealing, the respondent's first argument cannot be sustained, for several reasons. The legal principle cited by the respondent, with respect to the impropriety of an appellate court considering an entirely new argument which had not been raised below and in relation to which additional evidence is required, is indeed well-established: see, for example, "*Tordenskjold*" *(The) v.* "*Euphemia*" *(The)* (1908), 41 S.C.R. 154 (S.C.C.); *Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.), at 240; *R. v. Keegstra*, [1995] 2 S.C.R. 381 (S.C.C.) at para. 26; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 58. However, this principle is inapplicable in the instant case, for the appellant's argument is not in fact "entirely new" (*Perka* , *supra* at 240). As I explain further below, although the Competition Tribunal has not used the "but for" wording in its previous cases, this wording appears in *Enforcement Guidelines on the Abuse of Dominance Provisions* issued by the appellant, and the substance of this legal test has been articulated and applied by the Tribunal in prior decisions. The respondent thus had ample notice of this argument. Moreover, the primary concern underlying the general prohibition - namely, that the evidentiary record is insufficient to support the new argument (*Keegstra* , *supra* at para. 26) - also does not apply in this case, for the Commissioner bears the burden of establishing each statutory element; if insufficient evidence exists to meet the "but for" test, no order will issue.

34 As to the respondent's second argument, I am not persuaded that the Tribunal's error with respect to its determination under paragraph 79(1)(*c*) is one of mixed law and fact. The appellant's argument calls for an exercise of statutory interpretation, to determine whether the statutory language indeed mandates a particular analytic approach. As the Supreme Court of Canada noted in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para. 36 [*Southam*], questions of statutory interpretation "are generally questions of law", as such questions have "the potential to apply widely to many cases". In the case at bar, the Tribunal's actual appraisal and weighting of different factors - that is, the question of mixed law and fact - is a secondary question, arising only once it has been determined whether the correct legal test was applied. While the Tribunal has economics and competition law expertise in relation to the determinations of fact and mixed law and fact required for the *application* of the correct legal test, this is not sufficient to displace the expertise of this Court with respect to statutory interpretation itself. As this Court has previously determined - and indeed, the parties do not dispute - the Tribunal's conclusions on questions of law are to be reviewed on the standard of correctness: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185 (Fed. C.A.) at para. 88 [*Superior Propane*].

(1) The legal test under paragraph 79(1)(c)

35 In light of the appellant's argument, I must consider the correct statutory interpretation of paragraph 79(1)(*c*), which, for convenience's sake, I set out again:

> 79. (1) Where, on application by the Commissioner, the Tribunal finds that
>
> . . .
>
> > (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> 79. (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante:
>
> . . .
>
> > c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

36 Two aspects of the scope of paragraph 79(1)(*c*) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one: it is not the absolute level of competition in a market which must be substantial, but rather the preventing or lessening of competition that results from the impugned practice must be substantial.

37 The test mandated by paragraph 79(1)(*c*) is not whether the relevant markets would or did attain a certain level of competitiveness in the absence of the impugned practice, or whether the level of competitiveness observed in the presence of the impugned practice is "high enough" or otherwise acceptable. These are absolute evaluations, while the statutory language of "effect of preventing or lessening... substantially" clearly demands a relative and comparative assessment. In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(*c*), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial". This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially".

38 The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. Apart from its arguments concerning the evidentiary difficulties involved in the application of such a test at the appeal stage in this case, the respondent did not advance any reasons of principle or statutory interpretation as to why this approach to paragraph 79(1)(*c*) is incorrect or inappropriate. I would therefore endorse the formulation of the legal test proposed by the appellant: the question that must be assessed for the purposes of paragraph 79(1)(*c*) is, would the relevant markets - in the past, present or future - be substantially more competitive but for the impugned practice of anti-competitive acts?

39 It is important to note that the "but for" wording appears in the *Enforcement Guidelines on the Abuse of Dominance Provisions* issued by the appellant, which *Guidelines* are expressly intended to "help the general public, business people and their legal and economic advisors to better understand... the general approach taken by the Competition Bureau to enforce these provisions" (see Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (Industry Canada: Ottawa, 2001) at page 5). In describing the Commissioner's approach to assessing the effects of anti-competitive acts for the purposes of paragraph 79(1)(*c*), the *Guidelines* employ the "but for" wording (see page 19).

40 The expression "but for" has also appeared in American antitrust jurisprudence. In *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (U.S. C.A. 8th Cir. 2000), at 1055, the Court referred to the difficulty of constructing a hypothetical market:

> Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a "but for" market, free of the restraints and conduct alleged to be anticompetitive. The difficulty of such a task has long been recognized by courts in antitrust cases.

41 In substance, the "but for" interpretation of paragraph 79(1)(*c*) is also accordant with the Tribunal's interpretations in earlier abuse of dominance cases. Although the "but for" wording does not appear in the statutory provision or in previous Tribunal decisions, this legal test does not, as the respondent alleges, "amount[...] to an attempt by the Commissioner to re-write the Act at the appellate stage of this proceeding" (respondent's Memorandum of Fact and Law, para. 102). Rather, the "but for" test reflects the plain meaning of the statutory language of paragraph 79(1)(*c*), and corresponds to the Tribunal's analysis in its previous decisions with respect to this provision.

42 The Tribunal's use of a comparative and relative test for paragraph 79(1)(*c*) is evident in its descriptions, in previous abuse of dominance cases, of the appropriate analytic approach for determining whether there exists an actual or likely substantial lessening of competition. In *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.) [*Laidlaw*], the Tribunal specifically endorsed an assessment based upon comparison of the competitiveness of the relevant markets with and without the impugned practice (at p. 344-346):

> Laidlaw argues that the Director has not demonstrated that there has been any substantial lessening of competition in the relevant markets. It is argued that no analysis has been done of the state of competition in the markets before Laidlaw entered compared to what exists now... It is not just the number of competitors and comparative market shares which are relevant in considering whether a substantial lessening of competition has occurred... [T]he substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence.
>
> [Emphasis added.]

Similarly, in *Canada (Director of Investigation & Research) v. D & B Co. of Canada* (1995), 64 C.P.R. (3d) 216 (Competition Trib.) [*D & B*], the Tribunal described as follows the appropriate approach to assessing the existence of a substantial lessening of competition (at p. 267):

> First, we must establish what the conditions of entry would be without the exclusives [the impugned practice of anti-competitive acts] and, then, determine how the anti-competitive acts altered the prospects for economically feasible entry.

The correspondence between these formulations and the "but for" test described above is readily apparent.

43 The Tribunal's previous abuse of dominance decisions also highlight the centrality of *relative* comparison in the test mandated by paragraph 79(1)(*c*). The test for substantial lessening of competition articulated by the Tribunal in *NutraSweet*, *supra*, *Laidlaw*, *supra*, and *D & B*, *supra*, in all cases depends upon this relative comparative aspect:

> The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC [NutraSweet Co.] has market power [that is, market share and entry barriers]. In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC's market power. The issue with respect to the contract terms associated with exclusivity and the use of the United States patent as leverage in competing for Canadian customers is the degree to which

these anti-competitive acts add to the entry barriers into the Canadian market and, additionally therefore, into the industry.

(*NutraSweet*, *supra* at p. 47, emphasis added)

There is no reason to doubt that based solely on the economics of lift-on-board service that these should be highly competitive markets. The evidence shows, however, that the effect of the contracts is to make entry sufficiently difficult so that it no longer effectively polices the market. The evidence demonstrates that a new firm can acquire a certain number of customers but that it cannot establish a customer base with sufficient rapidity to make entry attractive. In the markets in question there is no doubt that acquisition practices of Laidlaw buttressed by the creation of artificial barriers to entry through the contracts have resulted in a substantial lessening of competition.

(*Laidlaw*, *supra* at p. 347-348, emphasis added)

The central issue to be decided in determining whether the Director has satisfied this third element [of sub-section 79(1)] is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the tribunal in *Nutrasweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen [D & B] preserve or add to Nielsen's market power.

(*D & B*, *supra* at p. 266-267, emphasis added).

Clearly, the assessment envisaged and undertaken by the Tribunal in all these cases was not merely an absolute evaluation of the level of competition in the relevant markets, but rather a relative comparison: did the impugned practice result in a *preventing or lessening* of competition as compared to the conditions governing in the absence of the practice, and was this lessening of a degree sufficient to be considered *substantial*?

44 Based upon the plain meaning of the statutory language, and supported by the interpretation advanced by the Tribunal in its earlier cases, I conclude therefore that paragraph 79(1)(*c*) mandates an approach that properly accentuates these comparative and relative aspects, and enables this analysis to be undertaken in respect of each of the three specified time frames (past, present and future). As I have explained, the "but for" test is one such approach. I must emphasize, however, as the Tribunal rightly implied in the passage from *Laidlaw* quoted in paragraph 39 above, that the "but for" test is not necessarily the only correct approach. I therefore expressly leave open the possibility that the Tribunal might in a future abuse of dominance case find evidence corresponding to a different test sufficient to discharge the burden placed upon the Commissioner by virtue of paragraph 79(1)(*c*). However, as the "but for" test describes an approach that corresponds to the requirements mandated by the statutory language of paragraph 79(1)(*c*), it is one that the Tribunal must consider in all cases - although it may in future cases choose to consider other appropriate tests as well.

(2) Application of the statutory test for paragraph 79(1)(c)

45 In practice, the application of the "but for" test, and in particular, determination of the appropriate methodology in any given case, is a matter for which the Tribunal is better qualified than this Court. This Court should not attempt to prescribe in the abstract the "correct" methodology, for "[s]uch a task is beyond the limits of the Court's competence" (*Superior Propane*, supra at para. 159). As the Supreme Court of Canada observed in *Southam*, *supra* at para. 52, for the questions of mixed law and fact involved in the application of the legal tests set out in the *Competition Act*, "what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge".

46 As suggested by the parties in the case at bar, application of the "but for" test could conceivably involve the construction of a hypothetical comparator model, a market identical to reality in all respects except that the impugned practice is absent. In appropriate circumstances, the "but for" test might also be applied by comparing the competitiveness of the market across time, and treating the market conditions before and after the introduction of the impugned practice

as proxies for the market with and without the practice. However, I would not want to be seen to suggest that any particular type of evidence would necessarily be required. Ultimately, the Commissioner bears the burden of proof for each requisite element, and the Tribunal must be convinced on the balance of probabilities. The evidence required to meet this burden can only be determined by the Tribunal on a case-by-case basis.

47 The *Act* does, however, provide some guidelines which should be borne in mind in undertaking the assessment mandated by paragraph 79(1)(*c*). In this regard, I would adopt *mutatis mutandis* the advice provided by Evans JA in *Superior Propane*, *supra* with respect to the methodology appropriate for determining the anti-competitive "effects" of a merger under section 96 of the *Act*:

> Whatever standard is selected (and, for all I know, the same standard may not be equally apposite for all mergers) must be more reflective than the total surplus standard [the methodology adopted by the Tribunal in that case] of the different objectives of the *Competition Act*. It should also be sufficiently flexible in its application to enable the Tribunal fully to assess the particular fact situation before it.

> Similarly, whatever methodology the Tribunal chooses in any given case in its application of the "but for" analysis required under paragraph 79(1)(*c*) must be sufficiently flexible to allow a full assessment of all factors relevant in the particular fact situation at issue, and must be reflective of the different objectives of the *Act*.

48 In *Superior Propane*, *supra*, at paras. 104-112, this Court looked to the purposes provision of the *Act*, section 1.1, to inform its analysis of the meaning of the word "effects" in section 96. Similarly, for the purposes of paragraph 79(1)(*c*), in undertaking its assessment of whether there is an actual or likely substantial preventing or lessening of competition, the Tribunal must ensure that the methodology chosen to apply the "but for" test reflects the multiple purposes or objectives set out in section 1.1. Four different purposes are described in section 1.1:

> **Purpose of Act**

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

> **Objet**

> 1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

All of these purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition for the purposes of paragraph 79(1)(*c*).

(3) The Tribunal's paragraph 79(1)(c) decision

49 Having articulated the legal test for paragraph 79(1)(*c*), I turn now to an analysis of what the Tribunal actually did in the case at bar. The Tribunal's analysis directly concerning paragraph 79(1)(*c*) is brief, and I will therefore quote it in its entirety:

> 263 The Tribunal, as stated above, is satisfied that Bibby does exercise market control. This can be traced to a number of factors and specifically to the fact that Bibby is the only Canadian supplier able to supply full product lines. The SDP is certainly an instrument that helps Bibby market its products, but the Tribunal is not satisfied

that the SDP has been shown to be a practice of anti-competitive acts. If, however, the Tribunal has erred in this assessment, the Tribunal is also of the view that the SDP has not been shown to be a practice that has substantially lessened or prevented competition, for the reasons that follow.

264 The Tribunal has accepted the Commissioner's submission that there are three distinct product markets, and six geographic markets. Therefore, the Commissioner has the onus of establishing a substantial lessening or prevention of competition in eighteen separate markets. Yet the Commissioner has not established to the Tribunal's satisfaction that the SDP has led to substantial lessening or prevention of competition in any of these markets.

265 In Western Canada and in Ontario, which represent approximately 75 percent of Bibby's market, there is significant evidence of competitive pricing, notwithstanding the SDP. This competitive pricing is due to imports and to the emergence of a new manufacturer. Although imports still represent a relatively small portion of the cast iron DWV markets, they have been steadily increasing and have had a noticeable impact on prices of cast iron DWV products. In addition, a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect. There is clearly effective entry in the market by Vandem, as evidenced by the lowering of prices for cast iron DWV products in Ontario. As discussed earlier, in these reasons, its viability remains to be determined. It is the Tribunal's view, however, that the evidence shows that a number of factors, unrelated to the SDP, will bear on Vandem's future. In consequence, the Tribunal is of the view that the SDP has not brought about a substantial lessening or prevention of competition for the Ontario and Western markets.

266 The Tribunal acknowledges that for Quebec and the Maritimes, which represent 25 percent of the market, prices appear not to have been constrained by competition. This, however, does not necessarily lead to a conclusion that the SDP has caused the lack of competition. The data provided by the Commissioner relate only to the period of time when the SDP was operating. Dr. Ross based his arguments concerning market power on pricing information covering the period of January 1998 to September 2003. The Tribunal has no historical data which would allow it to measure the state of competition before and after the SDP came into effect. Canada Pipe bought the assets of Canada's only manufacturer of cast iron DWV products, the Gooding foundries, a well-established player with no significant rivals. As well, Bibby has been and continues to be the only producer of a full line of products. The Tribunal therefore finds that there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition.

50 The Tribunal's substantive analysis for the purpose of paragraph 79(1)(*c*) is contained in two paragraphs, 265 and 266. Paragraph 265 considers the evidence with respect to the geographic markets of Western Canada and Ontario, and paragraph 266 considers that with respect to Quebec and the Maritimes. The Tribunal's stated reasons for concluding that substantial lessening of competition had not been established are very different for the two geographic groupings. In both cases, however, the Tribunal's reasoning evinces errors of law.

51 For Western Canada and Ontario, the reasons show that the Tribunal's conclusion was based upon its appreciation of three main factors: the existence of competitive pricing, the increasing presence of imported cast iron DWV products, and the effective entry of a new cast iron DWV manufacturer, Vandem. The Tribunal emphasized that these significant features have been observed "notwithstanding the SDP" and "while the SDP was in effect" (para. 265), and thus concluded that the SDP had not brought about a substantial lessening or prevention of competition in Western Canada or Ontario.

52 The occurrence of entry, both by importers and a new manufacturer, was evidently the key consideration in the Tribunal's analysis with respect to the absence of substantial lessening of competition. In the context of its direct analysis of paragraph 79(1)(*c*), the Tribunal's explanation of its use, for the purposes of paragraph 79(1)(*c*), of the evidence concerning entry is very brief: it merely noted that "a new competing manufacturer has emerged for the first time in thirty years and has succeeded in capturing 10 percent of the market in Canada within four years, while the SDP was in effect", and concluded that "[t]here is clearly effective entry in the market by Vandem" (para. 265). The Tribunal also noted the

"steadily increasing" presence of imports, which "although still represent[ing] a relatively small portion of the cast iron DWV markets", are said to "have had a noticeable impact on prices" (para. 265).

53 This analysis of the occurrence of entry in the Western Canada and Ontario markets provides no indication that the Tribunal considered expressly whether the SDP was responsible for a *substantial increase* in the difficulty of gaining entry in the market, and hence a *substantial lessening* of competition. The occurrence of entry and the consequent existence of a certain level of competition relate to an absolute evaluation of the state of the market in the presence of the SDP, which is neither an equivalent of nor a substitute for the relative and comparative assessment that is required by the statutory language of paragraph 79(1)(*c*). The fact that entry has been observed in the presence of the SDP, and that barriers to entry are therefore not total, does not by itself address the question of whether, in the absence of the SDP, there would be substantially more competition in the relevant markets, in the past, present or future. In short, the Tribunal's analysis with respect to these geographic markets does not address the "but for" question.

54 The Tribunal provided different reasoning for its conclusion in this regard concerning the Quebec and Maritimes markets (at para. 266). In these geographic markets, the Tribunal acknowledged that competitive pricing is absent, but cautioned that this "does not necessarily lead to a conclusion that the SDP has caused the lack of competition", as the Commissioner had not led any evidence concerning the period before the SDP was in effect. Without "historical data which would allow it to measure the state of competition before and after the SDP came into effect", and in light of other markets considerations (Canada Pipe's acquisition of the assets of another cast iron DWV manufacturer, and Bibby's status as the only full-line supplier), the Tribunal concluded that "there is insufficient evidence for it to conclude that the SDP is responsible for a substantial lessening or prevention of competition" (para. 266).

55 The legal error inherent in this portion of the Tribunal's paragraph 79(1)(*c*) analysis is manifest. As the Tribunal itself recognized in *Laidlaw*, *supra*, substantial lessening "need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness as present", for "substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence" (p. 346). For the purposes of paragraph 79(1)(*c*), it is insufficient to conclude that the Commissioner had not met her burden because no historical data was provided, for the Tribunal was required to also consider whether the evidence on record demonstrated that the SDP had the effect of substantially lessening competition in the past, present or future, as compared to the markets' *likely* competitiveness in the absence of the practice. The failure to consider this possibility in this case constitutes an error of law.

56 Can it be argued, as the respondent suggests, that the Tribunal implicitly took into account the relative and comparative considerations required under paragraph 79(1)(*c*)? In this vein, it could be argued that the Tribunal's paragraph 79(1)(*c*) reasoning depends implicitly upon its analysis undertaken in earlier sections of its decision, for the purposes of its determinations under paragraphs 79(1)(*a*) and (*b*), of the evidence concerning entry conditions and the effects of the SDP (paras. 141-156, and 204-254 and 260-261, respectively).

57 However, the Tribunal's treatment in these earlier sections of its decision of the evidence concerning entry and effects reinforces my conclusion that it erred in law in its paragraph 79(1)(*c*) analysis. In general, this earlier analysis treats the question of entry in an absolute sense, and appears to be guided by such questions as, has entry been prevented completely, or is a certain level of competition observed in the presence of the SDP. The evidence of actual entry is explicitly accorded a dominant and even preeminent role in the Tribunal's analysis (see, for example, paras. 149, 156 and 161). Throughout the Tribunal's decision, evidence concerning entry or the effects of the SDP is considered against the standard of "prevention" in an absolute sense, rather than a more relative standard such as that implied by the words "impeding" or "lessening" (see paras. 150, 155, 207, 225-226, 237, 241, 245, 254-255, 260-261). The decision does employ the words "impede" or "lessening" at several points (see paras. 2, 6, 53, 113, 162, 263-266, 280, 282), but these occur when the Tribunal is citing the text of the statutory provisions or paraphrasing the Commissioner's submissions, and not in the context of the Tribunal's own conclusions or analysis. In short, these earlier sections of the decision provide little if any support for the argument that the Tribunal implicitly took into account the relative and comparative considerations required under paragraph 79(1)(*c*). To the contrary, a careful reading of the Tribunal's reasons indicates that the analysis

throughout was conducted from the narrow, absolute perspective of preventing entry and competition, and not from the broader, relative and comparative perspective of "impeding" or "lessening".

(4) Conclusion with respect to paragraph 79(1)(c)

58 In summary, the Tribunal should have turned its mind to the question of whether, in each of the relevant markets, competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice. In other words, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive. Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater. In this regard, identification of the occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, is insufficient. I conclude therefore that the Tribunal erred in law in its analysis, for the purposes of paragraph 79(1)(*c*), as to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially in the relevant markets.

(B) For the purposes of paragraph 79(1)(b), did the Tribunal err in its determination with respect to whether the SDP constitutes an "anti-competitive act"?

59 The statutory test for an abuse of dominant position set out in section 79 is a conjunctive one: each of the three distinct elements must be found if an order is to issue. The Tribunal found that the market control element required under paragraph 79(1)(*a*) was established, and this finding, which is the subject of the cross-appeal, is upheld by this Court in separate reasons. This Court must also determine whether the Tribunal erred in its findings with respect to paragraph 79(1)(*b*).

60 Paragraph 79(1)(*b*) calls for a determination as to whether the respondent, through the SDP, "ha[s] engaged in or [is] engaging in a practice of anti-competitive acts". The Tribunal had no difficulty recognizing the SDP as a "practice". It wrote, at para. 171, that the term entails more than an isolated act but may be one occurrence that is sustained and systemic, or that has had a lasting impact on competition. It explained at para. 200 of its reasons that the SDP is structured, organized and applied throughout Canada, albeit with some variations in the multiplier and rebates in the different regions and that the various components of the program add up to a practice. The respondent does not appear to contest this particular finding. The dispute arises with respect to whether the SDP can be characterized as composed of "anti-competitive acts" (« agissements anti-concurrentiels »).

61 The Commissioner argued that while the Tribunal stated the correct legal test for anti-competitive acts, which was established in previous Tribunal decisions, this was not the test that it ultimately applied in its analysis of the SDP. The Tribunal erred in law, the Commissioner asserts, by requiring proof of a link between the SDP and a decrease in competition, and by improperly extending the scope of the valid business justification doctrine. As a result, according to the Commissioner, the approach to paragraph 79(1)(*b*) adopted by the Tribunal conflated the discrete statutory tests established by paragraphs 79(1)(*b*) and 79(1)(*c*).

62 This question is further complicated in the case at bar by the fact that this appeal represents the first time that a court has considered the legal test applicable for the purposes of paragraph 79(1)(*b*). The Tribunal has considered, in prior abuse of dominance cases, the legal test and analytic methodology applicable in ascertaining the existence of an "anti-competitive act". The Tribunal's jurisprudence on these questions cannot by itself be determinative in the current case, as its views on questions of law are not binding on this Court. The Tribunal's jurisprudence may however be indicative of what makes sense and what has been working in the past - if, at the same time, it corresponds to the wording of the Act.

(1) The legal test under paragraph 79(1)(b)

63 The *Act* does not provide an express definition of "anti-competitive act". Section 78 provides a list of eleven anti-competitive acts, expressly "without restricting the generality of the term". These examples are thus illustrative only, and indeed the Tribunal has recognized in its previous decisions that conduct not specifically mentioned in section 78 can constitute an anti-competitive act (*Nutrasweet*, *supra* at p. 34; *Laidlaw*, *supra* at p. 331-332; *D & B*, *supra* at p. 257; *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Competition Trib.), at 180 [*Tele-Direct (Publications) Inc.*]). While clearly non-exhaustive, the illustrative list in section 78 provides direction as to the type of conduct that is intended to be captured by paragraph 79(1)(*b*): reasoning by analogy, a non-enumerated anti-competitive act will exhibit the shared essential characteristics of the examples listed in section 78.

64 In *Nutrasweet*, *supra*, the Tribunal applied this interpretive approach to paragraph 79(1)(*b*), and suggested (at p. 34) the following working definition of "anti-competitive act":

> A number of the acts [mentioned in section 78] share common features but... only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. <u>The purpose common to all acts, save that found in paragraph 78(*f*), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.</u>
>
> (Emphasis added.)

65 I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(*f*). This exception was noted by the Tribunal in *Nutrasweet*, *supra*.

66 Two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its *purpose*. Second, the requisite purpose is an *intended predatory, exclusionary or disciplinary negative effect on a competitor*. I will elaborate on each of these aspects in turn.

67 First, the meaning of the term *purpose* deserves some comment. As the Tribunal observed in *Tele-Direct (Publications) Inc.* , *supra* at p. 180, "'purpose' is used in this context in a broader sense than merely subjective intent on the part of the respondent... it might be more apt to speak of the *overall character* of the act in question" (emphasis added). In order to apply paragraph 79(1)(*b*), the purpose or character of the impugned conduct must therefore be determined. Relevant factors to be considered and weighed to determine this overarching "purpose" include the reasonably foreseeable or expected objective effects of the act (from which intention may be deemed, as I explain further below), any business justification, and any evidence of subjective intent, if available (see *Tele-Direct (Publications) Inc.* , *supra* at p. 180).

68 The second aspect describes the *type of purpose* required in the context of paragraph 79(1)(*b*): to be considered "anti-competitive" under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor. The paragraph 79(1)(*b*) inquiry is thus focused upon the intended effects of the act *on a competitor*. As a result, some types of effects on competit*ion* in the market might be irrelevant for the purposes of paragraph 79(1)(*b*), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(*b*). While, for the *Act* as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(*b*), "anti-competitive" refers to an act whose purpose is a negative effect on a competit*or*.

69 Adopting this interpretive approach to section 79, it is conceivable that a practice might be found to be composed of anti-competitive acts within the meaning of paragraph 79(1)(*b*), but at the same time, for the purposes of paragraph 79(1)(*c*), be held not to have the effect of preventing or lessening competition substantially in the market in question.

70 A final comment should be made with respect to the evidence required to establish an anti-competitive purpose within the meaning of paragraph 79(1)(*b*). It is clear from the legislative history of paragraph 79(1)(*b*) that evidence of subjective intent, although certainly probative if available, is not required in order to find that a given act is anti-

competitive within the meaning of paragraph 79(1)(*b*). When Bill C-91, which eventually became the *Competition Act*, was first introduced in Parliament in December 1985, the text of paragraph (*b*) of the abuse of dominance provision (then section 51) read as follows:

> 51. (1) Where, on application by the Commissioner, the Tribunal finds that
>
> . . .
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, <u>and the object of the practice is to lessen competition,</u> and
>
> 51. (1) Lorsque le Tribunal, à la suite d'une demande du directeur, conclut:
>
> . . .
>
> b) que cette personne ou ces personnes se livrent ou se sont livrées à une practique d'agissements anti-concurrentiels <u>dont le but est de réduire la concurrence,</u> et

Perceived problems with the subjective intent requirement implied by the latter part of the proposed paragraph (*b*) were frequently raised in testimony before the House of Commons Legislative Committee on Bill C-91 (see Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, First session of 33[rd] Parliament, 1986 at pages 2:8-9, 3:7-9, 3:17, 5:13, 5:15, 5:63-64, 6:9-10; 9:20-21; note also the contrary view expressed at 4:55-56, 6:57-58; 7:55-57, 7:60-63 [*Minutes of Committee on Bill C-91*]). In response, the reference to "the object of the practice" was deleted in paragraph (*b*), in order to remove any subjective intent requirement from the statutory test for abuse of dominant position (see *Minutes of Committee on Bill C-91*, *supra* at pages 11:3 and 11:32-33).

71 On the basis of this legislative history, I would endorse the following comment by the Tribunal in *Laidlaw*, *supra* at p. 342, with respect to the proper role of evidence concerning subjective intent within paragraph 79(1)(*b*):

> Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a "smoking gun". (A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.) Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.

72 Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both.

73 Even though evidence of subjective intent is neither required nor determinative, intention remains an important ingredient of paragraph 79(1)(*b*). In particular, intention is relevant in the sense that while a respondent cannot disavow responsibility for the reasonably foreseeable consequences of its acts, a respondent might nevertheless be able to establish that such consequences should not, in the context of the paragraph 79(1)(*b*) inquiry, be considered the intended "purpose" or "overall character" of the acts in question. In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in the context of paragraph 79(1)(*b*), a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts. The appropriate application of the valid business justification doctrine in the context of paragraph 79(1)(*b*) will be further considered below, in my discussion of the Tribunal's analysis in the case at bar.

(2) The Tribunal's paragraph 79(1)(b) decision

74 In the case at bar, it would appear that the Tribunal correctly articulated the legal test. At para. 171 of its reasons, at the outset of its review of the Tribunal's definition of "anti-competitive acts" in its previous cases, the Tribunal stated:

> 171 ... In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market. [Note: *Nielsen* at 257; *Laidlaw* at 333; *Nutrasweet* at 34] In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors.
>
> [Emphasis added]

In the course of quoting a longer passage from *Tele-Direct (Publications) Inc.* , the Tribunal reproduced (at para. 178) the key sentence from *Nutrasweet*, *supra* at p. 34, to the effect that the feature common to anti-competitive acts is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary". This formulation was also repeated in the concluding section of the Tribunal's decision (at para. 284).

75 However, despite this correct articulation of the test, the Tribunal's analysis of the salient features of the applicable legal test is a cause for concern. At the end of the portion of its paragraph 79(1)(*b*) analysis entitled "The Law", the Tribunal summarized as follows its understanding of key aspects of the legal test (at para. 191):

> The Tribunal [in *Tele-Direct*] has stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if a practice does not appear to have an exclusionary effect or cause detriment to the consumer, it cannot be said to be anti-competitive.
>
> [Emphasis added.]

76 This statement is incorrect, in at least two respects.

77 First, for the purposes of paragraph 79(1)(*b*), a link need not be proven between the impugned practice and a decrease in competit*ion*. Quite simply, such a causal link is not part of the legal test for an anti-competitive act. Moreover, an emphasis upon evidence of this type runs the risk of obscuring the correct focus of the paragraph 79(1)(*b*) test. An anti-competitive act is one whose purpose is an intended negative effect on a competit*or* that is predatory, exclusionary or disciplinary. The focus of analysis is thus on the act itself, to discern its purpose. The questions as to whether a decrease in competit*ion* in the market is evident, or whether any such decrease can be causally attributed to the impugned practice, are not directly relevant for this task. Certainly, such findings are not requisite elements of the test for an anti-competitive act.

78 Obviously, if an act is to be found anti-competitive, there must be evidence linking the impugned practice to the requisite intended negative effect *on a competitor*: the practice must be found to cause or at least contribute to the intended negative effect. Such a negative effect on a competitor must also be found to be the "purpose" of the practice in question, and to this end, all relevant factors must be taken into account and weighed to determine if the requisite purpose is established. One must remember, however, that in the context of paragraph 79(1)(*b*), evidentiary factors are relevant only insofar as they shed light upon the paragraph 79(1)(*b*) statutory test, that is upon the *purpose of the act vis-à-vis competitors*. Evidence concerning other types of effects of the impugned act that are not related to competitors - while perhaps pertinent in respect of the paragraph 79(1)(*c*) assessment of competition - are not directly relevant for paragraph 79(1)(*b*). Similarly, evidence concerning the general competitive state and structure of the relevant market, and whether such features can be causally attributed to the impugned act, are not the direct focus of the paragraph 79(1)(*b*) analysis, and are more properly considered under paragraph 79(1)(*c*). In short, paragraph 79(1)(*b*) simply concerns whether the act displays the requisite intended effect on competit*ors*; it is not directly concerned with the state of competit*ion* in the

market or the general causes thereof. In directing itself to the contrary, and requiring proof of a causal link between the impugned act and a decrease in competition, the Tribunal erred.

79 Second, the Tribunal appears mistakenly to suggest in the above-quoted passage that the impugned practice's effects on the consumer should or could be considered within the paragraph 79(1)(*b*) analysis. However, contrary to what the Tribunal implies in the above quotation, "detriment to the consumer" is not a relevant independent consideration for the purposes of paragraph 79(1)(*b*), as evidence of this type does not relate directly to whether an act has the requisite defining characteristic of an intended negative effect on a competitor. The effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification, as I explain further below. Otherwise, however, such evidence is largely irrelevant for the purposes of the paragraph 79(1)(*b*) assessment, and is more appropriately considered under paragraph 79(1)(*c*). To the extent that the Tribunal suggests in the above-quoted sentence that "detriment to the consumer" is an independently relevant consideration for the purposes of paragraph 79(1)(*b*), the Tribunal therefore erred.

80 The Tribunal thus embarked on its paragraph 79(1)(*b*) analysis from an incorrect foundation: it erroneously believed itself obliged to consider factors which are not relevant in the correct legal test. The Supreme Court stated in *Southam*, *supra* at para. 41 that "[i]f the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law". Logically, this statement can be extended to encompass the situation of the case at bar: if the Tribunal considered items of evidence that the law requires it not to consider, then the Tribunal also erred in law. Moreover, these irrelevant factors may well have played a decisive role in this case: according to the Tribunal's own articulation, evidence of a link between the practice and a decrease in competition was considered to be *required* for the purposes of paragraph 79(1)(*b*). Thus, to the extent that the Tribunal misdirected itself as to the applicable legal test, and as a consequence considered irrelevant factors in making its paragraph 79(1)(*b*) determination, the Tribunal committed a reversible error of law.

81 The Tribunal's erroneous interpretation of the paragraph 79(1)(*b*) test played a significant role in its analysis of the SDP. It is clear that in concluding that the SDP was not anti-competitive, the Tribunal relied heavily upon its mistaken understanding that a demonstrable link must exist between the impugned act and a decrease in competition. Indeed, the Tribunal expressly stated that this factor was "the most striking" basis for its conclusion:

> 261 The most striking argument against the alleged anti-competitive effect of the SDP is the fact that it has not prevented entry nor competition in certain regions. The SDP has not prevented an increase in imports, nor has it prevented the emergence, for the first time in thirty years, of a new manufacturer of cast iron DWV products. For a practice to be found anti-competitive, it must have a negative effect on competition. As was stated in *Tele-Direct*, there has to be a link between the practice and its alleged anti-competitive effect. In the instant case, the link has not been established to the Tribunal's satisfaction. The Tribunal recognizes that entry may be difficult, but this appears unrelated to the SDP. Several other factors come into play: Bibby is a known manufacturer that offers a complete line of products; the market is not a growth market, thus limiting investment potential. Yet, it has been possible for competitors to match Bibby's price and offer a reliable supply, to the point of making it an interesting proposition for distributors or contractors to change suppliers. This has occurred, notwithstanding the SDP, as illustrated by new entrants such as Sierra and Vandem, and by new arrangements such as Wolseley's change of suppliers.

82 As this passage shows, the Tribunal's incorrect assumption that a link to a reduction in competition was required under paragraph 79(1)(*b*) critically influenced its reasoning. Instead of enquiring as to whether the SDP's purpose was an intended negative effect on competitors, the Tribunal asked whether there was evidence of a decrease in competition in the relevant market, in the abstract, and whether the identified competitive problems could be causally attributed to the SDP and hence be considered its "effects". This approach, of focussing on the general state of competition in the market rather than on the purpose of the impugned act, led the Tribunal to adopt an unwarrantedly and incorrectly narrow test for paragraph 79(1)(*b*): essentially, the Tribunal's reasoning would imply that unless an impugned act *prevents* entry of competitors or otherwise *prevents* competition, or unless it is the (predominant) *cause* of the uncompetitive attributes observed in the market, the act cannot be considered anti-competitive. This result is clearly incorrect.

83 In my view, the Tribunal's error of law with respect to paragraph 79(1)(*b*) is partly attributable to a conflation of the legal test for paragraph 79(1)(*c*) with that applicable for paragraph 79(1)(*b*). As I mentioned above at the outset of my analysis, the multi-element structure of section 79 suggests that upon proper interpretation, each statutory element must give rise to a distinct legal test. To repeat, paragraph 79(1)(*b*) relates to whether the impugned act exhibits the requisite anti-competitive purpose vis-à-vis competitors, while paragraph 79(1)(*c*) concerns the broader state of competition, and whether the practice has the effect of substantially lessening competition in the relevant market. A particular indirect evidentiary indicator may serve subtly different - yet importantly distinct - purposes in regards to paragraph 79(1)(*b*) as compared to paragraph 79(1)(*c*). Since paragraph 79(1)(*b*) focuses on whether the impugned act was performed for a particular purpose with respect to competitors, the relevant factors - that is, evidence concerning its foreseeable effects on competitors, business justifications for its adoption, and subjective intent - are to be interpreted in this particular light. By contrast, paragraph 79(1)(*c*) mandates an assessment of the substantiality of the practice's actual or likely effects on competition in the relevant market(s), a task that proceeds from the vantage point of the market as a whole and invites consideration of a wider range of effects of the practice in question. The approach adopted by the Tribunal in this case does not properly recognize or maintain these important conceptual distinctions between the statutory elements of paragraph 79(1)(*b*) and 79(1)(*c*).

(3) The valid business justification and paragraph 79(1)(b)

84 The Tribunal's conflation of the legal tests for paragraph 79(1)(*b*) and 79(1)(*c*) is also apparent in its discussion of the business justification arguments proffered by the respondent. The Tribunal noted two business justifications suggested by the respondent: first, that the SDP's uniform rebate structure encourages competition, by creating a level playing field between small and large distributors; and second, that the SDP makes possible the high-volume sales necessary to enable Bibby to maintain a full line of products.

85 The Tribunal rejected the first business justification proposed by the respondent, but was persuaded by the second. With respect to the first justification, the Tribunal concluded (at para. 209) that although the creation of equitable opportunities for small- and medium-sized enterprises to participate in the Canadian economy is an objective of the *Act* set out in section 1.1, this is not a relevant consideration for the purposes of section 79:

> While the Tribunal acknowledges this to be an enunciated purpose of the Act, the Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance. Competition between distributors is not at issue. Rather, the case is about competition between Bibby and other suppliers of cast iron DWV products. The equitable characteristics of the SDP as it relates to distributors have little to do with whether Bibby is exercising its market power in a way that precludes competition between suppliers of the product. In consequence, this argument of business justification must fail.

86 The Tribunal was persuaded, however, by the second business justification put forward by the respondent. It explained its reasoning as follows (at paras. 212 and 259):

> High volume sales are also important to a business which is volume-driven, as Mr. Leonard, General Manager of Bibby, explained. Bibby argues that it needs the sales to ensure efficiencies and to lower its cost of production; the Commissioner did not challenge this assertion. The rebate structure provided for in the SDP does encourage distributors to deal with Bibby for all three products if they choose Bibby to supply one of them and in consequence Bibby's sales are increased. As was stated in *Laidlaw*, the self-interest justification is not sufficient. However, in this case, the Tribunal accepts, based on Mr. Leonard's evidence, that high volumes allow Bibby to maintain in inventory smaller, less profitable but nevertheless important products. As a result, items that are used less often remain available in the market. This availability serves the interests of distributors and contractors, whether or not they belong to the SDP, and ultimately benefits the consumer.

> The respondent's business argument that Bibby needs to sell a certain volume in all three products to be able to maintain full production of all product lines is valid. There are certainly recognizable advantages in having a reliable source able to manufacture and supply a full line of cast iron pipe DWV products for the Canadian market.

87 This analysis is problematic, as the Tribunal appears to have lost sight of the role of the valid business justification doctrine *within paragraph 79(1)(b)*, and instead seems to grant it an independent role. A business justification for an impugned act is properly relevant only insofar as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. As I explained above in the discussion of the intentionality aspect of the paragraph 79(1)(*b*) test, a valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

88 The valid business justification doctrine is not an absolute defence for paragraph 79(1)(*b*). Rather, a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(*b*). As the Tribunal observed in *D & B*, *supra*, a business justification proffered by a respondent must therefore be "weigh[ed]... in light of any anti-competitive effects to establish the overriding purpose" of the impugned act (at p. 262, also quoted in *Tele-Direct (Publications) Inc.* , *supra* at p. 180). In *D & B*, *supra*, the Tribunal properly emphasized this balancing exercise (at p. 265):

> Proof of the existence of a business motive for long-term contracts [the impugned conduct] that was unrelated to an anti-competitive purpose would undoubtedly be relevant to an evaluation of an allegation of anti-competitive acts. The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.

89 In the case at bar, the Commissioner argued that the business justification accepted by the Tribunal is actually a self-interest argument based on selling more product, and therefore cannot qualify as a business justification for the purposes of paragraph 79(1)(*b*). The respondent countered that this was a mischaracterization of the Tribunal's reasons, as in its view the business justification actually accepted by the Tribunal related to the maintenance of a full product line and the consequent benefits for consumers: according to the respondent, "it is crystal clear from the Tribunal's reasons that the Tribunal accepted the SDP's business purpose on the basis of its benefits to *customers* and *end consumers*, rather than Canada Pipe" (Respondent's Memorandum of Fact and Law at para. 83, original emphasis).

90 In my view, the respondent's interpretation of the Tribunal's reasons with respect to the second business justification is apt. However, this reasoning, which relies solely upon consumer welfare benefits to establish the business justification, is at the core of the Tribunal's error. Simply stated, improved consumer welfare is on its own insufficient to establish a valid business justification for the purposes of paragraph 79(1)(*b*). A valid business justification must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive. The business justification must therefore be attributable to the respondent, for it is the latter's allegedly anti-competitive conduct which is sought to be explained.

91 In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(*b*). The Tribunal thus erred in concluding, on the basis of the reasoning provided in its decision, that the respondent had established a valid business justification

for the SDP. While this error may not ultimately have been determinative, in that a valid business justification is at most a factor to be balanced within the paragraph 79(1)(*b*) determination, it may well have played an important supporting role in the Tribunal's decision with respect to paragraph 79(1)(*b*).

(4) Conclusion with respect to paragraph 79(1)(b)

92 In sum, the aspects of the Tribunal's decision discussed above admittedly represent short extracts of a long and complex analysis. However, the identified errors suggest a basic misapprehension and misapplication of the legal test for paragraph 79(1)(*b*), and a troubling conflation between paragraphs 79(1)(*b*) and (*c*). Thus, at the very least, the extracts highlighted above render suspect the Tribunal's analysis of the relevant factors in the context of paragraph 79(1)(*b*). I can only conclude that the matter should be returned to the Tribunal for a reconsideration of its paragraph 79(1)(*b*) determination in light of the correct legal test.

(C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?

93 As I described above at paragraph 21 of these reasons, there is a parallel structure and logic between the requisite statutory elements for exclusive dealing under subsection 77(2) and abuse of dominant position under subsection 79(1). The parties did not present separate arguments with respect to the substantial lessening of competition element of subsection 77(2), and instead simply referred the Court to their arguments concerning this element in the context of section 79. This same approach was adopted by the Tribunal, which concluded, "[f]or the same reasons... as in our analysis under section 79," that the Commissioner had failed to establish that the exclusive dealing practice has lessened competition substantially (para. 282).

94 In *Nutrasweet*, *supra*, the Tribunal observed that "the fundamental test of substantial lessening of competition is the same in both sections of the Act [section 79 and subsection 77(2)]" (p. 56). The similarity between this element in section 79 and subsection 77(2) is indeed strong, in that both provisions employ the key concepts of substantial lessening and competition. However, the two provisions also contain some differences in wording. In particular, the scope of section 79 appears to include events of the past, which are not expressly included for the purposes of subsection 77(2): paragraph 79(1)(*c*) encompasses three time frames ("has had, is having or is likely to have"), while subsection 77(2) refers to only two ("is or is likely to").

95 For the purposes of this appeal, I need not consider whether the differences in wording between paragraph 79(1)(*c*) and subsection 77(2) might in particular cases properly yield substantively different results with respect to the substantial lessening of competition element. In the case at bar, it is clear that the Tribunal simply adopted the same legal test and analysis in respect of the substantial lessening of competition element for both section 79 and subsection 77(2). To the extent that the Tribunal erred in law in the context of paragraph 79(1)(*c*) in its interpretation of the test for substantial lessening of competition, the same errors of law apply with respect to subsection 77(2).

(D) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP is likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market?

96 The parallel structure of subsection 77(2) and 79(1) is also apparent in comparing the second elements required by the two statutory provisions: both provisions call for the identification of a particular type of impugned conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of subsection 77(2), and a practice of anti-competitive acts in the case of paragraph 79(1)(*b*). The parties did not present separate arguments concerning this element of subsection 77(2), but rather appear to have assimilated this element into their arguments concerning section 79.

97 The Tribunal was satisfied that the SDP was a practice of exclusive dealing according to the statutory definition provided in paragraph 77(1)(*b*) (para. 279). However, the Tribunal concluded that an exclusionary effect had not been established, based on its analysis under section 79:

> 281 We have concluded under section 79 that the SDP is not an anti-competitive practice because we found insufficient evidence to show that the SDP in itself had an exclusionary effect...
>
> 282 For the same reasons therefore as in our analysis under section 79, we find that the Commissioner has failed to establish that the exclusive dealing practice impedes or is likely to impede entry of a new competitor or have any exclusionary effect...

98 For the purposes of this appeal, I need not decide the precise scope or nature of the similarity between the statutory element of subsection 77(2) concerning exclusionary effects, and paragraph 79(1)(*b*). There may well be differences between the two provisions, which could prove pertinent in a future case. However, it is sufficient in the circumstances of this case to note that the exclusionary effects required under subsection 77(2) are clearly of a relative nature, as indicated by use of the word "impede" in paragraph 77(2)(*a*) and (*b*), rather than a more categorical verb, such as "prevent". I have already considered in detail the Tribunal's treatment of the evidence concerning barriers to entry and the effects of the SDP, and it is unnecessary to repeat this analysis here. My conclusion, stated above at paragraph 58, is equally applicable for the purposes of the Tribunal's determination with respect to the exclusionary effects element of subsection 77(2): the Tribunal's analysis of the evidence concerning barriers to entry and the effects of the SDP was conducted from the narrow perspective of prevention, and not the broader perspective implied by the word "impede". The adoption of this unduly narrow perspective constitutes reversible error.

99 Moreover, it should be noted that like subsection 79(1), subsection 77(2) establishes distinct statutory elements, each of which must be established before an order prohibiting exclusive dealing can issue. These distinct statutory elements must not be conflated: the existence of the various exclusionary effects described in paragraph 77(2)(*a*), (*b*) and (*c*) must be considered separately from the question of whether there has been a substantial lessening of competition. Since the Tribunal relied, for the purpose of its subsection 77(2) determination concerning exclusionary effects, upon its erroneous paragraph 79(1)(*b*) reasoning, its conclusion in this regard cannot stand.

V. Conclusion

100 For the above reasons, I would allow the appeal with costs, I would set aside the Tribunal's decision in this regard, and I would refer the matter back to the Tribunal for a redetermination in accordance with these reasons and on the basis of the evidence currently on record.

***G. Létourneau J.A.*:**

I agree.

***J.D.D. Pelletier J.A.*:**

I agree.

Appeal allowed.

End of Document

7

1990 CarswellNat 1368
Competition Tribunal

Canada (Director of Investigation & Research) v. NutraSweet Co.

1990 CarswellNat 1368, [1990] C.L.D. 1078, [1990] C.C.T.D. No. 17, 32 C.P.R. (3d) 1

In the Matter of an application by the Director of Investigation and Research under sections 79 and 77 of the Competition Act, R.S.C., 1985, c. C-34, as amended

In the Matter of the NutraSweet Company

The Director of Investigation and Research, Applicant and The NutraSweet Company, Respondent and Tosoh Canada Ltd., Intervenor

Roseman Member, Strayer J., Teitelbaum J.

Heard: January 9, 1990
Heard: July 10, 1990
Judgment: October 4, 1990
Docket: CT-89/2

Counsel: *Warren Grover, Q.C., John J. Quinn, Mark Katz, Winston Fogarty, Graham Garton, Q.C., Rory R. Edge*, for the Applicant
Bruce C. McDonald, James B. Musgrove, H. Scott Fairley, for the Respondent
R. Roy McMurtry, Q.C., Alan Pratt, for the Intervenor

Subject: Criminal; Intellectual Property; Property; Corporate and Commercial

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Constitutional issues — General principles

Tribunal of two Federal Court Judges and lay member validly constituted — Bias not arising from concurrent position of lay member as member of Restrictive Trade Practices Commission.

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — General principles

Elements of offence — Tied selling — Abuse of dominant position — Exclusive supply contracts — Incentives — Abuse after expiry of Canadian patent — Competition Act, R.S.C. 1985, c. C-34, s. 77, 77(1)(a), (b).

Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers

Elements of offence — Tied selling — Abuse of dominant — Exclusive supply contracts — Incentives — Abuse after expiry of Canadian patent — Competition Act, R.S.C. 1985, c. C-34, s. 77, 77(1)(a), (b).

A competition tribunal comprising two Federal Court Judges and one lay member is constitutionally valid. The concurrent function of the lay member as a member of the Restrictive Trade Practices Commission does not show bias.

***B.L. Strayer*:**

I. Introduction

1 On June 1, 1989 the Director of Investigation and Research ("Director") filed a notice of application under sections 79 (abuse of dominant position) and 77 (exclusive dealing and tied selling) of the *Competition Act*.[1] The Director asks the Tribunal to prohibit certain business practices of The NutraSweet Company ("NSC"), the respondent, which are alleged to be contrary to those sections, as well as to make such orders as may be necessary to overcome any adverse effects of those practices in the market.

1 R.S.C. 1985, c. C-34, as amended.

2 NSC is a major producer of the sweetener aspartame which it markets under the brand name NutraSweet. Aspartame is primarily used in diet soft drinks, chewing gum, low calorie formulations of various foods (e.g. yogurt), and as a table-top sweetener.

3 One intervenor, Tosoh Canada Ltd. ("Tosoh"), a rival producer of aspartame, applied for and was granted leave to intervene in these proceedings. The two major buyers of aspartame in Canada, Coca-Cola Ltd. ("Coke") and Pepsi-Cola Canada Ltd. ("Pepsi") also applied for leave to intervene but later withdrew their applications, agreeing instead to an arrangement whereby their respective witnesses would have counsel present to safeguard company interests during any examination.

4 NSC Canada is a branch of NSC, a United States corporation that is a wholly-owned subsidiary of Monsanto Co., another U.S. corporation. NSC had earlier been a division of G.D. Searle & Co. ("Searle") which was acquired in 1985 by Monsanto Co.

5 Aspartame is a high-intensity sweetener that was discovered in 1966 by Searle researchers. Searle obtained use patents (now exploited by NSC) on the product in a large number of countries, but due to delays in obtaining approvals for its use from regulatory health authorities aspartame did not come on the market until late in the lives of these patents. Approval for use in Canada was first granted in 1981 and the Canadian use patent expired in July 1987. In the United States health approval was effectively also first obtained in 1981, but this was for very limited use and aspartame was only permitted in soft drinks (by far aspartame's largest source of sales) in 1983. The life of the use patent was extended in a number of countries: from 1983 to 1987 in the United Kingdom, and until December 1992 in the United States and Australia.

6 Worldwide sales of aspartame in 1989 were approximately 7500 metric tonnes, consisting of somewhat over 75 percent sold in the United States, 5 percent in Canada, and 15 percent in Europe. Of the remaining roughly 5 percent, an appreciable percentage was sold in Australia. Canada and Europe are the principal regions where a use patent does not apply. Sales in Europe have grown rapidly, first surpassing those in Canada in 1987 and attaining a level of growth such that the *increase* in sales between 1988 and 1989 exceeded the *total* of Canadian sales in 1989.

7 NSC of course accounts for all sales in the United States and Australia (where the use patents are still in effect) and over 95 percent and 80 percent, respectively, of Canadian and European sales.[2] The Canadian (and worldwide) customers of NSC are primarily food and beverage manufacturers who use aspartame as a sweetening ingredient in their "sugar-free" or "diet" products. In 1989, NSC sold aspartame for use in Canada to about 65 customers for a total volume of 359 tonnes. Five soft drink franchisers figured among the top eight Canadian purchasers of aspartame (by volume and excluding Searle, the parent company) and accounted for over 300 tonnes. Those five were A & W, Cadbury Schweppes, Crush, Coke and Pepsi. The other three major Canadian buyers were Kraft General Foods, Wrigley and Adams Brands (the last two are chewing gum manufacturers). Coke and Pepsi are obviously by far the largest individual purchasers in this group.

2 Exhibits R-19, D-38 and X-16 (confidential).

8 NSC operates two plants in the United States with a combined capacity of 5400 tonnes per annum and it obtains supplies from Ajinomoto, a Japanese company with a high degree of expertise in the manufacture of aspartame. Until the mid-1980s, NSC also obtained supplies from other manufacturers before its own facilities could provide sufficient output. It has recently entered into similar arrangements with two manufacturers for supplies to bridge the period until planned expanded plant capacity is on stream in 1992. (Sales in a given year may exceed plant capacity due to the drawdown of inventories).

9 The relationship with Ajinomoto dates back to at least the early 1970s. NSC first obtained approval for the sale of aspartame from the United States Food and Drug Administration ("FDA") in 1974. For reasons that are not germane to the present proceedings, this approval was not implemented. An arrangement for supplies had been entered into with Ajinomoto in anticipation of FDA approval. Ajinomoto holds a large patent portfolio relating to the production of aspartame. It licenses both patents and know-how to NSC in some areas of manufacturing. Ajinomoto and NSC are joint owners in NutraSweet AG which markets aspartame under the NutraSweet trademark in Europe. The product for NutraSweet AG sales is supplied by Ajinomoto. It uses the great majority of its remaining output to supply NSC under long-term contract and a large percentage of Canadian supplies is derived from this source. According to the available evidence the terms of the contract with Ajinomoto restrict it from marketing directly in North America until 1996. Ajinomoto's manufacturing capacity is approximately 1500 tonnes per annum. Less than ten percent of this capacity is used to satisfy demand in Japan where per capita sales of aspartame are very low. Ajinomoto, like NSC, is proceeding with plant expansion.

10 There is only one producer of aspartame who is currently selling in competition with NSC in Europe and Canada. Holland Sweetener Company ("HSC") is a joint venture between Naamloze Vennootschap DSM and Tosoh Corporation of Japan. It operates a 500-tonnes per annum plant in Holland. Marketing in Europe is conducted by HSC and in Canada by Tosoh, a wholly-owned subsidiary of Tosoh Corporation. Tosoh started marketing efforts in Canada as soon as the Canadian use patent expired in the summer of 1987. HSC started production in mid-1988, several months behind schedule, and it has only recently been able to approach full capacity output. Sales have, to date, lagged behind output.

11 Several other firms have produced aspartame from time to time in small pilot plants or in general purpose fine chemical facilities. According to the available evidence none are currently producing. There is evidence, however, that at least some of them were left with inventories after they stopped producing. For example, Pierrel, a firm that had supplied NSC for a time and stopped producing in the mid-1980s, was left with inventory that a distributor was trying to sell in Canada in 1987 and 1988. While customers are not receptive to buying from a supply source that they cannot rely on, there is a strong incentive for firms holding inventories to dispose of them and it is likely that they are being sold and form part of worldwide supplies.

12 The Director's investigation was initiated by a complaint made by Tosoh.

13 In our view, the Director's principal allegations fall under two broad heads. Under the first head are contract terms that, it is alleged, create an exclusive supply relationship between NSC and its customers and thus restrict the entry or expansion of would-be or existing competitors. This type of allegation is advanced by the Director under two sections: under section 77, which specifically addresses exclusive dealing and tied selling; and under section 79, which addresses "anti-competitive acts". The Director contends that these exclusive supply devices fall within the general criteria for anti-competitive acts in section 78, even though not specifically mentioned in the non-exhaustive list of such acts in that section. Under the second broad head is the allegation that NSC has been selling below its "acquisition cost", one of the anti-competitive acts specifically set out in section 78. This virtually constitutes a separate case with regard to the elements that must be satisfied.

14 Before addressing the specific allegations certain background issues are discussed below under the headings of "Product Market", "Geographic Market" and "Aspartame Production: Potential Entrants and Entry Conditions into Manufacturing". This background is required not only for an understanding of market context, but also in directly addressing a number of elements in sections 77 and 79.

II. The Product Market

15 The need to identify a relevant product arises in both subsection 77(1) and paragraph 79(1)(a), which refer, respectively, to a supplier of a "product" and substantial or complete control of "a class or species of business". Paragraph 79(1)(c), which refers to substantial lessening of competition in a "market", also requires identification of a relevant product. It is not useful at this time to address the submissions regarding specific interpretations. Whichever interpretation is adopted for specific paragraphs, both sides accept that, at one point or another, it is necessary to consider the degree to which aspartame is sufficiently distinct from other sweeteners in order to decide whether it should be treated as a separate product or as part of a broader class of sweeteners.

16 The question is whether, and in what ways, other sweeteners are good substitutes for aspartame. In any given competition law case, a wide range of factors may be relevant in considering product substitutability. Factors which have proved pertinent in the instant case include taste, caloric content, other physical characteristics, safety concerns, price differences, and users' responses to price changes.

17 The respondent has submitted that it may not always be useful to define the product market exactly, that decisions can more reasonably be arrived at without taking this step since the factors to be considered in defining the market may be ones that are required in considering other critical questions such as market power. As the Tribunal understands the respondent's submission, it is that a narrow definition of the product market could lead to the conclusion that NSC has market power, whereas this conclusion might not follow if all competitive pressures (including those arising from sweeteners considered not to be sufficiently close substitutes to be included in the delineated product market) are taken into account when considering the market power question. It is the Tribunal's view that it is necessary that the overall purpose of a section be kept in mind when dealing with the elements which the legislative scheme requires to be specifically addressed. In approaching the discussion of product market, the Tribunal has kept in mind the implications that its conclusions would have for its consideration of market power.

1. Sweeteners

18 Caloric sweeteners and high-intensity sweeteners form two broad classes. Sugar and high-fructose corn syrup are the two most important caloric sweeteners.

19 High-intensity sweeteners have a perceived sweetness that is, by weight, many times that of sugar. On a rough average (since there is some variation by use), aspartame, cyclamates and saccharin are 180, 30 and 300 times sweeter than sugar, respectively.

20 There are, however, dimensions (or characteristics) other than sweetness that determine the demand for the various sweeteners. An obvious difference between high-intensity and caloric sweeteners is that the former have comparatively very little bulk. Thus, in uses where sugar provides an important part of the bulk, such as in chocolate bars, bulking agents must be added to the product if a high-intensity sweetener is to be used. The price comparisons among sweeteners contained in the evidence during the proceedings did not include the cost of bulking agents. Comparison between sweetener prices is usually done on a sweetness equivalency basis. The only product in which there is widespread use of high-intensity sweeteners and bulking agents is chewing gum. The bulking agents used in chewing gum provide roughly the same calories as sugar; however, neither the bulking agents nor the high-intensity sweeteners contribute to cavities.

2. Categories of Demand for Sweeteners

21 Sweetener consumption is conveniently divided in the first instance between table-top and industrial use. Table-top use refers to purchases of sweeteners by households and restaurants for direct consumption by individuals. Industrial demand derives from the inclusion of sweeteners as an ingredient in the entire gamut of food and beverages sold to households and institutions. In the table below covering Canada, the United States and the European Economic Community ("EEC"), table-top sales are seen to be only three or four percent of total sales in Canada and the United States. Industrial sales of aspartame are overwhelmingly driven by demand from the soft drink industry in each of the three geographic areas. Approximately 85 percent of industrial sales are made to this one industry. Coke and Pepsi have a similar order of importance to the soft drink industry as that industry has relative to the overall industrial demand for aspartame.

22 Aspartame's large percentage of sales to the soft drink industry contrasts with limited sales for other large scale industrial sweetener uses. There are technical problems in using aspartame in baked goods, and confectionery generally consists in large part by volume of sugar so that the use of a high-intensity sweetener (without a bulking agent) would cause much of the product to disappear. There are outstanding petitions to health authorities in Canada and in the United States for approval of the use of aspartame in encapsulated form in baked products. The Canadian petition was filed in September 1988. In spite of this petition and one filed in May of the same year, requesting approval of aspartame for use in such products as fruit spreads and salad dressings, there is nothing in the past history of the demand for aspartame or in the demand projections of NSC that suggest that the pivotal role played by the soft drink industry is likely to change in the foreseeable future.

	Table-Top Use as a Percentage of Total Sales in 1988	**Carbonated Soft Drinks as a Percentage of Industrial Use in 1988**
	All Sweeteners	
Canada	29	35
United States	21	40
European Economic Community	36	30
	Aspartame	
Canada	3	85
United States	4	84
European Economic Community	27	87

Source: Confidential schedules to the expert affidavit of J. Fry for NSC, Schedule 6 (Exhibit R-13-C).

3. High-Intensity Sweeteners

23 High-intensity sweeteners are subjected to a lengthy, rigorous approval process in developed countries. The concerns that arose over the safety of cyclamates and saccharin were apparently responsible for what was described by Mr. Smith of the Health Protection Branch ("HPB") of the Government of Canada as a "new era in the kinds of testing" required by governments for approval of new artificial sweeteners. [3] It required five years from the date of the petition for approval to be granted to the last high-intensity sweetener admitted in the United States. Petitions to HPB are not made public so it is not officially known if, or when, a petition for this same product, acesulfame-k, was filed in Canada. According to Ms. Mathews, formerly Manager of Regulatory Affairs with NSC, the manufacturer of acesulfame-k has publicly stated that a Canadian petition was filed. In any event, acesulfame-k has not been approved for use in Canada, two years after it was granted the approvals sought in the United States.

3 Transcript at 198 (10 January 1990).

24 All the studies designed to show that a new food additive is safe, in the quantities that it would be consumed in the uses requested in a petition, must be completed prior to the filing of a formal petition. Thus most of the effort, and a good part of the time, required to obtain approval for a new product has already been invested by the time a formal petition is filed. There are two new sweeteners, alitame and sucralose, for which petitions were filed in the United States in 1987 and, as might be expected, were likely filed at approximately the same time in Canada. Any other new high-intensity sweeteners on which work is being done are, based on the absence of evidence of imminent filings, so far from being marketed that they can safely be ignored.

25 There are currently four high-intensity sweeteners that have approval in either Canada, the United States or the EEC. These are aspartame, acesulfame-k, cyclamates and saccharin. In Canada and the United States, only aspartame is approved for a variety of "wet" and "dry" uses; that is, both in applications that do and do not require the high-intensity sweetener to be dissolved when it reaches the consumer. Cyclamates are approved for table-top use in Canada but are banned in the United States. Saccharin can be sold for table-top use in Canada solely in drug stores. In the United States, it is formally banned by the FDA but it has received a number of important congressional exemptions, including most importantly for use in carbonated soft drinks. In the United States the use of acesulfame-k in a number of dry uses was permitted in 1988.

26 Aspartame is considered to be closest to sugar from a taste point of view. However, it suffers from a number of technical deficiencies that tend to limit its use or make it vulnerable to competition from other sweeteners. Aspartame is not heat stable (i.e. it loses its sweetness when heated) and this has prevented its use as a sweetener in baked foods. This deficiency has been remedied technically by encapsulating the aspartame and petitions for use of this product in baking are pending in Canada and in the United States. Aspartame's less-than-perfect stability also manifests itself when it is used as a sweetener in carbonated soft drinks. It loses its sweetness if the product is stored for lengthy periods. As a result, diet fountain drinks in the United States tend to contain a blend of aspartame and saccharin, since saccharin is much more stable. Aspartame is exclusively used by Coke and Pepsi (and possibly by all brands) in their diet packaged products in Canada and the United States.

27 Saccharin is very inexpensive on a sweetness equivalency basis, the least expensive sweetener by far. It suffers, however, from an unpleasant (bitter) aftertaste and is considered to pose some potential health risks. The problem with saccharin's aftertaste can be resolved by blending saccharin with sweeteners such as aspartame or cyclamates.

28 Acesulfame-k is described as similar to saccharin. It is however, much more expensive. Its primary advantage over saccharin is that it apparently does not raise health concerns. Only limited capacity to produce acesulfame-k is in place, approximately 100 metric tonnes which is less than two percent of the capacity dedicated to the production of aspartame. Acesulfame-k is being marketed in the United States primarily as a table-top sweetener and approval for wet use has not been sought. Although there is no evidence of the wholesale prices of finished products, or of the ingredient cost of acesulfame-k, there is evidence of a pronounced increase in NSC's expenditures on promotion in response to the introduction of acesulfame-k in table-top use in the United States. Based on this evidence, it is reasonable to conclude that acesulfame-k is an important substitute product in table-top use in the United States and elsewhere where it has approval.

29 Acesulfame-k is used in a blend in Diet Coke in France, but there is no evidence that it has been adopted in diet formulations in other countries. Unfortunately the evidence does not allow a conclusion on whether this limited penetration of acesulfame-k in diet soft drinks is of broader competitive significance or whether it reflects a peculiarity of the French market or regulatory regime. Based on the considerable delay in obtaining regulatory approvals, acesulfame-k is unlikely to be a factor in the United States or Canadian soft drink industry for some time.

30 According to several witnesses, there is speculation that the United States' ban on cyclamates will shortly be lifted. As noted earlier, cyclamates application in Canada is limited to table-top use. In the EEC cyclamates are approved for soft drinks use only in West Germany. Clearly, little or no weight can be given to the potential competition from

cyclamates in major uses in Canada or in the United States. Apart from the unknowns regarding regulatory approvals (if, when and for what applications), it is highly doubtful that industrial users would move quickly to incorporate an ingredient about which there has been recent health concerns.

31 Two new high-intensity sweeteners could affect the competitive position of aspartame. The most serious competitive threat appears to be sucralose which, like aspartame, is considered to be similar to sugar in taste but is more stable than aspartame. A number of wet and dry applications are being sought for this product in petitions filed in mid-1987 with the FDA in the United States. The second product, alitame, appears to be considered less of a potential competitive threat. Petitions for various wet and dry applications were filed with the FDA in early 1987. To date, no country has granted approval to either ingredient for any application.

32 Blending of more than one high-intensity sweetener provides users with the opportunity to reduce their costs by adjusting the mix of sweeteners according to the prices and characteristics of the sweeteners. Blending also provides a synergistic increase in perceived sweetness beyond the level that would be anticipated from the perceived sweetness of each of the sweeteners if separately used. This means that although none of the presently approved high-intensity sweeteners is considered by itself to be an acceptable substitute for aspartame, such sweeteners, if blended, could provide price competition by affecting the proportion of aspartame used in the blends. Whether sweeteners are used individually or in blends, the evidence shows that taste is a major concern of most industrial users of sweeteners. Possible blends offering an acceptable taste profile in soft drinks, mentioned in evidence, are aspartame with saccharin (or acesulfame-k) and aspartame with cyclamates and saccharin. Professor Wilson, who appeared on behalf of the Director, is of the opinion that because of the possibility of blending, the relevant "product" is intense sweeteners.

4. Price Competition Between Sweeteners

33 Competition between sweeteners can be direct, in the sense that one sweetener is selected over another for a particular use, or the competition can be indirect in that there is competition among the products containing the sweeteners.

34 It is noteworthy that although aspartame prices fell below EEC sugar prices in 1986 and stood at 42 percent of sugar prices by 1989, aspartame has not been introduced into non-diet soft drinks as a sweetener in the EEC. An hypothesis held out by Dr. Fry, an expert witness for the respondent, is that at prices where aspartame is cheaper than caloric sweeteners it will replace them, with the result that the demand for aspartame becomes very sensitive to price changes. An implication of this result would be that producers of aspartame would be very reluctant to raise prices because to do so would entail a large loss in sales. There is no evidence of direct competition between aspartame and caloric sweeteners, although there is evidence that saccharin (or possibly acesulfame-k) is used in non-diet or regular carbonated soft drinks in the United Kingdom. There is clearly a cost incentive to use saccharin instead of other sweeteners, including sugar. Yet since 1982, when the use of saccharin peaked, the amount of saccharin (or acesulfame-k) used in regular carbonated soft drinks has steadily fallen; by 1989 it was down by 43 percent from its 1982 peak. There is no cost justification for this change since saccharin prices were 3.9 percent of sugar prices in the EEC on a sweetness equivalent basis in 1982 and 3.8 percent in 1989.[4]

4 Confidential schedules to the expert affidavit of J. Fry, Schedules 14 and 11 (Exhibit R-13-C). There is wide geographical variation in sugar prices because of the varying extent to which countries or trade groupings like the EEC protect their sugar producers. Although prices of aspartame in Canada and the EEC have been fairly close, the Canadian price did not fall below the landed price of sugar until 1989.

35 Dr. Fry drew on the growing market share of diet soft drinks as evidence of indirect competition between aspartame and caloric sweeteners. Using the change in the ratio of aspartame to sugar price between 1984 and 1988 in Canada and the change in the percentage share which diet drink sales form of total carbonated soft drink sales, he measured the average "cross-elasticity" between sugar and aspartame to be equal to .14. That is, he concluded that a one percent decline in the price of aspartame, keeping the price of sugar constant, resulted in a .14 percent increase in the diet drinks' share.[5]

The prices of diet and regular soft drinks have been kept equal by producers. Therefore, the mechanism by which the increase in market share is claimed to have been achieved is via increased advertising or other marketing effort in respect of diet soft drinks by the suppliers as the profit margin on the diet drinks became more favorable with declining aspartame prices. There is no evidence whatever that this hypothesized increase in marketing expenditures actually occurred. The only available evidence on advertising is for the United States. There the opposite occurred: less money both absolutely and relative to regular soft drinks was spent on diet drinks as the price of aspartame fell. [6] Furthermore, the logic of Dr. Fry's hypothesis is not clear since throughout the period in question in his study the ingredient price of aspartame was above that of sugar. Thus, even though the price of aspartame was falling and its cost disadvantage was decreasing, it is difficult to see why soft drink suppliers would find it in their interest to increase promotion of a lower profit product. Even on the basis of Dr. Fry's hypothesis it is unclear what the measured "cross-elasticity" represents since the claimed effect of the price change is so indirect.

5 Expert affidavit of J. Fry at B-34 to B-37 (Exhibit R-13-E); Schedules to the expert affidavit of J. Fry, Schedule 12 (Exhibit R-13-F).

6 Supplementary expert affidavit of J. Fry, Schedule 23, Table 1 (Exhibit R-13-G).

36 Measuring cross-elasticity is a difficult thing to do because of the problems of isolating the effect of price changes from other factors affecting sale. It is perfectly clear that the demand for diet products is greatly affected by life-style. No attempt was made to allow for this factor, nor could it have been, given the limited number of available observations. The growth in sales of diet drinks has been much faster than that for regular drinks over a long period predating the introduction of aspartame (as shown by the data filed for the United States between 1972 and 1988): [7] the growth rate in the diet segment was well over two and one-half times that for regular drinks between 1972 and 1982, before aspartame was a factor, and in spite of perceived health problems with the ingredient then used in diet drinks. The fact that there was continued growth after aspartame was introduced and its price was falling does not in any way support a finding that the growth in the diet segment can be attributed to the fall in the price of aspartame. While it is possible that aspartame could indirectly compete with caloric sweeteners in Canada and the EEC now that aspartame's price is lower on a sweetness equivalency basis, the evidence regarding this possibility and how it might affect the pricing of aspartame can only unfold in the future.

7 *Ibid*.

37 The question of indirect competition between aspartame and caloric sweeteners was also addressed through evidence on "cannibalization", which in the present context refers to sales of low-caloric or diet formulations of a product at the expense of the regular or full-caloric formulations. The import of this evidence on whether the price of aspartame is constrained by prices of caloric sweeteners is unclear. As stated by Professor Wilson, the fact that some consumers always or occasionally prefer a low-caloric formulation tells us absolutely nothing about the indirect *price* competition between aspartame and caloric sweeteners. [8] Dr. Fry gave evidence regarding cannibalization of regular soft drinks by diet versions in the United States. This evidence is in the form of a regression equation in which the consumption of soft drinks (diet, or diet plus regular) is "explained" by gross national product. [9] Apart from whether this evidence is relevant to the issue of substitutability, the Tribunal finds it unconvincing on its own terms given the failure of Dr. Fry to take into account the false statistical signals and misleading impressions of causality created by underlying trends in the economy that are common in this type of analysis.

8 Transcript at 1161-62 (8 February 1990).

9 Supplementary expert affidavit of J. Fry at 2-3 and Schedule 23, Tables 2, 3 (Exhibit R-13-G).

38 Examples of advertising by associations of sugar producers in Australia and other countries, highlighting the "naturalness" of sugar compared to aspartame, were introduced by the respondent as further evidence of competition between sugar and aspartame. While these advertisements indicate that the sugar associations believe that they can affect the demand for sugar (and aspartame) by discrediting the origin of aspartame, they do not affect the conclusion that substitution between diet and regular products is primarily life-style rather than price related.

39 Dr. Fry also submitted measures of the "cross-elasticity" between aspartame and cyclamates using the sales of table-top brands containing cyclamates and aspartame.[10] The figure obtained is approximately .35 which indicates a greater degree of indirect price competition than in the case of aspartame and caloric sweeteners used in soft drinks. There is no more reason to believe that the figures used by Dr. Fry measure the "cross-elasticity" between aspartame and cyclamates in table-top use than that similar figures measured the degree of indirect competition between aspartame and caloric sweeteners in soft drinks. The pattern captured by the numbers is a steady decline in the price of aspartame relative to that of cyclamates at the same time that sales of table-top sweeteners containing aspartame rose while those containing cyclamates were falling. It is noteworthy, however, that although the price of aspartame fell, it was at all times much more expensive than cyclamates — approximately nine times in 1984 and slightly less than four times in 1988.[11] While the ingredient cost of aspartame and cyclamates are in evidence, the prices charged for these table-top sweeteners are not. Figures in evidence on advertising expenditures of the principal table-top brand containing aspartame do not provide any coherent pattern.[12] The evidence does not support a conclusion that the changes in the relative shares of brands containing aspartame and cyclamates were due solely or primarily to what was happening to the prices of those ingredients. For example, consumers' perceptions of the safety of the two ingredients will obviously influence their relative sales.

10 Schedules to the expert affidavit of J. Fry, Schedule 12 (Exhibit R-13-F).

11 Confidential schedules to the expert affidavit of J. Fry, Schedule 11 (Exhibit R-13-C).

12 Supplementary expert affidavit of J. Fry, Schedule 24, Table 2 (Exhibit R-13-G).

40 This is not to say that it is unlikely that there is competition, broadly conceived, between aspartame and cyclamates. The critical question for present purposes is the extent to which this broad competition limits the ability of aspartame producers to raise prices. The information on which the measurement of cross-elasticity is based is simply too inadequate for the measurement to be useful in this regard. Finally, the fact that sales of aspartame for table-top use represent a very small percentage of total sales of aspartame means that the extent to which aspartame is in direct or indirect competition in this area has a correspondingly small effect on changes in profitability resulting from price changes.

41 The most potent source of competition for aspartame is likely to be from new high-intensity sweeteners. It is, however, difficult to weigh the potential competitive impact of a product that has not yet been approved for any use in any jurisdiction and will undoubtedly take a number of years to be brought into full-scale production after it is approved. The same comment applies to the possible legalization of cyclamates in the United States. While cyclamates are regarded as a good blended sweetener for soft drinks, whether they will be allowed for this purpose and will be an ingredient that beverage producers choose to use is unknown.

42 The best way of judging the extent to which the price of aspartame is constrained by sweeteners currently on the market, and those that are anticipated to be introduced, is to compare the price of aspartame in jurisdictions where the only competition comes from these other sweeteners to the price in jurisdictions where there is at least the possibility of competing aspartame suppliers. The former is the case in the United States where the use patent has been extended; the latter is the case in Canada. The average price of aspartame in the United States is more than 50 percent higher than it is in Canada. Alternative sweeteners do not provide sufficient competition to limit the market power of NSC in the United States.

43 In considering the competitive impact of alternative sweeteners it is also relevant to consider the decision of NSC to double, approximately, its production capacity. This decision has been taken in order to safeguard its market share once its United States use patent expires at the end of 1992. In weighing the risks posed by other sweeteners the decision was clearly taken to confront potential competition from other producers of aspartame by developing a highly efficient production capacity capable of meeting much of the future demand.

Conclusion as to the Product Market

44 To sum up, there is no evidence of direct competition between aspartame and caloric sweeteners and very weak evidence of indirect competition between diet and full-caloric products. There is, in comparison, some direct competition from other currently approved high-intensity sweeteners serving the diet market. None by itself, however, is a good substitute in large market segments, and there is also little indication that there is a serious threat from blends. We therefore would define the product market as being aspartame. It really matters little, however, whether the relevant product is defined as "aspartame" or "high-intensity sweeteners" so long as the limited extent to which other high-intensity sweeteners constrain aspartame prices is kept in mind. In Canada, aspartame is the only high-intensity sweetener allowed as a food additive. Any competition in the table-top segment is likely to have very limited effect on overall prices. Therefore, the effect in Canada of competition from other high-intensity sweeteners must be indirect, flowing from foreign to Canadian aspartame prices. The critical question is the extent to which the Canadian market is insulated from the effects of competition, if any, elsewhere. The answer to this question lies in the definition of the geographic market.

III. The Geographic Market

45 Given that there is no production of aspartame in Canada, from the point of view of source of manufacturers' supply Canada is necessarily part of a geographic market that extends beyond its borders. Since Canadian buyers are dependent on manufacturers in other countries, the further question arises as to whether Canada is a separate geographic market at the level of distribution.

46 The Director takes the position that the relevant geographic market for assessing the impact of the respondent's practices on competition in the sale of aspartame is Canada. He submits that this is supported by: price relationships in different geographic areas (in particular, as between Canada and the EEC); the separate treatment of Canada with respect to volume and price in multi-country contracts between NSC and Coke and Pepsi; and Canada's own regulatory scheme for admitting intense sweeteners as food additives, a scheme that leads to results different from those found in countries within the EEC. In the view of the Tribunal, the latter consideration is not very helpful in the delineation of geographic markets. It is true that more restrictive regulations regarding other high-intensity sweeteners are likely to increase the demand for aspartame and allow for higher prices. However, this consideration does not address the critical question required to be answered in defining geographic markets, namely, whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas.

47 The respondent's position is that the geographic market is worldwide (save for those countries where NSC still holds a use patent, presumably). It is based on the considerations that transportation costs are low, that there are no Canadian tariff or non-tariff barriers [13] and that, according to Professor Mathewson, an expert witness for the respondent, the minimal required infrastructure for distribution makes entry easy. Professor Mathewson concludes that as long as there are existing suppliers outside Canada they would quickly enter, directly or through others, should NSC attempt to raise Canadian prices.

13 The nominal tariff rates for aspartame are as follows: Most-Favoured-Nation Tariff, 12.5%; General Preferential Tariff, 8%; United States Tariff (as of 1 January 1990), 7.5%. See *Customs Tariff*, R.S.C. 1985, c. C-54, item 2924-29.00.10. Under the *Chemicals and Plastics Duties Reduction or Removal Order, 1988*, SOR/88-74, as am. SOR/88-340, SOR/89-327, SOR/90-383,

aspartame comes into Canada free of duty until 30 June 1991. On that date the exemption will likely be renewed for another year; an extension is apparently a routine matter.

48 Geographic market definition represents an attempt to determine the extent of the territory where there is competition and in which prices for a product tend toward uniformity. In most industries, the absence of governmental trade barriers and low transportation costs is enough to ensure that national boundaries do not create separate markets, particularly where there is easy entry into distribution. Under these circumstances one is usually justified in assuming that sellers (or even buyers) will move product from lower-priced areas to higher-priced areas so that attempts to charge higher prices in any region will be frustrated. This cannot, however, be taken for granted.

49 Any tendency towards equalization of aspartame prices is unlikely to result from arbitrage in a narrow sense, i.e. the physical movement of goods from lower-priced to higher-priced areas, since supply contracts for aspartame are country or region specific. To the extent equalization occurs, it is more likely to come from the negotiating position of multinationals who account for a large fraction of purchases. Even in companies that do not negotiate centrally, personnel in the different regions know the prices paid elsewhere.

50 On the supply side, HSC has an incentive to push its selling efforts in the region that offers the higher returns, thus tending to create downward pressure in the region with higher prices. Potential new entrants into distribution would have the same incentive. Professor Mathewson's conclusion on the ease of entry into distribution should be qualified by noting that the mere existence of the NutraSweet logo, its history and its use on the packaging of most of the major aspartame buyers is one of the conditions of entry faced by new distributors. Whether and to what extent the logo constitutes a barrier to entry need not be discussed here. The most important test of the operation of this and other factors in segregating the Canadian market from the rest of the world where there is competition (i.e. except for patent protected areas) is in the prices actually paid. The most complete price information in evidence is for Canada and Europe, particularly the EEC, and, in fact, these are the only two significant areas of aspartame consumption outside of the patent areas, the United States and Australia.

Conclusion as to the Geographic Market

51 The bottom line price of NSC, or the "net/net price" to use the term employed by NSC, is arrived at by applying a series of discounts that may be region or customer specific. NSC's average net/net prices in Europe were 10 percent higher than Canadian prices in 1987, the year that the use patents expired in Canada and in the United Kingdom (which had the largest sales of aspartame in Europe), 6 percent higher in 1988, and 13 percent lower in 1989. [14] Country-specific clauses in multi-country contracts along with these average price differences indicate that market conditions in Canada, which include the marketing practices of NSC, can and have produced prices that differ significantly from those in other regions of competition. In other words, it is reasonable to treat Canada as a separate geographic market for the purposes of evaluating the effects of NSC's marketing practices.

14 Exhibit D-3 (confidential).

IV. Aspartame Production: Potential Entrants and Entry Conditions Into Manufacturing

52 Aspartame is produced by combining (or "coupling") aspartic acid and phenylalanine. The former is available from a number of sources because it has uses other than in the production of aspartame. Phenylalanine, on the other hand, is almost exclusively used as an input in aspartame and aspartame producers must integrate in one way or another into its production.

53 NSC has two plants for the production of aspartame, one in University Park, Illinois and the other in Augusta, Georgia. The former was opened in 1982 and employs a less capital intensive, but overall apparently more costly coupling technology, the "Z" process. The Augusta plant, started up in 1985, uses the "F" process that is based on technology

developed by NSC's parent, Monsanto Company. [15] HSC uses the "Z" process, but it employs an enzymatic rather than a chemical process. Although having expertise in both processes, Ajinomoto apparently employs a third chemical process.

15 The cost estimates provided by NutraSweet did not include a cost for the use of capital apart from depreciation. Allowing for the cost of capital would have a greater effect on the more capital intensive "F" process and tend to eliminate or reverse the cost difference that is estimated to exist without this cost component.

54 There are a number of steps in aspartame production. Each or several combined, depending on the technology, is the subject of patents held by different firms. Apart from NSC (through its licensing agreements with Ajinomoto) and Ajinomoto, no single firm holds patents covering all steps. Ajinomoto is the sole firm with patents covering crystallization, which comes near the end of the production process. Ajinomoto has, according to the evidence of HSC, launched suits in England and Holland against HSC claiming patent infringement. A number of firms are known to hold patents covering one or more steps. Apart from the current large scale producers (NSC, Ajinomoto and HSC), only Mitsui Toatsu of Japan is known to hold a relatively full patent portfolio. It covers all production steps save for crystallization.

55 The Director takes the position that existing patent portfolios create a significant barrier to would-be entrants. He is also of the view that this barrier is reinforced by the economies of scale and sunk costs of aspartame production. The respondent's position with regard to patent portfolios is that it is in the interest of those holding unutilized technology to license their patents and the fact that *individual firms* do not have patents covering all processes does not create a barrier. The Tribunal accepts that it is not necessary to hold patents in order to produce aspartame; it is only necessary to have access to technology that does not violate patents held by others. Further, the fact that a patent is held does not indicate that the technology covered by the patent is low cost. The Tribunal is of the view that technology and proprietary technology protected by trade secrecy is an impediment to entry, but the available evidence is not sufficiently detailed to go beyond this mild conclusion. Potential entrants probably face a trade-off between investing in low cost technology and using available higher cost techniques. Firms contemplating large-scale entry through dedicated plants would almost certainly have to make investments in technology to assure that they could achieve competitive costs.

56 Dr. Fry and Professor Mathewson take the position that there are numerous potential entrants, represented by general fine chemical firms or former aspartame producers, who can easily enter or re-enter the industry. Professor Mathewson summarizes Dr. Fry's evidence and its implications:

> James Fry lists the current producers of aspartame in the world, including their production capacities, as well as potential new producers of aspartame. Further, he details the costs and time lags for converting fine chemical plants to the production of aspartame or reconverting former aspartame facilities to produce aspartame again. In general, any conversion costs are low and the time lags are short....
>
> [Given low transportation costs and ease of entry into distribution in Canada], the competitive pressures of potential suppliers under these circumstances would seem to be substantial. The ease of entry into the production and distribution of aspartame implies that NSC must act competitively to survive. [16]
>
> 16 Expert affidavit of F. Mathewson at paras 31-32 (Exhibit R-20-C) [footnotes omitted].

57 Dr. Fry and Professor Mathewson stress the length of time it would take a fine chemical producer to convert to aspartame production. Their analysis does not take account of the fact that fine chemical producers must have a source of phenylalanine and this requires investment in the production of this input directly or through a contractual commitment. Mr. Minarich, Vice-President of Operations and Technology for NSC, stated that it should be possible to purchase phenylalanine. The price range he suggested is well above NSC's cost of producing this ingredient. The evidence of Dr. Fry and of Professor Mathewson also avoids the key question regarding relative costs of producing aspartame in dedicated and general purpose plants. The uncontested evidence of Mr. Vermijs, General Manager of HSC, is that it

is considerably more expensive to produce in general purpose plants which would presumably be the type used by fine chemical firms to commence aspartame production.

58 A tolling agreement between NSC and Hexcel, a fine chemical producer, does not support the view that such producers can easily enter the industry. Under this agreement Hexcel is to manufacture aspartame for NSC. The apparently more costly "Z" coupling technology is to be employed, presumably because it requires equipment that the toll producer, for the most part, has on hand. The price to be paid to Hexcel may not reflect its production costs since NSC will be supplying the know-how, essential raw materials and some equipment. Furthermore, the other alternatives open to Hexcel are not known. The returns that it could earn from producing other fine chemicals would determine what it would demand from NSC. A restrictive covenant in the contract prevents Hexcel from producing aspartame for a five-year period following the termination of its supply agreement with NSC.

59 Dr. Fry cited a number of firms that have produced aspartame at one time, are currently producing it, or have expressed an interest in producing it. The latter evidence is too inconclusive with respect to potential competition to be meaningful (or useful). The information regarding former or current producers is summarized below. The scale of the plants is based on the evidence of Dr. Fry[17] but the evidence of other witnesses has been taken into account in establishing their status where his evidence was not definite or was contradicted. The first six firms are European, the two following Japanese, and the last two Korean.

17 Expert affidavit of J. Fry at I-1 to I-7 (Exhibit R-13-E).

FIRMS	***SCALE (tonneslyr)***	***STATUS***
Laboratoires Bottu	50	Produced in mid-1980s
Isochem	70	Not producing
Farmitalia (currently Antibioticus)	1000	Will produce under contract
Farchemia	100	Not producing
Pierrel	630	Last produced in 1985 or 1986
Orgamol	25	Produced in mid-1986
Mitsui Toatsu	15	Laboratory or pilot plant{18}
Tosoh	25	Pilot plant
Cheil Sugar	25	Not producing
Green Cross	125	Recently stopped producing{19}

Notes: 18 Dr. Fry cites Mitsui Toatsu as having a pilot plant but according to the evidence of Mr. Vermijs it is not clear whether this company is at the laboratory or pilot plant stage.19 Dr. Fry does not state whether Green Cross is currently producing. The evidence of Mr. Kuipers, Marketing Manager of HSC, is that it is not.

60 Although a number of firms have produced aspartame, very little is known about the cost at which they could do so if they chose to reenter into production. The European firms discontinued production in the mid-1980s when the price of aspartame was two to three times higher than its current price outside the United States. In almost all cases such production occurred (or is occurring) in pilot or general purpose plants.

61 The opportunity cost, and thus the willingness to begin producing aspartame, of existing fine chemical producers obviously depends on the returns that they can earn by producing other fine chemicals. Even though it is appreciably more expensive to produce in a general purpose fine chemical plant than one dedicated to the production of aspartame (and phenylalanine) when the cost comparison is made for plants constructed *de novo*, fine chemical producers might

nevertheless have costs more comparable to dedicated producers when there are anticipated depressed conditions in the fine chemical industry.

62 Pierrel, Farmitalia and Green Cross appear to have been the most serious entrants. Pierrel produced out of a general purpose facility. It supplied NSC for a time when NSC had inadequate capacity to satisfy demand. Pierrel also tried to sell on its own account. It reportedly discontinued production with large, unsold inventories. Pierrel, like the other firms that left the industry, faced formidable difficulties because the volume of sales possible outside of the areas covered by NSC's use patent was very small.

63 Farmitalia supplied NSC during the period 1982-85. It will be supplying NSC under a tolling agreement during part of 1990-91. It has equipment for all of the production steps and will be employing its own technology. NSC will be supplying the two basic raw materials. The high price to be received by Farmitalia under the agreement does not support the view that its potential entry would provide a constraint on the pricing of existing producers. In any event, Farmitalia is excluded, as is Hexcel, from producing aspartame for five years following the expiration of its supply agreement.

64 Little is in evidence regarding Green Cross other than that it recently discontinued production and that it was not considered to be a useful toll producer by NSC.

65 Based on its patent portfolio, Mitsui Toatsu appears to be a potential entrant. Dr. Fry states that it has a pilot plant but according to Mr. Vermijs it may not yet be at that stage. In any event, it takes about two years to construct a full-scale aspartame plant and then several months to overcome production problems. Since there is no evidence that Mitsui Toatsu has embarked on construction it is at least that far away from entry. If it does not have a pilot plant its entry would be delayed by a further two years or so, based on the experience of HSC.

66 Access to technology is a necessary first step for entry. However, even a firm with comparable technology to that used by existing firms may find entry conditions difficult, particularly prior to the expiration of the United States use patent at the end of 1992. According to the evidence of Mr. Minarich, there are economies of scale for a plant with a capacity of up to more than one-third of current world output. This is consistent with the evidence submitted by Mr. Vermijs that a decline in capital equipment requirements per unit as scale increases is a common feature in the chemical industry; that is, the cost of vessels and pipes increases less quickly than their capacity. The new 2100-tonne plant that is being constructed in Augusta falls short of Mr. Minarich's estimate of minimum efficient scale, but it nevertheless represents more than a quarter of world output and more than the total sales outside the United States. Thus, a firm that hopes to achieve cost parity with NSC must achieve a large market share. Such large scale entry entails significant risks since, according to the evidence of Mr. Vermijs, much of the investment in a dedicated aspartame plant is sunk: its value is much less in alternative uses. Another difficulty for would-be entrants is the existence of a marked learning curve in phenylalanine and aspartame production. Even a large, fully utilized plant may not provide costs comparable to those of NSC's present costs until the entrant has accumulated production experience.

Conclusion as to Entry Barriers

67 The Tribunal is satisfied that there are very serious barriers to the entry of new manufacturers of aspartame other than NSC. Entry is difficult because would-be entrants who hope to attain production costs comparable to those of NSC face barriers in the form of the patent portfolios of existing producers, significant economies of scale relative to existing world demand for aspartame and sunk costs that increase the risks of entry. Moreover, even for firms that have the necessary technology in place and the experience of pilot plant production behind them, there is a minimum two year lag before they can begin large-scale production.

V. Section 79

68 The Director alleges that NSC is engaging (and has been engaging since the expiry of its Canadian use patent) in the practice of a number of anti-competitive acts resulting in the likely substantial lessening of competition. The elements that must be met under section 79, quoted below, are found in paragraphs (a), (b) and (c) of subsection (1).

79. (1) Where, on application by the Director, 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.

1. "Control"

69 Paragraph (1)(a) requires that:

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

70 This first element raises a question regarding the meaning to be attributed to "control" in "substantially or completely control".

71 The Director submits that the ordinary dictionary definition of "control" should be applied:

To exercise restraint or direction upon the free action of; to dominate, command. [18]

18 Written argument of the Director at 17.

72 In the view of the Director, "control" is control over supply, which can be evaluated by looking to NSC's share of worldwide capacity and share of Canadian sales, or alternatively to the fact that it holds exclusive contracts covering over 90 percent of Canadian sales.

73 The respondent's view is that "control" is most meaningfully treated as synonymous with "market power". Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this 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 or market power will vary from case to case.

74 The Tribunal is persuaded that the respondent's position is in keeping with the logic of the section and the Act. This finding is of little practical import because, ultimately, all relevant indicators of market power must be considered in determining whether there is likely to be a prevention or lessening of competition substantially. Furthermore, it is difficult to see how any definition of control, including the dictionary definition, could exclude a consideration of conditions of entry. The structure of the section does, however, raise a question regarding how far it is necessary to go into the evidence on control since it may include an examination of the alleged anti-competitive acts and their effects. If all of the evidence is taken up here then the three principal elements in paragraphs (a), (b) and (c) of subsection 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required.

75 In the alternative argument of the Director, if control is defined to mean "market power" or "monopoly power", the evidence supports the conclusion that NSC has control by reason of its very large share of sales and capacity and the existence of barriers to entry into the intense sweetener market. The latter are set out as:

> (a) process patent barriers associated with producing aspartame; (b) significant sunk costs required to produce aspartame efficiently; (c) the Respondent's contractual practices, which preclude marginal entry and therefore increase the scale of and the costs associated with initial entry; (d) marketing practices of the Respondent which require competitors to engage in similar, expensive marketing in order to compete; and (e) delays associated with regulatory approval and subsequent consumer acceptance of any new intense sweetener. In addition, the most logical potential entrant into the market, Ajinomoto, has been expressly precluded by contract with the Respondent from entering the market. [19]

> 19 Confidential written argument of the Director at 21.

76 Earlier discussions of entry conditions into manufacturing and the product market cover the Director's points (a), (b) and (e), while (c) and (d) relate to allegations regarding NSC's conduct. Certain terms of NSC's contract with Ajinomoto are also considered by the Director to constitute an anti-competitive act on the part of NSC. For immediate purposes, the relevance of Ajinomoto's relationship with NSC is that virtually their total combined capacity is under the control of NSC.

77 The respondent's first submission regarding control is that declining prices and increased output since 1987 are evidence that NSC does not have market power. It is difficult to draw this conclusion from the evidence, particularly when it is considered along with the allegation that NSC is engaging in the anti-competitive act of pricing below its cost. What the evidence does show, and this is quite obvious in any event, is that what, if any, market power NSC currently possesses is much less than it held prior to the expiration of its Canadian use patent.

78 The respondent's key submission concerns the ability of Coke and Pepsi, as very large buyers, to protect their interests and to counteract any power NSC might have. Their strong bargaining power is stated to reside in the fact that they control sufficient volume to be able, if need be, to set up a rival producer to satisfy their demand. Their position is further strengthened, it is submitted, by the existence of NSC's sunk costs that make it highly vulnerable to such a threatened course of action. The respondent's submission is incomplete because it fails to consider that significant sunk costs, particularly when accompanied by extensive economies of scale, also affect the position of Coke and Pepsi as would-be entrants. As a result of this omission the respondent has greatly exaggerated the ability of Coke or Pepsi to enter the industry. Above all, this argument ignores the negative consequences that such entry could have on the relative position of the entrant vis-à-vis its major rival and other producers of diet carbonated beverages. Assuming that either firm could find a producer capable of producing at an acceptable cost level, the effect of sufficiently large scale entry to meet the needs of either Coke or Pepsi would be the creation of significant excess capacity. This would tend to place downward pressure on aspartame prices, and this would redound to the benefit of the firm that did not integrate backwards without cost to it. Meanwhile the soft drink firm that did enter, through long-term contract or ownership, would be locked into a situation that could very well result in higher input costs than those faced by its competitors.

79 There is no doubt that Coke and Pepsi are extremely important customers to NSC and that it must carefully weigh their likely response to any course it adopts. It is clear that the reverse is also true. Coke and Pepsi will still be critically dependent on NSC even after the United States use patent expires, since they will still have to rely on NSC for significant volumes of a highly important ingredient. They must each also consider how the other will react. For example, the risk to them in terms of lost sales if both remove the NutraSweet logo from their containers [20] is lower than if one of them does so alone, as would be the case if either of them did decide to enter the aspartame business. The history of the adoption of the NutraSweet logo by Coke is instructive in this regard. When aspartame was approved for use in carbonated soft drinks in the United States in 1983, Coke initially chose to use a mixture of aspartame and saccharin and Pepsi opted to use aspartame alone and to display the NutraSweet logo on its containers. Within months Coke had followed.

20 Under their contracts with NSC, both Coke and Pepsi have agreed to display the NutraSweet brand name and "swirl" logo on their diet product packages in return for a significant price discount on the aspartame they buy.

80 While Coke and Pepsi have considerable resources to protect their interests, the Tribunal is not persuaded that this consideration eliminates NSC's market power. This is particularly so while the United States use patent is in force and contractual negotiations regarding Canada are affected by it. Whatever conclusions may be reached regarding the nature and the effect of the allegedly anti-competitive contractual terms,[21] it cannot be concluded that NSC lacked market power while these were being negotiated.

21 Exclusivity and the related contract terms are discussed *infra* at 64ff.

81 The respondent also submits that NSC does not have market power because of the existence of other competitors and potential competitors. With respect to smaller competitors, the respondent submits that at the price Mr. Minarich stated that phenylalanine could be purchased (on two or three months notice), these firms might be able to achieve cost levels below the current prices in Canada. Although the evidence does not permit a conclusion regarding exact cost levels of general purpose fine chemical producers, it could possibly support the respondent's conclusion. As noted in the discussion of entry conditions, much depends on the returns that could be earned if the facilities were used to produce other products. In any event, it cannot be concluded that a comparison of *production costs* and *prices* alone means that NSC does not possess market power because of potential entry; there are other costs associated with distributing the product about which there is no evidence apart from the costs of NSC, which occupies a unique market position.

82 The evidence that NSC possesses appreciable market power given its market share (over 95 percent of sales in Canada), entry conditions and the constraints operating on its largest customers is sufficiently compelling so that the boundaries of *substantial* need not be explored. Its "control" is clearly substantial. Nor is it necessary to consider here the effect of the alleged anti-competitive acts on entry into distribution and indirectly into manufacturing.

2. "Class or Species of Business"

83 In the Director's view, the "class or species of business" referred to in paragraph 79(1)(a) should be interpreted in a "commercial" sense rather than in the economic sense of a product market, and when a commercial interpretation is applied the class or species of business is the manufacture and supply of aspartame. The Tribunal concurs with the opposing view of the respondent that "class or species of business" is synonymous with the relevant product market. This interpretation is consistent with the Tribunal's view that the meaning of "control" is market power since this concept can only meaningfully be related to a product market. Nothing hangs on the distinction in the instant case since the Tribunal considers the relevant product in Canada to be aspartame.

84 The Director cites *Eddy Match Co. v. R.*[22] in support of his point of view. This case was brought under the *Combines Investigation Act*,[23] a predecessor to the *Competition Act*. Section 32 provided that anyone who was a party to or knowingly assisted in the formation or operation of a combine was guilty of a criminal offence. "Combine" was defined in subsection 2(1) to include:

22 (1953), 109 C.C.C. 1 (Que. Q.B., A.S.).

23 R.S.C. 1927, c. 26, s. 32, 2.

> a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, ...

85 Paragraph 2(4)(b) further specified that "merger, trust or monopoly" could mean:

> one or more persons ... who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged, ...
>
> (emphasis added)

The underlined phrase contains the same wording as paragraph 79(1)(a).

86 Eddy Match Co. ("Eddy") was charged with operating a combine, namely a merger, trust or monopoly, which controlled the business of manufacturing and distributing wooden matches. Eddy and related companies had pursued an aggressive course of conduct towards, and subsequent acquisition of, any new entrants into wooden match production. In identifying wooden matches as the relevant "class or species of business" the court did not consider it necessary to take into account other means of producing a flame as possible substitutes. The court recognized that "lighting devices" was a general class which could contain many types of business but held that "class or species of business" meant wooden matches since that was the *only* business of Eddy and the matches were distinct from the other lighting devices.

87 Based on the facts in *Eddy Match Co.* and the different legislative schemes of the *Combines Investigation Act* and the *Competition Act*, the Tribunal does not believe that this case provides a sound basis for identifying "class or species of business" without referring to possible substitutes. The court in that case was seized with charges under a criminal statute, a case in which the accused had engaged in highly aggressive conduct towards other producers of wooden matches; Eddy certainly acted as though wooden matches were sufficiently distinct so that it was worthwhile for it to concentrate its efforts on that industry. In the present statute, however, section 79 provides other remedies and the deciding body is a specialized tribunal. It would run contrary to the spirit of this legislation for the Tribunal to eschew other relevant factors (i.e. possible substitutes) on some presumed technical ground.

88 Furthermore, the Director recognizes that the product market must be considered at some point in subsection 79(1). In his view, the appropriate place to do so is in paragraph 79(1)(c) in reference to the substantial lessening of competition in "a market", which requires the identification of both the product and geographic dimensions. In the view of the Tribunal, the logic of the section is better followed if the product market is precisely identified in connection with the question of "control" rather than being partially dealt with under paragraph 79(1)(a) and then revisited in paragraph 79(1)(c).

3. Practice of Anti-Competitive Acts

89 There are two elements that must be determined in paragraph 79(1)(b), namely whether there is a "practice" and whether there are "anti-competitive acts". Nine anti-competitive acts are set out in section 78:

> 78. 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; and

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

90 This list of anti-competitive acts is clearly not meant to be exhaustive and the respondent admits that other conduct not specifically mentioned in section 78 can constitute an anti-competitive act. A number of the acts share common features but, as recognized by the Director and the respondent, only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.

91 The term "practice" is mentioned at a number of points in the Act, but it is undefined. This question was addressed by the Director but not by the respondent. The Director submits that the interpretation of "practice" adopted in an Ontario decision on resale price maintenance is an appropriate one. The trial judge found, and was affirmed by the Court of Appeal in *R. v. William E. Coutts Co.*, [24] that conduct with respect to the sale of greeting cards over a week constituted a "practice". The trial judge stated: "I believe the word is used in the section in the sense that it denotes a distinction from an isolated act or acts." [25] The Director also submits that different anti-competitive acts may be considered together, as well as repeated instances of one act, to determine whether there is a "practice".

24 [1968] 1 O.R. 549.

25 *Ibid.* at 555.

92 In considering the meaning of "practice" the Tribunal is mindful of an important difference between resale price maintenance and conduct covered under section 79. The former is a criminal offence (with limited defences) whereas section 79 provides a civil remedy with a number of interrelated elements that must be satisfied before the remedy can be granted. If there is a good reason to avoid a limiting interpretation of "practice" under criminal law, it is all the more important to do so under section 79. The anti-competitive acts covered in section 78 run a wide gamut. Some almost certainly entail a course of conduct over a period of time, such as freight equalization in paragraph 78(c), whereas others consist of discrete acts, such as the setting of product specifications in paragraph 78(g). The interpretation of "practice" must be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the Tribunal is of the view that a practice may exist where there is more than an "isolated act or acts." For the same reasons, the Tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice. It is important to stress, however, that this does not in any way relieve the Director of the burden of establishing an anti-competitive purpose for each of the acts.

93 The Director identifies eight anti-competitive acts allegedly practised by the respondent. With the exception of "anti-competitive pricing", none of them is specifically related to the anti-competitive acts set out in section 78. Four of the alleged anti-competitive acts relate to the terms of NSC's supply contracts and are part of a supposed attempt by NSC to induce the majority of Canadian aspartame buyers to deal exclusively in its product. These are best treated together.

(A conclusion as to whether they constitute separate acts or are terms of contracts with a common theme is reserved until later.) Before discussing this area, the allegations of "abuse of governmental reporting" and "contractual exclusion of potential competitors" are taken up. "Anti-competitive pricing" and "use of U.S. patent to foreclose competition" are considered last.

94 The determination of an anti-competitive act, and particularly its purpose component, is a difficult task. The Director submits that evidence of subjective intent (through verbal or written statements of personnel of the respondent) or a consideration of the act itself (the premise that a corporation can be taken to intend the necessary and foreseeable consequences of its acts) can be used to establish purpose. The Tribunal finds nothing objectionable in these submissions. In most situations, of course, the purpose of a particular act will have to be inferred from the circumstances surrounding it.

(a) Abuse of Governmental Reporting Requirements

95 The Director submits that the fact that NSC showed a loss in its Canadian income tax returns for 1986-88 constitutes an anti-competitive act given its strong market position and the reasonable expectation that it should have been profitable. The Director's reasoning is that since NSC does not pay Canadian taxes on its Canadian operations, and will not have to do so for the foreseeable future because of its accumulated losses, it is provided with a competitive advantage vis-à-vis existing and potential competition. The respondent denies that NSC is avoiding taxes overall; if it is saving taxes in Canada, it is paying additional taxes in the United States as a result.

96 The Director also alleges that since there is no clear explanation for NSC's method of fixing the value of imported aspartame as shown on customs declaration forms, this too constitutes an anti-competitive act. He argues that NSC is avoiding the costs (admittedly very small) of accurately filling out the required forms. There is no duty or other monies payable by NSC associated with the import of aspartame and thus there is no financial implication associated with the accuracy of the returns.

97 In the view of the Tribunal, this allegation fails since the Director does not even attempt to demonstrate an anti-competitive purpose associated with these alleged abuses of governmental reporting requirements. [26]

26 Teitelbaum J. makes this further observation: With regard to the reporting by NSC of a financial loss in its Canadian operation on its Government of Canada corporate income tax returns for the 1986-1988 taxation years, information which NSC solemnly declared to be the truth, and although the Director has been unable to demonstrate an anti-competitive purpose to this reporting, I would comment that senior executive representatives of NSC, including its President, testified under oath that NSC made a profit from its Canadian operations. It thus becomes obvious that by "creative accounting" NSC is able to avoid paying to the Government of-Canada income taxes on the profits made by NSC in Canada. It is no excuse to state, as a representative of NSC did, that NSC would pay income taxes on its Canadian profits to the Government of the United States and would thus not avoid paying income tax on these profits.

(b) Contractual Exclusion of Potential Competitors

98 The Director alleges that the exclusion of Ajinomoto from Canada as an independent supplier of aspartame pursuant to an agreement between Ajinomoto and NSC constitutes an anti-competitive act. The written agreement has not been filed in evidence, but there is testimony from NSC witnesses that Ajinomoto has agreed not to sell in Canada (and the United States) through 1995. The respondent submits that the decision of Ajinomoto not to sell in Canada is not an anti-competitive act but part of an overall agreement that is efficiency enhancing. However, this submission is unsupported by any references to technical or economic complementarities arising from the Ajinomoto/NSC relationship.

99 Ajinomoto was selected as a supplier by NSC in the early 1970s (if not before) due to its expertise in areas allied to aspartame production. Until recently, Ajinomoto could not function as an independent supplier since NSC's use patents

covered most of the world. The evidence shows that NSC relies on Ajinomoto for a small part of its own supply, all of the supply for the joint venture with Ajinomoto in Europe (NutraSweet AG), and for patented and proprietary technology for which it pays a royalty. Ajinomoto is free to sell in Japan for its own account.

100 Company documents [27] contain information indicating that NSC made large investments in the Ajinomoto plant in the early 1980s. According to the oral evidence, the price paid by NSC to Ajinomoto for aspartame in the early and mid-1980s was set at a level designed to allow Ajinomoto rapidly to recover its capital. In later years the price had to cover primarily variable costs. A similar approach is to be used for output from a planned expansion of Ajinomoto facilities. Whether NSC will be providing capital as well for this additional capacity is not in evidence.

27 Exhibit VIII-29 (confidential): NSC 1989 Long Range Plan, table entitled "Capital Expenditure Trends".

101 On its face, what is known about the arrangement suggests that NSC has ensured that it will not have to confront Ajinomoto as a competitor in the near future. Apart from the licensing of Ajinomoto technology, which is highly likely to be desirable from an efficiency standpoint, it is difficult to perceive any efficiency enhancing or pro-competitive elements in the relationship. Rather, the contrary appears to be true: the two leading producers, each with formidable, if somewhat different, strengths have in effect agreed not to compete.

102 The critical question is whether the agreement is an anti-competitive act under section 78. In the Director's view, the fact that NSC, given its market position, has an arrangement with Ajinomoto that *excludes* Ajinomoto from selling in Canada qualifies the arrangement as such. In the Tribunal's view, this by itself is not sufficient. A consistent pattern in the anti-competitive acts cited in section 78 (save for that in paragraph (f)) is that the competitor of the dominant firm is a target not a fellow actor. While the Tribunal is reluctant to conclude that all horizontal arrangements are excluded from sections 78 and 79, we do not believe that we have been provided with adequate justification for including the NSC/ Ajinomoto arrangement (insofar as it affects Canada) as an anti-competitive act under section 78.

(c) Contract Terms Associated with Exclusivity

103 The Director alleges that the respondent's use of the contractual terms described below constitutes a practice of anti-competitive acts.

104 (i) Exclusive supply clauses require that the customer purchase all of its aspartame requirements from NSC. Exclusive use clauses require that the customer use aspartame produced by the respondent as the sole or primary sweetener in some or all of the customer's products. A common formulation of these clauses is:

> X agrees to use NutraSweet brand aspartame as the sole (or primary) intense sweetening ingredient in its [list of products by name] [diet and sugar-free products] produced in Canada during the duration of this agreement and further agrees to purchase all of its requirements of NutraSweet brand aspartame from NSC.

105 A reference herein simply to "exclusivity" includes both types of clause. The two are slightly repetitive since NutraSweet brand aspartame cannot normally be purchased from anyone other than NSC. The result of such clauses is that the customer agrees to purchase only NutraSweet brand aspartame for all of its non-caloric sweetener requirements or for all of those requirements for a particular product line.

106 (ii) The trademark display allowance or logo display allowance provides a substantial discount from the gross price of the aspartame to the customer. In return, the customer must display the NutraSweet name and logo on its packaging and in print and television advertising featuring the product containing NutraSweet brand aspartame. The allowance is fixed at $X/lb calculated on the total number of pounds of aspartame the customer buys, not on the number of uses made of the trade mark. NSC dictates what has to appear on the packaging (the "NutraSweet/NutraSuc" brand name and the swirl logo) and in what colours and sizes.

107 Cooperative marketing allowances provide a further discount to the customer in the form of a per pound payment by NSC for support of marketing programs promoting customer products containing only NutraSweet brand aspartame. The payment is calculated on the basis of the total amount of aspartame purchased and must be applied towards NSC-approved advertising ventures. The approval process is apparently relatively informal, consisting of mutual ongoing discussions or endorsement after the fact. One witness for a customer said that making sure the NutraSweet name and logo were in the advertisement was all that was necessary. This is in fact also dictated by the terms of the standard trademark display allowance.

108 (iii) In some contracts, a meet-or-release clause gives NSC the option to meet a lower price offered to its customer or to release the customer to purchase from the other supplier; and a most-favoured-nation clause ensures that the price to a particular customer is the lowest price paid by any customer for an equivalent volume of aspartame. Payment from NSC under a most-favoured-nation clause is made by cheque to the particular customer at year-end, without any further explanation.

109 The first two items, (i) and (ii), clearly constitute a practice since they appear in virtually every one of the respondent's supply contracts. Since the Coke and Pepsi contracts contain the two clauses in (iii) and they cover a large volume of sales over several years, the Director submits that the inclusion of these clauses constitutes a practice. This viewpoint is not disputed by the respondent and the Tribunal agrees with the Director on this point.

110 Exclusivity as such is not mentioned among the anti-competitive acts in section 78, but in this case it is wholly consistent with them. Exclusivity and the contract terms related to it stem from NSC's "branded ingredient strategy". The idea of identifying and promoting an ingredient such as aspartame is apparently unique to NSC. Buyers of ingredients to be used in their products tend to be highly informed; they are generally interested in the properties of the ingredient they buy and not in its image. Normally the ultimate consumers are only marginally aware, if at all, of particular ingredients in the product they consume. The NSC branded ingredient strategy was implemented soon after the FDA gave approval for the use of aspartame in carbonated soft drinks in the United States. There is no evidence that NSC ever made the use of the NutraSweet name and logo a condition of supply; rather NSC made the use of the name and logo attractive to customers through the offer of discounts for its display and for joint advertising. However, as long as NSC was, through its patent monopoly, the sole supplier of aspartame, the distinction between inducing the use of the name and logo through price reductions and requiring it as a condition of supply was largely a semantic one since NSC could arrange its prices so that customers had little effective choice. The branded ingredient strategy becomes a matter of exclusivity wherever the use patent expires and customers have at least the legal opportunity of buying from other suppliers.

111 As stressed in the evidence of Professor Mathewson, there is widespread exclusivity in the economy and there are numerous examples where exclusivity in distribution is required to bring forth the necessary effort for the efficient distribution of the product or service. Exclusivity can clearly be the outcome of competitive markets.

112 According to internal documents, NSC believes that the branded ingredient strategy is necessary to prevent price from falling to the level of marginal costs of production, which tends to occur with other chemicals that are sold as commodities. The internal documents also stress what is referred to as a "sole supplier strategy", that NSC should endeavour to capture and to keep as much of the market as possible for NutraSweet brand aspartame.[28] On the basis of this evidence and the fact that the strategy was introduced when the use patent was in force and customers did not have a choice of suppliers and marketing approaches, the Tribunal is persuaded that the strategy has been and is pursued for the purpose of excluding future or existing competition and not because it is required for efficient distribution or use of the product.

28 Section 69 of the *Competition Act* provides that company documents stand as *prima facie* proof that the respondent had knowledge of their contents and that they were created with its authority. The Tribunal's conclusions on the purpose of the branded ingredient strategy are drawn from the Strategic Plan 1984-88 of the NutraSweet Group (developed in 1983 for Searle management) and NSC's Long Range Plans (1986 and 1989), prepared by Mr. Shapiro, President, for presentation to the

Executive Management Committee of Monsanto Co. (Exhibits V-20, VIII-29, VIII-31)(confidential). It is not disputed that these documents accurately reflect NSC corporate policy; it is only disputed that the implications of such a policy are anti-competitive.

113 NSC witnesses stated that the purpose of promoting NutraSweet brand aspartame was to dispel consumers' concerns regarding the safety of aspartame — concerns that were to be expected given the adverse publicity associated with high-intensity sweeteners such as cyclamates and saccharin. In fact, NSC does not promote aspartame, but rather its own name and mark. According to surveys conducted on behalf of NSC, at least some consumers believe that the presence of NutraSweet brand aspartame in products is a positive thing. However, the fact that consumers react positively to the NutraSweet brand is an outcome for which any company engaging in extensive promotion of its product hopes and does not affect the Tribunal's conclusions regarding NSC's purpose in pursuing exclusivity.

114 The logo display and cooperative marketing allowances create a strong inducement for the logo's use. Any customer who wants to buy from NSC is virtually compelled to use the logo on any packaging containing NutraSweet aspartame, given that the price inducement is of the order of 40 percent when both logo display and promotion allowances are considered, with the discount for logo display comprising by far the major part. The amount of the logo display allowance is not, as far as anything in evidence shows, in any way related to the value to NSC of the exposure obtained when its logo is displayed on one customer's packaging as compared to another's. A recent increase in the amount of this allowance was explained by Mr. Rosa, Group Vice-President and General Manager of the Sweetener Group of NSC, as being NSC's preferred form of price reduction.

115 The logo and advertising discounts create an "all-or-nothing" choice for customers. In the event that customers decide that they would prefer not to use the logo for a particular product line or not to commit themselves to use it on all of that line, they are forced to purchase all their supply from another supplier because it is too expensive to buy from NSC without the logo and advertising discounts. This means that new suppliers must become sufficiently established so that potential customers are willing to entrust all of their needs for a product line to the new supplier.

116 Although NSC is obviously interested in promoting its name and mark, exclusivity in its own right, rather than exposure of its product name, is clearly at play in the contracts with Coke and Pepsi. They receive logo display allowances for their diet drinks sold in large returnable bottles that do not bear NutraSweet brand identifiers; the trademark is represented only in tiny lettering on the bottle cap. The allowance is also paid for their diet fountain products which do not carry the logo at all.

117 Therefore, it is clear that the logo display and promotion allowances are essentially inducements to exclusivity.

118 The Director objects to the meet-or-release clause, as does Tosoh, on the grounds that it gives NSC an advantage over its competitors. When invoked by a customer, the clause provides NSC with information on competitors' offers. To retain the customer's business (or the part on which the customer received a competing bid), NSC need only match the offer. According to Tosoh, competitors are discouraged from making offers if they know that such offers will only be used as a bargaining chip with NSC. According to Professor Thompson, appearing for the Director, meet-or-release clauses are sometimes regarded by economists as an information exchange device among competing firms. In the instant case, it is his view that the clauses serve as entry-deterring devices that reinforce the anti-competitive effects of exclusivity.

119 In the view of the Tribunal the meet-or-release clause is there at the behest of the largest customers, Coke and Pepsi, who had entered into long-term exclusive contracts. The clause was seen as a way of mitigating the effects of being locked in by an exclusive contract. If exclusive supply is objectionable in the instant case, so is a meet-or-release clause: by making exclusivity more acceptable to customers it serves as an inducement for customers to enter into exclusive arrangements. There is also no reason to conclude that the clause mitigates the entry-barring effects created by exclusivity. Competitors are discouraged from submitting bids since they know that NSC will be given the opportunity of meeting any price that they submit. In the event that competing bids are submitted, NSC is in a position to ensure that it keeps the business.

120 The Director's submission regarding the most-favoured-nation clause is that it is an inducement to exclusive dealing because it assures customers that they will not be treated worse than their competitors. The Director submits, correctly in the Tribunal's view, that only a firm with a very large market share can be expected by its customers to provide a most-favoured-nation clause because only it will almost certainly be selling to the customers' competitors. The Tribunal would observe that to the extent that large buyers can exert pressure on their suppliers and thus enhance competition, they are more likely to do so if (unlike the present case) they are assured that they alone will benefit from the pressure they exert and that competitors will not similarly benefit from their efforts. Thus, like the meet-or-release clause, the most-favoured-nation clause does not mitigate the objectionability of exclusive supply.

121 The Director submits that each of these contract terms associated with exclusive supply should be considered a separate anti-competitive act. In support, he cites case law from the United States relating to exclusive dealing, and case law from the European Commission concerned with "fidelity rebates" similar to the logo display and cooperative marketing allowances, and decisions from the same body relating to meet-or-release clauses. The Tribunal sees little purpose in the context of the present case in determining whether each clause constitutes an anti-competitive act. It is doubtful whether the meet-or-release and most-favoured-nation clauses would exist in the absence of an explicit or implicit exclusive supply agreement. In the Tribunal's view, the issue is whether the agreements requiring exclusive supply, and all the contract terms related to it, have an exclusionary purpose. The Tribunal is persuaded that this is the case.

(d) Selling Below Cost: Relevant Cost Standard

122 The Director alleges that NSC is engaging in the anti-competitive act described in paragraph 78(i) of "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor." The Director submits alternative interpretations or sources of cost information for "acquisition cost" in the instant case. The respondent submits, correctly in the Tribunal's view, that acquisition cost does not easily lend itself to manufacturing situations. In fact, the language of the paragraph suggests that Parliament intended this paragraph to be applied to distribution, i.e. to situations where articles are purchased for resale. Since NSC buys product from Ajinomoto, there is a purchase and resale by NSC. The respondent's submission with respect to these purchases, that acquisition cost is restricted to the cost of the articles and not to the cost of distributing them, is consistent with the language of the paragraph; that is, only the price paid to Ajinomoto, and not the marketing and distribution costs of the Canadian operations, conforms to acquisition cost. Under this interpretation, NSC's prices exceeded its acquisition costs by a comfortable margin.

123 The respondent also submits that if paragraph 78(i) is to be applied to the aspartame manufactured by it then only the cost of manufacturing the product conforms to the meaning of acquisition cost, and other costs, such as marketing and distribution, are excluded. There is no reason, however, for applying paragraph 78(i) to manufacturing situations where there is not a purchase and resale of articles. Therefore, paragraph 78(i) does not apply with respect to NSC's manufacturing and other costs and the Director's allegation that NSC has been selling below acquisition cost fails.

124 Some considerable time was spent before the Tribunal in argument as to whether, apart from the allegation of selling below acquisition costs, NSC is guilty of an anti-competitive act through some other form of predatory pricing not specified in section 78. The Tribunal is satisfied that the term "anti-competitive act" in section 78 is broad enough to cover other predatory pricing. We will not deal with this question extensively, however.

125 First, in spite of an exhaustive review of the evidence we find it less than compelling as to whether there has been pricing below cost by NSC. The Director did not present a consistent or coherent case as to the proper measurement of cost for this purpose. While the correct definition of "cost" here is highly debatable, we accept for present purposes the view of Areeda and Turner [29] that marginal cost (that is, the added cost of producing an additional unit) ("MC") is an appropriate standard. We also agree with them that, because MC is so difficult to determine, a proxy for it is normally average variable cost ("AVC"), that is the average cost per unit of all production taking into account only the cost components that vary with output. It flows from this, however, that AVC is only a valid proxy for MC when a

firm is producing below capacity. Areeda and Turner, following common usage by economists, define "capacity" with reference to the output level that corresponds to the point where the average total cost per unit of production ("ATC") is a minimum. [30] MC is equal to ATC at this point and therefore ATC rather than AVC is obviously the better proxy for MC for a firm producing at capacity. Capacity in this sense need not correspond to any notion of a physical limit to output since firms can often increase output by more intensively utilizing existing facilities. Doing this will cause MC to rise above ATC.

29 P. Areeda & D.F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 Harv. L. Rev. 697, reprinted in (1980) 10 J. Reprints for Antitrust L. & Econ. 1.

30 *Ibid*. at 710.

126 In the instant case NSC operates its plants 24 hours per day, seven days per week, with an annual shutdown of several weeks for maintenance. In the absence of further information we have adopted "capacity" to be equal to this physical limit, which also probably closely approximates the low point of ATC. Thus when at capacity, NSC can increase output only by investing in additional plant and equipment rather than by utilizing existing facilities more intensively.

127 It is not clear whether the plants are operated so intensively for technical reasons or because it is (and was) cheaper to do so taking into account existing and anticipated increases in sales. Given that the plants apparently have been operated at their physical limits for some time, a judgment as to whether NSC has been operating at capacity, in the sense of straining to satisfy its level of sales, requires an examination of output and sales or inventory levels. This evidence, along with NSC's investment and purchasing decisions, leaves no doubt that NSC has been and will be fully utilizing its existing capacity to meet its sales. Under these circumstances MC is most closely approximated by ATC, that is all costs including the costs of capital. Identifying a precise date when capacity was reached is not possible, but according to the evidence of Mr. Balbirer, Vice-President of Finance and Planning for NSC, the supply situation of NSC became "very tight" towards the end of 1988. It appears to us that prior to this period, NSC was operating at less than capacity so that the appropriate test of cost would have been AVC. It also appears that during that period its prices were above AVC.

128 Even if NSC was pricing below cost after 1988, it is highly unlikely that NSC would be able to recoup from Canadian consumers the foregone profits resulting from below-cost pricing. There is, however, evidence that NSC would have a strong commercial motive to sell below cost, outside the United States, having regard to its desire to discourage entry into international markets now so as to preserve its own giant American market when the patent expires there in 1992. However, from the evidence available we can draw only tentative conclusions as to the relationship between prices and ATC, the relevant cost standard for a firm at capacity, after 1988.

129 Finally, even if we reached a conclusion against NSC in this respect, the Director in his pleadings did not ask for any remedy concerning prices other than that they be forbidden to fall below "acquisition cost", a concept we have found to be irrelevant to this case. Therefore a specific finding on selling below cost is not required in respect of any potential remedy.

(e) Use of United States Patent to Foreclose Competition

130 The final anti-competitive act alleged by the Director is that NSC has used its United States use patent in three different ways to gain a competitive advantage in Canada.

131 First, the existence of the patent is stated to have been instrumental in causing Coke and Pepsi to agree to exclusive supply contracts outside of the United States. This matter has already been considered in other contexts and in the view of the Tribunal the evidence does not support a finding that it constitutes or is part of a separate anti-competitive act.

132 The second way that the patent is stated to have been used anti-competitively is as an instrument for financing below-cost pricing in Canada. The argument that the patent provided NSC with a "deep pocket" is part of the allegation

that NSC was and is pricing below cost in Canada, but in the view of the Tribunal this argument does not advance the allegation.

133 The third way that the patent was allegedly used involved U.F.L. Foods Inc. ("UFL"). UFL is a Canadian co-packer for Nutri/System; it supplies various low calorie dishes or formulations that are marketed by Nutri/System. UFL had had a supply agreement with Tosoh for the purchase of aspartame used in these products. NSC approached Nutri/System and succeeded in obtaining its cooperation by offering it a number of incentives if it would require its co-packer, UFL, to purchase its aspartame from NSC. One of the benefits consisted of a rebate on all products containing NSC aspartame imported by Nutri/System from co-packers in the United States, equal to the difference between the NSC's United States and Canadian prices times the amount of aspartame contained in the imports.

134 There are several aspects to this rebate which lead to the conclusion that the United States patent is being used to exclude competition, and in a most heavy-handed fashion. It is virtually impossible for HSC or any other competitor to meet NSC's offer, short of providing customers with a blank cheque. Competitors cannot know how much the rebates on a customer's United States imports will amount to. The large difference between the price in the United States and Canada and the effect that rebating this amount has on the net/net price is evidence that NSC is willing to price without regard to its cost in order to prevent the expansion of HSC. NSC would not have any way of knowing how costly its offer might be.

135 This is a form of dumping in that NSC can in effect export its product at a price below that charged in the United States, without any risk to its domestic price which is protected by its exclusive patent rights.

136 The Tribunal accepts the Director's submission that the use of a monopoly position (created by the United States patent) to obtain a competitive advantage for a dominant firm in another market is an anti-competitive act.

4. Preventing or Lessening Competition Substantially in a Market

137 The final element that must be satisfied for an order to issue is that the practice of anti-competitive acts has or is likely to have "the effect of preventing or lessening competition substantially in a market." For reasons that have been previously addressed, the market in question is the sale and purchase of aspartame in Canada.

138 The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC has market power. In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC's market power.

139 The issue with respect to the contract terms associated with exclusivity and the use of the United States patent as leverage in competing for Canadian customers is the degree to which these anti-competitive acts add to the entry barriers into the Canadian market and, additionally therefore, into the industry.

140 The arguments of the Director and the respondent can be summed up as follows. The Director submits that the NSC supply contracts and their terms tie up a very large percentage of the market and prevent small scale or "toe-hold entry" and that the proof lies in the very limited inroads into NSC's market share by HSC and would-be entrants. The respondent submits that: the supply terms are not particularly restrictive; HSC's failure to make more rapid progress is due to growing pains which are now being overcome; NSC's large market share is due to superior economic performance; and, finally, the presence of large buyers who are able to create supply options for themselves is a guarantee that they will not accept supply contracts that injure their (and their consumers') interests.

141 The HSC plant was originally scheduled for completion in November 1987, but it did not get into production until mid-1988, and it did not achieve its rated capacity until the end of 1989. Prior to output being available from its plants, HSC relied on the limited output from the Tosoh pilot plant and the accumulated inventories from that operation. As a result of having to rely on output from the pilot plant, Tosoh ran into some difficulties in providing consistent samples for product testing and this delayed the acceptance of its product by some buyers. There were, however, no difficulties with

acceptance by most prospective customers and, in particular, there were none with those in the carbonated soft drink industry which accounts for 84 percent of aspartame purchases. But the delay in getting the plant into full production could have caused a more general credibility problem that contributed to HSC's difficulty in attracting customers. The importance of this consideration is greatly diluted by the fact that, as its Canadian patent expired, NSC entered into exclusive contracts running, for the most part, to the end of 1988. Even upon expiry of those contracts, the customer/supplier relationship entrenched by the contract terms (discussed further below) dictated that a new supplier would have to be able to meet all of a customer's requirements, or at least those for a product line; the customers did not have the option of placing small orders with suppliers as a way of trying them and contributing to their survival. Thus, to the extent that HSC may have had a credibility problem at the end of 1988, it cannot be separated from the effect of NSC's practices.

142 Success or failure for an entrant into aspartame sales hinges on its ability to obtain business from Coke or Pepsi. Both companies had entered into worldwide exclusive contracts in 1986. There was a possible opening for an entrant due to the meet-or-release clauses in those contracts.

143 In response to overtures from HSC/Tosoh both Coke and Pepsi asked for bids for all of their 1989 requirements. HSC/Tosoh refused on the stated ground that it did not have sufficient free capacity to meet all the needs of both companies and it wanted to deal with both in the same way. It submitted a bid covering a substantial volume but much less than that requested. The respondent submits that in so doing HSC/Tosoh was the author of its lack of success in obtaining any volume from Coke or Pepsi. We agree with Tosoh's view that it was being used by Coke and Pepsi to obtain a better price from NSC and that there was little chance that either of them was seriously considering giving all of its Canadian business to Tosoh. The fact that neither Coke nor Pepsi had conducted consumer surveys to determine the effect of removing the NutraSweet name and logo from its packages (upon changing aspartame supplier) is very strong evidence of this. It is highly unlikely that either would take such an important step without testing likely consumer reaction. This conclusion is strongly supported by the impression left by the witnesses representing the two companies in the proceedings. As potential markets for which HSC can compete, these two companies are more restricted in their decisions on sourcing aspartame than a smaller buyer that can easily have its total requirements met by HSC. Their strategic position is also much affected by their rivalry.

144 The Tribunal is convinced that the exclusivity in NSC's contracts, which includes both the clauses reflecting agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impedes "toehold entry" into the market and inhibits the expansion of other firms in the market. Since exclusive use and supply clauses appear in virtually all of NSC's 1989 contracts, and thus cover over 90 percent of the Canadian market for aspartame, it is clear that during the currency of those contracts there is little room for entry by a new supplier.

145 It is true that these contracts are generally only one year in duration. Theoretically, therefore, the bulk of the market is only tied up for a year at the most and then a new supplier would have the same chance as NSC of bidding for and winning the supply contracts that have expired. There are, however, significant differences in such circumstances in the position of a new supplier and that of NSC.

146 There is the question of the logo unit that appears on the packaging of those customers using NutraSweet brand aspartame who also receive the logo display allowance (in 1989, all of them). If a customer switched suppliers or sourced with two suppliers, the logo unit would have to be removed from its packaging. (The practicality of sourcing from different suppliers by product or product line and thus leaving the NutraSweet logo unit on some packages and not others will be dealt with below.) If changes to advertising are involved and must be put in on short notice, then there are additional costs. There was no evidence that any customer considered the costs of removing the logo to be prohibitive to a change in aspartame supplier, although it would certainly be a factor in the decision. In the cases of Cadbury-Schweppes and Stafford Foods, who did switch to Tosoh aspartame and thus removed the logo from some or all of their packaging, Tosoh contributed to the costs of changing over.

147 More important than the physical or advertising costs of removing the logo is the uncertainty expressed by customers, particularly the soft drink franchisers, as to the effect of the removal, both on consumers and on their position relative to their competitors. Although Cadbury-Schweppes has removed the logo from certain canned diet products sold in Ontario and Quebec, namely Schweppes Diet Ginger Ale and Diet Tonic Water, and buys its aspartame for those products from Tosoh, Mr. Matthews, Managing Director at Cadbury Beverages Canada Ltd., indicated that before his company would give more business to Tosoh, entailing the removal of the logo unit from other products, it would want to see one of the major cola brands (i.e. Coke or Pepsi) stop using the swirl. Cadbury-Schweppes has no concrete information that the logo is significant to consumers and is not aware of any direct negative effects resulting from the limited removal already undertaken. There is, however, obviously considerable uncertainty as to whether the logo *might* have some value and, as Mr. Matthews put it, Cadbury-Schweppes is not willing to risk putting itself at a competitive disadvantage vis-à-vis the major cola companies by taking it off all packaging.

148 Even Coke and Pepsi themselves expressed similar reluctance to take a chance in removing the logo. Neither has conducted market research into how their consumers feel about the logo although both Mr. Eames, President of Coca-Cola Ltd. (the Canadian subsidiary), and Ms. Price, Manager of Package Marketing for Pepsi-Cola Co., believed that there was some NSC-conducted research that appeared to indicate that diet consumers may feel that the logo indicates a safer product. Mr. Eames stated that the issue of having the logo or not is "pretty tough now it has been on for several years". [31] Before recommending that his company take the logo off its products, Mr. Eames would want to be very comfortable that there would be no negative impact from a consumer perspective. He said that putting the logo on is "primarily a function of price; taking it off would be more than that ...". [32] Coke does in fact sell its products without the logo in certain EEC countries. Pepsi also has some products in the EEC which do not carry the logo but Ms. Price admitted that Pepsi had been concerned that NSC and Coke would take a strong marketing position in support of a Coke brand containing NutraSweet brand aspartame and against the Pepsi products without it and that Pepsi management thoroughly canvassed this issue before the decision was taken to launch those products. The major cola companies may be ambivalent about the consumer reaction to the logo; they are certainly very apprehensive about taking a chance on removing it that a rival has not taken.

31 Confidential transcript at 622 (25 January 1990).

32 *Ibid*. at 626.

149 The cost of removing the logo and customers' concerns about a possible negative impact on sales from removal would be present even if all NSC contract clauses relating to exclusivity were removed. Nevertheless, the effect of the logo on entry conditions is relevant in evaluating whether exclusivity and the inducements thereto have the effect of substantially lessening competition. Past exclusivity has contributed to the present importance of the logo. More importantly, the starting position as well as the change in market power resulting from a practice need to be considered in evaluating its effects.

150 Furthermore, the attitude of customers to sourcing from two different aspartame suppliers, thus allowing a smaller supplier to enter the market and gain a track record, is significant. Most of the buyers have an internal policy of using two suppliers for key ingredients, if possible. With respect to aspartame the only practical way to source from two suppliers, given the NSC pricing structure, seems to be to split sources by product line or (for soft drink makers) by package type (e.g. fountain drinks or returnable bottles). In this manner, the logo can be retained on the packaging for products containing NutraSweet brand aspartame and the logo display and cooperative allowances will still apply to that line of product or packaging. If these rebates are not available because all of the aspartame is mixed together, then the higher price on the NSC-sourced component makes the overall price too high. Sourcing from two suppliers means maintaining two inventories and keeping all the aspartame totally separate. In addition, it is not practical for all customers to split off product lines in this manner. Crush, for example, promoted all of its products jointly since none of them generated

enough sales on its own to justify independent promotion and thus could not advertise separately those lines containing NSC aspartame. Wrigley's has only one sugar-free brand of chewing gum ("Extra") as does Adams Brands ("Trident").

151 The Director further submits that the failure of two particular Canadian distributors of food additives and other ingredients to make any headway in attracting aspartame customers is due to the exclusionary tactics of NSC. In one case the distributor represented Lark and Pierrel (Italy) and in the other Mitsui Toatsu (Japan). The evidence of aspartame buyers is that they were not interested in purchasing from distributors who did not represent manufacturers with ongoing production. This evidence illustrates that in the presence of NSC's branded ingredient strategy, it is difficult to see any potential for "hit and run" entry of fine chemical producers into aspartame production. It is also true that NSC's price was falling rapidly. This was not mentioned as a consideration by buyers, but it obviously affected the potential profitability of the distributors.

152 The respondent, through its expert witness Professor Mathewson, submits that exclusivity is necessary for NSC to make the investments to meet customers' needs. A similar submission is that overall inventory costs are lower under exclusivity than they would be if each customer had to look after its own needs, as per-unit inventory costs are less when inventories are centrally managed (by NSC). This line of reasoning, it should be noted, is not an "efficiency defence". It leads, rather, to the conclusion that customers are, on balance, better off as a result of exclusivity and that they pass these cost savings on to consumers. Under exclusivity customers are able to negotiate a band of minimum and maximum purchases. Without it, the customers would presumably have to commit to a specific volume and would have to hold inventories to satisfy higher-than-anticipated demand, or would have to make higher-than-required purchases in the event that requirements were less than anticipated. An executive of a major customer stated that the broad band negotiated by the customer in its exclusive contract does not mean that this is an important consideration; the customer is, in any event, quite capable of accurately forecasting demand for its product. Whatever the customer's abilities, the Tribunal does not see much merit in the respondent's line of reasoning. It can always be claimed that the risk and cost of holding plant and inventory are reduced if there is a single supplier rather than several. Unless it can be shown that an industry has special characteristics that make this claimed source of cost savings important, there is no reason to give it any weight.

153 The respondent also submits that exclusivity is necessary to protect NSC against "free riding". NSC bore all the costs of obtaining regulatory approvals and developing markets for aspartame and now other suppliers could reap the benefit of those investments. The Tribunal does not accept that NSC is entitled to any more protection against competition than it was able to obtain through patent grants that provided it with a considerable head start on potential competitors.

Conclusion on Section 79

154 The Tribunal therefore concludes that NSC substantially controls through its market power a class or species of business, namely the sale of aspartame in Canada.

155 Further, we conclude that NSC has engaged, and is engaging, in a practice of anti-competitive acts. There are several such acts, and they have been frequently repeated. They include the use in its supply contracts of exclusive supply and use clauses, logo display allowances, cooperative marketing allowances, meet-or-release clauses, and most-favoured-nation clauses. They also include the use of its United States patent to foreclose competition by a system of rebates on exports from the United States to induce Canadian importers to have only NSC aspartame used in products purchased by them in Canada.

156 We also conclude that these practices have had and are having the effect of preventing or lessening competition substantially.

VI. Section 77

1. Exclusive Dealing

157 Section 77(1) defines "exclusive dealing" as:

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

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

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

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

158 The Director submits that it can be proven that, as a condition of supplying aspartame to its Canadian customers, NSC required the customers to enter into exclusive contracts or, alternatively, that the various "fidelity rebates" (logo display allowance and cooperative marketing funds) in the contracts constitute inducements for a customer to deal exclusively in NutraSweet brand aspartame. These arguments are put forward to meet the requirements of paragraphs (a) and (b), respectively, of subsection 77(1).

159 In support of his first submission, the Director argues that the presence of an exclusivity clause in the supply contracts constitutes exclusive dealing since failure by a customer to comply with the exclusivity requirement would entitle NSC to suspend its performance under the contract, namely the supply of aspartame. This follows either because of a specific rescission clause in the contract or because the exclusivity clauses are essential to the contract. The Director also argues that a "condition" of supply is simply a term or provision of the supply contract and that, therefore, the mere inclusion of an exclusivity clause in a supply contract constitutes exclusive dealing.

160 The Director may be correct in his submission that the exclusivity clauses constitute a "condition" of the contract once the contract is entered into, in the sense that under contract law they must be complied with or certain results will flow, including the right to repudiate. But we are of the view that in considering an allegation of exclusive dealing it is the circumstances in which the particular terms of supply were agreed upon that are critical. The ordinary meaning of the words used in paragraph 77(1)(a) is that the supplier must have refused to supply the product unless the buyer agrees to the terms described in subparagraph 77(1)(a)(i) or (ii). The respondent submits that the evidence does not show any refusal to supply aspartame or threats of such refusal unless customers agreed to purchase exclusively from NSC. The Tribunal agrees that there is no evidence on the record that customers were refused or threatened with a refusal of aspartame supply if they did not enter into exclusive contracts with NSC. Several customers explicitly denied any coercion and admitted that the request for exclusivity originated with them. The Tribunal therefore accepts that there is no exclusive dealing in this case in the sense set out in paragraph 77(1)(a).

161 The Director then argues that the fidelity rebates constitute clear financial inducements to the customer both to deal only in the respondent's brand of aspartame and to refrain from using another producer's aspartame. The provision of rebates in the form of the logo display allowance and the cooperative marketing funds encourages customers to use only NutraSweet brand aspartame. In order to qualify for those discounts the logo must appear on the customer's packaging and in its television and print advertising. Obviously, if the logo appears on the package or in the advertising, it follows that only NutraSweet brand aspartame may be used in the particular product or product line to which the packaging and the advertising belong. A customer would have to pay NSC substantially more for aspartame if he did not qualify himself for these rebates. In its written argument, the respondent concedes that the set of circumstances surrounding these customer contracts

probably does amount to an "inducement" of exclusivity by NutraSweet within the meaning of Section 77(1)(b), simply because a real benefit passes from NutraSweet to the customer in return for the commitment in the form of lower price or other better value. [33]

33 Written argument of NSC at 156.

162 Therefore we conclude that the financial incentives and the exclusivity clause amount to exclusive dealing within the meaning of paragraph 77(1)(b): the customers clearly agreed to deal only or primarily in the products of NSC and in return received various rebates whose existence depends on exclusive use of NutraSweet brand aspartame. There are, however, other requirements to be met before an order can be made.

(a) "Practice"

163 The Director submits that the same definition of "practice" as holds for sections 78 and 79 should apply here (something other than an isolated act). The Tribunal accepts that this is an appropriate approach. The respondent does not dispute that a practice of exclusive dealing exists on these particular facts in view of the number of contracts containing exclusive use and supply clauses.

(b) Other Requirements for Order

164 Once the existence of a practice of exclusive dealing is established, subsection 77(2) sets out the requirements for a Tribunal order to issue:

> 77. (2) Where, on application by the Director, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
>
> (a) impede entry into or expansion of a firm in the market,
>
> (b) impede introduction of a product into or expansion of sales of a product in the market, or
>
> (c) have any other exclusionary effect in the market,
>
> with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

165 In considering whether NSC is a "major supplier" of a "product" in a "market", the Tribunal adopts the definition of a "major supplier" established by the Restrictive Trade Practices Commission ("RTPC") in *Director of Investigation and Research v. Bombardier Ltd.*:

> A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells. [34]

34 (1980), 53 C.P.R. (2d) 47 at 55.

166 In that case, which dealt with exclusive dealing in the snowmobile industry, the RTPC went on to state that a firm's market share is a good indicator of its importance, along with characteristics such as its financial strength and record as an innovator, and possibly other factors depending on the industry.

167 The relevant product and geographic market having been previously defined, it is not necessary to look beyond the respondent's extremely large market share and share of production capacity in order to conclude that NSC is a major supplier in the Canadian aspartame market. The respondent admits that if "major" denotes nothing more than quantitative sales share, then NSC is a major supplier. The respondent does not advance any other factors that might be taken into account that would affect this conclusion, and does not dispute, in any event, that the practice of exclusive dealing is widespread in Canada since virtually all customers buy pursuant to requirements contracts from either NSC or Tosoh.

168 There remains the further question of whether there has been a "substantial lessening of competition". Paragraphs (a), (b) and (c) of subsection 77(2) are most conveniently, and logically, considered as part of the overall question of whether the exclusive dealing results in a substantial lessening of competition in the market. These paragraphs provide clarification of *how* such an effect on competition would be achieved. This was the approach adopted in *Bombardier*:

> Whether exclusive dealing by a supplier impedes expansion or entry of competitors in the market is most easily and meaningfully considered as part of the determination of whether there is or is likely to be a substantial lessening of competition as a result of the practice. [35]

35 *Ibid*. at 56.

169 The effect on competition of exclusivity and the related contractual terms, specifically the logo display allowance and cooperative marketing funds, have been discussed thoroughly in the context of section 79. Since the fundamental test of substantial lessening of competition is the same in both sections of the Act, the same conclusions apply. [36]

36 See *supra* at 80ff.

170 The Director also argues that the exclusive dealing practices of the NSC will have an adverse effect on the introduction of a new intense sweetener. Not only will regulatory approval have to be obtained, he submits, but a new producer will have to await the expiry of the contracts of the major users of intense sweeteners. We are not convinced that the effects on the introduction of new sweeteners would be significant and, in the light of our other conclusions it is not necessary to consider this further.

2. Tied Selling

171 Subsection 77(1) also defines tied selling. For the purposes of the section, "tied selling" means:

> (a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to
>
> > (i) acquire any other product from the supplier or the supplier's nominee, or
> >
> > (ii) refrain from using or distributing in conjunction with the tying product another product that is not of a brand or manufacture designated by the supplier or the nominee, and
>
> (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms if the customer agrees to meet the condition set out in either of those subparagraphs.

172 The Director submits that the respondent's trademark constitutes a tying product. He argues that, as a condition of supplying the trademark (the NutraSweet brand name and logo) to a customer, the respondent requires that the customer purchase another of its products, namely aspartame, and refrain from using the aspartame of any other producer in

conjunction with the trademark. He further argues that the respondent also offers to supply the trademark on more favourable terms, through the logo display allowance, if the customer purchases aspartame from NSC and does not use any other aspartame with the trademark.

173 The Tribunal recognizes that, in appropriate circumstances, a trademark might be the subject of a tying arrangement. It is not, however, convinced by the Director's argument that such is the case on the facts before it. In fact, the Director's argument on this point has not been consistent. As pointed out by the respondent, in his notice of application the Director alleged that the tying product was NutraSweet brand aspartame; in his written argument the trademark itself is alleged to be the tying product. Further, it is not clear that the Director seeks any additional remedy in this respect beyond those designed to deal more generally with exclusivity practices. In fact, the Director recognised that the respondent's proprietary rights in its trademark should not be interfered with. Therefore we are making no finding with respect to tied selling.

Conclusion on Section 77

174 The Tribunal therefore concludes that NSC has induced exclusive dealing with its aspartame customers through its financial incentives or fidelity rebates, and its exclusivity clauses. These inducements amount to a practice. NSC is a major supplier and this exclusive dealing has lessened, and is likely to lessen, competition substantially.

VII. Remedies

175 Having reached the above conclusions as to the applicability of sections 79 and 77 to this situation, the Tribunal is authorised by subsections 79(1) and 77(2) to make orders prohibiting the respondent from engaging in the practices complained of and found to have been committed. It is also authorised by subsections 79(2) and 77(2) to make orders to overcome the effect of such practices as may have already occurred.

176 In formulating an appropriate order the Tribunal is of the view that it must confine itself essentially to the kind of orders requested by the Director in his original application with such modifications as may fairly be considered to have been in issue in the case. While other possible remedies were discussed during argument, no amendment was sought to the application in this respect. It is a matter of fairness that the respondent not now be faced with a remedy of which it had no formal notice. Further, although Tosoh suggested various other remedies, it is not a party and cannot define the issues including that of the remedies being sought.

177 This means that the Tribunal must confine itself to the consideration of the remedies applied for by the Director whose particulars are set out at pages 28 to 31 of his Notice of application, filed on June 1, 1989.

178 As already noted, this means that we cannot make any order as to selling below cost, as those particulars only request a prohibition against sale below acquisition cost, a concept we have found to be irrelevant. It also means that we cannot make an order specifically addressed to the kind of rebates that NSC offered to UFL to compensate it for the difference between the United States and Canadian prices, even though we found this to be an anti-competitive act.

179 We have been asked in effect to declare various contracts, some of them not even made in Canada, to be invalid in whole or in part. Some questions have been raised in the pleadings as to our jurisdiction to make such declarations. Without addressing that issue, we find it preferable to confine ourselves to certain directions to the respondent both with respect to enforcing certain terms of existing contracts or entering into such terms in the future.

180 Apart from these considerations we will also confine our order to terms which we believe will be relatively certain and enforceable.

181 We will therefore issue an order prohibiting NSC from enforcing, or entering into, certain terms of contracts for the supply of aspartame to Canadian customers: terms which require the purchaser to purchase or use only NSC aspartame; terms which provide financial inducements to purchase NSC aspartame through trademark display, advertising, or

similar allowances; meet-or-release terms; and most-favoured-nation clauses, unless such clauses are also inserted in supply contracts between the respondent and any competitor of that Canadian customer.

VIII. Constitutional Validity of the Tribunal

1. The Issues

182 After the Tribunal had heard all the evidence in the present case, but before final argument had been presented, Philippon J. of the Superior Court of Quebec rendered a decision in the case of *Alex Couture Inc. c. P.G. Canada*.[37] In that decision he concluded that major sections of the *Competition Act* are constitutionally invalid and he also found the Competition Tribunal to be invalidly constituted. His reasons may perhaps be adequately summarized in the following paragraph from his decision:

37 (6 April 1990), Quebec 200-05-001361-877. This decision has been appealed to the Quebec Court of Appeal.

> A notre avis, le Parlement n'a pas la compétence d'accorder les pouvoirs que la Loi accorde au Tribunal de la concurrence, l'assimilant à une cour supérieure d'archives avec tous les pouvoirs d'une véritable cour, sans accorder à ce tribunal les attributs essentiels d'indépendance.[38]
>
> 38 *Ibid*. at 86.

183 An unofficial translation has rendered this paragraph as follows:

> In our opinion, Parliament does not have jurisdiction to grant the powers which the Act confers on the Competition Tribunal, treating it like a superior court of record with all the powers of a true court, without giving the Tribunal the characteristics essential to independence.

184 As a result of this decision, counsel for the respondent, NSC, in the present case requested and obtained, on April 26, 1990, leave to amend its response in order to challenge the constitutionality of the Tribunal. As a result the following paragraph was added to its response:

> 25a. The Respondent says that the Competition Tribunal is constituted pursuant to the *Competition Tribunal Act* in a manner contrary to the *Constitution Act, 1982*, and the *Canadian Bill of Rights*, and is therefore without jurisdiction to adjudicate in this matter in that, although it is required to act judicially:
>
> > (a) the legislative provisions providing for the appointment and removal of members of the Competition Tribunal other than Federal Court judges, pursuant to which appointments have purportedly been made, do not safeguard the independence and impartiality of the Tribunal; and
> >
> > (b) F. Roseman, a full-time, non-judicial member of the Tribunal, continues as a member of the Restrictive Trade Practices Commission under the Combines Investigation Act with statutory responsibilities that are inconsistent with constitutional requirements of neutrality, impartiality and independence that are necessary for the Competition Tribunal to act judicially.[39]
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> > 39 Amended response of NSC.

185 Consequently, an additional date was set aside in July 1990 for argument of the constitutional issue.

186 For convenience we will first set out the legislative provisions which give rise to this challenge. Subsections 5(2) and (3) of the *Competition Tribunal Act*[40] provide as follows:

40 R.S.C. 1985 (2d Supp.), c. 19.

(2) Each lay member shall be appointed for a term not exceeding seven years and holds office during good behavior but may be removed by the Governor in Council for cause.

(3) A member of the Tribunal, on the expiration of a first or any subsequent term of office, is eligible to be reappointed for a further term.

187 When the *Competition Act* was extensively amended and the Competition Tribunal was established, it was provided in the amending legislation as follows:

> 60(1) Notwithstanding any other provision of this Act, the members of the Restrictive Trade Practices Commission appointed under the *Combines Investigation Act* (in this section referred to as the "members" and the "Commission"), while this subsection is in force, continue in office as such and may exercise such of the powers and perform such of the duties and functions as were, before the coming into force of this Act, vested in them as such for the purpose only of completing any inquiry or other matter or proceeding commenced under the *Combines Investigation Act* or any other Act of Parliament before the coming into force of this section.
>
> (2) For the purposes of any inquiry or other matter or proceeding referred to in subsection (1), the *Combines Investigation Act* and any other Act of Parliament amended by this Act shall be read as if this Act has not come into force.
>
> (3) While the members continue in office in accordance with this section, they may, if so appointed, hold office as members of the Competition Tribunal, but any person who, pursuant to this subsection, holds more than one office is entitled to be remunerated only in respect of one of those offices.
>
> (4) The Governor in Council may, by proclamation, repeal subsection (1) when he is satisfied that the Commission no longer has any inquiry or other matter or proceeding referred to in subsection (1) before it and that the Commission has reported to the Minister of Consumer and Corporate Affairs in respect of all inquiries before it. [41]
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> 41 *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, R.S.C. 1985 (2d Supp.), c. 19.

188 The panel of the Tribunal hearing the present case is composed of two judicial members who are judges of the Federal Court - Trial Division, and one "lay member". The two judicial members, Strayer and Teitelbaum JJ., were appointed members of the Tribunal for a period of seven years effective June 30, 1986. The "lay member" is Dr. Frank Roseman who is presently serving under an appointment by the Governor in Council for a term of seven years commencing May 12, 1987.

189 The challenge to the validity of the Tribunal here is based on the presence of Dr. Roseman on the panel. The contention is that, as a matter of law, the Tribunal panel cannot be validly constituted because: (1) Dr. Roseman does not enjoy sufficient independence because he is appointed for a limited term of seven years but is eligible, under subsection 5(3) of the *Competition Tribunal Act*, for re-appointment should the Governor in Council so choose, and because he may be removed, according to subsection 5(2) of that Act, by the Governor in Council "for cause"; (2) Dr. Roseman is still a member of the Restrictive Trade Practices Commission ("RTPC") in accordance with the provisions of section 60 of the amending Act as quoted above and in that role has executive functions which are "institutionally inconsistent with a duty to act judicially". [42]

42 Memorandum of constitutional argument of NSC at para. 43.

190 It must be emphasized at the outset that the respondent is not disputing the personal integrity, independence and impartiality of Dr. Roseman in fact. In its factum it states the following:

> The Respondent has complete confidence in the actual personal sense of independence, impartiality and neutrality of Dr. Roseman, just as it does with respect to the other members of the Tribunal. However, it is respectfully submitted, that is not the issue.[43]

43 *Ibid.*

191 It should also be noted that when the respondent first raised this issue before the Tribunal, Dr. Roseman stated for the record that he had had absolutely nothing to do with the work of the RTPC since becoming a member of the Tribunal. He offered to provide an affidavit to this effect but none was requested.

192 No issue has been raised as to the independence of the judicial members of the Tribunal. They have full independence as judges of the Federal Court. They are appointed for limited terms of up to seven years as members of the Tribunal. This involves only a portion of their time since work at the Tribunal is conducted in place of some Federal Court work and carries no additional remuneration. There is no provision for the removal of judicial members of the Tribunal before their terms as judicial members are completed, provided they continue as judges of the Federal Court.

193 The Tribunal accepts that it must deal with the constitutional issue to the extent that it is relevant to the hearing of this particular case by this particular panel. We are not in a position such as that of a judge of the Quebec Superior Court in the *Alex Couture Inc*. case to issue declarations as to the general validity or invalidity of legislation, but we must, in determining the law applicable to the case before us, have regard to all of the law including the law of the constitution. The determination of these questions of law must, in accordance with paragraph 12(1)(a) of the *Competition Tribunal Act*, be made by the two judicial members of the panel.

194 It is not suggested that the composition of the present panel in any way conflicts with legislation duly enacted by Parliament: indeed, it is clearly in accordance with the provisions of the *Competition Tribunal Act* and subsection 60(3) of the amending Act quoted above. Therefore the whole issue is a constitutional one. It involves a question of whether our constitution requires Parliament to provide some prescribed standard of independence for members of a tribunal such as this, such independence to involve some minimum security of tenure and a separation from the exercise of non-judicial functions.

195 To underline further the nature of the issues involved here, it must be emphasized that the legislation under attack is federal legislation dealing with a federal appointment to a federal tribunal. This has no direct relationship to the creation of provincial tribunals and the constraints which section 96 of the *Constitution Act, 1867*[44] has been held to impose on provincial legislation.

44 (U.K.), 30 & 31 Vict., c. 3.

196 While a variety of alleged constitutional constraints on Parliament were suggested in argument, we believe they may be most conveniently grouped in two categories: implied constraints, and specific constraints arising out of the judicature provisions of the *Constitution Act, 1867* (sections 96-101).

2. Implied Constitutional Constraints

197 The essential argument made here is that the Competition Tribunal performs judicial functions and therefore the constitution implicitly requires that all members of the Tribunal must enjoy some degree of independence akin to that enjoyed by the traditional senior courts.

198 It is admitted that there is no express constitutional requirement precisely to this effect. While some reference was made to section 7 and paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*,[45] counsel for the respondent conceded that these provisions do not apply to the situation. Section 7 in guaranteeing the right to "life, liberty and security of the person" and the right not to be deprived thereof "except in accordance with the principles of fundamental justice" does not apply: there is no life, liberty or security interest involved in these proceedings which relate to alleged anti-competitive practices by the respondent in the marketing of aspartame. Further, it is clear that as a corporation the respondent cannot invoke section 7.[46]

45 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

46 *A.G. Quebec v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927 at 1003, 1004, 1009.

199 Paragraph 11(d) of the Charter, guaranteeing the right to a hearing by an "independent and impartial tribunal", only guarantees that right to a "person charged with an offence". The respondent is not charged with an offence in these proceedings.

200 The respondent has also made reference to paragraph 2(e) of the *Canadian Bill of Rights*[47] which requires that:

47 S.C. 1960, c. 44.

> no law of Canada shall be construed or applied so as to
>
> . . .
>
> > (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; ....

While this is not a constitutional requirement it does require us to interpret the *Competition Tribunal Act* so as not to deny the respondent a "fair hearing in accordance with the principles of fundamental justice". But unless that paragraph must be read to have abolished *per se* a multitude of federal tribunals exercising judicial and quasi-judicial power whose members are not given an independence akin to that of judges, which we do not accept, then it must be understood to permit an examination of the circumstances in each case as to whether fairness or natural justice is being denied. We will come back to this question later.

201 It was argued that even if the above provisions do not create a specific requirement binding on Parliament in this specific situation, they are but examples of a broader principle which is implicit in the constitution. This principle is also said to be, impliedly, part of the constitution of Canada because of the words of the preamble of the *Constitution Act, 1867*, which stated that Canada was to have "a constitution similar in principle to that of the United Kingdom." It is said that the independence of the judiciary is part of the constitution of the United Kingdom and therefore the Canadian constitution also requires that anyone who exercises judicial functions must enjoy the kind of independence accorded to judges of senior courts.

202 It might first be noted that this line of argument proceeds on an idealized view of separation of powers in the United Kingdom. The phrase "separation of powers" should, in relation to the United Kingdom constitution, be understood as descriptive rather than prescriptive. Even as a description it must be seen as a generalisation to which there are many exceptions. While it would not be productive to explore this question in detail, it might be observed, for example, that if

Canada fully adopted the model of the constitution of the United Kingdom, the Chief Justice of Canada would, like the Lord Chancellor, be a member of the federal Cabinet and would preside in the Senate. Also, at the time of Confederation, when we inherited the principles of the United Kingdom constitution, the Master of the Rolls (the Chief Justice of the Court of Appeal) was still entitled to sit as a member of the House of Commons. [48]

48 S. Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland, 1976) at 15.

203 Further, the United Kingdom constitution does not appear to require that judicial functions be confined to legally trained full-time judges with security of tenure. There are, for example, some 25,000 active justices of the peace in England and Wales who try criminal cases and who can impose sentences of up to six months. They are mostly lay people who have no security of tenure and who serve part time. [49] Lay juries have long been a feature of both British and Canadian law. All that is required of these lay adjudicators is that they not be biased in the particular case before them. They are not constitutionally disqualified from performing judicial functions. It is also instructive to note that the constitution of the United Kingdom seemingly accommodates the existence of a tribunal similar in many respects to this Tribunal. The Restrictive Practices Court, which deals with issues of the nature before the Tribunal in this case, is composed of five superior court judges and up to ten lay members. The lay members serve for limited terms as fixed by Her Majesty on the recommendation of the Lord Chancellor and may be removed by the Lord Chancellor (himself a member of the government in power) "for inability or misbehaviour" or for conflict of interest. They are also eligible for re-appointment. Unlike this Tribunal, the Restrictive Practices Court is expressly made a "superior court of record". [50]

49 S.A. de Smith, *Constitutional and Administrative Law*, 5th ed. by H. Street & R. Brazier (Harmondsworth, Eng.: Penguin, 1985) at 369-70, 389.

50 *Restrictive Practices Court Act 1976* (U.K.), 1976, c. 33, s. 1,3. *Restrictive Trade Practices Act 1976* (U.K.), 1976, c. 34.

204 It must always be remembered that when the *Constitution Act, 1867* gave Canada a constitution "similar in principle to that of the United Kingdom" it also included the principle of parliamentary sovereignty which was to be subject only to such limitations as were imposed by other provisions of the constitution. Therefore any implied guarantees of separation of powers or independence of those exercising a judicial function must be weighed against the implied powers of Parliament to provide what it regards as the most effective means for adjudicating difficult economic and social issues.

205 The respondent instead argues that Parliament is precluded by the constitution from conferring any judicial functions on any person or body who or which does not enjoy the kind of individual and institutional independence typical of conventional courts. The terms of this alleged constitutional imperative, however, are drawn by counsel from cases involving the judges of conventional courts and involving other constitutional provisions. [51] They are of little help in defining the constitutional requirements of independence, if such there be, in relation to specialized tribunals such as the Competition Tribunal.

51 *Valente v. R.*, [1985] 2 S.C.R. 673; *R. v. Beauregard*, [1986] 2 S.C.R. 56.

206 The Tribunal recognizes that most of its functions are of a judicial nature. In substance we determine facts on the basis of evidence and we apply pre-existing law to those facts to render binding decisions. Procedurally it is clear that we must respect the rules of natural justice and fairness in the conduct of our hearings. But we are, as the Federal Court of Appeal has recently pointed out, "an inferior Court". [52] We do not have the implied powers of a superior court and we are subject to the supervision of a superior court. [53]

52 *Chrysler Canada Ltd. v. Competition Tribunal*, (10 July 1990), A-135-90 at 4. This was the position taken by both counsel which the Court accepted.

53 There is a right of appeal under section 13 of the *Competition Tribunal Act* from the Tribunal to the Federal Court of Appeal on any question of law and with leave on any question of fact; the Superior Court of Quebec has taken the position, apparently, that the Tribunal is also subject to the review powers of the superior courts of the provinces: see *Alex Couture Inc. c. P.G. Canada* (6 August 1987), Quebec 200-05-001361-877 (S.C.), granting a stay against the Tribunal, confirmed by the Court of Appeal in *P.G. Canada c. Alex Couture Inc.*, [1987] R.J.Q. 1971.

207 If there is any implied constitutional requirement, which we doubt, for Parliament to legislate certain safeguards of independence for such a tribunal, that implied requirement would surely be consonant with the common law requirements traditionally recognized in England and in Canada. These are probably well expressed in paragraph 2(e) of the *Canadian Bill of Rights*, also relied on by the respondent, which obliges us to interpret an Act of Parliament such as the *Competition Tribunal Act* as not depriving a person of the right "to a fair hearing in accordance with the principles of fundamental justice". Insofar as those principles of fundamental justice would require independence, they have probably been best summed up by de Grandpré J. in *The Committee for Justice and Liberty v. The National Energy Board*:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly." [54]

> 54 [1978] 1 S.C.R. 369 at 394. This test has been approved as a constitutional requirement in certain contexts; in *Valente v. R*, *supra* note 53 at 689, in respect of the requirement of an "independent and impartial tribunal" under paragraph 11(d) of the *Charter*, and by Mahoney J. in *Canadian Imperial Bank of Commerce v. Rifou*, [1986] 3 F.C. 486 at 493 (C.A.), as a suggested implied constitutional requirement on Parliament in respect of the exercise of its authority to create courts under section 101 of the *Constitution Act, 1867*.

This test has subsequently been applied by the Federal Court of Appeal in at least two cases involving allegations of bias. [55] It will be noted that all of these decisions specifically involved the standard applicable to federal tribunals other than ordinary courts.

55 *Sethi v. Minister of Employment and Immigration* (1988), 87 N.R. 389 at 393, 31 Admin L.R. 123 at 129-30 (F.C.A.), leave to appeal denied (1988), 36 Admin L.R. xln (S.C.C.); *Mohammad v. Minister of Employment and Immigration* (1988), 91 N.R. 121 at 132 (F.C.A.), leave to appeal denied (1989), 101 N.R. 157 (S.C.C.).

208 Using this test, we do not accept that because of the tenure and re-appointment provisions of the *Competition Tribunal Act* and the fact that Dr. Roseman is still a member of the RTPC, the presence of Dr. Roseman would create in a reasonable, informed person an apprehension of bias. This imaginary reasonable, informed person would take into account factors such as the following: that each member of the Tribunal, including lay members, must before commencing his duties take an oath that he will "duly and faithfully, and to the best of his skill and knowledge, execute the powers and trusts reposed in him as a member of the Tribunal"; [56] that no member can take part in any matter before the Tribunal in which he has a direct or indirect financial interest; [57] that a lay member must be assigned to a particular case by the Chairman who is a judge of the Federal Court and who will, presumably, take into account any valid reason including that of possible bias for not assigning a particular lay member to a particular case; that every panel hearing a case is presided over by a judge of the Federal Court who will also, presumably, be conscious of any apparent bias in a

lay member and halt proceedings where he feels such bias to exist; [58] that lay members do not participate in the decision of any question of pure law; [59] and that there is an appeal from the Tribunal to the Federal Court of Appeal as of right on any question of law or mixed law and fact, and with leave on any question of fact alone. [60] Surely a reasonable, informed person would see in these arrangements adequate protection against bias on the part of a given lay member.

56 *Competition Tribunal Act*, s. 7(1).

57 *Ibid.*, s. 10(3).

58 *Ibid.*, s. 10(2).

59 *Ibid.*, s. 12(1)(a).

60 *Ibid.*, s. 13.

209 It is argued by the respondent, of course, that the conditions of tenure of lay members such as Dr. Roseman, given that they are appointed for a term not exceeding seven years and hold office "during good behavior but may be removed by the Governor in Council for cause", combined with the possibility of re-appointment, would make it appear to the reasonable observer that such members would decide for the Director of Investigation and Research and against a respondent in order to avoid dismissal or to create favour in hope of re-appointment. We do not accept that the right of dismissal "for cause" gives the Governor in Council the right to dismiss a member simply because he has decided a case or cases against the Director. In our view, the word "cause" must be interpreted as confined to a reason for removal involving the conduct of the member in relation to his ability to perform his duties properly, and the test of proper performance of his duties cannot depend on whether he decides in favour of the Director rather than a respondent. Instead it must depend on whether he performs his duties "duly and faithfully, and to the best of his skill and knowledge" as he has taken an oath to do.

210 If there is any ambiguity in the words "for cause" then we must interpret them in a way which is consistent with paragraph 2(e) of the *Canadian Bill of Rights*, as we are obliged to do by that section, and we should interpret them consistently with the alleged requirement of the constitution that such members be independent. [61] Further we respectfully concur with the view of the Federal Court of Appeal in the *Sethi* case [62] to the effect that the reasonable, informed observer should not be taken to assume that the government will favour a member of a tribunal who deals unfairly with a party before that tribunal. While it is true that a government officer, the Director of Investigation and Research, is typically a party before the Competition Tribunal, the Minister of Consumer and Corporate Affairs who nominates lay members of the Tribunal has a broader responsibility to ensure that the *Competition Tribunal Act* and the *Competition Act* are administered in accordance with the law, and the law requires a fair hearing for parties before the Tribunal including a lack of bias on the part of members of the Tribunal.

61 See *e.g. Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078.

62 *Supra*, note 57 at 394.

211 It is also in effect argued by the respondent that a reasonable, informed person would conclude that by the mere fact of his membership in the RTPC, Dr. Roseman cannot be seen to be an unbiased member of the Competition Tribunal. But this informed observer would also note that by the very words of section 60 of the amending Act, quoted above, which continued Dr. Roseman as a member of the Commission and enabled him to sit on the Tribunal at the same time, it would be impossible for a matter which had been commenced before the Commission, in respect of which it is argued Dr. Roseman might have had some administrative involvement by his membership in the Commission, to come before the Tribunal. Therefore, he could not reasonably be seen to have an institutional bias in respect to any matter

coming before the Competition Tribunal. If there were, as counsel hypothesized, a case before the Tribunal closely related to matters which had previously been before the Commission it would be time enough for Dr. Roseman to disqualify himself from that particular case or for the Chairman to refrain from assigning him to it. There is no suggestion that any such circumstance exists in respect of the present case with which we are dealing.

212 The other aspect of the argument that Dr. Roseman's membership in the RTPC constitutionally disqualifies him as a member of this Tribunal is really based on some imagined constitutional imperatives. That is, it is contended that if a person may be called upon in another role to exercise executive functions, he cannot legally exercise any judicial functions. We see no support in the law for such a rigid separation of powers, assuming there is no reasonable apprehension of bias in respect of a given case.

213 We therefore conclude that, even if the legislative provisions authorizing the membership of Dr. Roseman in the Tribunal must be tested against some constitutional standard appropriate for such tribunals, the relevant legislation meets that standard for the purposes of this case. It may well be that longer terms of appointment and clear safeguards as to security of tenure would, in the interest of good public administration, be desirable but we are not persuaded that there is an implied constitutional imperative which prevents Dr. Roseman from sitting on this panel in this case.

3. Express Judicature Provisions of the Constitution Act, 1867

214 This aspect of the respondent's argument is to the effect that the Tribunal has been given "superior court functions" and that sections 96 to 100 of the *Constitution Act, 1867* preclude not only provincial legislatures but also the Parliament of Canada from conferring such functions on any body other than a superior court. In support of this argument the respondent relies essentially on jurisprudence concerning the constitutional limitations on provincial legislatures in respect of the creation of provincially-appointed bodies with powers analogous to those of superior, district and county courts. There are several reasons why this jurisprudence is of little help in determining the power of Parliament in respect of the creation of courts and tribunals.

215 It must first be observed that the limitation on provincial legislative powers in this respect has usually been tied to the provision in section 96 of the *Constitution Act, 1867* that the judges of superior, district and county courts are to be appointed by the Governor in Council. Impugned provincial legislation has, of course, provided for appointment by provincial authorities. In the present case, however, there is no such issue as the members of the Competition Tribunal are appointed by the Governor in Council and for that reason such appointments do not *per se* conflict with section 96.

216 The significance of section 96 has usually been seen in its keystone role in the distribution of powers — both executive and legislative — in respect of the constitution, maintenance, and staffing of the provincial courts. It was an essential part of the Confederation "deal", a compromise whereby provincial courts would administer all provincial laws and most federal laws. For this reason each level of government would have a role in the operation of those courts: the province through its legislative role under section 92, head 14 of the *Constitution Act, 1867*, Parliament through its role in assigning jurisdiction to such courts and in providing for the salaries of their judges, and the Governor in Council through his power of appointment of judges. It is this rationale which is referred to in *McEvoy v. A.G. New Brunswick*, [63] a case heavily relied upon by the respondent. In a unanimous judgment, the Court stated:

63 [1983] 1 S.C.R. 704.

> The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867* and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian constitution the Superior Courts are independent of both levels of government. The provinces constitute, maintain and organize the Superior Courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures. [64]

64 *Ibid*. at 720.

From the context it is obvious that this refers only to provincial superior courts, and that the "independence" being referred to is the lack of complete dependence on one level of government or the other which these courts enjoy.

217 It was also part of the Confederation "deal", however, that Parliament would retain the authority under section 101 of the *Constitution Act, 1867* to create other courts for the administration of federal law. That section provides:

> 101. The Parliament of Canada may, *notwithstanding anything in this Act*, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.
>
> (emphasis added)

It is fundamental to note that Parliament is given power to establish "additional courts for the better administration of the laws of Canada" and that this authority is conferred "*notwithstanding anything in this Act*". Of these words, Duff C.J. once said:

> Whatever is granted by the words of the section, read and applied as *prima facie* intended to endow Parliament with power to effect high political objects concerning the self government of the Dominion ... in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely. [65]

65 *Reference Re Abolition of Appeals to the Privy Council*, [1940] S.C.R. 49 at 63-64, aff'd *(*sub nom. *A.G. Ontario v. A.G. Canada)* [1947] A.C. 127 (P.C.).

These words were quoted with approval in the judgment of the Judicial Committee of the Privy Council on appeal. [66]

66 *A.G. Ontario v. A.G. Canada*, *ibid*. at 152.

218 With all due respect to those of a different view [67] section 101 does not read "notwithstanding *some things* in this Act". Thus, whatever limitations flow from sections 96 to 100 of the *Constitution Act, 1867* with respect to the nature of tribunals which provincial legislatures can create, those limitations cannot apply to Parliament in the exercise of its overriding authority under section 101. Cases such as *McEvoy* are not relevant because there what was in issue was the hypothetical exercise of Parliament's criminal law jurisdiction under section 91, head 27 of the *Constitution Act, 1867*. It was held that the exercise of that authority could not override the distribution of legislative and executive powers pertaining to provincial courts as specified in sections 96 to 100. *McEvoy* did not involve the exercise of Parliament's authority under section 101.

67 See *e.g*. W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769, 1139 at 1175-76. It is accepted by the Tribunal, of course, that Parliament could not, for example, use its power under section 101 to preclude *any* judicial review on constitutional issues. That flows, however, not from other provisions of the *Constitution Act, 1867*, but from the power of judicial review that is implicit in a constitution which limits the powers of governments. Stone, J. in *Canadian Imperial Bank of Commerce v. Rifou*, *supra*, note 56 at 510-15 also held that Parliament's power under section 101 was not limited as to the nature of the "courts" it could create.

219 In fact the respondent's case rests, not on distribution of powers arguments which might be relevant if a provincial tribunal were involved, but on some kind of separation of powers which, it contends, applies to federal organs of government. In effect, it is arguing that Parliament cannot exercise its power to create courts under section 101 in a way

which confers certain kinds of judicial functions on bodies other than traditional courts. In support of this proposition the respondent has referred to the statements by two judges of the Federal Court of Appeal in *Canadian Imperial Bank of Commerce v. Rifou*.[68] One of the issues involved in that case was whether an adjudicator under the Canada Labour Code had been validly given "judicial powers" by Parliament. The three members of the panel hearing the case agreed that the particular powers in question had been validly conferred. However, two members of the panel, Urie and Mahoney JJ., did not accept that Parliament's powers in this respect were completely unfettered. It appears that these comments were *obiter dicta*, and it was therefore unnecessary for those learned judges to define the source or scope of such a limitation on Parliament's powers. The point upon which they agreed in this respect was that as long as Parliament did not preclude judicial review of the decision of such an adjudicator it would not offend the constitutional limitation. This conclusion supports the validity of the Competition Tribunal as there is not only judicial review of it provided, but full powers of appeal from its decisions.

68 *Supra*, note 56.

220 If however we should be wrong in the conclusion that Parliament is not constrained in the exercise of its powers under section 101 in the matter of courts or tribunals which it can create, we will outline briefly why we believe the traditional limitations imposed on provincial legislatures, if applicable to the establishment of federal tribunals, would not invalidate the inclusion of lay members such as Dr. Roseman in the Competition Tribunal.

221 It should first be underlined that the Tribunal is not a "superior court". This has been recently confirmed by the Federal Court of Appeal in *Chrysler Canada Ltd. v. Competition Tribunal*[69] with the result that this "inferior tribunal" does not have the implied powers of a superior court. It was held in that case that the Competition Tribunal, unlike a superior court, has no power to punish for a contempt committed *ex facie* of the Tribunal as no such power was specifically conferred on it.

69 *Supra*, note 54.

222 It is true, of course, that the Tribunal does exercise essentially judicial functions. But that fact by itself does not invalidate the creation of a tribunal other than a superior, district or county court. It is a long recognized principle of administrative law that inferior tribunals can exercise judicial functions: indeed, until recently the supervising writs of prohibition and *certiorari* were available only in respect of tribunals exercising judicial and quasi-judicial functions. The criteria now accepted for determining whether a provincial court or tribunal is in reality a superior, district or county court and therefore invalidly constituted if not staffed with section 96 judges, are those set out by the Supreme Court of Canada in the *Reference Re The Residential Tenancies Act, 1979*.[70] Three criteria were identified there, and unless a tribunal comes within all three it does not violate the requirements of sections 96 to 100 of the *Constitution Act, 1867*. We will refer to the first test only which is:

70 [1981] 1 S.C.R. 714 at 734-36.

> ... whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation.[71]
>
> 71 *Ibid*. at 734.

223 We are satisfied that the kind of jurisdiction exercised by the Competition Tribunal in the present case was not exercised by a superior, district or county court at the time of Confederation. In general terms, what we are called upon to decide in this case is whether the respondent has been practising "exclusive dealing", "tied selling", or "anti-competitive acts" in its sale of aspartame in Canada. If we find that the respondent has committed any or all of these acts we must

still be satisfied that the result of such acts is that competition is or is likely to be lessened substantially. There was no comparable law at the time of Confederation or for many years thereafter, and provincial, county and district courts at the time of Confederation had no comparable power or jurisdiction to intervene in the market-place as the Tribunal is called upon to do. The issues involved are in many respects essentially economic and require the input of specialized knowledge in a manner unknown to pre-Confederation courts. [72]

72 For a history of the development of competition legislation see the reasons of Dickson J. in *A.G. Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206 at 250-54.

224 Further, the contest is, in effect, between an officer of the state and the respondent, the proceedings, though civil in nature, being brought to protect the public interest and not simply to advance the personal interests of the initiating party. In this respect they fall between the civil and criminal law proceedings which were typical of the jurisdiction of pre-Confederation courts. Therefore the Tribunal fails to come within the first criterion of the *Residential Tenancies Act* case and it is unnecessary to consider the other criteria of that case.

225 In a sense, the respondent's contention that Parliament can only confer such judicial functions on section 96 courts, or possibly on federal superior courts, fails because it proves too much. It is implicit in such an argument that a "superior court" created by Parliament under section 101 has also to meet any relevant requirements in sections 96-100. The result would be that any federal tribunal to which such judicial functions are assigned could consist only of lawyers, members of the Bars of the respective provinces as prescribed in sections 97 and 98. Further, if they exercise any "superior court functions" they would have to have security of tenure to age 75 in accordance with section 99 and presumably they would have to devote themselves full time to the tribunal. This would not only invalidate a host of existing federal tribunals but would also preclude for the future the inclusion in such tribunals of persons with specialized knowledge (other than that of law) or persons who wish to continue on a part-time basis the careers from which they derive the economic, business, or other special knowledge which they are expected to bring to that tribunal. We find it difficult to believe that the constitution of Canada compels such a result.

Conclusion on Constitutional Issues

226 We therefore conclude that the Tribunal panel hearing this case has been validly constituted.

IX. Order

227 FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT:

1. In this order "Canadian customer" includes any person or corporation entering into agreements whether inside or outside of Canada for the purchase of aspartame, in respect of any aspartame to be delivered in Canada for use as a food ingredient.

2. The respondent, The NutraSweet Company, shall not enter into, or enforce, any term of an agreement for the supply of aspartame which:

(a) requires a Canadian customer

(i) to buy all of its aspartame requirements from the respondent; or

(ii) to use the respondent's aspartame exclusively or primarily as the sweetener in some or all of the customer's products;

(b) entitles a Canadian customer to receive

(i) a discount or allowance in return for the use of the respondent's trademark or logo on the customer's products or in its advertising; or

(ii) any similar discount or allowance whose purpose is to induce such customer to buy aspartame exclusively from the respondent as an ingredient for any or all of that customer's products;

(c) entitles a Canadian customer

(i) to require the respondent either to meet any price at which aspartame is offered to the Canadian customer by a competitor of the respondent or to allow that customer to be relieved from his contractual obligations to the respondent; or

(ii) to require the respondent to supply aspartame to the Canadian customer on terms as favourable as those on which the respondent supplies aspartame to any of the customer's competitors, unless such requirement is also included in the respondent's contracts for the supply of aspartame to any of that customer's competitors.

Footnotes

8

1990 CarswellNat 1372
Competition Tribunal

Canada (Director of Investigation & Research) v. Xerox Canada Inc.

1990 CarswellNat 1372, [1990] C.L.D. 1146, 33 C.P.R. (3d) 83

In the Matter of an application by the Director of Investigation and Research for an order pursuant to section 75 of the Competition Act, R.S.C., 1985, c. C-34, as amended, requesting that the respondent accept the Exdos Corporation as a customer for the supply of a product

The Director of Investigation and Research, Applicant and Xerox Canada Inc., Respondent

Clarke Member, Reed J., Roseman Member

Heard: June 11, 1990
Heard: July 20, 1990
Judgment: November 2, 1990
Docket: CT-89/4

Counsel: *James W. Leising, John S. Tyhurst*, for the Applicant
Colin L. Campbell, Q.C., William Donaldson, for the Respondent

Subject: Criminal; Intellectual Property; Property; Corporate and Commercial; Constitutional

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Constitutional issues — General principles

Section 75 of Act valid — Competition Act, R.S.C. 1985, c. C-34, s. 75.

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — General principles

Elements of offence — Refusal to supply — Change in policy, from supplying spare parts to independent service organization to refusal to supply, justifying order requiring supply — Competition Act, R.S.C. 1985, c. C-34, s. 75.

Section 75 of the Act is valid as being ancillary to the main purpose of the Act, and is intended to promote and preserve competition within the context of the Act, where refusal to supply is only an offence where competition is prejudiced thereby.

Decision of the Board:

I. Introduction

1 The Director of Investigation and Research ("Director") brings an application seeking an order to require Xerox Canada Inc. ("Xerox") to accept Exdos Corporation ("Exdos") as a customer for the supply of certain Xerox copier parts. This application is brought pursuant to section 75 of the *Competition Act*. [1]

1 R.S.C. 1985, c. C-34, as amended.

2 Xerox followed the practice, for a number of years, of freely selling parts for its photocopier machines to any purchasers willing to pay the list price, of whom Exdos was one. Sales were made without regard to the use subsequently made of the parts, whether they be used by the purchasers as end users [2] of the photocopier machines, or as suppliers of maintenance service to owners of Xerox photocopiers, or as refurbishers of second-hand Xerox machines for resale into the used photocopier market. Then, in August 1988, in response to a policy originating with Xerox Corp. (U.S.) but subsequently adopted by Xerox (Canada), the supply of such parts was curtailed. This was done in order to eliminate competition from organizations which had grown up and were providing maintenance service for Xerox photocopiers. Xerox determined that some of the "margin-rich area" of service revenue was being lost to these competitors. The competitors are referred to in the evidence as independent service organizations ("ISOs"). The curtailment of the supply will also effectively eliminate most of the second-hand market in Xerox copiers, except to the extent that such is controlled by Xerox. Exdos was one of the organizations caught in this general refusal to supply copier parts. Insofar as the particular position of Exdos is concerned, the relevant facts follow.

2 The "end user" is the person who, irrespective of *ownership*, is *in possession of* and actually *uses* one or more Xerox copiers.

II. Background and Refusal to Supply

A. Initiation of the Business Relationship

3 In 1982 Xerox found itself with an overly large inventory of used photocopiers. It was Xerox's practice, at the time, to either scrap such machines or to refurbish them to an "as new" condition. In the latter case the machines were resold, leased or rented with a "new machine" warranty. Xerox was concerned about the drain the oversupply of used inventory was creating on the financial position of the company.

4 The oversupply of used machines was the result of a number of factors: there was a general economic downturn in 1980-81; the patent which Xerox held on the photocopier technology had expired in the mid-1970s and, with that expiry, Xerox faced increasing competition from other manufacturers of photocopiers. In addition, Xerox was moving to a new technology, described generally in the evidence as "10 Series copiers", which was eventually introduced in 1983. [3] It was anticipated that many of Xerox's customers would wish to move to this new technology. Consequently, as a result of both the increased competition which Xerox was facing and the desire of customers to move to the new technology, it was expected that the return of old machines to Xerox would increase.

3 The "10 Series copiers" are also referred to in the evidence as the "Marathon" family of copiers.

5 The normal practice of Xerox, prior to the late 1970s, had been to place machines with customers on a rental basis. Under this practice ownership of the machines remained at all times in the hands of Xerox or returned to Xerox at the end of the lease. In the late 1970s, the practice in the industry began to change to one of selling the machines to customers either by way of an outright sale or through a lease-purchase arrangement. With more and more machines owned by customers directly, it was anticipated that a considerable second-hand market in the machines would develop.

6 In 1982, Terry Reid was an employee of Xerox. Terry Reid subsequently became and remains the president and majority shareholder of Exdos. Xerox and Reid determined that a mutually advantageous arrangement might be created if Reid left the Xerox company and created an independent company which would purchase some of the used copier machines from Xerox in an "as is" condition, refurbish them and sell them into the second-hand market. [4] It was contemplated that this would tap an area of the market not previously served by Xerox. It would also free the Xerox sales force to concentrate on selling the newer model machines. It would give Reid an opportunity to develop his own business and would have a positive effect on the Xerox balance sheet. It was contemplated that Reid would create a

dealer network throughout Canada for the purpose of disposing of the used copiers. It was also contemplated that he would himself market some of the machines directly into the end user market.

4 The other options open to Xerox at the time were to: (1) refurbish as many of the machines as the market would bear to an "as new" condition and scrap the remainder (as it had been doing in the past); or (2) develop an in-house second-hand market division.

7 In May 1983, Exdos (initially carrying the name XDS Corp.) and Xerox entered into a contract pursuant to which Exdos was to be allowed to purchase certain copier models [5] at specified prices. Delivery of the equipment was taken by Exdos at Xerox's three distribution centres in Toronto, Montreal and Calgary. Exdos was also given, under the May 24, 1983 contract, the right to purchase copier parts for the various second-hand models covered by that contract. Such parts were to be sold to Exdos at 50 percent off list (drums for the machines were to be sold at an even more advantageous price, namely twice the Canadian landed price). The contract was expressed to run for a year or to come to an end at an earlier date should Exdos purchase, by that time, a certain dollar volume of equipment. For four months Exdos was given an exclusive right to purchase the used copier models (from May 24, 1983 until October 1, 1983). At the time, this arrangement was clearly, in the eyes of Xerox, an experiment; it was designed to determine if a mutually advantageous business arrangement could be developed.

5 Model Nos. 660, 3100, 3103, 3107, 4000, 4500, 2400, 3600, 7000; all were pre-10 Series machines.

8 It was recognized from the beginning that there was a potential for Exdos' activity, in moving into or feeding a market for second-hand copiers, to lead to conflict with Xerox's mainline sales activity. Indeed, the initial contract signed by the parties contained an extensive list of Xerox's major customers to which Exdos agreed it would not market the used machines purchased from Xerox. It is clear that Reid understood from the very beginning that if his activities in selling second-hand copier equipment resulted in conflict with Xerox's mainline sales efforts ("raised the field noise level") this could result in the cancellation of his contract.

B. Contract Modifications - Copiers from Sources Other than Xerox - Parts from Xerox

9 The contract between Exdos and Xerox was extended and modified from time to time. Many of the changes need not be detailed here. Suffice it to say that Exdos' exclusive right to purchase certain used photocopier models from Xerox, which was originally designed to operate for only four months, was extended indefinitely; a reciprocal exclusivity obligation was imposed on Exdos (to purchase the models covered by the contract from Xerox only); the contract was varied to one of indefinite duration, subject to termination by either party at first on 60 days notice and later on 30 days notice. The list of copiers which Reid was entitled to purchase from Xerox under the contract was expanded slightly from time to time to include three or four additional models as such became "obsolete", that is moved off Xerox's active sales list, but this list never included used 9000 [6] or 10 Series machines [7] . The 50 percent discount off list, for parts for the used machines which Reid obtained from Xerox, was subsequently modified to a 25 percent discount and eventually eliminated. He thereafter paid list price for the parts purchased. The most significant change in the contract arrangement between the parties, for the purposes of this case, however, was the addition of provisions with respect to the purchase and sale of parts for copier models acquired by Exdos from sources other than Xerox, about which more will be said later.

6 The 9000 Series of copiers both pre-dated and post-dated 1983 and the introduction of the 10 Series. They were manufactured from 1979 to 1986.

7 Some 9000 and 10 Series copiers were acquired by Exdos, at a later period of time, through Xerox sales representatives. Such representatives, when faced with competition from other copier manufacturers for the business of a particular customer, would persuade the customer to buy a new Xerox machine by offering a better price for the old machine. They would contact Reid to buy the customer's machine because Exdos would pay more for the used copier than Xerox allowed on a trade-in. In such cases, Exdos sometimes made the purchase cheque payable to the customer and sometimes to Xerox directly, depending on who

actually owned the machine. Reid did not hide from Xerox the fact that this activity was taking place although he did refuse to name the sales representatives who were approaching him. Xerox did not approve of this activity by its sales representatives.

10 Almost from the beginning Exdos began purchasing second-hand Xerox copier models from sources other than Xerox. These were obtained, for example, from finance companies who had repossessed the equipment for non-payment, or from owners of the equipment who were upgrading to a newer model, or at auction. The used copiers obtained in this way at first included only pre-1983 copier models not covered by the contract [8] . Eventually they also included the newer 9000 and 10 Series models. They never, however, included the 50 Series machines which were introduced by Xerox in 1989.

8 Models Nos. 2300, 2350, 5400, 5600 and the older 9000 Series machines.

11 Reid used Exdos to purchase the second-hand equipment, either from Xerox or other sources. When the copiers were placed directly into the end user market, Reid used a company called Nezron Office Products ("Nezron") to deal with the end user. Reid acquired a 70 percent interest in Nezron shortly after he established Exdos. (In late 1989, Exdos acquired the remaining 30 percent interest.) Exdos also established contacts with existing Canadian ISOs and encouraged the creation of other ISOs in various locations throughout the country, to which Exdos sold used copier equipment. Eventually, equipment was also sold into the United States and abroad.

12 After a photocopier is sold, there is a continual need to provide maintenance service to support the machine in the customer's hands. Reid used Nezron to support the second-hand machines he placed directly into the end user market. The other ISOs offered service for the machines they placed in that market. Alternatively, the final purchaser could contract with Xerox for service, providing Xerox's terms for dealing with used machines were met. The usual practice in the industry is for the purchaser of a machine to obtain service from the vendor of the machine.

13 In order to provide service, access to spare parts is of course necessary. From the beginning Reid purchased parts from Xerox for this purpose. The parts purchased related to both the used equipment purchased from Xerox and the used equipment purchased elsewhere. This included parts for the newer copier models (9000 and 10 Series). Some of the ISOs who purchased used equipment from Reid apparently bought at least some Xerox parts through him; several of them also bought parts directly from Xerox.

C. Xerox's Reaction to Exdos' Purchasing Equipment Outside the Initial Contract

14 Various Xerox employees of Xerox testified that the activity of Exdos (Reid), in purchasing used machines from sources other than Xerox and in purchasing parts from Xerox for those machines, was considered by Xerox from the beginning to be a breach of, at least, the spirit of its May 1983 contract with Exdos. It was contended that Xerox, with one exception, did not knowingly supply Reid with parts for copier models other than those expressly covered by the May 24, 1983 contract (or any successor contract). The one exception was said to be the supply of parts to Reid when these were required for his *own* end use. The evidence does not support that conclusion. While the initial formal written contract between Exdos and Xerox governed only the purchase of parts and supplies for photocopier models sold under the contract, it is clear that from a very early stage Xerox was aware of both Exdos' expansion of its business into other copier models and its purchase of parts for these machines from Xerox.

15 Insofar as the expansion of the business is concerned Xerox documents record, as early as April 1984, that:

> EXDOS may ... source [buy] Xerox equipment that we will not supply him from other sources. There are several models that we will not sell him and these are the units that we are still actively marketing. He buys these from many sources. [9]
>
> 9 Exhibit A-1, tab 26.

16 With respect to the purchase of parts for the copier models not covered by the contract, during the first year of the contract orders for such were lumped together by Exdos with orders for the copier parts on which Exdos was entitled to a 50 percent discount under the contract. This was not considered by Xerox to have been intended. Thus, when Xerox conducted an internal review of the Exdos contract in December 1984, one of the concerns expressed was that:

> EXDOS/NEZRON or its agents as a condition of our agreement must be prohibited from ordering parts for any piece of equipment not sold to them by Xerox other than at full retail price at which they are available to any customer.
>
> (underlining added) [10]
>
> 10 Exhibit A-1, tab 35.

17 Consequently, Exdos was given separate customer numbers: one under which it was to order parts for copier models pursuant to the May 1983 contract and another under which it could order parts not covered by the contract. The May 1985 version of the contract expressly provided that:

> Parts and drums for equipment not listed in Appendix A [Appendix A listed equipment available from Xerox] may be purchased by Exdos (subject to availability and Xerox's right to limit quantities at any one time) at standard retail prices in effect at the time of purchase. [11]
>
> 11 Exhibit A-1, tab 56A, clause 12.

There is no evidence that Exdos (Reid) tried to circumvent or abuse this ordering system, for example, by ordering parts for the newer copier models under the number which was to be used for the ordering of parts on which he was entitled to a discount.

18 As has been noted, Xerox argues that throughout its relationship with Reid its policy was to sell parts for the newer copier models to the end users of photocopiers only and that it was on this basis that Reid was allowed to purchase parts for models not covered by the contract, including eventually the post-1983 copier models. This is not supported by the weight of the evidence. There is no documentary record of such a restriction having been communicated to or imposed upon Exdos. There is no documentary evidence of such a restriction having been communicated to the employees of Xerox who processed the Exdos orders. There was no monitoring by Xerox of either the volume or type of parts being purchased. And there is no evidence that any monitoring took place with respect to any other customer purchasing Xerox parts. By mid-1985 a monitoring system was easily available to Xerox, as a result of a change made to its parts ordering system at that time.

19 The volume of 10 Series parts Reid purchased is entirely inconsistent with the suggestion that Xerox was only providing such to Exdos for its own end use. In this regard, Xerox employees were aware of the approximate size and nature of Reid's operation. For example, Mr. Hyde visited the Exdos-Nezron business premises in the late fall of 1984 and saw used 10 Series machines in the showroom at that time. Reid sought and received, from Xerox, copies of both parts price lists and service manuals for the 10 Series machines. Such activity is entirely inconsistent with the suggestion that Xerox was only selling parts to end use customers and that Reid's acquisition of post-1983 copier parts was in some way accomplished through subterfuge. It is clear that post-1983 copier parts were being purchased by Exdos and other independent service organisations openly and without restriction.

20 Although not directly relevant to the issues in this case, for completeness one further aspect of Reid's expansion of his business during the 1984-1985 period should be referred to. Reid expanded his business into the United States and purchased and resold second-hand copiers and parts in that market. This expansion was with Xerox Canada's knowledge

and at least tacit permission. Again there was a need to support the photocopier sales with a supply of spare parts. In this context some of the parts being purchased by Exdos from Xerox at a discount (particularly the drums) found their way into the United States market. The parts, having been purchased from Xerox at 50 percent off list, and the drums at a more advantageous price, could be resold into the United States market at prices which undercut the sales efforts of the marketing arm of Xerox Corp. (U.S.). This entity is referred to in the evidence as the United States Marketing Group ("USMG"). In response to concerns expressed by USMG, the discount to Reid for parts for the pre-1983 copier models was revised in the May 1985 contract renegotiations; the 50 percent discount was lowered to 25 percent. In addition, the list prices of the parts themselves were raised. These changes led Xerox officials to conclude with respect to the concerns raised by USMG:

> The contract has recently been renegotiated with Exdos. The issues you have alluded to ought not to occur unless Exdos wishes to take advantage of any currency exchange fluctuations. [12]

12 Exhibit A-1, tab 55.

D. Expansion of Exdos and Other ISOs - Consumer Benefit

21 At the same time that Exdos was expanding its activities in the marketing and servicing of second-hand Xerox equipment, others were doing likewise. A number of ISOs were becoming established in Canada as they had been for some time in the United States. These enterprises provided competition to Xerox with respect to the provision of service for Xerox machines, both second-hand and new. The second-hand machines also provided some competition at the lower end of the market to the sale of new Xerox machines. With respect to this last, however, Reid generally managed to avoid sales conflicts with Xerox. In general there was little "field noise".

22 Evidence before the Tribunal makes it clear that the second-hand copier market and the option for an alternate source of service provided by ISOs are beneficial to consumers. They allow for customer choice which would not otherwise be available. With respect to the sales of copiers, Exdos-Nezron and other dealers selling second-hand equipment provide the market with machines at a lower price than is the case for a new machine (e.g. $55,000 for a refurbished model 1090 copier as compared to approximately $95,000 for a new machine). [13] Also, the evidence demonstrates that Exdos-Nezron and other ISOs provide service of a quality comparable to that provided by Xerox, and on occasion better and at a lower price. Reid speculated that this was possible, even though the ISOs had to buy the parts for the newer copier models from Xerox at full retail price, because the smaller organizations had less overhead and more flexibility than Xerox. In addition, some customers indicated that they preferred to be free of the rather oppressive overselling of Xerox sales representatives. They were unhappy, for example, with the fact that equipment did not always last the life of a given lease and with the continual pressure from Xerox sales personnel to upgrade even though such might not be in the customer's best interest.

13 Exhibit A-1, tab 230. These prices are taken from a February 1990 letter soliciting business for Nezron. The Tribunal has taken due account of the fact that this is promotional material.

23 The customers of Exdos who were called as witnesses were operating, in general, under significant cost restrictions (some were described by counsel as "mom and pop businesses"). It is clear that a second source of supply for Xerox machines, albeit used machines, and a second source of supply for maintenance services are extremely important in enabling such individuals to obtain quality machines and quality service at an affordable price. In one instance the evidence indicates that in the absence of Exdos the customer, Raymar Equipment Service of Beaton, Ontario, would not have been able to acquire a Xerox machine because service was simply not provided by the company to that geographical area. (Beaton is about an hour northwest of Toronto.)

24 The evidence of Mr. Kelly, Director of Purchasing for Humber College, is particularly illustrative. Humber College has a heavy capital investment in its reprographic equipment. During the 1986-87 period it owned approximately sixty

Xerox machines. About thirty of these had been purchased two years previously. In 1986, Humber College was receiving less than satisfactory service with respect to these machines:

> Everything was fine for the first few years, but service began to deteriorate. ...
>
> You have [to] realize that in an academic institution, a copier is very essential as far as preparation of materials for various classrooms. So, it is a very high priority product in our organization.
>
> Service deteriorated to the point where equipment was down for four and six days at a time. Complaints to service management — to our marketing rep — they tried a number of remedies. Nothing seemed to work. They basically explained that it was the high volumes that were causing the problems.
>
> It got to the point where it became critical. ... We had professors going — walking right into the President's office and throwing it at him. Now, that is something that a President certainly does not need, ...
>
> We had to start to source some kind of an alternative. We had heard about — through colleagues in purchasing — that there were some independent service people out there, so we sourced the marketplace, and found a company by the name of Anco Equipment. [14]
>
> 14 Transcript at 547-48 (13 June 1990).

Accordingly, Humber College began using Anco Equipment to service its machines:

> We found that the independent operators were certainly cheaper. We were very skeptical, though. It was about four months of interviews and reassurances to really separate from Xerox and we started off with just a couple of machines and let Anco look after a couple, ...
>
> As he progressed and proved that he could look after our equipment, we added more and more equipment to his installed base. [15]
>
> 15 *Ibid*. at 550.

25 Humber College subsequently purchased nineteen used Xerox copiers from this same ISO to replace some of its existing unsatisfactory machines:

> That was very beneficial to the college. We bought them and installed them and, of course, set him [Anco] up as the service agent for that equipment. ...
>
> [With respect to the service received from Anco] we are looking at least 75 per cent better than it was with the same volumes. ... It is much cheaper. [16]
>
> 16 *Ibid*. at 552.

E. Photocopiers - Service and Parts Revenue - Xerox's Market Position

26 Photocopiers, by their nature, require constant service. This is so whether the machine be second-hand or new. Indeed, there was evidence that the purchaser of a machine, either second-hand or new, is unlikely to make a purchase without at the same time making some arrangement for its servicing. Because photocopiers require constant service, the revenue received therefrom rivals, if not exceeds, that obtained from the original sale of the machine.

27 When buying a machine from Xerox, customers are given several options with respect to a possible service agreement. Customers can choose a full service maintenance agreement under which they pay Xerox an amount which is calculated by reference to the usage which the machine receives. The cost of parts and service are not separated out or identified in the amount paid. For example, Humber College paid Xerox, under its service contract, a certain base charge which was paid as a lump sum at the beginning of each year and then 1.15 cents for each copy produced by the machines. Ninety-five percent of Xerox's customers choose a full service agreement. A second option which customers can choose is a time and materials service agreement. Under this arrangement they pay for parts and service only as and when the machine breaks down. A third option is available for some large volume customers. An employee of the customer can be trained by Xerox to service the photocopiers (at least insofar as the less complicated repairs are concerned). Under this option the customer provides its own service and the required parts are purchased from Xerox. The University of Manitoba, for example, is one customer who chooses this option.

28 Xerox obtains the parts which it either sells (now only to end users) or provides to its service representatives from Xerox Corp. (U.S.). In determining a retail price for these parts there is no evidence that competitive factors are taken into account. Xerox simply uses a grid formula pursuant to which the landed Canadian price, paid by Xerox to its parent, is multiplied by a factor of from two to eight with the multiples being inversely related to the landed price of the parts. Xerox parts are generally more expensive than comparable parts for other copiers. A study of comparable parts was placed in evidence. It shows that prices for Xerox parts are from 198 percent to 951 percent (the median being 389 percent) higher than similar parts used in two equivalent copiers. While Xerox challenges the accuracy of this study it produced no direct evidence to support that challenge. Accordingly, the probative value of that study has not been seriously undermined.

29 Xerox is the largest supplier of copiers in Canada. In 1989, Xerox had a dominant position in the high-volume end of the market (90 percent share of copier placements) and accounted for almost one-half of the copier placements in the medium volume range. [17] It accounts for about one-third of the low-volume copier placements but does not compete in the personal copier market. The copier market is described by Professor Wilson, testifying on behalf of the Director, as a differentiated oligopoly with an active competitive fringe. As Professor Wilson stated, and which the Tribunal accepts, while there is obviously competition in the copier market, with success critically dependent upon an ability to sell upgraded equipment from a cost and features standpoint, the evidence does not warrant the conclusion that Xerox has little market power in the copier market.

17 "Volume" refers to the copier's rate of copy production per minute.

F. Introduction of an ISO Policy (United States)

30 In January 1987 a policy respecting ISOs was issued by USMG for the United States market. This was a revised version of an earlier policy which had been developed in April 1984 but which had not been implemented. The policy was to refuse, thereafter, to supply ISOs with 10 Series and any new product parts for resale. Part of the documentation describing the initial policy change in 1984 reads:

> We have had a long standing policy of selling parts at commercial list price to all third parties, including direct purchasers of our equipment, third party leasing companies and third party service companies. The establishment of resellers authorized to service Xerox equipment has necessitated a significant change to this policy. [18]
>
> 18 Exhibit A-1, tab 114A.

The January 1987 policy reads in part:

> For 10 Series copiers ... we will not knowingly supply ISOs with parts for resale, technical training, technical documentation, or other resources (not generally available to end-users). When an order for such resources is received, we may require verification that the purchaser is an end-user and that any parts are not intended for resale. (Resources for new Xerox products introduced after the effective date of this policy likewise will not be offered to ISOs.) [19]

19 Exhibit A-1, tab 114E.

31 The ISO policy for the United States was clearly designed to undercut the viability of the ISOs and to preserve, if not enhance, the revenue derived by Xerox Corp. from the service aspect of its business. This policy was subsequently adopted in similar form by Xerox Canada in June 1988 and led to the refusal to supply which is in issue in this case. [20] Before dealing further with the events which led to the refusal to supply, evidence respecting the Xerox-Exdos business relationship during the April 1987 to August 1988 period will be referred to.

20 Discussed *infra* at 27ff.

G. Xerox/Exdos' Business Relationship — April 1987 to August 1988

32 In April 1987, Reid received notice that Exdos' contract with Xerox for the purchase of used equipment was being terminated as of the end of May. It was the view of the person in charge of dealing with Reid at that time (Mr. Haltigin) that the contract was not profitable from Xerox's point of view. This view was based on Mr. Haltigin's analysis of the difference between the cost to Xerox of scrapping the used machines (including the recoverable metal obtained in that process) and the profit received as a result of selling the machines to Reid. The analysis was successfully challenged by Reid who pointed out that it had not taken into account the revenue received by Xerox from the sale to Exdos of parts and supplies for the machines.

33 Thus, while Reid's 1983/1985 contract was cancelled, subsequent negotiations led in November 1987 to an arrangement whereby he was allowed to purchase second-hand equipment from Xerox on a "one off basis". There was no change, however, in Reid's pattern of purchasing parts from Xerox. He continued to purchase parts for both the used machines which he had purchased from Xerox and for the used copiers, including post-1983 models, which he had purchased elsewhere. Both categories of parts were sold to him at full retail price.

34 Correspondence which documents the agreement clearly provides that:

> Parts for Xerox equipment <u>not</u> purchased by EXDOS from XCI [Xerox] (i.e. equipment <u>not</u> listed in Attachment B), <u>will continue to be available for EXDOS purchase at standard retail prices</u>. Order fulfilment will be subject to availability and Xerox's right to limit quantities. [21]

21 Exhibit A-1, tab 153, Attachment A.

(some underlining added)

This portion of the correspondence was a direct response to Reid's May 1987 request for clarification from Xerox of various issues arising from the contract termination:

> There are a number of models of Xerox equipment which we service which were not purchased directly from XCI but rather were purchased from XCI customers, through XCI sales representatives, leasing companies and end users directly. We need confirmation that parts for this type of equipment will continue to be available at a standard retail rate. [22]

22 Exhibit A-1, tab 117.

All during the May 1987 to August 1988 period parts for both pre-1983 and post-1983 copier models were sold to Exdos.

H. Development of Canadian ISO Policy — Refusal to Supply Parts

35 To return to a consideration of the Xerox ISO policy, the evidence establishes that the USMG policy, concerning the refusal to sell 10 Series and newer copier parts to ISOs, would not be effective unless it was implemented by Xerox worldwide. Thus, this ISO policy which originated in the United States was subsequently adopted in Canada. Xerox argued that insofar as Canada was concerned, the implementation of the policy was nothing more than the formalization of what had always been the company policy, that is, that it would only sell post-1983 copier parts to end users of the machines. As has been noted, the evidence does not support that conclusion except, perhaps, with respect to 50 Series parts, which were not on the market until well after the effective date of the Canadian policy.

36 The first draft of the Canadian ISO policy was prepared by Xerox in December 1987. This policy was modeled on the Xerox Corp. (U.S.) policy. Background documents on the policy provided Xerox employees with the following information:

> Senior management is increasingly emphasizing the importance of service revenue to XCI profits.
>
> Our challenge is to grow service revenue stream which is essential to Xerox success.
>
> Sale of parts, training documentation and other support requirements for 10 Series, EP, OS products to ISOs (independent service organizations) is contrary to this objective. [23]

23 Exhibit A-1, tab 179.

On March 7, 1988, a meeting was held to discuss the final draft and implementation of the policy. As part of that implementation procedure, Xerox compiled a list of its top 150 parts customers for the purpose of identifying those among them who were ISOs. The highest volume parts purchaser identified as an ISO was Exdos. In June 1988 the Canadian ISO policy became effective. [24] By July 6, 1988, a list of ISOs had been prepared along with a draft letter notifying them of the parts cut off.

24 A copy of the policy is included in Exhibit A-1, tab 201.

37 On August 26, 1988, a letter was sent to Exdos advising it that Xerox had recently reviewed its product strategy and determined that:

> ... continuation of a used equipment sales and support channel would conflict with other market initiatives presently underway. As a result, we find it necessary to discontinue the sale of used equipment, supplies and parts to EXDOS .... [25]

25 Exhibit A-1, tab 198.

The cut-off date for used equipment sales was September 26, 1988; parts for resale or service would be unavailable after October 26, 1988. Exdos purchases as an "end user customer" were unaffected.

38 On August 29, 1988, letters were sent by Xerox to all the other Canadian ISOs announcing the refusal to continue to sell 10 Series parts, 9000 Series parts and parts for various other listed products, other than to end users. For this

purpose, ownership of a machine was considered to be irrelevant. The person who actually used the machine, regardless of who owned it, was classified as the end user. Thus ISOs who owned used Xerox equipment, which they had placed under rental to customers, were not entitled to parts for even those machines.

III. Competition Law Issues

39 An order is sought pursuant to section 75 of the *Competition Act* to require Xerox to supply Exdos (Reid) with post-1983 copier parts. For the purposes of the present case, section 75 can be excerpted as follows:

> 75. (1) Where, on application by the Director, the Tribunal finds that
>
> > (a) a person is substantially affected in his business ... due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (b) the person ... is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (c) the person ... is willing and able to meet the usual trade terms ..., and
> >
> > (d) the product is in ample supply,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer.
>
> (underlining added)

40 There is no dispute that the parts in question are in adequate supply. There is no dispute that Exdos is willing and able to meet the usual trade terms. There is little doubt that Exdos is unable to obtain adequate supplies of the parts. And, there is little doubt that the inability to obtain supply of the parts has and will substantially affect Exdos' business.

41 The main competition law issue in this case is the proper product market definition and concomitantly whether it can be said that Exdos' inability to obtain adequate supplies of the product arose because of "insufficient competition among suppliers of the product in the market" ("en raison de I'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché"). More particularly, does section 75 encompass a situation in which the product is proprietary and derives largely from a single source?

A. Inadequate Supply

42 Prior to Xerox's refusal to sell post-1983 copier parts, except to end users, Exdos could obtain supplies from Xerox itself and from other ISOs either in Canada or the United States. It also could obtain parts from Rank Xerox, the British arm of the Xerox corporate family. Indeed, for some time after the supply of parts had been cut off in both Canada and the United States the supply from Rank Xerox continued. As of February, 1990, however, this source dried up as Rank Xerox implemented the ISO policy which had been adopted previously in the United States and Canada.

43 Exdos can now obtain Xerox copier parts: (1) from Xerox, to the extent that Exdos is recognized by Xerox as an end user of any given machine; (2) from the "cannibalization" of used machines; and (3) from independent manufacturers of Xerox parts. With respect to the first source of supply, upon being notified of Xerox's refusal to supply parts except to end users, Reid moved a number of different copier models into his showroom. He had them registered with Xerox in the name of Exdos, as an end user. He is receiving through this process a limited number of parts. This source of supply was described by counsel for the Director as a "trickle" of parts.

44 The second source of supply, the "cannibalization" of machines, is not an adequate source of supply over the long run. Many parts in a photocopier are "consumable" parts. That is, they wear out on a regular basis, after a given amount of use. They must be frequently replaced. Consumable parts which are obtained from used machines automatically have

a more limited life than new parts. Thus replacing a worn out consumable part with a used one invites more frequent service calls. In addition, an ISO is left with a stock pile of unused parts (from the rest of the machine) which do not need to be replaced with the same frequency as the consumable parts. The cannibalization of machines is not in the long run an economically viable source for consumable parts.

45 With respect to the third source of supply, the evidence establishes that there were and are independent manufacturers who make some Xerox copier parts. They manufacture the parts that are in heavy demand but they do not manufacture all the parts necessary to properly service the machines. Some unique parts, which are essential for proper service, cannot be obtained from this source. It is clear on the basis of the evidence, then, that the sources of supply of Xerox parts left, in the face of Xerox's refusal to supply, are inadequate.

B. Business Substantially Affected

46 The evidence establishes that the Exdos-Nezron business has three overlapping aspects. The first is the purchase and sale of used Xerox photocopiers from a variety of sources and the marketing of them, together with the parts required to refurbish and service them, to customers in Canada and elsewhere. This is sometimes referred to as the "brokering" aspect of the business. The second is the refurbishing of the machines by Exdos-Nezron and the marketing of those machines directly into the end-user market, whether by sale, lease or rental. This involves both the placement of the copiers in the end-user market and the provision of continuing service for the machines in the customers hands, should the customer so wish. The third aspect of the business is the servicing of Xerox copiers independently of the sale of the machines. All three aspects of the business require access to Xerox copier parts for the business to survive.

47 Xerox argues that since it is still willing to supply Exdos with pre-1983 copier parts there should be a finding of no substantial effect on the Exdos business. This is not convincing both because of the volume of the Exdos-Nezron installed 10 Series customer base and because the pre-1983 copier market is a shrinking one. Xerox further argues that since its policy is to allow end users to purchase parts, there should be a finding of no substantial effect. It argues that Reid's customers can order service from Exdos-Nezron, then order the parts themselves directly from Xerox, after which Exdos-Nezron can complete the service. This is clearly so impractical that it has the appearance of a charade. Customer after customer testified that this was not a viable procedure. In the first place, customers do not want to be involved in the administrative task of ordering parts. More importantly, however, they will not tolerate the machine down-time which such a process of service and repair would entail.

48 While it seems axiomatic, from the nature of the Exdos-Nezron business and from the facts set out above, that the refusal to supply will substantially affect if not destroy the Exdos-Nezron business, the Tribunal does not rely solely on the evidence which has already been described. The evidence of Mr. Banks, the accountant who performed an audit of the Exdos-Nezron business for the purpose of assessing the effects of the Xerox refusal to supply, establishes beyond any doubt that the Exdos business will be substantially affected by the refusal. One caveat must be added to this conclusion. No evidence was led with respect to the effect that the non-supply of 50 Series parts would have on Exdos. Mr. Banks did not deal with this matter in his evidence. Mr. Reid did not give evidence with respect thereto. As the Tribunal understands it, the 50 Series operates by means of new technology. They were first marketed in 1989 and parts have apparently never been sold to Exdos or to other ISOs.

C. Product/Market

49 Section 75 requires that one find that a person is unable to obtain adequate supplies "of a product anywhere in a market". In this case, there is little question about the geographic dimension of the market; it was tacitly assumed to be Canada. The main issue between the parties is the relevant product and, concomitantly, the relevant product market. The Director argues that the relevant product is Xerox copier parts, in particular post-1983 Xerox copier parts. The respondent submits that the relevant product market is that in which Xerox itself competes, namely "the provision of reprographic equipments, parts and service to end use customers."

50 The various arguments which have been raised before the Tribunal with respect to product definition will be considered in the following order: (1) whether, in the present case, Xerox parts should be considered to be a relevant product market for section 75 purposes; (2) whether vertical integration exists as a norm in the industry and the extent to which such might be relevant in the identification of a relevant market; (3) the significance of the complainant's conduct to the identification of the relevant market; and (4) whether the respondent need exercise market power in the relevant market in order for section 75 to apply.

(1) Xerox Parts

51 The parties called various economists to testify on their behalf as to the relevant product market. While the process of product market definition is clearly founded on economic analysis, the question of the "relevant" market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole. It is clear that much of the difference between the expert economists in this case rests upon differing views as to the objectives of section 75 rather than upon differences regarding the proper economic principles respecting market definition. This is particularly true of the evidence given by Professor Waverman. Whether much of this expert evidence was proper opinion evidence was not raised by counsel. In any event, to the extent that Professor Waverman or any other expert was opining on questions of law or on what they considered to be the proper policy of the legislation rather than giving what can legitimately be classified as expert evidence as an economist, the Tribunal has treated that opinion as the personal policy preference of the witness only.

52 "Product" is a term of art in competition law. [26] The determination of what is a relevant product, for any given purpose, carries with it an identification of the relevant product market. The relevant product and product market may be very broad or may be very narrow depending upon the context within which and the purpose for which that identification is required.

26 S. 2(1) of the *Competition Act* defines "product" as "including an article and a service".

53 The Director argues that section 75 focuses on the objective of promoting efficiency and consumer choice through the enhancement of participation by individual businesses and that, therefore, the product market is most appropriately defined by reference to the acceptable substitutes available to the business refused supply in satisfying its customers. The Director submits that Exdos must satisfy its customers' demands for the refurbishing, service and sale of used copiers. Those customers own or wish to purchase Xerox machines and therefore, the Director continues, the technical inability to substitute other parts, to make or to keep the machines operational, limits the product definition to Xerox copier parts.

54 This is consistent with the position taken by the Tribunal in *Director of Investigation & Research v. Chrysler Canada Ltd.*:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers. [27]
>
> 27 (1989), 27 C.P.R. (3d) 1 at 10.

55 The Director's expert economist in the present case, Professor Gillen, defined an economic market by reference to the following criteria:

> An economic market is defined as an area in which prices of qualitatively similar goods tend to equality with allowance for transportation or transactions cost. In essence a market defined in this classical economic sense is the set of products within which prices are closely linked to one another by supply and demand and whose prices are relatively independent of prices of goods not in the market. The extent of the market can be measured by the degree of product substitution in the presence of relative price changes [cross elasticity of demand]. ... Products which are close substitutes will exhibit a high cross elasticity of demand or supply and would be included in the same market. [28]

28 Expert affidavit of D. Gillen at para. 17 (Exhibit A-1, tab 2).

56 Professor Gillen accepted as a starting point that one possible market definition in this case was the product refused, post-1983 Xerox copier parts. In order to test this hypothesis, he asked: (1) whether a market for parts used by ISOs could be defined separately from a market for a service package demanded by end users; (2) whether parts and service are distinct and separate products; (3) whether other companies' copier parts should be included in the market; and (4) whether Xerox sourced parts alone form the supply side. That is, he asked as a factual matter whether a market existed: whether there were demanders, suppliers, and transactions occurring. Then, he examined the boundaries of that market and since parts for different vintages and models of Xerox equipment cannot be substituted, he concluded that post-1983 Xerox copier parts was a relevant market.

57 The respondent's expert economist, Professor Waverman, considered this to be an overly simplistic approach. He attempted to demolish the analysis by stating that if post-1983 Xerox copier parts was a market (or submarket) then logically each part for each machine should be considered a separate market because they are non-substitutable one for the other. The Director's expert was not claiming, however, that post-1983 Xerox copier parts was an exclusive definition of the market which might exist in relation to copiers. Rather he was "limiting the scope of the parts under *consideration to those which were refused and which constitute the base of the definition for the market*." [29]

29 Expert affidavit of D.W. Gillen (reply to L. Waverman) at para. 4 (Exhibit A-3, tab 6) (emphasis added).

58 This approach is consistent with that which has been articulated in the academic literature. For example, Areeda and Turner emphasize the need to determine products and product markets by reference to the legislative purpose for which such identification is required:

> One cannot determine ... the "proper" market definition, without reference to the legal context in which the issue arises. One must consider what is under attack, the substantive rules of liability that govern the particular case, and the relief that is at issue. ... [30]

30 P. Areeda & D.F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 2 (Boston: Little, Brown, 1978) at para. 518 [references omitted].

And, in a recent supplement to the same text, the authors note that:

> ... talk of markets and submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for a <u>relevant</u> market — that is a market <u>relevant</u> to the legal issue before the court. [31]

31 P.E. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 1989 Supp. (Boston: Little, Brown, 1989) at para. 518.1c [references omitted].

(underlining added)

59 This approach is also consistent with the decision in *R. v. J.W. Mills & Son Ltd.*, [32] a decision to which both counsel referred. In *J.W. Mills & Son Ltd.*, a conspiracy prosecution, Mr. Justice Gibson stated:

32 [1968] 2 Ex. C.R. 275, aff'd (*sub nom. J.W. Mills & Son Ltd. v. R.*) (1970), [1971] S.C.R. 63.

> In examining and assessing the competitive feature of the market structure, what is pertinent is the boundaries of the market because the determination of what competition is relevant is one of the key issues, ...
>
> As a matter of law of course there is no definition of the "market" in relation to which the evidence of any alleged violation ... may be examined. What is the relevant market in every case is a matter of judgment based upon the evidence. ...
>
> But speaking generally, it is of importance to bear in mind that the term "market" is a relative concept. In one sense, there is only one market in an economy since, to some extent, all products and services are substitutes for each other in competing for the customer's dollar.
>
> In another sense, almost every firm has its own market since, in most industries, each firm's product is differentiated, to some extent, from that of all other firms.
>
> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.
>
> . . .
>
> For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.
>
> And many characteristics or dimensions may be considered in defining the relevant market. All are not of the same order. And, in any particular case, usually, not all of the many characteristics or dimensions will have to be considered. In some instances, the definition may turn on only one characteristic or dimension or two .... [33]
>
> 33 *Ibid.* at 304-6.
>
> (underlining added)

60 Mr. Justice Gibson then listed a number of characteristics which could be used in the definition of a relevant market: actual and potential competition; integration and stages of manufacturers; method of production or origin; physical characteristics of products or services; end users of products; product substitutability; geographic area; relative prices of goods or services. As arranged, the first three characteristics relate primarily to the supply side of the market, and the subsequent three to product substitutability. "Geographic area" is a conclusion rather than a factor in market definition and it would often be established after extensive analysis of the other factors. Price information can be used to draw conclusions about substitutability in supply, between products and over distance.

61 Professor Waverman for the respondent stated that the relevant product in the present case is the provision of a package of services which leads to the creation of an imaged piece of paper. [34] He was of the opinion that this definition is consistent with the manner in which the product is purchased by the final consumer. The respondent's expert economist did not deny that Xerox copier parts are products for which an identifiable market exists, a market in which persons wishing to service Xerox machines are customers. However, it was his view that this was not the *relevant* market for

section 75 purposes. He argued that the product market which was relevant for section 75 purposes should be determined by reference to the market in which Xerox competes and that that is the end user market:

34 Expert affidavit of L. Waverman at para. 9 (Exhibit A-3, tab 3):

> the provision of the services of imaged pieces of paper with a given set of cost and performance specifications, through the provision of reprographic equipment and the service, parts and supplies, required to enable the equipment to produce copies on a regular basis with minimum interruption from the equipment not working.

> ... the relevant competition is not that for Xerox proprietary parts, but among the providers of photocopying services, of which there are many.
>
> To argue that the market is Xerox parts ignores the manner in which consumers make decisions. End-users (those who want photocopying services) are not indifferent to the prices of Xerox parts since ultimately that price, whether explicit or implicit, is a component of the cost per copy. Competition among providers of photocopying services in the cost per copy provides discipline in the market for parts. [35]

35 Expert affidavit of L. Waverman (rebuttal to D.W. Gillen) at para. 9 (Exhibit A-3, tab 4).

Professor Waverman took the position that Xerox's actions in curtailing supply were motivated by competition in the copier market and would only, in the long run, result in the intensification of that competition. He was of the view that an order under section 75 would cause a welfare loss to consumers by substituting inefficient distribution systems for efficient (as dictated by the market) systems. Therefore, it was argued that the fact situation does not fall within either the spirit or intention of section 75.

62 Even if this position were correct, however, the evidence in the present case would not support a conclusion that the end-user market provides competitive discipline to the parts market. It is clear that at present Xerox does not price its parts by reference to competitive factors but, rather, sets prices according to an arbitrary "formula". In addition, even if Xerox were forced to price parts competitively in the long run, a present owner of a Xerox machine cannot easily, during the economic life of that machine, switch to another manufacturer's brand of copier. As counsel for the Director argues, it is no answer to Exdos' customers to tell them that "based on some Chicago School of Economics theory ... [they] should wait until the market rights itself" and that in the long term when they purchase their next copier they can purchase from a company that provides better and cheaper parts and service.

63 To turn then to a consideration of whether or not proprietary replacement parts should ever be categorized as a "product" or as constituting the base of a "product market", it should first of all be noted that the *Competition Act* and, in particular, section 75, is not limited to ensuring the availability of *final* products at competitive prices. The Act itself is not expressly so worded and there is nothing in the statement of its purposes which leads to a conclusion that such a limitation was intended. Indeed one of the purposes set out in section 1.1 of the Act is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". This would seem on many occasions to contemplate, if not require, action to preserve the competitive situation in an intermediate market. It was argued to the Tribunal that if the respondent's interpretation of the legislation was correct, it would mean, for example, that because General Motors and Ford compete in the final market for automobiles there would be no definable market for captive parts for Ford cars. Or, it would mean that for purposes of the *Competition Act*, the concentration of upstream assets in the hands of suppliers, such as oil companies, should be ignored because such companies face retail competition downstream.

64 In other competition law contexts intermediate markets in proprietary replacement parts have been identified as relevant markets. None of these, of course, relate to section 75 of the *Competition Act*. They can only be cited, and have only been cited, for the purpose of demonstrating that such product markets *may* be relevant for competition law purposes. For example, in *R. v Chatwin Motors Ltd.*, [36] the Crown alleged a conspiracy between franchised dealers with

respect to one part of the motor vehicle parts and accessories market: captive parts for Ford and General Motors vehicles and, in particular, those captive parts secured on special orders where the dealer paid the freight charges. The British Columbia Supreme Court held that the only substantial competition in captive parts was between franchised dealers and that, however narrow a field of competition, the public was entitled to have it preserved. [37]

36 (1978), 37 C.P.R. (2d) 156 (B.C.S.C.). The appeal courts quashed the Crown's appeal on the basis that it involved questions of fact: (1978), 7 B.C.L.R. 171, 40 C.P.R. (2d) 106 (C.A.), aff'd [1980] 2 S.C.R. 64.

37 The Court found an agreement between the dealers to levy a freight charge on the special orders but also decided that the agreement had no effect on the competitive nature of their dealings. In fact, the Court accepted the defendants' argument that they were improperly joined in the same conspiracy charge since there was never any competition between Ford and General Motors dealers that could have been restricted by an agreement.

65 In *Hugin Kassaregister AB v. Commission of the European Communities*, [38] Article 86 of the Treaty of Rome was under consideration. Article 86 provides that any abuse of a dominant position within the European Economic Community ("EEC") or a substantial part of it shall be prohibited insofar as it may affect trade between member states. The Swedish company and its subsidiaries had refused to supply spare parts for Hugin cash registers to a British firm that specialized in the service, reconditioning and renting out of Hugin cash registers. Hugin Kassaregister AB ("Hugin AB") argued that the supply of spare parts and of maintenance services was not a separate market but rather a component of the cash register market. The headnote describing the Commission's decision that Hugin AB had infringed Article 86 states in part that:

38 (No. 22/78), [1979] C.M.R. 7439 (E.C.J.).

> Where a particular brand of a product uses spare parts which are not interchangeable with spare parts of other brands of the same product and cannot otherwise be economically reproduced, and the parts are made to the (non-EEC) manufacturer's design, with tools belonging to the manufacturer and are exclusive to the manufacturer such that the manufacturer controls the supply of all its spare parts throughout the world, it enjoys a monopoly in the parts and thus, with its subsidiaries established in the EEC, holds a dominant position in the Common Market for the supply of such spare parts. It therefore has also a dominant position for the maintenance and repair of the product itself in relation to companies which need a supply of the spare parts. This is so even if the market share of the manufacturer in the product itself does not give him a dominant position in the product.
>
> . . .
>
> A manufacturer who has a monopoly in the supply of spare parts for his product and who delivers such parts only to his own subsidiaries and authorized dealers for their own use and not for resale abuses his dominant position in that he restricts competition through his refusal without objective justification to supply others. [39]

39 *Liptons Cash Registers and Business Equipment Ltd v. Hugin Kassaregister AB* (1977), [1978] 1 C.M.L.R. D19. The Court of Justice also found that Hugin parts required by independent undertakings constituted a relevant market for the purposes of applying Article 86 to the facts before it and that Hugin had a dominant position in that market. The Court annulled the decision of the Commission on the narrow ground that the actions of Hugin had not affected trade between member states since the servicing, rental and sale of cash registers was a local business by nature.

66 In *Image Technical Service, Inc. v. Eastman Kodak Co.*, [40] it was held that a refusal by Eastman Kodak Co. ("Kodak") to sell copier equipment parts to ISOs, after having sold them to such businesses for several years, was a triable issue under section 2 of the Sherman Act. [41] Section 2 makes it an offence to monopolize or to attempt to monopolize "any part of the trade or commerce among the several States, or with foreign nations". No definitive ruling was given on

the facts of the case because the issue was addressed by the Ninth Circuit Court of Appeals in the context of an appeal from the summary dismissal of the plaintiffs' private antitrust action. In reaching the decision that such a summary dismissal was not appropriate, the Court stated:

40 No. 88-2686 (9th Cir., 1 May 1990).

41 15 U.S.C. § 1-7.

> ... there is logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand market. But in light of appellants' evidence we cannot say that this theory mirrors reality. [42]

> 42 *Supra*, note 40 at 3643.

67 The same case also involved an allegation that Kodak had infringed section 1 of the Sherman Act in refusing to sell replacement parts to end users of its equipment except on condition that they not engage ISOs to service the copiers. [43] Kodak argued that parts and service formed a single product market and that therefore there could be no tying arrangement. The Court held that this argument presented, at best, a disputed issue of fact.

43 Section 1 of the Sherman Act declares "every contract, combination ... or conspiracy, in restraint of trade or commerce" illegal. The particular restraint alleged in this case was the illegal tying of parts to service. In order to be successful in such a claim, the plaintiff had to prove: (1) that separate markets for parts and service existed and (2) that the defendant had sufficient economic power in the tying product market (parts for Kodak copiers) to restrain competition appreciably in the tied market (service for Kodak copiers).

> That products must be used together does not eliminate the possibility that they form distinct markets. ... Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service. [44]

> 44 *Supra*, note 40 at 3632-33.

68 The Court also stated that, assuming a tying arrangement existed, there was an issue of material fact as to whether Kodak had the requisite economic power in the tying product market. Plaintiffs/appellants argued that Kodak had power in the parts market because its parts were unique and because owners of its machinery could not readily switch. Kodak countered that it did not have market power in the interbrand market for copiers and therefore could not have market power in the after-market for spare parts. The Court stated:

> We believe that competition in the interbrand markets might prevent Kodak from possessing power in the parts market. ... In this case, Kodak has tied parts to service, not equipment to parts. Interbrand competition in the equipment market does not in the abstract negate appellants' claim that Kodak has power in the parts market.
>
> . . .
>
> While appellants have not conducted a market analysis and pinpointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market. [45]

45 *Ibid*. at 3634-36.

In coming to this decision the Court distinguished one of its earlier tying decisions: *General Business Systems v. North American Philips Corp*.[46]

46 699 F. 2d 965 (9th Cir. 1983). The dissenting judge in *Image Technical Service, Inc.* described the argument accepted by the Ninth Circuit in *General Business Systems* as "similar" to the reasoning set out by Judge Posner (of the Seventh Circuit) in dissent in *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F. 2d 228 (7th Cir. 1988). The dissenting judge was of the opinion that:

the majority has misconstrued the nature of Kodak's argument. Applying Judge Posner's analysis in *Sterling*, competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively — yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions — not the sort of thing the antitrust laws do or should worry about."

Supra, note 40 at 3646. The dissenting judge considered that the majority in *Image Technical Service, Inc.* had rejected this line of reasoning as too theoretical to serve as a basis for summary judgment.

69 The decision in the *Image Technical Service, Inc.* case has been quoted at length because much of the expert evidence filed by the respondent in the present case seems infused with and based on concepts which exist in United States antitrust jurisprudence and upon arguments which have been made or are being made in relation thereto. These are not necessarily relevant to the interpretation of the Canadian legislation.[47] The case does demonstrate, however, that even in that jurisdiction proprietary replacement parts may be a relevant product market for competition legislation purposes.

47 Unlike the *Competition Act* the concept of refusal to supply in both U.S. law and EEC law operates within the framework of provisions preventing abuse of dominant position or monopolization and tied selling and other vertical restraints.

70 In the present case, a determination of the relevant product market and an assessment of the extent of the market in which that product is situated, by reference to the product which has been refused and to factors such as those set out in the decision of Mr. Justice Gibson, are appropriate. The geographical extent of the market is not seriously in doubt; it has basically been assumed to be Canada. Prior to the implementation of the refusal to supply by both Xerox Corp. (U.S.) and Rank Xerox, the market might have been described as larger in extent; parts could, at that time, be imported.

71 The boundaries of the product market can properly be defined as parts for Xerox copiers. The relevant submarket, or class of product falling within that market, for purposes of the present case, is parts for post-1983 model copiers. There is no compelling reason flowing from either the legislative text of section 75 or from general economic principles which requires that proprietary replacement parts should not be considered to be a relevant product for section 75 purposes.

72 The consumers of the product are Exdos, other ISOs and those Xerox customers who service the machines themselves. While the Director's expert economist's position is that Xerox is the sole supplier, he also notes that this is essentially a factual question rather than one for expert evidence. Professor Gillen identifies Xerox as the sole supplier because other sources of supply located both within Canada and without are qualitatively different from the supply provided by Xerox. In the Tribunal's view, it is more accurate to identify the suppliers, prior to the refusal to supply, as Xerox, other ISOs, Rank Xerox, and the independent manufacturers of parts.

(2) Vertical Integration

73 The respondent has put forward several arguments with respect to the proper market definition which are based on conclusions of fact not supported by the evidence. For the sake of completeness, however, they will be discussed. One such argument is that the end-user market and not the parts market should be identified as the relevant market because the industry norm is one of vertical integration. It is argued that vertical integration is adopted by firms for reasons of efficiency and that it should be assumed in this case that this is the reason for Xerox's desire to remain with or return to a system of vertical integration.

74 "Vertical integration" was used by the respondent's expert in a very limited sense, as meaning only that Xerox did not sell parts except to end users, not that Xerox only provided its parts through its own service technicians. It is clear that Xerox, for many years, sold parts freely and openly to anyone who wished to purchase them; sales were not limited to end users. Xerox did not practice a system of vertical integration even in the sense in which that term has been used in the evidence by Professor Waverman and Xerox does not practice vertical integration in any more comprehensive sense, since it is still willing to sell parts directly to end users. Nor does the evidence establish that vertical integration is the norm in the industry either in this restricted sense or in a more general one.

75 The respondent's expert stated that firms adopt vertically integrated structures for reasons of economic efficiency [48] and that if vertical integration is not preserved the benefits which accrue therefrom (e.g. the use of increased service revenues to defray high research and development costs or the ensuring of a consistent quality of service) are denied to consumers. The difficulty with the respondent's expert's argument is that it is entirely hypothetical. While it may be true that firms adopt systems of vertical integration for efficiency reasons, there is no evidence that such is true in the present case.

48 The term "efficiency" has (at least) two meanings in economic literature: (1) welfare benefits (the best allocation of resources in society as a whole); (2) cost minimization by a firm (see J. Tirole, *The Theory of Industrial Organization* (Cambridge, Mass.: MIT Press, 1988) at 16). In the present context "efficiency" is being used as synonymous with the cost-minimizing organization of economic activity. Efficiency gains from vertical integration may arise for technological reasons or because of reduced transaction costs and reduced uncertainty.

76 Whether situations where vertical integration is either the norm in the industry or is dictated by reason of economic efficiency fall within section 75 can only be determined in the context of cases where a relevant factual basis exists. It may be that such factors would lead the Tribunal to conclude that a product market did not exist or it may be that they would lead the Tribunal to conclude that the complainant's inability to obtain supply did not arise "because of insufficient competition among suppliers of the product in the market". But it suffices for present purposes to note that the conclusions of fact which are sought to be drawn, in this case, to support such an argument cannot be substantiated.

(3) Conduct of Complainant/Burden on Xerox

77 The respondent alleges that no market was established because Reid acquired parts through subterfuge. As has been noted elsewhere, this is not supported by the evidence. Also, the evidence does not support a conclusion that Reid was refused supply because of particularly onerous administrative obligations and expenses which arose for Xerox as a result of dealing with him (e.g. inventory costs). Nor is there convincing evidence that Exdos can "free ride" on Xerox's investments in many areas. There is evidence that many of the ISO dealers who were part of the Exdos network and some of the Nezron service people were ex-Xerox employees who had been trained by Xerox to service Xerox equipment. But this is hardly sufficient to constitute the "free-riding" which is alleged. There is also no convincing evidence that Xerox could be injured because Exdos generally would not, and could not be expected to, take the standard of care in maintenance and repair of Xerox machines that Xerox would. Nor is there evidence to support the assertion that Xerox's reputation suffers every time Exdos is unable to service a photocopier properly or that if Exdos-Nezron is unable to fix a machine it then calls on Xerox to fix the machine. In fact, it might be argued that Exdos, perhaps more than Xerox, has an *immediate* interest in providing timely, high-quality service and repairs since that is its business. In general, it is

to be noted that Professor Waverman's expert affidavits are replete with assertions of fact that are entirely unsupported by the evidence.

78 Whether factors relating to the conduct of the complainant or the administrative burden or other costs placed upon a supplier might be relevant to a determination of the existence and the definition of a product market can only be assessed in the context of a case where factual evidence establishes that *such* factors exist. It may be that the existence of those factors would lead the Tribunal to conclude that a "product market" did not exist, or more likely, it may be that they would lead the Tribunal to conclude that the inability of the complainant to obtain adequate supplies did not arise "because of insufficient competition among suppliers of the product in the market" but rather for objectively justifiable business reasons, or that as a matter of discretion an order to supply should not be given. It suffices for present purposes to note, as with the arguments based on vertical integration, that the conclusions of fact which are sought to be drawn, in this case, to support those arguments, cannot be substantiated.

(4) Market Power of the Respondent

79 One last consideration respecting the definition of the relevant product market should be considered, that is, whether the market must be one in which the respondent exercises "market power". As will be noticed from the references above to both EEC competition law and the United States antitrust jurisprudence, this is a question which is relevant in those jurisdictions. A similar argument was addressed by the Tribunal in the *Chrysler Canada Ltd*. decision:

> The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.
>
> This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion. [49]

49 *Supra*, note 27 at 12.

80 This argument has already been dealt with to some extent above, in the context of the discussion of what constitutes a relevant product market for section 75 purposes. If the relevant product market is identified as parts, then it is clear that Xerox has almost a monopoly position in that market. If the product market is copiers then Xerox still has substantial power in that market. Whether or not it could be said to have a dominant position was not in issue in this case. In any event, it is useful to stress that the respondent's market power is not an element which need be proven for the purposes of obtaining a section 75 order. It may be that it will be rare to find a situation in which a supplier refuses to supply a would-be purchaser, for anti-competitive reasons, without holding significant market power in the relevant market. It would be counterproductive if the would-be purchaser could easily find an alternate source of supply. Nevertheless, neither the identification of the relevant product nor the definition of the relevant market hinges, for section 75 purposes, on an assessment of the respondent's market power in the relevant market. All that is required is that the complainant's inability to obtain adequate supplies occur "because of insufficient competition among suppliers of the product in the market".

D. Insufficient Competition Among Suppliers of the Product

81 Although section 75 does not directly demand that the Tribunal find any specified effect on competition in the market resulting from the refusal to supply, it is clear that not all situations where a supplier decides to discontinue selling its products to a customer will fall within the section. Paragraph 75(1)(b) requires that the person who has been refused the product be "unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market".

82 Thus, a particular market situation must exist at the time of the refusal, a situation that can fairly be described as "insufficient competition among suppliers". How much competition between suppliers is insufficient will depend on the facts of the particular case. Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the Tribunal where so many of a multitude of suppliers would refuse to supply an individual that his business could be "substantially affected". One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

83 In addition, the refusal to supply must occur "*because* of insufficient competition among suppliers of the product". That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.

84 In this case, the Director submits that since the relevant product market is confined to Xerox parts, the only issue raised by paragraph (b) is whether adequate supplies can be obtained from sources other than Xerox itself. Since, as was discussed above, the alternative sources are neither adequate nor economically viable, the Director argues that, by definition, the market for these parts is characterized by insufficient competition. On this characterization, this is undoubtedly true, since Xerox is, for all practical purposes, a monopolist in its own proprietary parts.

85 The respondent's argument on this point is inextricably linked to its position on the question of the definition of the relevant product market for section 75 purposes. The respondent submits that the wording of paragraph (b) contemplates that the "market" should consist of more than one supplier since the word "suppliers" is specifically used. Therefore, the respondent reiterates, the relevant market must be that in which the manufacturers of copiers compete.

86 In response to questions concerning the proper interpretation of the phrase "because of insufficient competition *among suppliers* in the market", counsel for the Director pointed out that the usage of the word "suppliers" in that phrase can legitimately apply to a situation where the refusal emanates not only from a dominant manufacturer/supplier of parts but also from a single supplier. Subsection 33(2) of the *Interpretation Act*,[50] clearly establishes at least a presumptive rule that "words in the plural include the singular".

50 R.S.C. 1985, c. I-21.

87 Counsel for the Director further argued that, although such a presumption could be overturned if dictated by the context in which the particular phrase occurred, an interpretation including the singular[51] is supported by reference to the rest of section 75. He submitted that the intent of section 75 was clearly to *catch* rather than to *exclude* the single supplier market. Counsel pointed to subsection 75(2) to support this argument: subsection 75(2) would allow an article differentiated by a trademark or proprietary name to be considered a separate "product" for the purposes of the section *if* the article occupies such a dominant position in the market as to substantially affect the ability of the person denied access to carry on business. In appropriate circumstances, he argued, this would lead to a product market definition limited to a proprietary or trademarked article with a dominant position and therefore the order would issue against a sole supplier.

51 The words "among suppliers" would have to be read out of the phrase altogether for it to continue to make grammatical sense in the singular.

88 The Tribunal accepts that the use of the plural in paragraph 75(1)(b) includes the singular. There has been no convincing argument before us that would lead us to conclude that the statutory context of that paragraph dictates otherwise. It would import a logical inconsistency into the section to hold that a supplier of the relevant product in, for example, a market with three or four suppliers, could be subject to review by the Tribunal for refusing to supply while a supplier with a monopoly position could not be.

89 Many arguments were made to the Tribunal concerning the implications an order to supply proprietary replacement parts would have for the future application of section 75. The *Chrysler Canada Ltd.* decision has already established that an order to supply proprietary replacement parts can properly be issued pursuant to section 75. Many of the arguments raised before the Tribunal in this case were also raised in that case; many refer to hypothetical situations which it is suggested might arise in the future and with respect to which it is argued that the Tribunal might, then, have to make a section 75 order if such an order is granted in this case.

90 As has already been noted, it is difficult to deal with this kind of argument. In the absence of an actual situation establishing the facts which are hypothesized, a conclusion that they might or might not justify a section 75 order is difficult to make. For example, it has been suggested that if an order can be given in the circumstances of this case one might also issue in a situation where a manufacturer/supplier of proprietary parts had never unbundled the sale of its parts from the sale of its machines. Whether such an order could properly be obtained under section 75 is not in issue in this case, but one can ask whether the Director, in such circumstances, would be able to prove the existence of a market for the product in question; one can ask whether a complainant could say that his or her business was substantially affected by such a refusal to supply. It is useful to quote some of the respondent's argument which seems to recognize this:

> It was accepted by all the economic experts that from an economic perspective there is nothing either inefficient or anti-competitive about a manufacturer carrying on business within a vertically integrated structure.
>
> . . .
>
> The only competition issue arises then, when a manufacturer operates in a fashion to "break the bundle" of goods and services and to create a market where none previously existed. The most typical situation in which this occurs is at the dealer level.
>
> If a manufacturer distributes his product through a dealer network then it may be appropriate to look at the competition aspects of this market so created to ensure that as between dealers there is not discrimination and restricted competition.
>
> . . .
>
> Absent the conduct of the manufacturer which can clearly and unequivocally be said to have created a market for parts at the dealer level there is no competition issue to be dealt with. [52]
>
> 52 Written argument of Xerox at paras 148, 150, 151, 160.

In the present situation the manufacturer/supplier did create a market for Xerox copier parts. It created a market for Xerox copier parts not through use of a dealer network but by selling to anyone who wished to purchase.

91 Another hypothetical situation raised was whether section 75 could catch a manufacturer who refused to supply certain customers merely because he wished to change his distribution system for the product. Again, in the absence of an actual factual situation, it is impossible to conclusively answer such a question. At the same time, one can question whether an inability to obtain supply in such circumstances would necessarily meet the test of occurring "because of insufficient competition among suppliers of the product in the market". It may very well be that the inability to obtain supply in such circumstances could be related to a legitimate business decision unconnected to anti-competitive factors.

In any event, the present situation is not one in which the respondent is attempting to change its dealer distribution system. And, it is abundantly clear that the decision was taken for the very purpose of curtailing competition in the after-sale market.

92 The last consideration which is relevant to this issue is the legislative framework of section 75. Counsel for the Director argues and the Tribunal accepts that section 75 must be read in the light of the express purposes of the legislation and the other provisions of the Act. Section 1.1 describes the purposes of the *Competition Act* as including "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" and "to provide consumers with competitive prices and product choices." Both these purposes would be served by granting an order in favour of Exdos as sought by the Director. Exdos will continue to have an "equitable opportunity to participate" and consumers will have price and product choices available which they would not otherwise have.

IV. Constitutional Issues

93 The constitutional jurisdiction of the Parliament of Canada to enact section 75 is challenged. The respondent argues that if the Tribunal can make an order under section 75 to govern a supplier's conduct without reference to the effect on competition that section is legislation with respect to property and civil rights in the province (subsection 92(13) of the *Constitution Act, 1867* [53]) and that it is not legislation with respect to any matter falling under Parliament's jurisdiction pursuant to section 91 of the *Constitution Act, 1867*. Even if the section might otherwise be constitutionally valid, counsel argues that it is inoperative with respect to the facts of this case because the facts do not encompass a situation where the refusal to supply is one having anti-competitive effects.

53 (U.K.), 30 & 31 Vict., c. 3.

94 In addition, issues respecting the constitutionality of the Tribunal itself are raised. These last rely on the decision of Mr. Justice Philippon of the Superior Court of Quebec in *Alex Couture Inc. c. P.G. Canada*. [54]

54 (6 April 1990), Quebec 200-05-001361-877.

A. Constitutionality of Section 75

95 The starting point for a discussion of the constitutionality of a provision of the *Competition Act* is the Supreme Court decision in *General Motors of Canada Ltd. v. City National Leasing*. [55] That decision dealt with the constitutionality of section 31.1, added to the *Combines Investigation Act* in 1976, [56] which section provided that a person who had suffered damage as a result of conduct contrary to Part V of that Act (the criminal offences) or in breach of an order of the Restrictive Trade Practices Commission or a court, could sue for damages. In the *City National Leasing* decision, Chief Justice Dickson referred to the history of subsection 91(2) (the federal trade and commerce power) of the *Constitution Act, 1867*. [57] He noted that *Citizens Insurance Co. of Canada v. Parsons* [58] had established three important propositions with regard to the federal trade and commerce power:

55 [1989] 1 S.C.R. 641.

56 R.S.C. 1970, c. C-23 as am. S.C. 1974-75-76, c. 76, s. 12. The same section, slightly modified, appears as section 36 of the *Competition Act*, R.S.C. 1985, c. C-34, as am. *Miscellaneous Statute Law Amendment Act, 1987*, R.S.C. 1985 (4th Supp.), c. 1, s. 11.

57 Initially set out in *A.G. Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

58 (1881), 7 App. Cas. 96 (P.C.)

> ... (i) it does not correspond to the literal meaning of the words "regulation of trade and commerce"; (ii) it includes not only arrangements with regard to international and interprovincial trade but "it may be that ... (it) would include general regulation of trade affecting the whole dominion"; (iii) it does not extend to regulating the contracts of a particular business or trade. [59]

59 Quoted in *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 656.

96 The Chief Justice noted that since *Parsons*, the jurisprudence relating to subsection 91(2) had largely consisted of an elaboration of federal authority with respect to "international and interprovincial trade" and that the second branch of federal authority, that with respect to the power over "general trade and commerce affecting Canada as a whole", had remained largely unexplored. He indicated that in assessing the interaction of subsection 91(2), Parliament's authority to legislate in relation to trade and commerce, with subsection 92(13), provincial legislative authority in relation to property and civil rights in the province, a balance must be struck:

> ... somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless. [60]

60 *Ibid*. at 660.

97 The Chief Justice cited *MacDonald v. Vapor Canada Ltd.*, [61] where three criteria were set out as relevant in assessing the constitutionality of legislation in relation to general trade and commerce under the second branch of *Parsons*: (1) the impugned legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry. [62] Chief Justice Dickson also adopted two further criteria, identified in *A.G. Canada v. Canadian National Transportation Ltd*, [63] that were relevant in assessing the constitutional validity of legislation in relation to general trade and commerce; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. [64] The five factors thus identified were said to be *indicia* which, however, *did not represent an exhaustive list of traits* which might be relevant for the purpose of characterizing legislation as general trade and commerce legislation. Also, *the presence or absence of any one criteria was held not to be necessarily determinative*, in reaching a decision with respect to the legislation's constitutional characterization.

61 (1976), [1977] 2 S.C.R. 134.

62 *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 661. In *MacDonald v. Vapor Canada*, paragraph 7(e) of the *Trade Marks Act*, R.S.C. 1970, c. T-10 was found to be invalid federal legislation. That section was a general catch-all section which prohibited a person doing "any act" or adopting any "business practice contrary to honest industrial or commercial usage in Canada". It was not connected to a federal regulatory scheme relating to the general trade and commerce.

63 *Supra*, note 57.

64 *General Motors of Canada Ltd. v. City National Leasing*, *supra*, note 55 at 662.

98 Throughout its history, various provisions of the *Combines Investigation Act* have been subject to challenge on constitutional grounds. [65] The Act was extensively amended in 1976 and again in 1986 when it was renamed the *Competition Act*. It is unnecessary to describe the substance of these amendments; they are well known. Suffice it to say, they too have given rise to several constitutional challenges.

65 See, *e.g., R. v. Hoffman-La Roche Ltd. (Nos. 1 & 2)* (1981), 33 O.R. (2d) 694, 125 D.L.R. (3d) 607 (Ont. C.A.) (predatory pricing offence could be supported under s. 91(2) as well as s. 91(27) and the residual power); *A.G. Canada v. Canadian National Transportation Ltd.*, *supra*, note 57 (the three judges of the Supreme Court who dealt with the issue would have supported the conspiracy provisions under s. 91(2)).

99 In addition to the Supreme Court decision in *City National Leasing*, several other of the 1976 amendments were challenged and supported. In *P.G. Canada c. Miracle Mart Inc.*,[66] the Court held that the prohibition on making sales above advertised prices (a criminal offence) was constitutionally valid under Parliament's power over trade and commerce. The Federal Court of Appeal in *Re BBM Bureau of Measurement and Director of Investigation and Research*[67] was of the opinion that the reviewable trade practice of tied selling (previously the jurisdiction of the Restrictive Trade Practices Commission and now within that of the Tribunal) was valid federal legislation under subsection 91(2). Most recently, in *Alex Couture Inc. c. P.G. Canada*,[68] Mr. Justice Philippon upheld Parliament's legislative authority to enact the civil merger provisions, added to the *Competition Act* in 1986, under the trade and commerce power. He struck down those provisions on the basis that they violated the freedom of association of commercial undertakings subjected to them.

66 [1982] C.S. 342, *(*sub nom. *R. v. Miracle Mart Inc.)* 68 C.C.C. (2d) 242 (C.S. Que.) [translation].

67 (1984), 9 D.L.R. (4th) 600, *(*sub nom. *BBM Bureau of Measurement v. Director of Investigation and Research under the Combines Investigation Act)* 82 C.P.R. (2d) 60.

68 *Supra*, note 54.

100 As a result of the various constitutional challenges and particularly the Supreme Court decision in *City National Leasing* it is clear that the general legislative scheme of the *Competition Act* is constitutionally valid. In *City National Leasing* Chief Justice Dickson wrote with respect to the *Combines Investigation Act* as amended up until 1980:

> From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme or regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy.[69]
>
> 69 *Supra*, note 55 at 676.

While that decision related to the *Combines Investigation Act* before the amendments of 1986, the reasoning and conclusions are equally applicable to the amended legislation.[70]

70 See Memorandum of law (constitutional issue) of the Director at para. 18:
The basic structure of the *Combines Act* referred to by Mr. Justice Dickson was kept intact in the amendments that created the *Competition Act* and *Competition Tribunal Act* in 1986. The major changes implemented in 1986 were:
(i) insertion of a purpose clause (s. 1.1);

(ii) provision for application of the Act to crown corporations (s. 2.1);

(iii) revision of the investigatory powers of the Director to comply with the *Hunter v. Southam* decision and other considerations (ss. 11-20);

(iv) addition of an offence concerning banking conspiracies (s. 49);

(v) addition of the civilly reviewable abuse of dominance (s. 78-79) and merger provisions (s. 91-100), including special procedural remedies for mergers such as interim injunctions;

(vi) addition of a scheme of merger prenotification (sections 108-124);

(vii) abolition of the RTPC and its jurisdiction over research inquiries and "s. 18" inquiries and its replacement with the Competition Tribunal for adjudication of civilly reviewable matters, and the regular courts for adjudication of search warrants and other investigative applications.

101 Indeed counsel for the respondent does not contest the constitutional validity of the Act as a whole. Rather he argues that section 75 is invalid, if it carries an interpretation which would allow it to apply whether or not there is an effect on competition. Counsel's argument in this regard mirrors Chief Justice Dickson's characterization of the *City National Leasing* case as one where:

> The issue is not whether the Act as a whole is rendered *ultra vires* because it reaches too far, but whether a particular provision is sufficiently integrated into the Act to sustain its constitutionality. [71]

71 *Supra*, note 55 at 670.

102 Counsel for the respondent argues, in addition, that even if section 75 is valid it cannot support an order which affects a manufacturer's legitimate business interests but is not founded upon an effect on competition. That is, the section may be constitutionally valid but still inoperative with respect to certain factual situations. If the section's breadth is such as to encompass both orders directed at the preservation of competition and those which are not, then the section might be operative to support the former but inoperative with respect to the latter. This second prong of the constitutional argument is easily disposed of given the findings of fact which have been made. It is clear that the order sought, in the present case, is directly related to the preservation of competition in the service market for Xerox copiers. It is also directed to the preservation of the competition which exists as a result of the existence of a second-hand market for those machines. Thus, if section 75 is valid it is operative to support an order in the present circumstances.

103 To turn then to the constitutional validity of section 75. The approach to be taken, when an isolated section of an Act is being assessed for constitutionality, was addressed in *City National Leasing*. In that case it was argued that section 31.1 taken alone was clearly unconstitutional because it was legislation in relation to property and civil rights in the province. A contrary argument was put, urging that the section could not and should not be assessed in isolation but had to be considered in the context of the scheme of the Act as a whole. The Chief Justice answered these arguments by stating that if the impugned provision was clearly constitutional as within federal authority and did not intrude on provincial authority, then, no further consideration was needed:

> [I]f in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further. In that situation both the provision and the act are constitutionally unimpeachable. If, as may occur in some instances, the impugned provision is found to be constitutionally unimpeachable while the act containing it is not, then the act must be assessed on it [*sic*] own. In these instances, it is clear that the claim of invalidity should originally have been made against the act and not against the particular provision. [72]

72 *Ibid*. at 667.

104 In most cases, however, it was noted that it was likely that an impugned section could be characterized as being, *prima facie*, in relation to a provincial head of power (intruding to some extent on provincial powers). The degree of "intrusion on provincial powers" is to be assessed not for the purpose of ascertaining the section's constitutionality but in order to weigh this as a factor in assessing the justification of the section as part of the regulatory scheme of the legislation as a whole.

105 Next, it is necessary to assess the constitutional validity of the legislative scheme as a whole. Once this is done the relationship between the impugned provision and the legislative scheme is to be assessed by reference to a test which is of varying strictness. The strictness of the test varies with the degree of intrusion which the impugned section exhibits with respect to provincial powers. The mere inclusion of a provision in a valid legislative scheme does not *ipso facto* confer constitutional validity upon that provision:

> [T]he court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive *vis-à-vis* provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.
>
> In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate.[73]
>
> 73 *Ibid.* at 668-69.

The Chief Justice then referred to the various ways the required "fit" or test had been described. He listed these in what appears to be an ascending order of strictness: having a rational and functional connection; ancillary to the main purpose of the legislation; necessarily incidental; truly necessary; having an intimate connection; being an integral part of the scheme.

106 The Chief Justice found that since section 31.1 of the *Competition Act* constituted a minimal intrusion on provincial authority, it was only necessary to demonstrate that a rational and functional connection existed between that section and the overall scheme of the legislation. At the same time he indicated that section 31.1 could also have been justified on the basis of a stricter test; it could have been classified as an integral part of the legislative scheme.

107 What then of section 75. It is obvious that a section 75 order may affect the property and civil rights of the person who is ordered to supply and of the person receiving supply. The effect of the section, however, as an intrusion into a provincial legislature's domain with respect to property and civil rights in the province, is not generally very extensive. The section is not, as the respondent has suggested, aimed primarily at governing or regulating contractual relations. That effect is secondary. The section's impact is limited and carefully constrained to redress conduct which is considered to be of competitive prejudice. Simply refusing to supply is not an offence in itself. Section 75 is one of a group of trade practices that are *reviewable* and that *may* be prohibited if certain conditions are met. The elements of paragraphs 75(1)(a), (b), (c) and (d) limit the application of the section and its effect.

108 Pre-1976 the only prohibitions in the *Combines Investigation Act* which dealt, indirectly, with refusal to supply, were conspiracy, monopoly and resale price maintenance. It was decided that there was a need to deal with refusal to supply in cases having anti-competitive effects, that is, where a person, because of an uncompetitive supply situation in a market, was unable to obtain adequate supplies of a product essential to the operation of his business. Section 75 provides that this type of refusal may be prohibited by the Tribunal; other, justifiable refusals will not be so prohibited.

109 Section 75 is not a greater interference with provincial jurisdiction than many other valid remedial or prohibitory provisions of the Act which are directed toward controlling competitively undesirable conduct. Such remedies or prohibitions always affect property and civil rights or local contracts within a province to some extent. Certainly the effect on property and civil rights of an order under section 75 is no greater than one under section 77 of the Act (tied selling) or those which regulate mergers and hence affect contracts that may involve parties wholly within a province.

110 While section 75, unlike section 31.1, is a substantive provision, it is limited in scope and application. It can only be called into play when the Director, after investigation, initiates an action. There is good reason to conclude, then, that the section attracts a no more stringent test than the rationally and functionally related test which was applied to section 31.1. However, like section 31.1, it could satisfy a more stringent test if required.

111 Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI. Only the Director may bring an application to require that an order to supply be issued. The Director does so after investigation and in the context of the common enforcement policy of the Act with which he is charged.

112 Accordingly, section 75 meets the required test set out in *City National Leasing*.

B. Constitutionality of the Competition Tribunal

113 The parties filed an agreed statement of facts on which an argument could be founded to challenge the constitutionality of the Tribunal. The argument contemplated would follow that set out in the decision of the Quebec Superior Court in *Alex Couture Inc. c. P.G. Canada* [74] This argument, however, was being considered by another panel of the Competition Tribunal, insofar as it related to that panel's constitutional validity, in the hearing of the application in *Director of Investigation and Research v. The NutraSweet Company*. The parties to the present proceeding, accordingly, agreed that rather than rearguing the issue in the context of this case, they would be bound by the decision given in *The NutraSweet Company* case. The agreement provides that either party is free to appeal from a finding of the Tribunal as though the constitutional question raised in *The NutraSweet Company* case had been fully argued and decided in the context of this case.

74 *Supra*, note 54.

114 The decision in *The NutraSweet Company* case has now been rendered. [75] The conclusion reached, contrary to that in the *Alex Couture Inc.* case, is that the panel of the Tribunal hearing that case was validly constituted. Pursuant to the agreement of the parties, that decision is taken as also applicable to the panel hearing this case.

75 (4 October 1990), CT-89/2, Reasons and Order (Competition Trib.).

V. Conclusion

115 As has been set out above, Xerox followed a practice, for a number of years, of selling parts to willing purchasers. As a result of that practice independent service organizations grew up and a second-hand market in Xerox copiers

developed. The refusal of Xerox to supply parts to Exdos and to others (except end users) was specifically designed to eliminate competition in the service market. Xerox's refusal was part of a concerted effort to eliminate such competition. This effort was initiated originally by Xerox Corp. (U.S.). It was subsequently adopted both in Canada and elsewhere, for example, by Rank Xerox in the United Kingdom.

116 Section 75 of the *Competition Act* states that where, pursuant to an application by the Director, the Tribunal finds that a person is substantially affected in his business due to an inability to obtain adequate supplies of a product in the market and that inability occurs because of insufficient competition among suppliers of the product, the Tribunal may order a supplier to accept the person as a customer.

117 In the present case, for the reasons which have been given, the Tribunal finds that all the requirements of section 75 have been met. Therefore an order will issue, as requested by the Director, requiring Xerox to accept Exdos as a customer for post-1983 Xerox copier parts. These will not include parts for the 50 Series copiers. As has been noted, there has been no evidence adduced that a lack of supply of those parts would substantially affect the Exdos business.

VI. Order

118 FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT:

119 The respondent, Xerox Canada Inc., shall accept the Exdos Corporation as a customer for the supply of Xerox copier parts, manuals and related resources on usual trade terms.

120 This order does not encompass parts for 50 Series copiers or for any model of copier which has not yet been introduced, with respect to which no evidence was placed before the Tribunal.

Footnotes

End of Document

9

1997 CarswellNat 2811
Competition Tribunal

Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.

1997 CarswellNat 2811, [1997] C.C.T.D. No. 53, 43 B.L.R. (2d) 93, 78 C.P.R. (3d) 321

In the Matter of an application by the Director of Investigation and Research pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34;

In the Matter of an inquiry relating to the refusal of Warner Music Canada Ltd. and its affiliates, Warner Music Group Inc. and WEA International Inc., to deal with BMG Direct Ltd.

The Director of Investigation and Research, Applicant and Warner Music Canada Ltd., Warner Music Group Inc., WEA International Inc., Respondents

McKeown, Simpson JJ., Bolton Member

Heard: December 4 and 5, 1997
Judgment: December 18, 1997
Docket: CT-97/3

Counsel: *D. Martin Low, Q.C.* and *Duane Schippers*, for the Applicant.
John F. Rook, Q.C., *David Stratas* and *Mahmud Jamal*, for the Respondents.

Subject: Intellectual Property; Corporate and Commercial; Property; Civil Practice and Procedure

Headnote

Trade and commerce --- Competition and combines legislation — Investigation and prosecution — Jurisdiction

Record company refused to grant copyright licences to make sound recordings from master recordings record company owned to company which needed licences to compete in mail order record club business — Director of Investigation and Research brought application against record company pursuant to s. 75 of Competition Act — Director requested order to compel record company to issue licences to mail order record club — Record company brought motion to strike application — Motion granted — Licenses were not "product"within meaning of s. 75 of Act — Right granted by Parliament to exclude others was fundamental to intellectual property rights and not anti-competitive — Section 75 of Act not intended to operate as compulsory licensing provision for intellectual property — Competition Act, R.S.C. 1985, c. C-34, s. 75.

Practice --- Pleadings — Application to strike — Jurisdiction

Record company refused to grant copyright licences to make sound recordings from master recordings record company owned to company which needed licences to compete in mail order record club business — Director of Investigation and Research brought application against record company pursuant to s. 75 of Competition Act — Director requested order to compel record company to issue licences to mail order record club — Record company brought motion to strike application — Motion granted — Test mandated by R. 474 was met — No dispute as to any fact material to question of law existed — Matter for determination was pure question of law — Determination of matter eliminated necessity of trial — Plain and obvious case for striking out application required by R. 419 was made out — Competition Act, R.S.C. 1985, c. C-34, s. 75 — Federal Court Rules, C.R.C. 1978, c. 663, R. 474, 419.

Table of Authorities

Cases considered by *McKeown J.*:

Berneche v. R., (sub nom. *Berneche v. Canada)* [1991] 3 F.C. 383, (sub nom. *Berneche v. Canada)* 133 N.R. 232, (sub nom. *Berneche v. Canada)* 52 F.T.R. 144 (note) (Fed. C.A.) — applied

Canada (Director of Investigation & Research) v. Imperial Oil Ltd. (November 10, 1994), Doc. CT-89/3 (Competition Trib.) — applied

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc., 73 C.P.R. (3d) 1 (Competition Trib.) — applied

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
s. 31 — considered

s. 32 — considered

s. 75 — pursuant to

s. 75(1)(a) — considered

s. 75(1)(b) — considered

s. 75(1)(c) — considered

s. 75(1)(d) — considered

s. 79 — considered

s. 79(5) — considered

Copyright Act, R.S.C. 1985, c. C-42
Generally — considered

s. 3 — considered

s. 5 — considered

s. 5(1) — considered

Federal Court Act, R.S.C. 1985, c. F-7
s. 18.3 [en. 1990, c. 8, s. 5] — considered

s. 28(2) — considered

Trade-marks Act, R.S.C. 1985, c. T-13
Generally — referred to

Rules considered:

Competition Tribunal Rules, SOR/94-290
Generally — referred to

Federal Court Rules, C.R.C. 1978, c. 663
Generally — considered

s. 419 — considered

s. 474 — considered

Words and phrases considered

product

. . . the licences are not a product as that term is used in section 75 of the Act, [Competition Act, R.S.C. 1985, c. C-34], because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" — there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld.

MOTION by record company to strike application made by Director of Investigation and Research under the *Competition Act*.

The judgment of the court was delivered by *McKeown J.*:

I. Introduction

1 The Director brought an application alleging that the respondents' refusal to grant copyright licences to make sound recordings from their master recordings to a company, BMG (Canada), which needs such licences to compete in the mail order record club business in Canada, contravenes section 75 of the *Competition Act*. The Director alleged no anti-competitive objectives nor that the existing licences include any anti-competitive provisions. The Director in his proposed order was prepared to have BMG (Canada) obtain the licences on the usual trade terms which were to be at least as favourable as the existing licences to Columbia House (Canada), a company in which one of the respondents holds a 50 percent partnership interest. The respondents moved to strike out the Director's application.

2 The issue is whether, in the circumstances, the Tribunal has jurisdiction under section 75 to hear the application.

II. Background

(a) The Parties

3 The three respondents described hereafter will be referred to collectively as the "respondents". The business of the respondents and their affiliates includes contracting with a wide variety of artists to record their performances on Warner master recordings. These master recordings are then used to manufacture sound recordings of various types including tapes, compact disks and records.

4 The respondent Warner Music Canada Ltd. ("Warner Canada") is an Ontario corporation which has its head office in Scarborough, Ontario. It has, *inter alia*, the right to grant licences to manufacture, distribute and sell in Canada sound recordings of performances by Canadian artists which have been recorded on Warner master recordings.

5 The respondent WEA International Inc. ("WEA (U.S.)") is a Delaware corporation which has its head office in New York City. It has, *inter alia*, the right to grant licences to manufacture, distribute and sell in Canada sound recordings of performances which have been recorded on Warner master recordings by non-Canadian artists.

6 The respondent Warner Music Group Inc. ("Warner Music (U.S.)") is a Delaware corporation which has its head office in New York City. It is involved in the business of managing companies affiliated with Warner Communications Inc., including the respondents Warner Canada and WEA (U.S.). Warner Music (U.S.) is alleged to be the party responsible for negotiating licences granted by Warner Canada and WEA (U.S.).

7 The Columbia House Company in Canada ("Columbia House Canada") is an equal partnership of Warner Canada and Sony Music Entertainment (Canada) Inc., and is located in Scarborough, Ontario. It operates a mail-order record club business throughout Canada which offers its customers sound recordings in most music categories.

8 BMG Direct Ltd. ("BMG (Canada)") is a wholly-owned subsidiary of BMG Direct Marketing Inc. ("BMG (U.S.)") and is located in Mississauga, Ontario. It commenced a national mail-order record club business in Canada in December 1994. With the entry of BMG (Canada), Columbia House (Canada) ceased to be the only mail-order record club in Canada offering sound recordings in most music categories.

(b) The Director's Application

9 The Director of Investigation and Research ("Director") made the application to the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act* ("Act"). [1]

1 R.S.C. 1985, c. C-34.

10 In the application, the Director alleges that, contrary to section 75 of the Act, the respondents have refused to deal with BMG (Canada) by refusing to grant it licences to make sound recordings from Warner master recordings. The Director alleges that BMG (Canada) needs such licences in order to compete in the mail-order record club business in Canada. However, the Director does not allege that the respondents' conduct in refusing to grant licences is motivated by anti-competitive objectives, and does not allege that the respondents' existing licences include anti-competitive provisions.

11 In the application, the Director seeks an order from the Tribunal to compel the respondents to issue licences to BMG (Canada). The order sought in paragraph 67 of the application requires that:

> (i) the Respondents accept BMG Direct Ltd. ("BMG") as a customer on usual trade terms for the supply of licences to manufacture, advertise, distribute and sell sound recordings made from master recordings owned or controlled by the Respondents or any of their affiliates;
>
> (ii) the terms of the licences sought in (i) above be at least as favourable in all respects as the terms of any comparable licence or licences to The Columbia House Company in Canada ("CHC"). For greater certainty, the licences sought in (i) above shall provide BMG with the right to at least an equal number and variety of Warner master recordings as are supplied to CHC by the Respondents or any of their affiliates;
>
> (iii) the licences referred to above be supplied within 30 days of the issuance of the Tribunal's Order; and
>
> (iv) such further or other Order as the Tribunal may consider appropriate.

III. The Present Motion

12 The respondents' motion is to strike out the Director's application against all the respondents on the basis that section 75 of the Act does not give the Tribunal jurisdiction to compel the respondents to issue licences for the manufacture, distribution and sale of sound recordings of the performances on the Warner master recordings. The respondents also take the position that the Tribunal does not have jurisdiction over WEA (U.S.) and Warner Music (U.S.), that the Act does not have extraterritorial application, that effective service on WEA (U.S.) and Warner Music (U.S.) has not been accomplished, that this motion is timely and that this is a proper case for a reference to the Federal Court of Appeal under sections 18.3 and 28(2) of the *Federal Court Act*.[2]

2 R.S.C. 1985, c. F-7.

13 The Director opposes the motion saying that the Tribunal has jurisdiction to order a licence under section 75, that the Tribunal has jurisdiction over WEA (U.S.) and Warner Music (U.S.), that the question of the extraterritoriality of the Act is not in issue since the Director is only seeking redress in respect of the respondents' business activities in Canada, that proper service has been effected, that this motion is premature and that a reference to the Federal Court of Appeal would also be premature.

14 At the hearing of the motion, the Tribunal heard the jurisdictional argument and arguments about the prematurity of this motion and the extraterritorial application of the Act. The parties maintained their positions in respect of a reference to the Federal Court of Appeal but did not argue the issue, preferring to rely on their memoranda.

15 The Tribunal adjourned *sine die* without hearing submissions on the other issues. As these reasons disclose, the Tribunal has decided that the motion is not premature and that a reference to the Federal Court of Appeal will not be ordered. The Tribunal has also concluded that it lacks jurisdiction to grant the relief sought by the Director in his application. For this reason, the issues of extraterritoriality, proper service and jurisdiction over the person will not be addressed.

IV. The Facts

16 For the purpose of this motion, the Tribunal relies on the following undisputed facts:

(1) WEA (U.S.) has a licence agreement with Columbia House (Canada) entitling Columbia House (Canada) to manufacture, distribute and sell in Canada sound recordings made from Warner master recordings of performances by non-Canadian artists.

(2) Warner Canada has licensed Columbia House (Canada) to manufacture, distribute and sell in Canada sound recordings made from Warner master recordings of performances by Canadian artists.

(3) When BMG (Canada) commenced its direct mail-order record club business in Canada, it had obtained reproduction, distribution and sales licences for a number of record labels, but it had not reached an agreement with Warner Music (U.S.) respecting Warner Canada and WEA (U.S.) reproduction and sales licences, and no such agreement has since been reached. It is the respondents' refusal to grant these licences on terms similar to those found in the licences to Columbia House (Canada) that triggered the Director's application. There is no issue that BMG (Canada) can purchase the respondents' manufactured CDS, tapes and records at the wholesale level. However, the prices at wholesale are too high to enable BMG (Canada) to compete in the mail-order record club business. To compete in that business, BMG (Canada) must obtain the cost savings that are possible if it manufactures the Warner sound recordings itself under licences from the respondents.

(4) BMG (Canada) is unable to offer its customers the broad range of sound recordings which is available through Columbia House (Canada), because only Columbia House (Canada) carries sound recordings of performances by artists on Warner master recordings.

(5) The respondents concede, for the purpose of this motion, that if BMG (Canada) is unable to obtain licences for the reproduction and sale of sound recordings made from Warner master recordings, it will be substantially affected and will be unable to continue its mail-order record club business in Canada.

V. Issue and Questions

17 The issue is whether the Tribunal has jurisdiction, pursuant to section 75 of the Act, to make an order compelling the respondents to licence BMG (Canada) to manufacture, distribute and sell sound recordings of performances on Warner master recordings. It is worth emphasizing that the Tribunal was only asked to order that a compulsory license be granted to BMG (Canada) where the respondents refused to do so upon BMG (Canada)'s request. The Tribunal was not asked to find that a physical product was in short supply in the market due to a refusal to grant a copyright licence.

18 Section 75 of the Act reads as follows:

75. (1) Where, on application by the Director, the Tribunal finds that

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

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

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

(d) the product is in ample supply,

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

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

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

The issue raises the following questions, which will be discussed in turn:

(1) What is the nature of the respondents' intellectual property interest in the Warner master recordings?

(2) Could a copyright right be a "product" pursuant to the definitions in section 2 of the Act?

(3) Is it reasonable to conclude that a licence is a "product" as that term is used in section 75 of the Act?

(4) Does the Tribunal have sufficient evidence to decide the issue on this motion?

VI. Discussion

19 Counsel for the respondents indicated that he would be focusing on the respondents' copyright rights in the Warner master recordings for the purposes of this motion, although he mentioned in passing that other intellectual property rights also exist

20 The Director did not dispute that the respondents hold Canadian copyright in the Warner master recordings which are the subject of the application. Even so, counsel for the respondents made detailed submissions which satisfied the Tribunal that, under the *Copyright Act*,[3] the respondents have the exclusive right to reproduce musical works and to make the contrivances (i.e., records, tapes, CDS, etc.) for the performance of musical works. In particular, section 3 of the *Copyright Act* defines copyright as the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, and, for the purposes of this motion, the musical works are subject to copyright and the copyright includes the right to make a sound recording as provided under section 3. Copyright subsists in Canada for Warner Canada by reason of subsection 5(1) of the *Copyright Act* and in Canada for WEA by reason of the treaty provisions referred to in section 5. Since 1993, there has been no provision in the *Copyright Act* which limits the copyright holder's sole and exclusive right to licence. These conclusions mean that as a matter of copyright law the respondents have the right to refuse to licence the Warner master recordings to BMG (Canada).

3 R.S.C. 1985, c. C-42.

21 The Director's counsel submitted that the definitions of "article" and "product" in section 2 of the Act are broad enough to encompass a copyright right as a form of personal property. Counsel for the respondents agreed and the Tribunal accepts this submission. However, this conclusion does not answer the next question, which is whether the licences are products within the meaning of section 75 of the Act.

22 The Director's position is that the respondents' manufacturing, distribution and sales licences are the "product" for the purpose of section 75 and that the market for the purpose of the section is Canada. The Director says that, given these definitions and, in the absence of language which excludes the recognition of intellectual property rights in section 75, the section clearly applies to the facts of this case.

23 With regard to paragraph 75(1)(a), the Director notes that the respondents do not dispute, for the purposes of this motion, that BMG (Canada) is being substantially affected in its business by reason of their refusal to grant it licences to manufacture, distribute and sell sound recordings of the Canadian and non-Canadian performances on the Warner master recordings. The Director further says that paragraph 75(1)(b) applies because BMG (Canada)'s inability to obtain adequate supplies is caused by insufficient competition among suppliers of the product in the market, i.e., among Warner Canada, WEA (U.S.) and Warner Music (U.S.). Further, with regard to paragraph 75(1)(c), the Director acknowledges that there is only one supplier of each licence (Warner Canada and WEA (U.S.)) and that the only two licences in place in Canada are the two respondents' licences to Columbia House (Canada). However, the Director says that the Tribunal may have regard to the terms of licences granted by other comparable licensors throughout North America in order to reach a conclusion about what might be usual trade terms in Canada if additional licences were to be granted by the respondents. Finally, on the subject of paragraph 75(1)(d), the Director submits in paragraph 16 of his application that, because the two licences to Columbia House (Canada) are nonexclusive, there could be further licences if the respondents were willing to grant them. Accordingly, the product is in ample supply. For all these reasons, the Director says that section 75 can be sensibly read to apply to a refusal to grant a copyright licence.

24 The Director is also of the view that policy considerations favour the application of section 75. He states that, if a refusal to grant a licence is not caught by section 75, the effect will be that intellectual property rights will be seen to "trump" competition law. He submits that dire consequences will follow a finding that the Tribunal has no jurisdiction in this case. He is concerned that all distribution arrangements involving the licensing of manufacturing rights will be beyond the Director's reach in cases where an alleged refusal to supply is accomplished by a refusal to licence. He also

suggests that this problem will augment because businesses will rearrange their affairs to increase their reliance on licence arrangements.

25 On the other hand, the respondents say that the language of section 75 has been "tortured" by the Director to force it to apply to this case. They submit that the Director's interpretation of the section ignores the respondents' copyright rights. For example, licences are only in ample supply if one assumes that the respondents do not have the right to refuse to grant them. Similarly, to find that usual trade terms may exist ignores the reality that Columbia House (Canada) is the only licensee in Canada, and that Canada is the market as defined by the Director. Furthermore, even if granted, any future licences must be negotiated. In these circumstances, the respondents submit that one could not find that there are usual trade terms.

26 The respondents also counter the Director's position by saying that nowhere in the Act is the Tribunal given the power to override the simple exercise of intellectual property rights and that, for this reason, any grant of such a power must be based on clear and unequivocal language. This is particularly true in their submission in view of the provisions of section 32 of the Act. Section 32 deals, *inter alia*, with situations in which the use of exclusive copyright rights prevents, or lessens, unduly competition in the manufacture or sale of an article. In such situations, jurisdiction is given to the Federal Court of Canada to make a wide range of orders including directing the grant of a licence.

27 Section 32 differs from section 75 in that: (i) it is specifically directed to the use of copyright rights; (ii) a competition impact test must be met before an order will be made; (iii) the Attorney General of Canada and not the Director is the applicant and; (iv) there is a defence based. on treaty provisions. Section 32 reads as follows:

> 32. (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more trade-marks, by a copyright or by a registered integrated circuit topography, so as to
>
> > (*a*) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,
> >
> > (*b*) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,
> >
> > (*c*) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or
> >
> > (*d*) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,
>
> the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.
>
> (2) The Federal Court, on an information exhibited by the Attorney General of Canada, may, for the purpose of preventing any use in the manner defined in subsection (1) of the exclusive rights and privileges conferred by any patents for invention, trade-marks, copyrights or registered integrated circuit topographies relating to or affecting the manufacture, use or sale of any article or commodity that may be a subject of trade or commerce, make one or more of the following orders:
>
> > (*a*) declaring void, in whole or in part, any agreement, arrangement or licence relating to that use;
> >
> > (*b*) restraining any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or licence;
> >
> > (*c*) directing the grant of licences under any such patent, copyright or registered integrated circuit topography to such persons and on such terms and conditions as the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent that use, revoking the patent;

(*d*) directing that the registration of a trade-mark in the register of trade-marks or the registration of an integrated circuit topography in the register of topographies be expunged or amended; and

(*e*) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use.

(3) No order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement with any other country respecting patents, trade-marks, copyrights or integrated circuit topographies to which Canada is a party.

28 The respondents argue that, in the absence of clear language, it would be wrong to conclude that the Tribunal, as an inferior tribunal, has been given the power to ignore intellectual property rights and order the respondents to grant what are, in effect, compulsory licences in favour of BMG (Canada) when the Federal Court can make such an order only after the applicant meets a competition impact test and only after any defences based on international treaty rights are considered.

29 The respondents also rely on subsection 79(5) of the Act, which deals with abuse of dominant position and which provides, *inter alia*, that acts engaged in only pursuant to the exercise of rights under the *Copyright Act* are not anti-competitive acts. In the respondents' submission, because Parliament expressly excluded the simple exercise of copyright rights from the definition of anti-competitive acts in section 79, one cannot reasonably find jurisdiction over such matters in section 75 without a clear statement to that effect.

30 Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" — there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.

31 As well, the Tribunal has accepted the respondents' submissions that, when considered in the context of sections 32 and 79(5) of the Act, the term "product" in section 75 cannot be read to include these copyright licences. These submissions are discussed above and need not be repeated here.

32 Although the Tribunal was commenting on section 79 and intellectual property (trade-marks) in *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*, we are of the view that its statement is very compelling in the circumstances of the motion before us:

> The respondents' refusal to licence their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark — essentially, to share the goodwill vesting in the asset — is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence. [4]

4 (1997), 73 C.P.R. (3d) 1 (Competition Trib.), at 32.

The *Copyright Act* is similar to the *Trade-marks Act*, [5] in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license.

5 R.S.C. 1985, c. T-13.

33 Finally, the Tribunal adopts Rothstein J.'s response to the Director's argument about dire policy consequences in his decision regarding the Tribunal's jurisdiction over certain undertakings made to the Director pursuant to the consent order in the *Imperial Oil* case:

> The *Competition Act* does not confer open-ended jurisdiction on the Tribunal to deal with any and all competition issues. It is given specific powers which are set out in the *Competition Act* and in the *Competition Tribunal Act*. It may only act where it has been given the power to do so. [6]

6 *Canada (Director of Investigation & Research) v. Imperial Oil Ltd.* (November 10, 1994), Doc. CT-89/3 (Competition Trib.), Reasons for Decision Regarding Jurisdiction Over Undertakings at 14-15.

34 Finally, on the issue of the prematurity of this motion, the Director's counsel pressed the Tribunal to adopt a cautious approach and to avoid making a decision without the benefit of all the relevant facts. However, when pressed in turn about what facts were missing which would be relevant to the issue of jurisdiction, counsel responded that the Tribunal needs to hear facts concerning the terms of the Columbia House (Canada) licences and similar licences in North America. When asked why these would be relevant, counsel for the Director indicated that they might support an inference of anti-competitive motive on the respondents' part.

35 There are two problems with this submission. Firstly, section 75 says nothing about motive and, secondly, the Director has not pleaded anything about motive in his application. This being the case, it is clear that the missing facts would not be relevant at a hearing on the merits as this case is presently conceived. Accordingly, the absence of such facts should not forestall a decision on this motion at this time.

36 The Director's counsel also indicated that the Tribunal needed more information about the nature of the direct mail-order record club business. He submitted that once the Tribunal was in possession of such information, it would accept that in this business the licence is a "product" because it is just a surrogate for the manufactured records, tapes and CDS which are produced pursuant to the licence. However, Director's counsel conceded that in all cases where licences grant a right to manufacture, the licence could be seen as a surrogate for the finished goods.

37 In spite of these submissions, the Tribunal has not been persuaded that it lacks any information about the nature of the direct mail-order record business which would contribute to a decision on the issue of its jurisdiction under section 75 of the Act in the circumstance of this motion.

VIII. Conclusions

38 As the *Competition Tribunal Rules* do not deal with this motion, the Tribunal has had regard to the *Federal Court Rules*, [7] wherein Rule 419 (striking a pleading for disclosing no cause of action) and Rule 474 (preliminary determination of a question of law) seem most apt. The Federal Court of Appeal considered Rule 474 in *Berneche v. R.* and said:

7 C.R.C. 1978, c. 663.

> What Rule 474(1)(a) requires is that the Court be satisfied (1) that there is no dispute as to any fact material to the question of law to be determined; (2) that what is to be determined is a pure question of law, and (3) that its

determination will be conclusive of a matter in dispute so as to eliminate the necessity of a trial or, at least, shorten or expedite the trial. [8]

8 [1991] 3 F.C. 383 (Fed. C.A.), at 388.

39 In the Tribunal's view, the respondents have met these tests and have also made out a plain and obvious case for striking out the application as required under Rule 419. Accordingly, the Tribunal has concluded that section 75 of the Act does not give it jurisdiction to make the order sought by the Director in his application. An order will therefore be made granting this motion and striking out the Director's application against the respondents.

Motion granted.

Footnotes

10

2004 SCC 13, 2004 CSC 13
Supreme Court of Canada

CCH Canadian Ltd. v. Law Society of Upper Canada

2004 CarswellNat 446, 2004 CarswellNat 447, 2004 SCC 13, 2004 CSC 13, [2004] 1 S.C.R. 339, [2004] S.C.J. No. 12, 129 A.C.W.S. (3d) 177, 236 D.L.R. (4th) 395, 247 F.T.R. 318 (note), 30 C.P.R. (4th) 1, 317 N.R. 107, J.E. 2004-602, REJB 2004-54747

The Law Society of Upper Canada, Appellant/Respondent on cross-appeal v. CCH Canadian Limited, Respondent/Appellant on cross-appeal

The Law Society of Upper Canada, Appellant/Respondent on cross-appeal v. Thomson Canada Limited c.o.b. as Carswell Thomson Professional Publishing, Respondent/Appellant on cross-appeal

The Law Society of Upper Canada, Appellant/Respondent on cross-appeal v. Canada Law Book Inc., Respondent/Appellant on cross-appeal and Federation of Law Societies of Canada, Canadian Publishers' Council and Association of Canadian Publishers and Société québécoise de gestion collective des droits de reproduction (COPIBEC) and The Canadian Copyright Licensing Agency (Access Copyright), Interveners

Arbour J., Bastarache J., Binnie J., Deschamps J., Iacobucci J., LeBel J., Major J., McLachlin C.J.C.

Heard: November 10, 2003
Judgment: March 4, 2004
Docket: 29320

Proceedings: reversing *CCH Canadian Ltd. v. Law Society of Upper Canada* (2002), 2002 FCA 187, 2002 CarswellNat 1000, 18 C.P.R. (4th) 161, 212 D.L.R. (4th) 385, 289 N.R. 1, 2002 CAF 187, 2002 CarswellNat 2841, [2002] 4 F.C. 213, 224 F.T.R. 111 (note) (Fed. C.A.); reversing in part *CCH Canadian Ltd. v. Law Society of Upper Canada* (1999), 1999 CarswellNat 2123, 179 D.L.R. (4th) 609, 169 F.T.R. 1, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139, [2000] 2 F.C. 451, 1999 CarswellNat 3080 (Fed. T.D.); additional reasons at *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 2000 CarswellNat 168, 184 D.L.R. (4th) 186, 4 C.P.R. (4th) 129 (Fed. T.D.)

Counsel: Gowling Lafleur Henderson, for the respondents/appellants on cross-appeal
Sim Hughes Ashton, McKay, for the intervener, the Federation of Law Societies of Canada
Borden Ladner Gervais, for the interveners, the Canadian Publishers' Council and the Association of Canadian Publishers
McCarthy Tétrault, for the interveners, Société québécoise de gestion collective des droits de reproduction (COPIBEC) and The Canadian Copyright Licensing Agency (Access Copyright)
Ogilvy Renault

Subject: Intellectual Property; Property; Civil Practice and Procedure; Constitutional

Headnote

Intellectual property --- Copyright — Material in which copyright may subsist — Literary works — General

Copyright subsisting in plaintiffs' three headnotes, case summary, topical law report index, annotated statute, textbook and monograph — Copyright not subsisting in judicial reasons themselves, alone without headnotes.

Intellectual property --- Copyright — Material in which copyright may subsist — Literary works — Compilations

Copyright subsisting in headnotes — Copyright not subsisting in judicial reasons themselves, alone without headnotes.

Intellectual property --- Copyright — Basic requirements for protection — Originality

Originality not requiring imagination or creative spark — Work must originate from author, be product of author's skill and judgment, and not be copied from another work — Exercise of skill and judgment must be more than mechanical exercise.

Intellectual property --- Copyright — Infringement of owner's rights — Direct infringement — Reproduction and copying — General

Defendant did not infringe copyright by reproducing single copy of reported decision, case summary, statute, regulation or limited selection of text from treatise in accordance with library's "Access to the Law Policy" — Defendant did not authorize copyright infringement by making free-standing photocopiers readily available in library and posting warning notice that it would not be responsible for any copies made in infringement of copyright.

Intellectual property --- Copyright — Infringement of owner's rights — Direct infringement — Authorizing acts infringing copyright

Defendant did not authorize copyright infringement by making free-standing photocopiers readily available in library and posting warning notice that it would not be responsible for any copies made in infringement of copyright.

Intellectual property --- Copyright — Infringement of owner's rights — Direct infringement — Telecommunications

Defendant provided custom photocopying service for members of legal profession and judiciary — Facsimile transmission to single individual of single copy is not communication made to public.

Intellectual property --- Copyright — Infringement of owner's rights — Indirect infringement — Sale, distribution, exhibition or importation

No secondary infringement by defendant in providing custom photocopying service for members of legal profession and judiciary.

Intellectual property --- Copyright — Defences to infringement — Public interest

Defendant provided custom photocopying service for members of legal profession and judiciary — Defendant's activities were within "fair dealing" exemption — Defendant's "Access to the Law Policy" did not result in primary infringement.

Intellectual property --- Copyright — Defences to infringement — Fair dealing

Defendant provided custom photocopying service for members of legal profession and judiciary — Defendant's activities were within "fair dealing" exemption.

Intellectual property --- Copyright — Defences to infringement — Lack of substantiality

If amount taken is trivial then fair dealing analysis not needed — Amount taken may be fair depending on purpose — Defendant's "Access to the Law Policy" indicated that defendant would exercise discretion to ensure amount of dealing with copyrighted works would be reasonable.

Intellectual property --- Copyright — Remedies — General

Defendant provided custom photocopying service for members of legal profession and judiciary — Injunctive relief not warranted because defendant's activities were within "fair dealing" exemption.

Injunctions --- Availability of injunctions — Injunctions in specific contexts — Intangible property rights — Copyright — Literary works

Defendant provided custom photocopying service for members of legal profession and judiciary — Injunctive relief not warranted because defendant's activities were within "fair dealing" exemption.

Intellectual property --- Copyright — Practice and procedure — Costs — Persons entitled to or liable for costs

Defendant provided custom photocopying service for members of legal profession and judiciary within "fair dealing" exemption — Defendant did not authorize copyright infringement by providing free-standing photocopiers — Defendant successful on appeal and cross-appeal so defendant entitled to costs throughout.

Propriété intellectuelle --- Droit d'auteur — Ouvrages susceptibles de faire l'objet d'un droit d'auteur — Oeuvres littéraires — En général

Trois sommaires, le résumé jurisprudentiel, l'index analytique du recueil de jurisprudence, la loi annotée, le manuel et la monographie confèrent tous un droit d'auteur aux demandeurs qui les publient — Jugement non accompagné de sommaires ne confère aucun droit d'auteur.

Propriété intellectuelle --- Droit d'auteur — Ouvrages susceptibles de faire l'objet d'un droit d'auteur — Oeuvres littéraires — Compilations

Sommaires confèrent un droit d'auteur — Jugement non accompagné de sommaires ne confère aucun droit d'auteur.

Propriété intellectuelle --- Droit d'auteur — Conditions de base pour bénéficier de la protection — Originalité

Originalité ne nécessite pas d'avoir de l'imagination ou une idée créatrice — Oeuvre doit émaner de l'auteur, résulter de l'exercice non négligeable du talent et du jugement de l'auteur et ne pas être une copie d'une autre oeuvre — Exercice du talent et du jugement ne doit pas se faire de façon mécanique.

Propriété intellectuelle --- Droit d'auteur — Violation des droits du titulaire — Violation directe — Reproduire et copier — En général

Défendeur n'a pas violé le droit d'auteur en reproduisant une seule copie d'une décision publiée, d'un résumé de jurisprudence, d'une loi, d'un règlement ou d'un extrait limité d'un traité conformément à la « Politique d'accès à l'information juridique » de la bibliothèque — Défendeur n'a pas autorisé la violation en fournissant des photocopieuses libre-service dans la bibliothèque et en affichant un avis indiquant qu'il n'était pas responsable pour toute copie faite en violation du droit d'auteur.

Propriété intellectuelle --- Droit d'auteur — Violation des droits du titulaire — Violation directe — Actes autorisant la violation du droit d'auteur

Défendeur n'a pas autorisé la violation en fournissant des photocopieuses libre-service dans la bibliothèque et en affichant un avis indiquant qu'il n'était pas responsable pour toute copie faite en violation du droit d'auteur.

Propriété intellectuelle --- Droit d'auteur — Violation des droits du titulaire — Violation directe — Télécommunications

Défendeur fournissait un service de photocopie personnalisé aux membres de la profession juridique et aux juges — Transmission par télécopieur d'une seule copie à un seul individu ne constitue pas une communication faite au public.

Propriété intellectuelle --- Droit d'auteur — Violation des droits du titulaire — Violation indirecte — Vente, distribution, exposition ou importation

Défendeur n'a fait aucune violation à une étape ultérieure en fournissant un service de photocopie personnalisé aux membres de la profession juridique et aux juges.

Propriété intellectuelle --- Droit d'auteur — Moyens de défense à l'accusation de violation — Intérêt public

Défendeur fournissait un service de photocopie personnalisé aux membres de la profession juridique et aux juges — Activités du défendeur se situaient dans les limites de l'exception pour « l'utilisation équitable » — « Politique d'accès à l'information juridique » du défendeur ne constituait pas une violation initiale.

Propriété intellectuelle --- Droit d'auteur — Moyens de défense à l'accusation de violation — Utilisation équitable

Défendeur fournissait un service de photocopie personnalisé aux membres de la profession juridique et aux juges — Activités du défendeur se situaient dans les limites de l'exception pour « l'utilisation équitable ».

Propriété intellectuelle --- Droit d'auteur — Moyens de défense à l'accusation de violation — Partie non importante de l'oeuvre

Il n'est pas nécessaire de procéder à l'analyse de l'utilisation équitable lorsqu'une infime partie de l'oeuvre est utilisée — Ampleur de l'extrait sera équitable en fonction de l'objectif poursuivi — « Politique d'accès à l'information juridique » du défendeur démontrait que celui-ci ferait preuve de discrétion pour s'assurer qu'un usage raisonnable était fait des oeuvres protégées par le droit d'auteur.

Propriété intellectuelle --- Droit d'auteur — Réparations — En général

Défendeur fournissait un service de photocopie personnalisé aux membres de la profession juridique et aux juges — Injonction n'était pas nécessaire puisque les activités du défendeur se situaient dans les limites de l'exception pour « l'utilisation équitable ».

Injonctions --- Possibilité d'obtenir une injonction — Injonction dans certains contextes particuliers — Droits de propriété intangibles — Droit d'auteur — Oeuvres littéraires

Défendeur fournissait un service de photocopie personnalisé aux membres de la profession juridique et aux juges — Injonction n'était pas nécessaire puisque les activités du défendeur se situaient dans les limites de l'exception pour « l'utilisation équitable ».

Propriété intellectuelle --- Droit d'auteur — Procédure — Frais — Personnes ayant droit aux frais ou en étant responsable

Défendeur fournissait un service de photocopie personnalisé aux membres de la profession juridique et aux juges, lequel se situait dans les limites de l'exception pour « l'utilisation équitable » — Défendeur n'a pas autorisé de violation du droit d'auteur en fournissant des photocopieuses libre-service — Défendeur ayant eu gain de cause à l'égard du pourvoi et du pourvoi incident, il avait droit aux dépens devant toutes les instances.

The plaintiffs were Canadian publishers of law reports, law textbooks, and other legal publications. The defendant was a non-profit corporation that governed the legal profession of Ontario pursuant to statutory authority. The defendant maintained and operated a reference library for its members and the judiciary. The defendant had free-standing photocopiers for the use of library patrons using coins and prepaid cards. Above each photocopier, the defendant posted a notice stating that certain types of copying might infringe copyright law and disclaiming liability by the defendant for infringing copies made by library patrons. The defendant also provided a custom photocopying service by making copies available in person, by mail or by facsimile transmission machines. The defendant's "Access to the Law Policy" provided that, for a fee, single copies of library materials required for research, review, private study, and criticism as well as for use in court, tribunal, and government proceedings could be provided to patrons of the library.

The plaintiffs alleged that the defendant infringed their copyright by its photocopying policies and activities in supplying for the legal profession and the judiciary limited copies of legal materials published by the plaintiffs and held in the defendant's reference library. In particular, the plaintiffs referred to the defendant's custom photocopying service and its free-standing photocopiers. The plaintiffs brought actions for injunctive relief and for declarations regarding the ownership and subsistence of copyright, and infringement of copyright in specific publications or portions of publications in which the plaintiffs allegedly owned copyright. The defendant counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by its staff or a patron of the free-standing photocopiers for the purpose of research. The defendant also sought solicitor-and-client costs, and injunctive relief.

The actions were allowed in part and the counterclaims were dismissed. A declaration was granted that copyright subsisted in the plaintiffs' annotated statute, textbook, and monograph published as a chapter in a textbook, and that the defendant infringed the plaintiffs' copyright in the textbook and the monograph by photocopying a substantial portion and by distributing the copy. The plaintiffs were unsuccessful in their claim for a declaration that copyright subsisted in the plaintiffs' three reported judicial decisions, the three headnotes to those decisions, a case summary, and a topical law report index. A general declaration and permanent injunction were refused. The declaration sought by the defendant in its counterclaim was refused as overly broad.

The plaintiffs' appeal was allowed in part and the defendant's cross-appeal was dismissed. Copyright was held to subsist in all of the plaintiffs' items. The defendant appealed and the plaintiff cross-appealed.

Held: The appeal was allowed and the cross-appeal was dismissed with costs to the defendant throughout.

The purpose of copyright law is to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. The "sweat of the brow" approach to originality is too low a standard. To be "original" under the Copyright Act, the work must originate from an author, not be copied from another work, and must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. Creative works by definition are "original" and protected by copyright, but creativity is not required in order to render a work "original." The headnotes, case summary, topical index and compilation of reported judicial decisions are original works in which copyright subsists. Although the reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons are original works covered by copyright, the judicial reasons in and of themselves, without the headnotes, are not original works in which the plaintiffs can claim copyright.

The defendant did not authorize copyright infringement by maintaining self-service photocopiers for use by library patrons and posting a warning notice disclaiming liability for copies made in infringement of copyright. Although authorization could be inferred from acts that were less than direct and positive, a person did not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. The court should presume that a person who authorizes an activity does so only insofar as it is in accordance with the law. This presumption could be rebutted if it was shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement. There was no evidence that the photocopiers had been used in a manner inconsistent with copyright law. The defendant's posting of a notice warning that it would not be responsible for any copies made in infringement of copyright did not constitute an express acknowledgment that the photocopiers would be used in an illegal manner. Given that the defendant is responsible for regulating the legal profession in Ontario, it is more logical to conclude that the notice was posted to remind library patrons that copyright law governed the making of photocopies in the library. Even if there were evidence that the copies were used to infringe copyright, the defendant lacked sufficient control of the library patrons to permit the conclusion that it sanctioned, approved, or countenanced the infringement.

Fair dealing under s. 29 of the Act for the purpose of research or private study does not infringe copyright. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. It is not limited to non-commercial or private contexts. Research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is "research". Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29. Whether something is fair is a question of fact and depends on the facts of each case. Relevant factors in determining whether a dealing is fair include: (a) the purpose of the dealing, (b) the character of the dealing, (c) the amount of the dealing, (d) available alternatives to the dealing, (e) the nature of the work, and (f) the effect of the dealing on the work.

The defendant's dealings with the plaintiffs' works through the defendant's custom photocopy service were research-based and fair. The defendant's "Access to the Law Policy" placed appropriate limits on the type of copying that the defendant was doing. The defendant did not infringe copyright when, pursuant to its access policy, it made a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise. If a request did not appear to be for the purpose of research, criticism, review or private study, then the copy would not be made. If a question arose as to whether the stated purpose was legitimate, the reference librarian would review the matter. The access policy limited the amount of work that would be copied. The reference librarian reviewed requests that exceeded what might typically be considered to be reasonable and had the right to refuse to fulfil a request. The custom photocopy service was an integral part of the legal research process, an allowable purpose under s. 29 of the Act. The dealings were fair.

There was no secondary infringement. The facsimile transmissions of single copies of the plaintiffs' works to lawyers in Ontario were not communications "to the public by telecommunication." Although a series of repeated facsimile transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright, there was no evidence that this occurred in this case.

The defendant did not infringe copyright by selling copies of the plaintiffs' works. There was no primary infringement so there could be no secondary infringement. A declaration was granted that the defendant does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the defendant in accordance with its "Access to the Law Policy" and that the defendant did not authorize copyright infringement by maintaining a photocopier in the library and posting a warning notice that it would not be responsible for any copies made in infringement of copyright. No injunctive relief was warranted. Given that the defendant was successful on the appeal and cross-appeal, it was awarded costs throughout.

Les demandeurs étaient des éditeurs de recueils de jurisprudence, de traités de droit et d'autres publications juridiques. Le défendeur était une société à but non lucratif qui régissait la profession juridique en Ontario, conformément aux pouvoirs qui lui étaient décernés par la loi. Il exploitait et gérait une bibliothèque de référence pour ses membres et pour les juges. Il fournissait des photocopieuses libre-service aux utilisateurs de la bibliothèque se servant de monnaie ou de cartes prépayées. Le défendeur a posé au-dessus de chaque photocopieuse un avis indiquant que certains types de photocopies pourraient violer le droit d'auteur et qu'il déclinait toute responsabilité à l'égard des photocopies qui pourraient être faites en violation des droits d'auteur par les utilisateurs de la bibliothèque. Il fournissait également un service de photocopie personnalisé qui distribuait des photocopies en personne, par la poste ou par télécopieur. Le défendeur avait une « Politique d'accès à l'information juridique » qui, pour un certain montant, fournissait aux usagers de la bibliothèque des copies individuelles de documents de la bibliothèque à des fins de recherche, de révision, d'étude et de critique, et aussi pour l'utilisation lors d'une instance judiciaire ou d'une audience devant un organisme gouvernemental.

Les demandeurs ont allégué que le défendeur violait leur droit d'auteur par ses politiques en matière de photocopie et par ses activités consistant en la fourniture, à la profession juridique et aux juges, de copies des documents juridiques publiés par les demandeurs et détenus dans la bibliothèque de référence du défendeur. Plus particulièrement, les demandeurs ont fait référence au service de photocopie personnalisé du défendeur et aux photocopieuses libre-service. Ils ont intenté des actions en injonction et en jugement déclaratoire relativement à la propriété et à l'existence du droit d'auteur ainsi qu'à la violation du droit d'auteur que les demandeurs alléguaient détenir à l'égard de certaines publications ou de portions de publications. Le défendeur a fait une demande reconventionnelle afin qu'il soit déclaré que le droit d'auteur n'était pas violé par une seule copie d'une décision publiée, d'un résumé de jurisprudence, d'une loi, d'un règlement ou d'un extrait d'un traité faite par un employé ou par un utilisateur des photocopieuses libre-service à des fins de recherche. Le défendeur a aussi demandé des frais avocat-client en plus d'une injonction.

Les actions ont été accueillies en partie et les demandes reconventionnelles ont été rejetées. On a déclaré que les demandeurs avaient un droit d'auteur à l'égard de la loi annotée, du manuel et de la monographie constituant un chapitre de livre; il a aussi été déclaré que le défendeur avait violé le droit d'auteur des demandeurs à l'égard du manuel et de la monographie en photocopiant une partie importante de ceux-ci et en distribuant les copies faites. Les demandeurs se sont par ailleurs vu refusé la déclaration qu'ils bénéficiaient d'un droit d'auteur à l'égard des trois jugements publiés, des trois sommaires ajoutés aux décisions, du résumé et de l'index analytique du recueil de jurisprudence. La déclaration générale et l'injonction permanente ont été refusées. On a refusé d'accorder au défendeur la déclaration qu'il recherchait dans sa demande reconventionnelle au motif qu'elle était trop générale.

Le pourvoi des demandeurs a été accueilli en partie et le pourvoi incident du défendeur a été rejeté. Tous les ouvrages des demandeurs leur conféraient un droit d'auteur. Le défendeur a interjeté appel et les demandeurs ont fait un pourvoi incident.

Arrêt: Le pourvoi a été accueilli et le pourvoi incident a été rejeté avec dépens devant toutes les cours.

Le droit d'auteur vise à trouver un équilibre entre, d'une part, la promotion, dans l'intérêt du public, de la création et de la diffusion des oeuvres artistiques et intellectuelles et, d'autre part, l'obtention d'une juste récompense pour le créateur. Associer le critère d'originalité à la notion de labeur donne une norme trop faible. Pour être « originale » en vertu de la Loi sur le droit d'auteur, l'oeuvre doit provenir d'un auteur, ne pas être une copie d'une autre oeuvre et elle doit être le produit du talent et du jugement de l'auteur. Le talent et le jugement exercés pour produire une oeuvre ne doivent pas être insignifiants au point de pouvoir être qualifiés d'exercice purement mécanique. Les oeuvres de création sont par définition « originale[s] » et protégées par le droit d'auteur; il n'est cependant pas nécessaire de faire preuve de créativité pour qu'une oeuvre soit « originale ». Les sommaires, le résumé, l'index analytique et la compilation des décisions judiciaires publiées sont des oeuvres originales qui confèrent un droit d'auteur. Même si les décisions judiciaires publiées sont des oeuvres originales protégées par un droit d'auteur lorsqu'elles sont vues comme une compilation du sommaire et des motifs judiciaires révisés, les motifs judiciaires en soi, non accompagnés de sommaires, ne constituent pas une oeuvre originale à l'égard de laquelle les demandeurs peuvent prétendre avoir un droit d'auteur.

Le défendeur n'a pas autorisé de violations du droit d'auteur en fournissant des photocopieuses libre-service aux usagers de la bibliothèque ou en affichant un avis qu'il déclinait toute responsabilité à l'égard de toute copie faite en violation du droit d'auteur. Même si l'autorisation pouvait être inférée d'actes pas vraiment directs ou positifs, une personne ne pouvait autoriser une violation en autorisant tout simplement l'usage d'équipements pouvant être utilisés pour violer le droit d'auteur. La cour doit présumer qu'une personne qui autorise une activité le fait dans les limites où celle-ci est conforme à la loi. Cette présomption peut être réfutée en démontrant l'existence d'un rapport ou d'un degré de contrôle entre la personne qui aurait accordé l'autorisation et les personnes ayant violé le droit d'auteur. Il n'y avait aucune preuve que les photocopieuses avaient été utilisées d'une manière non conforme au droit d'auteur. L'avis affiché par le défendeur selon lequel il n'était pas responsable des copies faites en violation du droit d'auteur ne pouvait constituer une reconnaissance expresse que les photocopieuses seraient utilisées illégalement. Étant donné que le défendeur a la responsabilité de réglementer la profession juridique en Ontario, il est plus logique de conclure que l'avis avait été affiché afin de rappeler aux usagers de la bibliothèque que le droit d'auteur régissait les photocopies faites à la bibliothèque. Même s'il existait de la preuve que les copies étaient utilisées pour violer le droit d'auteur, le défendeur ne jouissait pas d'un contrôle suffisant sur les usagers de la bibliothèque pour pouvoir conclure qu'il avait sanctionné, approuvé ou soutenu la violation.

En vertu de l'art. 29 de la Loi sur le droit d'auteur, l'utilisation équitable faite à des fins de recherche ou d'étude privée ne viole pas le droit d'auteur. Le terme « recherche » doit recevoir une interprétation large et libérale afin de ne pas restreindre indûment les droits des utilisateurs. La recherche ne se limite pas aux contextes privés ou non commerciaux. La recherche effectuée pour conseiller des clients, donner des avis, plaider des causes et préparer des mémoires et des factums demeure de la « recherche ». Les avocats exerçant le droit dans un but lucratif font de la recherche au sens de l'art. 29. La question de savoir si quelque chose est équitable constitue une question de fait qui dépend des faits de chaque affaire. La détermination de ce qui est équitable comprend l'examen des facteurs suivants: a) le but de l'utilisation; b) la nature de l'utilisation; c) l'ampleur de l'utilisation; d) les solutions de rechange à l'utilisation; e) la nature de l'oeuvre; f) l'effet de l'utilisation sur l'oeuvre.

L'utilisation que le défendeur faisait des oeuvres des demandeurs, par le biais de son service de photocopie personnalisé, était faite à des fins de recherche et était équitable. La « Politique d'accès à l'information juridique » du défendeur limitait de façon appropriée le type de photocopies fait. Le défendeur ne violait pas le droit d'auteur lorsque, conformément à sa politique d'accès, il faisait une seule copie d'une décision publiée, d'un résumé, d'une loi, d'un règlement ou d'un extrait limité d'un traité. Si la demande ne semblait pas avoir été faite à des fins de recherche, de critique, de révision ou d'étude privée, on refusait de faire la copie. En cas de doute quant à la légitimité du but indiqué, le bibliothécaire de référence trancherait. La politique d'accès limitait la quantité de l'oeuvre qui pouvait être copiée. Le bibliothécaire de référence examinait les demandes excédant ce qui pouvait généralement être considéré comme raisonnable et il pouvait refuser une demande. Le service de photocopie personnalisé faisait partie intégrante du processus de recherche juridique, une fin permise en vertu de l'art. 29 de la Loi. L'utilisation faite était équitable.

Aucune violation à une étape ultérieure n'était faite. La transmission par télécopieur d'une seule copie des oeuvres des demandeurs à des avocats ontariens ne constituait pas une communication « au public, par télécommunication ». Même si l'envoi répété de télécopies d'une même oeuvre à différents récipiendaires pouvait constituer une communication au public en violation du droit d'auteur, rien ne prouvait que c'était ce qui s'était passé en l'espèce.

Le défendeur n'a pas violé le droit d'auteur en vendant des copies des oeuvres des demandeurs. Il ne pouvait y avoir de violation à une étape ultérieure puisqu'il n'y avait aucune violation initiale. Il était donc déclaré que le défendeur ne violait pas le droit d'auteur en faisant une seule copie d'une décision publiée, d'un résumé de jurisprudence, d'une loi, d'un règlement ou d'un extrait limité d'un traité, lorsque cette copie était faite conformément à sa « Politique d'accès à l'information juridique », et que le défendeur n'avait pas autorisé la violation du droit d'auteur en fournissant des photocopieuses dans la bibliothèque et en affichant un avis selon lequel il déclinait toute responsabilité à l'égard de toute copie faite en violation du droit d'auteur. Aucune injonction n'était nécessaire. Le défendeur ayant gain de cause tant à l'égard du pourvoi que du pourvoi incident, il avait droit aux dépens devant toutes les cours.

Table of Authorities

Cases considered by *McLachllin C.J.C.*:

Associated Newspapers Group plc v. News Group Newspapers Ltd. (1986), [1986] R.P.C. 515 (Eng. Ch. Div.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Beloff v. Pressdram Ltd. (1973), [1973] 1 All E.R. 241, [1973] R.P.C. 765 — referred to

Bishop v. Stevens (1990), 72 D.L.R. (4th) 97, [1990] 2 S.C.R. 467, 31 C.P.R. (3d) 394, 111 N.R. 376, 1990 CarswellNat 738, 1990 CarswellNat 1028 (S.C.C.) — referred to

C.A.P.A.C. v. CTV Television Network (1968), [1968] S.C.R. 676, 38 Fox Pat. C. 108, 55 C.P.R. 132, 68 D.L.R. (2d) 98, 1968 CarswellNat 26 (S.C.C.) — considered

C.B.S. Inc. v. Ames Records & Tapes (1981), [1981] 2 All E.R. 812, [1981] R.P.C. 407, [1981] 2 W.L.R. 973, 125 Sol. Jo. 412, [1982] Ch. 91 (Eng. Ch. Div.) — considered

Compo Co. v. Blue Crest Music Inc. (1979), [1980] 1 S.C.R. 357, 45 C.P.R. (2d) 1, 105 D.L.R. (3d) 249, *(*sub nom. *Blue Crest Music Inc. v. Compo Co.)* 29 N.R. 296, 1979 CarswellNat 640, 1979 CarswellNat 640F (S.C.C.) — considered

de Tervagne v. Beloeil (Town) (1993), 50 C.P.R. (3d) 419, *(*sub nom. *de Tervagne v. Beloeil (Ville))* 65 F.T.R. 247, [1993] 3 F.C. 227, 1993 CarswellNat 222, 1993 CarswellNat 222F (Fed. T.D.) — followed

Édutile Inc. v. Automobile Protection Assn. (APA) (2000), 2000 CarswellNat 744, 2000 CarswellNat 1258, 188 D.L.R. (4th) 132, 255 N.R. 147, [2000] 4 F.C. 195, 6 C.P.R. (4th) 211, *(*sub nom. *Edutile Inc. v. Automobile Protection Association)* 181 F.T.R. 160 (Fed. C.A.) — referred to

Feist Publications Inc. v. Rural Telephone Service Co. (1991), 111 S.Ct. 1282, 113 L.Ed.2d 358, 59 U.S.L.W. 4251, 18 U.S.P.Q.2d 1275, 18 Media L. Rep. 1889, 121 P.U.R. 4th 1, 499 U.S. 340 (U.S. Kan.) — considered

Galerie d'art du Petit Champlain inc. c. Théberge (2002), 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307, *(*sub nom. *Théberge v. Galerie d'Art du Petit Champlain inc.)* 17 C.P.R. (4th) 161, *(*sub nom. *Théberge v. Galerie d'Art du Petit Champlain inc.)* 210 D.L.R. (4th) 385, 23 B.L.R. (3d) 1, *(*sub nom. *Théberge v. Galerie d'art du Petit Champlain inc.)* 285 N.R. 267, [2002] 2 S.C.R. 336 (S.C.C.) — considered

Goldner v. Canadian Broadcasting Corp. (1972), 7 C.P.R. (2d) 158 (Fed. T.D.) — referred to

Grignon v. Roussel (1991), 38 C.P.R. (3d) 4, 44 F.T.R. 121, 1991 CarswellNat 208 (Fed. T.D.) — referred to

Hubbard v. Vosper (1971), [1972] 2 Q.B. 84, [1972] 1 All E.R. 1023 (Eng. C.A.) — considered

Ladbroke (Football) Ltd. v. William Hill (Football) Ltd. (1964), [1964] 1 All E.R. 465, [1964] 1 W.L.R. 273 (U.K. H.L.) — referred to

Moorehouse v. University of New South Wales (1976), [1976] R.P.C. 151 (Australia H.C.) — not followed

Moreau v. St. Vincent (1950), 10 Fox Pat. C. 194, [1950] Ex. C.R. 198, 12 C.P.R. 32, [1950] 3 D.L.R. 713, 1950 CarswellNat 4 (Can. Ex. Ct.) — considered

Muzak Corp. v. Composers, Authors & Publishers Assn. (Canada) (1953), [1953] 2 S.C.R. 182, 13 Fox Pat. C. 168, 19 C.P.R. 1, 1953 CarswellQue 18 (S.C.C.) — followed

Pro Sieben Media AG v. Carlton UK Television Ltd. (1999), [1999] F.S.R. 610, [1999] 1 W.L.R. 605 (Eng. C.A.) — referred to

Sillitoe v. Mc-Graw Hill Book Co. (U.K.) Ltd. (1983), [1983] F.S.R. 545 (Eng. Ch.) — considered

Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co. (1984), [1985] 1 W.W.R. 112, 3 C.P.R. (3d) 81, 1984 CarswellBC 765 (B.C. S.C.) — considered

Tele-Direct (Publications) Inc. v. American Business Information Inc. (1997), 221 N.R. 113, 154 D.L.R. (4th) 328, 76 C.P.R. (3d) 296, 134 F.T.R. 80 (note), 1997 CarswellNat 2111, [1998] 2 F.C. 22, 37 B.L.R. (2d) 101, 1997 CarswellNat 2752 (Fed. C.A.) — considered

U & R Tax Services Ltd. v. H & R Block Canada Inc. (1995), 62 C.P.R. (3d) 257, 97 F.T.R. 259, 1995 CarswellNat 1343 (Fed. T.D.) — considered

University of London Press v. University Tutorial Press Ltd. (1916), [1916] 2 Ch. 601 (Eng. Ch. Div.) — considered

Statutes considered:

Copyright Act, R.S.C. 1985, c. C-42
Generally — considered

Pt. I — considered

Pt. III — considered

Pt. IV — considered

s. 2 "computer program" — considered

s. 2 "dramatic work" — considered

s. 2 "every original literary, dramatic, musical and artistic work" — considered

s. 2 "library, archive or museum" — considered

s. 2 "work" — referred to

s. 2.1 [en. 1993, c. 44, s. 54] — referred to

s. 3(1) "copyright" — considered

s. 3(1) "copyright" (f) — considered

s. 5 — considered

s. 5(1) — referred to

s. 27(1) — considered

s. 27(2) — considered

s. 27(2)(a) — considered

s. 29 — considered

ss. 29-29.2 — considered

s. 29.1 [en. 1997, c. 24, s. 18(1)] — considered

s. 29.2 [en. 1997, c. 24, s. 18(1)] — considered

ss. 29.4-30 — referred to

s. 30 — considered

ss. 30.1-30.5 [en. 1997, c. 24, s. 18(1)] — referred to

s. 30.2 [en. 1997, c. 24, s. 18(1)] — referred to

s. 30.2(1) [en. 1997, c. 24, s. 18(1)] — considered

s. 34(1) — considered

Treaties considered:

Berne Convention for the Protection of Literary and Artistic Works, 1886, 828 U.N.T.S. 221
Generally — referred to

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Words and phrases considered

AUTHORIZE

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors & Publishers Assn. (Canada)*, [1953] 2 S.C.R. 182 (S.C.C.), at p. 193; *de Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (Fed. T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *C.B.S. Inc. v. Ames Records & Tapes*, [1981] 2 All E.R. 812 (Eng. Ch. Div.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak Corp. , supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak Corp.* , *supra*; *de Tervagne* , *supra*: see also, J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (looseleaf), at p. 21-104 and P.D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

CASE SUMMARY

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] A summary of judicial reasons is not simply a copy of the original reasons. Even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract and how to arrange them in the summary requires an exercise of skill and judgment.

DEALING

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* [R.S.C. 1985, c. C-42] states that "[f]air dealing for the purpose of research or private study does not infringe copyright". The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

FAIR DEALING

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] At the Court of Appeal [2002 CarswellNat 1000], Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard , supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

HEADNOTES

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The Federal Court of Appeal [2002 CarswellNat 1000] held that "headnotes", defined as including the summary of the case, catchlines, statement of the case, case title and case information, are more than mere copies and hence "original" works in which copyright subsists. It found that the headnotes are more than simply an abridged version of the reasons; they consist of independently composed features. As Linden J.A. explained, at para. 73, the authors of the headnotes could have chosen to make the summaries "long or short, technical or simple, dull or dramatic, well written or confusing; the organization and presentation might have varied greatly".

Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute "original" works in which copyright subsists.

ORIGINAL

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] For a work to be "original" within the meaning of the *Copyright Act* [R.S.C. 1985, c. C-42], it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

REPORTED JUDICIAL DECISION

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The reported judicial decisions, when properly understood as a *compilation* of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright. Copyright protects originality of *form* or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of copyright, but the over-all arrangement of them which the plaintiff through his industry has produced": *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C. S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (U.K. H.L.), at p. 469.

The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright.

RESEARCH

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The fair dealing exception under s. 29 [of the *Copyright Act,* R.S.C. 1985, c. C-42] is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal [2002 CarswellNat 1000] correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research". Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

TO THE PUBLIC BY TELECOMMUNICATION

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The fax transmission of a single copy to a single individual is not a communication to the public [within the meaning of s. 3(1)(f) of the *Copyright Act,* R.S.C. 1985, c. C-42]. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

TOPICAL INDEX

[McLachlin C.J.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ. concurring):] The topical index is part of the book *Canada GST Cases*, (1997). It provides a listing of cases with short headings to indicate the main topics covered by the decision and very brief summaries of the decisions. The Federal Court of Appeal [2002 CarswellNat 1000] held that the index was original in that it required skill and effort to compile. I agree. The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an "original" work in which copyright subsists.

Termes et locutions cités

AUTORISER

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):]« Autoriser » signifie « sanctionner, appuyer ou soutenir » (« *sanction, approve and countenance* ») : *Muzak Corp. c. Composers, Authors and Publishers Association of Canada Ltd.*, [1953] 2 R.C.S. 182, p. 193; *De Tervagne c. Beloeil (Ville)*, [1993] 3 C.F. 227 (1re inst.). Lorsqu'il s'agit de déterminer si une violation du droit d'auteur a été autorisée, il faut attribuer au terme « *countenance* » son sens le plus fort mentionné dans le dictionnaire, soit « approuver, sanctionner, permettre, favoriser, encourager » : voir *The Shorter Oxford English Dictionary* (1993), vol. 1, p. 527. L'autorisation est néanmoins une question de fait qui dépend de la situation propre à chaque espèce et peut s'inférer d'agissements qui ne sont pas des actes directs et positifs, et notamment d'un degré suffisamment élevé d'indifférence : *CBS Inc. c. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Div. Chanc.), p. 823 et 824. Toutefois, ce n'est pas autoriser la violation du droit d'auteur que de permettre la simple utilisation d'un appareil susceptible d'être utilisé à cette fin. Les tribunaux doivent présumer que celui qui autorise une activité ne l'autorise que dans les limites de la légalité : *Muzak*, précité. Cette présomption peut être réfutée par la preuve qu'il existait une certaine relation ou un certain degré de contrôle entre l'auteur allégué de l'autorisation et les personnes qui ont violé le droit d'auteur : *Muzak*, précité; *De Tervagne*, précité. Voir également J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4e éd. (feuilles mobiles)), p. 21-104 et P.D. Hitchcock, « Home Copying and Authorization » (1983), 67 C.P.R. (2d) 17, p. 29 à 33.

RÉSUMÉ DE JURISPRUDENCE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Le résumé des motifs d'un jugement n'est pas que la copie des motifs originaux. Même si le résumé reprend souvent les mêmes termes que les motifs du jugement, le choix des extraits et leur agencement requièrent l'exercice du talent et du jugement.

UTILISATION

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Cela soulève une question préliminaire : le Barreau est-il tenu de prouver que chacun des usagers utilise de manière équitable les ouvrages mis à sa disposition, ou peut-il s'appuyer sur sa pratique générale pour établir le caractère équitable de l'utilisation? Je conclus que ce dernier élément suffit. L'article 29 de la *Loi sur le droit d'auteur* [L.R.C. 1985, c. C-42] dispose que « [l]'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur ». Les termes employés sont généraux. « Utilisation » ne renvoie pas à un acte individuel, mais bien à une pratique ou à un système. Cela est compatible avec l'objet de l'exception au titre de l'utilisation équitable, qui est de faire en sorte que la faculté des utilisateurs d'utiliser et de diffuser des oeuvres protégées ne soit pas indûment limitée. La personne ou l'établissement qui invoque l'exception prévue à l'art. 29 doit seulement prouver qu'il a utilisé l'oeuvre protégée aux fins de recherche ou d'étude privée et que cette utilisation était équitable. Il peut le faire en établissant soit que ses propres pratiques et politiques étaient axées sur la recherche et équitables, soit que toutes les utilisations individuelles des ouvrages étaient de fait axées sur la recherche et équitable.

UTILISATION ÉQUITABLE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Le juge Linden, de la Cour d'appel [2002 CarswellNat 2841], a reconnu l'absence d'un critère établi permettant de dire qu'une utilisation est équitable ou non, mais il a énuméré des facteurs pouvant être pris en compte pour en décider. S'inspirant de *Hubbard*, précité, ainsi que de la doctrine américaine de l'utilisation équitable, il a énuméré les facteurs suivants : (1) le but de l'utilisation; (2) la nature de l'utilisation; (3) l'ampleur de l'utilisation; (4) les solutions de rechange à l'utilisation; (5) la nature de l'oeuvre; (6) l'effet de l'utilisation sur l'oeuvre. Bien que ces facteurs ne soient pas pertinents dans tous les cas, ils offrent un cadre d'analyse utile pour statuer sur le caractère équitable d'une utilisation dans des affaires ultérieures.

SOMMAIRES

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] La Cour d'appel fédérale [2002 CarswellNat 2841] a statué que les « sommaires », y compris le résumé de l'affaire, les mots clés, l'exposé de l'affaire, l'intitulé répertorié et les autres renseignements relatifs aux motifs du jugement, n'étaient pas que de simples copies et constituaient donc des oeuvres « originales » conférant un droit d'auteur. Elle a estimé que les sommaires étaient davantage qu'une version abrégée des motifs, qu'ils comportaient des caractéristiques composées de façon indépendante. Comme le juge Linden l'a expliqué, au par. 73, les auteurs des sommaires auraient pu choisir de rédiger des résumés « longs ou courts, techniques ou simples, ternes ou remarquables, bien écrits ou confus; leur arrangement et leur présentation auraient pu varier grandement ».

Même si un sommaire s'inspire en grande partie du jugement qu'il résume et auquel il renvoie, il ne s'agit manifestement pas d'une copie identique des motifs. L'auteur doit choisir des éléments précis de la décision et il peut les présenter de nombreuses façons différentes. Ces choix supposent l'exercice du talent et du jugement. Le rédacteur doit faire appel à ses connaissances juridiques et à l'aptitude qu'il a acquise pour cerner la *ratio dedidendi* de la décision. Il doit également faire appel à sa faculté de discernement pour décider quelles parties du jugement doivent figurer dans le sommaire. Il ne s'agit pas d'une entreprise purement mécanique. Un sommaire constitue donc une oeuvre « originale » conférant le droit d'auteur.

ORIGINALE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Pour être « originale » au sens de la *Loi sur le droit d'auteur* [L.R.C. 1985, c. C-42], une oeuvre doit être davantage qu'une copie d'une autre oeuvre. Point n'est besoin toutefois qu'elle soit créative, c'est-à-dire novatrice ou unique. L'élément essentiel à la protection de l'expression d'une idée par le droit d'auteur est l'exercice du talent et du jugement. J'entends par talent le recours aux connaissances personnelles, à une aptitude acquise ou à une compétence issue de l'expérience pour produire l'oeuvre. J'entends par jugement la faculté de discernement ou la capacité de se faire une opinion ou de procéder à une évaluation en comparant différentes options possibles pour produire l'oeuvre. Cet exercice du talent et du jugement implique nécessairement un effort intellectuel. L'exercice du talent et du jugement que requiert la production de l'oeuvre ne doit pas être négligeable au point de pouvoir être assimilé à une entreprise purement mécanique. Par exemple, tout talent ou jugement que pourrait requérir la seule modification de la police de caractères d'une d'oeuvre pour en créer une « autre » serait trop négligeable pour justifier la protection que le droit d'auteur accorde à une oeuvre « originale ».

DÉCISIONS JUDICIAIRES PUBLIÉES

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Les décisions judiciaires publiées, considérées à juste titre comme une *compilation* du sommaire et des motifs judiciaires révisés qui l'accompagnent, sont des oeuvres « originales » protégées par le droit d'auteur. Celui-ci protège l'originalité de la *forme* ou de l'expression. Une compilation consiste dans la présentation, sous une forme différente, d'éléments existants. Celui qui l'effectue n'a aucun droit d'auteur sur les composantes individuelles. Cependant, il peut détenir un droit d'auteur sur la forme que prend la compilation. [TRADUCTION] « Ce ne sont pas les divers éléments qui sont visés par le droit d'auteur, mais bien leur agencement global qui est le fruit du travail du demandeur » : *Slumber-Magic Adjustable Bed Co. c. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (C.S. C.-B.), p. 84; voir également *Ladbroke (Football) Ltd. c. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), p. 469.

Les décisions judiciaires publiées qui sont visées en l'espèce satisfont au critère d'originalité. Les auteurs ont agencé de façon particulière le résumé jurisprudentiel, les mots clés, l'intitulé répertorié, les renseignements relatifs aux motifs du jugement (les sommaires) et les motifs de la décision. L'agencement de ces différents éléments nécessite l'exercice du talent et du jugement. Considérée globalement, la compilation confère un droit d'auteur.

Cela dit, les motifs de la décision en eux-mêmes, sans les sommaires, ne constituent pas des oeuvres originales sur lesquelles les éditeurs peuvent revendiquer un droit d'auteur.

RECHERCHE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Toute personne qui est en mesure de prouver qu'elle a utilisé l'oeuvre protégée par le droit d'auteur aux fins de recherche ou d'étude privée peut se prévaloir de l'exception créée par l'art. 29 [*Loi sur le droit d'auteur*, L.R.C. 1985, c. C-42]. Il faut interpréter le mot « recherche » de manière large afin que les droits des utilisateurs ne soient pas indûment restreints. J'estime, comme la Cour d'appel, que la recherche ne se limite pas à celle effectuée dans un contexte non commercial ou privé. La Cour d'appel [v. 2002 CarswellNat 2841] a signalé à juste titre, au par. 128, que « [l]a recherche visant à conseiller des clients, donner des avis, plaider des causes et préparer des mémoires et des factums reste de la recherche ». L'avocat qui exerce le droit dans un but lucratif effectue de la recherche au sens de l'art. 29 de la *Loi sur le droit d'auteur*.

AU PUBLIC, PAR TÉLÉCOMMUNICATION

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] Transmettre une seule copie à une seule personne par télécopieur n'équivaut pas à communiquer l'oeuvre au public [au sens de l'art. 3(1)f) de la *Loi sur le droit d'auteur*, L.R.C. 1985, c. C-42]. Cela dit, la transmission répétée d'une copie d'une même oeuvre à de nombreux destinataires pourrait constituer une communication au public et violer le droit d'auteur. Toutefois, aucune preuve n'a établi que ce genre de transmission aurait eu lieu en l'espèce.

INDEX ANALYTIQUE

[McLachlin J.C.C. (Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish, J.J. souscrivant à l'opinion de la juge McLachlin):] L'index analytique fait partie de l'ouvrage *Canada GST Cases* (1997). Il fournit une liste de décisions accompagnées de courtes rubriques indiquant les principaux sujets abordés et d'un très bref résumé. La Cour d'appel fédérale [2002 CarswellNat 2841] a statué qu'il était original en ce que sa compilation exigeait habilité et effort. C'est également mon avis. L'auteur de l'index a dû faire un tri initial pour repérer les affaires décisives en matière de TPS. À lui seul, ce tri appelle l'exercice du talent et du jugement. L'auteur a dû également décider des rubriques et choisir les décisions qui figureraient sous chacune d'elles. Il lui a fallu dégager l'essence de chacune des décisions et l'exprimer dans une phrase succincte. Toutes ces opérations nécessitent un talent et un jugement suffisamment importants pour qu'on puisse conclure que l'index analytique est une oeuvre « originale » conférant le droit d'auteur.

APPEAL and CROSS-APPEAL from judgment reported at (2002), 2002 FCA 187, 2002 CarswellNat 1000, 18 C.P.R. (4th) 161, 212 D.L.R. (4th) 385, 289 N.R. 1, 2002 CAF 187, 2002 CarswellNat 2841, [2002] 4 F.C. 213, 224 F.T.R. 111 (note) (Fed. C.A.), allowing appeal in part and dismissing counterclaim from judgment declaring that copyright did not subsist in plaintiffs' reported judicial decisions, headnotes, case summary, and topical index.

POURVOI et POURVOI INCIDENT à l'encontre de l'arrêt publié à (2002), 2002 FCA 187, 2002 CarswellNat 1000, 18 C.P.R. (4th) 161, 212 D.L.R. (4th) 385, 289 N.R. 1, 2002 CAF 187, 2002 CarswellNat 2841, [2002] 4 C.F. 213, 224 F.T.R. 111 (note) (C.A. Féd.), qui a accueilli le pourvoi en partie et a rejeté le pourvoi incident à l'encontre du jugement qui avait déclaré que les décisions judiciaires publiées, les sommaires, les résumés de jurisprudence et les index analytiques ne conféraient aucun droit d'auteur aux demandeurs.

***The Chief Justice*:**

I. Introduction -- The Issues To Be Determined

1 The appellant, the Law Society of Upper Canada, is a statutory non-profit corporation that has regulated the legal profession in Ontario since 1822. Since 1845, the Law Society has maintained and operated the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service (the "custom photocopy service") for Law Society members, the judiciary and other authorized researchers. Under the custom photocopy service, legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons.

2 The respondents, CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc., publish law reports and other legal materials. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in eleven specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these eleven works as well as any other works that they published.

3 The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service photocopier for the purpose of research.

4 The key question that must be answered in this appeal is whether the Law Society has breached copyright by either (1) providing the custom photocopy service in which single copies of the publishers' works are reproduced and sent to patrons upon their request or by (2) maintaining self-service photocopiers and copies of the publishers' works in the Great Library for use by its patrons. To answer this question, the Court must address the following sub-issues:

(1) Are the publishers' materials "original works" protected by copyright?

(2) Did the Great Library authorize copyright infringement by maintaining self-service photocopiers and copies of the publishers' works for its patrons' use?

(3) Were the Law Society's dealings with the publishers' works "fair dealing[s]" under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended?

(4) Did Canada Law Book consent to have its works reproduced by the Great Library?

5 The publishers have filed a cross-appeal in which they submit that, in addition to infringing copyright by reproducing copies of their works, the Law Society infringed copyright both by faxing and by selling copies of the publishers' copyrighted works through its custom photocopy service. The publishers also contend that the Great Library does not qualify for the library exemption under the *Copyright Act* and, finally, that they are entitled to an injunction to the extent that the Law Society has been found to infringe any one or more of their copyrighted works. The four sub-issues that the Court must address on this cross-appeal are:

> (1) Did the Law Society's fax transmissions of the publishers' works constitute communications "to the public" within s. 3(1)(*f*) of the *Copyright Act* so as to constitute copyright infringement?
>
> (2) Did the Law Society infringe copyright by selling copies of the publishers' works contrary to s. 27(2) of the *Copyright Act*?
>
> (3) Does the Law Society qualify for an exemption as a "library, archive or museum" under ss. 2 and 30.2(1) of the *Copyright Act*?
>
> (4) To the extent that the Law Society has been found to infringe any one or more of the publishers' copyrighted works, are the publishers entitled to a permanent injunction under s. 34(1) of the *Copyright Act*?

6 With respect to the main appeal, I conclude that the Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service. Although the works in question were "original" and thus covered by copyright, the Law Society's dealings with the works were for the purpose of research and were fair dealings within s. 29 of the *Copyright Act*. I also find that the Law Society did not authorize infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

7 On the cross-appeal, I conclude that there was no secondary infringement by the Law Society; the fax transmissions were not communications to the public and the Law Society did not sell copies of the publishers' works. In light of my finding on appeal that the Law Society's dealings with the publishers' works were fair, it is not necessary to decide whether the Great Library qualifies for the library exemption. This said, I would conclude that the Great Library does indeed qualify for this exemption. Finally, in light of my conclusion that there has been no copyright infringement, it is not necessary to issue an injunction in this case. I would dismiss the cross-appeal.

II. Analysis on Appeal

8 Copyright law in Canada protects a wide range of works including every original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works: see s. 5 and ss. 2 and 2.1 of the *Copyright Act*. Copyright law protects the expression of ideas in these works; it does not protect ideas in and of themselves. Thorson P. explained it thus in *Moreau v. St. Vincent*, [1950] Ex. C.R. 198 (Can. Ex. Ct.), at p. 203:

> It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.

It flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection: see s. 2 definitions of "dramatic work" and "computer program" and, more generally, *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158 (Fed. T.D.), at p. 162; *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4 (Fed. T.D.), at p. 7.

9 In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Galerie d'art du Petit Champlain inc. c. Théberge*, [2002] 2 S.C.R. 336, 2002 SCC 34 (S.C.C.), at para. 5; *Bishop v.*

Stevens, [1990] 2 S.C.R. 467 (S.C.C.), at p. 477; *Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 (S.C.C.), at p. 373. In interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory interpretation whereby "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

10 Binnie J. recently explained in *Théberge , supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator...
>
> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature.
>
> In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.

11 Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users. Part I of the Act specifies the scope of a creator's copyright and moral rights in works. For example, s. 3 of the Act specifies that only copyright owners have the right to copy or to authorize the copying of their works:

> **3**. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof...
>
> . . . . .
>
> and to authorize any such acts.

12 Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do". More specific examples of how copyright is infringed are set out in s. 27(2) of the Act. The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29-29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss. 29.4-30 (educational institutions), and ss. 30.1-30.5. Part IV of the *Copyright Act* specifies the remedies that may be awarded in cases where copyright has been infringed. Copyright owners may be entitled to any number of different remedies such as damages and injunctions, among others.

13 This case requires this Court to interpret the scope of both owners' and users' rights under the *Copyright Act*, including what qualifies for copyright protection, what is required to find that the copyright has been infringed through authorization and the fair dealing exceptions under the Act.

(1) Are the Publishers' Materials "Original Works" Covered by Copyright?

(a) The Law

14 Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every *original* literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary ... work" as including "every original production in the literary ... domain, whatever may be the mode or form of its expression". Since copyright protects only

the expression or form of ideas, "the originality requirement must apply to the expressive element of the work and not the idea": S. Handa, *Copyright Law in Canada* (2002), at p. 209.

15 There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. See, for example, *University of London Press v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 (Eng. Ch. Div.); *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (Fed. T.D.). This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality, which is premised on a natural rights or Lockean theory of "just desserts", namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. See, for example, *Feist Publications Inc. v. Rural Telephone Service Co.* (1991), 499 U.S. 340 (U.S. Kan.) ; *Tele-Direct (Publications) Inc. v. American Business Information Inc.* (1997), [1998] 2 F.C. 22 (Fed. C.A.). This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection. It has been suggested that the "creativity" approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. See *Feist Publications Inc. , supra*, at p. 353.

16 I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

17 In reaching this conclusion, I have had regard to: (1) the plain meaning of "original"; (2) the history of copyright law; (3) recent jurisprudence; (4) the purpose of the *Copyright Act*; and (5) that this constitutes a workable yet fair standard.

(i) The Plain Meaning of "Original"

18 The plain meaning of the word "original" suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment. The *Concise Oxford Dictionary* (7th ed. 1982), at p. 720, defines "original" as follows:

> 1. *a* .... existing from the first, primitive, innate, initial, earliest; ... **2.** that has served as pattern, of which copy or translation has been made, not derivative or dependant, first-hand, not imitative, novel in character or style, inventive, creative, thinking or acting for oneself.
>
> "Original"'s plain meaning implies not just that something is not a copy. It includes, if not creativity *per se*, at least some sort of intellectual effort. As Professor Gervais has noted, "[w]hen used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of 'originated,' and fails to reflect the ordinary sense of the word": D.J. Gervais, "*Feist* Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law" (2002), *49 J. Copyright Soc'y U.S.A.* 949, at p. 961.

(ii) History of Copyright

19 The idea of "intellectual creation" was implicit in the notion of literary or artistic work under the *Berne Convention for the Protection of Literary and Artistic Works* (1886), to which Canada adhered in 1923, and which served as the precursor to Canada's first *Copyright Act*, adopted in 1924. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), at p. 900. Professor Ricketson has indicated that in adopting a sweat of the

brow or industriousness approach to deciding what is original, common law countries such as England have "depart[ed] from the spirit, if not the letter, of the [Berne] Convention" since works that have taken time, labour or money to produce but are not truly artistic or literary intellectual creations are accorded copyright protection: Ricketson, *supra*, at p. 901.

20 In the international context, France and other continental civilian jurisdictions require more than mere industriousness to find that a work is original. "Under the French law, originality means both the intellectual contribution of the author and the novel nature of the work as compared with existing works": Handa, *supra*, at p. 211. This understanding of originality is reinforced by the expression "*le droit d'auteur*" - literally the "*author's* right" -- the term used in the French title of the *Copyright Act*. The author must contribute something intellectual to the work, namely skill and judgment, if it is to be considered original.

(iii) Recent Jurisprudence

21 Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in *Tele-Direct (Publications) Inc. , supra*, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law." See also *Édutile Inc. v. Automobile Protection Assn. (APA)*, [2000] 4 F.C. 195 (Fed. C.A.), at para. 8, adopting this passage.

22 The United States Supreme Court explicitly rejected the "sweat of the brow" approach to originality in *Feist Publications Inc. , supra*. In so doing, O'Connor J. explained at p. 353 that, in her view, the "sweat of the brow" approach was not consistent with the underlying tenets of copyright law:

> The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement -- the compiler's original contributions -- to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information."... "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law - that no one may copyright facts or ideas.
>
> As this Court recognized in *Compo Co., supra*, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor's J. concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O'Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist, supra*, at pp. 345 and 358.

(iv) Purpose of the Copyright Act

23 As mentioned, in *Galerie d'art du Petit Champlain inc. c. Théberge, supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. See J. Litman, "The Public Domain" (1990), 39 *Emory L.J.* 965, at p. 969, and C.J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28 *Queen's L.J.* 1. By way of contrast, when an author must exercise skill and judgment to

ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) Workable, Yet Fair Standard

24 Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

(vi) Conclusion

25 For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".

(b) Application of the Law to these Facts

26 At trial, the respondent publishers claimed copyright in eleven works: three reported judicial decisions; the three headnotes preceding these decisions; the Annotated *Martin's Ontario Criminal Practice 1999*; a case summary; a topical index; the textbook *Economic Negligence* (1989); and the monograph "Dental Evidence", being chapter 13 in *Forensic Evidence in Canada* (1991). Gibson J. held that the publishers' works should be judged against a standard of intellect and creativity in order to determine if they were original. Based on this standard of originality, the trial judge found that the publishers only had copyright in the Annotated *Criminal Practice*, the textbook and the monograph. He concluded that the remaining eight works were not original and, therefore, were not covered by copyright ((1999), [2000] 2 F.C. 451 (Fed. T.D.)).

27 On appeal, the Law Society did not challenge the trial judge's findings with respect to the three works in which he found copyright did exist, with the exception of questioning whether the monograph constituted a "work" within the meaning of the *Copyright Act*. The Federal Court of Appeal adopted the "sweat of the brow" approach to originality and found that if a work was more than a mere copy, it would be original. On this basis, Linden J.A., writing for the majority, held that all of the remaining works were original and therefore covered by copyright ([2002] 4 F.C. 213 (Fed. C.A.)). The Law Society appeals, contending that the headnotes, case summary, topical index and reported judicial decisions are not "original" within the meaning of the *Copyright Act* and, therefore, are not covered by copyright.

28 As stated, in order to be original, a work must have originated from the author, not be copied, and must be the product of the exercise of skill and judgment that is more than trivial. Applying this test, all of the works in question are original and therefore covered by copyright.

(i) Headnotes

29 The Federal Court of Appeal held that "headnotes", defined as including the summary of the case, catchlines, statement of the case, case title and case information, are more than mere copies and hence "original" works in which copyright subsists. It found that the headnotes are more than simply an abridged version of the reasons; they consist of

independently composed features. As Linden J.A. explained, at para. 73, the authors of the headnotes could have chosen to make the summaries "long or short, technical or simple, dull or dramatic, well written or confusing; the organization and presentation might have varied greatly".

30 Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute "original" works in which copyright subsists.

(ii) Case Summary

31 For substantially the same reasons as given for headnotes, the case summary is also covered by copyright. A summary of judicial reasons is not simply a copy of the original reasons. Even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract and how to arrange them in the summary requires an exercise of skill and judgment.

(iii) Topical Index

32 The topical index is part of the book *Canada GST Cases*, (1997). It provides a listing of cases with short headings to indicate the main topics covered by the decision and very brief summaries of the decisions. The Federal Court of Appeal held that the index was original in that it required skill and effort to compile. I agree. The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an "original" work in which copyright subsists.

(iv) Reported Judicial Decisions

33 The reported judicial decisions, when properly understood as a *compilation* of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright. Copyright protects originality of *form* or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of copyright, but the over-all arrangement of them which the plaintiff through his industry has produced": *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C. S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (U.K. H.L.), at p. 469.

34 The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

35 This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical

exercise. As such, the reported reasons, when disentangled from the rest of the compilation - namely the headnote - are *not* covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.

36 In summary, the headnotes, case summary, topical index and compilation of reported judicial decisions are all works that have originated from their authors and are not mere copies. They are the product of the exercise of skill and judgment that is not trivial. As such, they are all "original" works in which copyright subsists. The appeal of these findings should be dismissed.

(2) Authorization: The Self-Service Photocopiers

(a) The Law

37 Under s. 27(1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorizing the exercise of his or her own rights. It does not infringe copyright to authorize a person to do something that would not constitute copyright infringement. See *C.A.P.A.C. v. CTV Television Network*, [1968] S.C.R. 676 (S.C.C.), at p. 680. The publishers argue that the Law Society is liable for breach of copyright under this section because it implicitly authorized patrons of the Great Library to copy works in breach of the *Copyright Act*.

38 "Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors & Publishers Assn. (Canada)*, [1953] 2 S.C.R. 182 (S.C.C.), at p. 193; *de Tervagne v. Beloeil (Town)*, [1993] 3 F.C. 227 (Fed. T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "give approval to, sanction, permit, favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *C.B.S. Inc. v. Ames Records & Tapes*, [1981] 2 All E.R. 812 (Eng. Ch. Div.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak Corp. , supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak Corp.* , *supra*; *de Tervagne* , *supra*: see also, J.S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (looseleaf), at p. 21-104 and P.D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

(b) Application of the Law to these Facts

39 For several decades, the Law Society has maintained self-service photocopiers for the use of its patrons in the Great Library. The patrons' use of the machines is not monitored directly. Since the mid-1980s, the Law Society has posted the following notice above each machine:

> The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by users of these machines.
>
> At trial, the Law Society applied for a declaration that it did not authorize copyright infringement by providing self-service photocopiers for patrons of the Great Library. No evidence was tendered that the photocopiers had been used in an infringing manner.

40 The trial judge declined to deal with this issue, in part because of the limited nature of the evidence on this question. The Federal Court of Appeal, relying in part on the Australian High Court decision in *Moorehouse v. University of New South Wales*, [1976] R.P.C. 151 (Australia H.C.), concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users.

41 With respect, I do not agree that this amounted to authorizing breach of copyright. *Moorhouse, supra*, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, *Copyright Law* (2000), at p. 27, and McKeown, supra, at p. 21-108. In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.

42 Applying the criteria from *Muzak Corp. , supra*, and *de Tervagne , supra*, I conclude that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law.

43 First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright, I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

44 Second, the Court of Appeal erred in finding that the Law Society's posting of the notice constitutes an express acknowledgement that the photocopiers will be used in an illegal manner. The Law Society's posting of the notice over the photocopiers does not rebut the presumption that a person authorizes an activity only so far as it is in accordance with the law. Given that the Law Society is responsible for regulating the legal profession in Ontario, it is more logical to conclude that the notice was posted for the purpose of reminding the Great Library's patrons that copyright law governs the making of photocopies in the library.

45 Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement: see, for example, *De Tervagne, supra*. Nor does the Law Society exercise control over which works the patrons choose to copy, the patron's purposes for copying or the photocopiers themselves.

46 In summary, I conclude that evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. I would allow this ground of appeal.

(3) The Law Society and Fair Dealing

47 The Great Library provides a custom photocopy service. Upon receiving a request from a lawyer, law student, member of the judiciary or authorized researcher, the Great Library staff photocopies extracts from legal material within its collection and sends it to the requester. The question is whether this service falls within the fair dealing defence under s. 29 of the *Copyright Act* which provides: "Fair dealing for the purpose of research or private study does not infringe copyright."

(a) The Law

48 Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be

interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

49 As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

50 In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

51 The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research". Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

52 The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, *supra*, at p. 23-6. Lord Denning explained this eloquently in *Hubbard v. Vosper* (1971), [1972] 1 All E.R. 1023 (Eng. C.A.), at p. 1027:

> It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

53 At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard , supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

(i) The Purpose of the Dealing

54 In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. See McKeown, *supra*, at p. 23-6. See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Eng. Ch. Div.). Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.

(ii) The Character of the Dealing

55 In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. Mc-Graw Hill Book Co. (U.K.) Ltd.*, [1983] F.S.R. 545 (Eng. Ch.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) The Amount of the Dealing

56 Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from *Hubbard* indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

(iv) Alternatives to the Dealing

57 Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

(v) The Nature of the Work

58 The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work - one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 at p. 264.

(vi) Effect of the Dealing on the Work

59 Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (Eng. C.A.), *per* Robert Walker L.J.

60 To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing

depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.

(b) Application of the law to these facts

61 In 1996, the Law Society implemented an "Access to the Law Policy" ("Access Policy") which governs the Great Library's custom photocopy service and sets limits on the types of requests that will be honoured:

> **Access to the Law Policy**
>
> The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.
>
> This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.
>
> **Guidelines to Access**
>
> 1 The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.
>
> 2 The specific purposes are research, review, private study and criticism, as well as use in court, tribunal, and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.
>
> 3 The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.
>
> 4 As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.
>
> 5 This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.
>
> When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

62 At trial, the Law Society claimed that its custom photocopy service does not infringe copyright because it is a fair dealing within the meaning of s. 29 of the *Copyright Act*. The trial judge held that the fair dealing exception should be strictly construed. He concluded that copying for the custom photocopy service was not for the purpose of either research or study and therefore was not within the ambit of fair dealing. The Court of Appeal rejected the argument that the fair dealing exception should be interpreted restrictively. The majority held that the Law Society could rely on the purposes of its patrons to prove that its dealings were fair. The Court of Appeal concluded, however, that there was not sufficient evidence to determine whether or not the dealings were fair and, consequently, that the fair dealing exception had not been proven.

63 This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright". The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

64 The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism ... may be provided to users of the Great Library". When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

65 The evidence also establishes that the dealings were fair, having regard to the factors discussed earlier.

(i) Purpose of the Dealing

66 The Access Policy and its safeguards weigh in favour of finding that the dealings were fair. It specifies that individuals requesting copies must identify the purpose of the request for these requests to be honoured, and provides that concerns that a request is not for one of the legitimate purposes under the fair dealing exceptions in the *Copyright Act* are referred to the Reference Librarian. This policy provides reasonable safeguards that the materials are being used for the purpose of research and private study.

(ii) Character of the Dealing

67 The character of the Law Society's dealings with the publishers' works also supports a finding of fairness. Under the Access Policy, the Law Society provides single copies of works for the specific purposes allowed under the *Copyright Act*. There is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession. Copying a work for the purpose of research on a specific legal topic is generally a fair dealing.

(iii) Amount of the Dealing

68 The Access Policy indicates that the Great Library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. The Access Policy states that the Great Library will typically honour requests for a copy of one case, one article or one statutory reference. It further stipulates that the Reference Librarian will review requests for a copy of more than five percent of a secondary source and that, ultimately, such requests may be refused. This suggests that the Law Society's dealings with the publishers' works are fair. Although the dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred.

(iv) Alternatives to the Dealing

69 It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty per cent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source. Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library. If researchers could not request copies of the work or make copies of the works themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters.

70 The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act*'s balance between owner's rights and user's interests.

(v) Nature of the Work

71 I agree with the Court of Appeal that the nature of the works in question - judicial decisions and other works essential to legal research -- suggests that the Law Society's dealings were fair. As Linden J.A. explained, at para. 159: "It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained." Moreover, the Access Policy puts reasonable limits on the Great Library's photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Requests for copies will be honoured only if the user intends to use the works for the purpose of research, private study, criticism, review or use in legal proceedings. This further supports a finding that the dealings were fair.

(vi) Effect of the Dealing on the Work

72 Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation.

(vii) Conclusion

73 The factors discussed, considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.

(4) Canada Law Book's Consent

74 Under s. 27(1) of the *Copyright Act*, a person infringes copyright if he or she does something that only the owner of the copyright has the right to do without the owner's consent. On appeal to this Court, the Law Society submits that

six of the items that the respondent publishers have claimed were copied in infringement of copyright were copied at the request of Jean Cummings, a lawyer who had been asked by Canada Law Book's Vice-President to obtain copies of these works from the Law Society. As such, the Law Society contends that the copies were made with the consent of Canada Law Book and therefore were not an infringement of copyright.

75 This issue was not really addressed in the courts below. In light of my findings on the issue of fair dealing, it is not necessary to answer this question to dispose of this appeal, and I decline to do so.

(5) Conclusion on Main Appeal

76 I would allow the appeal and issue a declaration that the Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy. I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.

III. Analysis on Cross-Appeal

(1) Are the Law Society's fax transmissions communications to the public?

77 At trial, the publishers argued that the Law Society's fax transmissions of copies of their works to lawyers in Ontario were communications "to the public by telecommunication" and hence infringed s. 3(1)(*f*) of the *Copyright Act*. The trial judge found that the fax transmissions were not telecommunications to the public because they "emanated from a single point and were each intended to be received at a single point" (at para. 167). The Court of Appeal agreed, although it allowed that a series of sequential transmissions might constitute an infringement of an owner's right to communicate to the public.

78 I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

79 On the evidence in this case, the fax transmissions were not communications to the public. I would dismiss this ground of cross-appeal.

(2) Did the Law Society infringe copyright in the publishers' works by selling copies contrary to s. 27(2) of the Copyright Act?

80 Under s. 27(2)(*a*) of the *Copyright Act*, it is an infringement of copyright to sell a copy of a work that the person knows or should have known infringes copyright, a practice known as secondary infringement. The majority at the Court of Appeal rejected the allegation of secondary infringement on the ground that it was not established that the Law Society knew or should have known it was dealing with infringing copies of the publishers' works. The publishers appeal this finding on cross-appeal.

81 At the Court of Appeal, Rothstein J.A., in his concurring judgment, properly outlined the three elements that must be proven to ground a claim for secondary infringement: (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with a product of infringement; and (3) the secondary dealing must be established; that is, there must have been a sale.

82 In the main appeal, I have concluded that the Law Society did not infringe copyright in reproducing the publishers' works in response to requests under its custom photocopy service. Absent primary infringement, there can be no secondary infringement. I would dismiss this ground of cross-appeal.

(3) Does the Law Society's Great Library qualify for an exemption as a "library, archive or museum" under ss. 2 and 30.2(1) of the Copyright Act?

83 In 1999, amendments to the *Copyright Act* came into force allowing libraries, archives and museums to qualify for exemptions against copyright infringement. Under s. 30.2(1), a library or persons acting under its authority may do anything on behalf of any person that the person may do personally under the fair dealing exceptions to copyright infringement. Section 2 of the *Copyright Act* defines library, archive or museum. In order to qualify as a library, the Great Library: (1) must not be established or conducted for profit; (2) must not be administered or controlled by a body that is established or conducted for profit; and (3) must hold and maintain a collection of documents and other materials that is open to the public or to researchers. The Court of Appeal found that the Great Library qualified for the library exemption. The publishers appeal this finding on the ground that the Law Society, which controls the library, is indirectly controlled by the body of lawyers authorized to practise law in Ontario who conduct the business of law for profit.

84 I concluded in the main appeal that the Law Society's dealings with the publishers' works were fair. Thus, the Law Society need not rely on the library exemption. However, were it necessary, it would be entitled to do so. The Great Library is not established or conducted for profit. It is administered and controlled by the Benchers of the Law Society. Although some of the Benchers, when acting in other capacities, practise law for profit, when they are acting as administrators of the Great Library, the Benchers are not acting as a body established or conducted for profit. The Court of Appeal was correct in its conclusion on this point. I would dismiss this ground of cross-appeal.

(4) Are the publishers entitled to a permanent injunction under s. 34(1) of the Copyright Act?

85 Under s. 34(1) of the *Copyright Act*, the copyright owner is entitled to all remedies, including an injunction, for the infringement of copyright in his or her work. An injunction is, in principle, an equitable remedy and, thus, it is within the Court's discretion to decide whether or not to grant an injunction. See P.E. Kierans and R. Borenstein, "Injunctions - Interlocutory and Permanent", in R.E. Dimock, ed., *Intellectual Property Disputes: Resolutions* & *Remedies* (2002), vol. 2, at p. 15-4.

86 Given my finding on the main appeal that the Law Society did not infringe copyright in the publishers' works, it is unnecessary to consider whether the Court of Appeal erred in choosing not to issue an injunction in this case. I would dismiss this ground of appeal.

(5) Conclusion on Cross-Appeal

87 In the result, I would dismiss the cross-appeal.

IV. Conclusion

88 On the main appeal, I conclude that the Law Society did not infringe copyright through its custom photocopy service when it provided single copies of the publishers' works to its members. The publishers' headnotes, case summary, topical index and compilation of reported judicial decisions are all "original" works covered by copyright. They originated from their authors, are not mere copies and are the product of the exercise of skill and judgment that is not trivial. That said, the Great Library's dealings with the works were for the purpose of research and were fair dealings within the meaning of s. 29 of the *Copyright Act* and thus did not constitute copyright infringement. I also conclude that the Law Society did not authorize copyright infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

89 My conclusions on the cross-appeal follow from those on the main appeal. No secondary infringement of copyright by the Law Society is established. The Law Society's fax transmissions did not constitute communications to the public and it did not sell copies of the publishers' works. Were it necessary, I would conclude that the Great Library qualifies for

a library exemption under the *Copyright Act*. Finally, in light of my finding that there has been no copyright infringement in this case, an injunction should not be issued in this case. I would dismiss the cross-appeal.

90 In the result, the appeal is allowed and the cross-appeal dismissed. I would issue a declaration that the Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its "Access to the Law Policy". I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright. Given the appellant's success on the appeal and cross-appeal, it is entitled to costs throughout.

Appeal allowed with costs and cross-appeal dismissed with costs.

Appeal allowed; cross-appeal dismissed.

Pourvoi accueilli; pourvoi incident rejeté.

APPENDIX — Legislative Provisions:

Copyright Act, R.S.C. 1985, c. C-42, as amended.

2. "every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science "library, archive or museum" means

(*a*) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

(*b*) any other non-profit institution prescribed by regulation

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(*a*) to produce, reproduce, perform or publish any translation of the work,

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(*e*) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(*g*) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan, (*h*) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(*i*) in the case of a musical work, to rent out a sound recording in which the work is embodied, and to authorize any such acts.

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:...

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(*a*) sell or rent out,

(*b*) distribute to such an extent as to affect prejudicially the owner of the copyright,

(*c*) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(*d*) possess for the purpose of doing anything referred to in paragraphs (*a*) to (*c*), or

(*e*) import into Canada for the purpose of doing anything referred to in paragraphs (*a*) to (*c*), a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(*a*) the source; and

(*b*) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(*a*) the source; and

(*b*) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

30.2 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

End of Document

11

1989 CarswellNat 720
Competition Tribunal

Chrysler Canada Ltd. v. Canada (Competition Tribunal)

1989 CarswellNat 720, [1989] C.L.D. 1247, [1989] C.C.T.D. No. 49, 27 C.P.R. (3d) 1

In The Matter of an application by the Director of Investigation and Research under section 75 of the Competition Act, R.S.C., 1985, c. C-34, as amended

In The Matter of a refusal to supply automotive parts for export by Chrysler Canada Ltd. to Richard Brunet

The Director of Investigation and Research Applicant v. Chrysler Canada Ltd. Respondent

Teitelbaum, Martin, Roseman Members

Judgment: October 13, 1989
Docket: Doc. CT-88/4

Counsel: Counsel For the Applicant: *William J. Miller John S. Tyhurst John F. Rook, Q.C.*
Counsel For the Respondent: *Thomas A. McDougall, Q.C. Anne Mactavish*.
Amicus Curiae: Yves Bériault Madeleine Renaud.

Subject: Intellectual Property; Property; Corporate and Commercial

Headnote

Trade and Commerce --- Combines and competition legislation — Investigation and prosecution — Judicial review and appeals

***M.M. Teitelbaum*:**

COMPETITION TRIBUNAL REASONS AND ORDER

1 On December 14, 1988, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended ("Act"), requesting the following relief:

1. An order against the Respondent Chrysler Canada Ltd. (Chrysler) requiring that it forthwith and thereafter accept Richard Brunet (Brunet) as a customer on trade terms usual and customary to its relationship with Brunet for the supply of Chrysler Parts (as hereafter defined) to Brunet; and

2. Such other and further orders which in the circumstances may be just, including:

a) requiring and directing that Chrysler reverse all steps taken to dissuade any person (including Chrysler franchised dealers) in Canada from conducting business with Brunet with respect to Chrysler Parts;

b) restraining Chrysler from combining or arranging with any other person to refuse, suppress, hinder or delay the supply of Chrysler Parts to Brunet; and

c) directing that Chrysler take all such ancillary and necessary steps and actions to restore Brunet to the position he enjoyed before the actions herein complained of.

2 In 1977 Richard Brunet ("Brunet") opened and began to operate a business in the City of Montreal, Province of Quebec, commonly known as R. Brunet Company ("RBC"). The business was registered as a sole proprietorship.

3 Brunet's father had operated a similar business in New York City, State of New York, in the United States of America, under the name of G. Brunet Company. This business was involved in the export of automotive parts, including automotive parts of Chrysler Corporation, Ford Corporation and General Motors Corporation. The automotive parts were exported, in the main, to Colombia, Peru and Venezuela. In November 1974, following the death of his father, Brunet took over the operation of his father's business until 1976 when he came to live in Canada.

4 Brunet, as had his father, exported automotive parts to markets outside of North America, initially to South America, and later to the Middle East, Scandinavia and the United Kingdom.

5 Although RBC deals with the sale of automotive parts which it purchases from various suppliers, the present application pertains to the relationship between RBC and Chrysler Canada and the sale by RBC of Chrysler automotive parts in the export market.

6 Throughout the proceedings, certain terminology relating to the Chrysler parts has been used. The most frequent references are to two groups of Chrysler parts: "A parts" and "B Parts". On its price lists, Chrysler [1] identifies its parts by a seven-digit number and by one of the above two letters.

1 "Chrysler" without a modifier refers to the entire Chrysler organization in North America.

7 B Parts are commonly known as "captive" parts. Mr. Clifford Roy Burnett ("Burnett"), the recently retired Vice-President of Parts and Service and Technical Programs of Chrysler Canada, who since 1974 had the responsibility through various positions for the parts distribution in Canada, testified that some automotive parts that are considered captive parts may in fact be available from a source other than Chrysler. Generally, however, if an owner of a Chrysler motor vehicle must replace a B Part, the part will have to be obtained from Chrysler. Sheet metal parts or interior mouldings were referred to as clear examples of captive parts that could only be supplied by Chrysler.

8 A Parts are commonly known as "competitive" parts since these parts are available from a variety of automotive parts manufacturers for a particular application. An example of a competitive part would be a shock absorber or a fan belt.

9 Automotive parts can also be divided according to the use to which the part is put. When reference is made to "service" parts, this is taken to mean parts that are used to repair a vehicle, consequent upon an accident or some other malfunction, as opposed to "aftermarket" parts which are replaced as a matter of course during routine maintenance. The breakdown according to application relates to the captive/competitive dichotomy in the following way: service parts may be both captive and competitive; aftermarket parts are competitive more than captive.

10 Certain brand names specific to the Chrysler organization also appear in the evidence. "Autopar" is a line of Chrysler parts which comprises only competitive parts and which is marketed only by Chrysler Canada. "Mopar" is a line of Chrysler parts which, in Canada, includes mainly captive parts.

11 Finally, mention should be made of the "Interparts" programs of Chrysler U.S. Interparts programs involve a bulk purchase of some minimum quantity of an automotive part from a special production run of that specific part. These programs include both captive and competitive parts and are only available through Chrysler U.S.

12 RBC had its first dealings with Chrysler Canada in 1977 and continued to buy from them until the events that led to the present application. Apart from selling Chrysler parts Brunet dealt with two major suppliers in the United States (described as "Other U.S." in Table 1 below). He has also purchased small volumes of auto parts from several suppliers in Canada. His principal supplier in the U.S. until 1983 was Ford Corporation. His relationship with this company ended in 1985. The "Other U.S." since 1985 consists, for practical purposes, of purchases from a single source of supply on

behalf of a particular customer. The purchases from Chrysler Canada dealers relate to the present proceedings. Table 1 divides the sales of RBC by the aforementioned sources of supply since 1984.

TABLE 1
R. Brunet Company
Gross Sales by Line of Business

Year	Chrys. Canada	Chrys. Canada Dealers	Chrys. U.S.	Inter-Parts M.D.<*>	Other Canada	Other U.S.
1989<#>	-	26,618	67,630	-	21,706	-
1988	-	119,310	52,734	156,464	23,985	376,648
1987	99,154	223,495	24,126	325,872	78,280	140,890
1986	362,245	-	25,180	171,551	50,920	225,207
1985	259,892	-	20,442	95,235	11,984	338,824
1984	300,394	-	27,813	23,631	57,373	508,370

Notes:
<*> M.D. = Master Distributors
<#> To May 12, 1989 only. Transactions with customers were placed in supplier categories by Mr. Reinke of Arthur Anderson Co. based on the supplier from whom Brunet made the largest purchases in each transaction. As a result, there are some minor discrepancies between the values in the table for 1989 and the actual sources of supply.

Total Gross Sales

Year	Total
1989<#>	115,954
1988	729,141
1987	891,817
1986	835,103
1985	726,377
1984	917,581

Notes:
<#> To May 12, 1989 only.
Sources:
Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand, for the Director of Investigation and Research, Schedules A to H; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989, prepared by B.J. Reinke, C.A.

13 It is uncontested that Brunet was encouraged by Chrysler Canada throughout his association with it to expand the sale of Chrysler Canada auto parts in the export market. A number of actions were taken by Chrysler Canada in its treatment of Brunet to allow for the needs of his customers who faced particular problems of exchange controls and import permits with time deadlines. The details of some of the particular services provided by Chrysler Canada will be discussed in connection with the definition of market. Brunet undertook to represent the Autopar line at trade shows in South America with posters supplied by Chrysler Canada. On occasion Chrysler Canada referred potential customers to Brunet.

14 On August 29, 1986, Brunet received a telephone call from a Mr. P.R. Williams, National Parts and Sales and Marketing Manager for Chrysler Canada, who informed Brunet that all his orders with Chrysler Canada had been placed on hold. By letter dated October 8, 1986, in reply to a letter from Brunet dated October 2, 1986, sent to Brunet and dealing with a matter referred to as "Requirement for Britain", [2] Burnett advised Brunet that there was "no longer any organizational responsibility for handling these orders in Canada". This letter went on to state that all orders currently in the system would be processed according to "normal practice and/or availability of supply":

2 Exhibit 3, Tab 162.

October 8, 1986

Mr. Richard Brunet

R. Brunet Company

Suite 918

360 St. James Street West

Montreal, Quebec

H2Y 1P5

Dear Richard:

Your letter of October 2, 1986 is received and since there is no longer any organizational responsibility for handling these orders in Canada I have referred your request to Mr. B.J. Lerner in the U.S. Chrysler Export Sales Office who will handle all of your requirements.

All orders currently in the system will be filled and shipped as per our normal practice and/or availability of supply.

Thank you for your inquiry. You will hear from Mr. Lerner's office in the near future.

Yours very truly,

(s) C.R. Burnett [3]

3 Exhibit 3, Tab 164.

15 The orders currently in the system were filled by Chrysler Canada over the following five to six months. No new orders were accepted by Chrysler Canada after October 8, 1986 causing Brunet to try to find alternative sources of supply. In January 1987, Brunet approached several Montreal-area Chrysler Canada dealers in order to source parts to service his customers. It did not take long for Chrysler Canada to become aware that Brunet was purchasing parts from its dealers. This information was relayed to Chrysler Canada's head office by Chrysler Canada field representatives through its Montreal office. Suspicion was also aroused by a large order placed by a Chrysler Canada dealer through the Chrysler Canada computer system. This order contained an unusually large number of older automotive parts, far in excess of normal domestic demand. A representative of Chrysler Canada (head office) contacted the Sales Manager of the Regional Office in Pointe Claire, Province of Quebec, a Mr. Jacques St. Pierre, and asked St. Pierre to have his district managers instruct their dealers not to sell Chrysler automotive parts for export.

16 This initiative was followed up by a bulletin to all Chrysler Canada dealers dated May 8, 1987:

Bulletin No. 87-37

May 8, 1987

TO ALL DEALERS AND AUTOPAR DISTRIBUTORS OF CHRYSLER CANADA LTD.

EXPORT PARTS SALES

We have received several inquiries recently from Dealers regarding the sale of Chrysler Parts for *Export Sales* purposes. The requests may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets.

The sales of Mopar and Autopar Parts by Chrysler Canada is strictly *to service our Canadian customers, not for export*. If you receive an inquiry concerning export sales, please contact your Regional Parts Sales Manager, for referral to our Export Sales Office in Detroit. All Chrysler Canada Export Sales will be handled in this manner.

We would appreciate your co-operation in this matter.

(s) P.R. Williams

P.R. Williams

National Parts Sales

and Marketing Manager [4]

4 Exhibit 4, Tab 230 (underlining added).

Bulletin nº 87-37

Le 8 mai 1987

AUX CONCESSIONAIRES ET DISTRIBUTEURS AUTOPAR DE CHRYSLER CANADA LTÉE

VENTE DE PIECES POUR L'EXPORTATION

Plusieurs concessionnaires nous ont récemment contactés au sujet de la vente de pièces Chrysler *pour l'exportation*. Les demandes sont peut-être reliées à la parution de certains articles dans la presse déclarant que Chrysler étendrait la vente de certains produits de fabrication nord-américaine aux marchés étrangers.

La vente des produits Mopar et Autopar par Chrysler Canada est strictement *réservée à nos clients canadiens et non à l'exportation*. Pour toute demande concernant la vente pour l'exportation, veuillez communiquer avec votre directeur régional, secteur vente des pièces, qui en référera au bureau des ventes pour l'exportation à Detroit. Toutes les ventes des pièces pour l'exportation de Chrysler Canada seront ainsi traitées.

Votre collaboration dans cette affaire sera grandement appréciée.

Le Directeur national,

vente et commercialisation

des pièces,

(s) P.R. Williams

P.R. Williams [5]

5 *Ibid.* (underlining added).

17 Despite the general language of this bulletin, the Tribunal is satisfied, from the testimony of Burnett, that the bulletin *was aimed at preventing Brunet* from obtaining Chrysler parts to service his customers.

Q. Now, in the second sentence in that first paragraph, it says:

> The request may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets.

Given your evidence to this point on this bulletin, would you agree with me that the specific impetus for the bulletin was Mr. Brunet and not any articles that may have appeared in the press?

A. That is true, although there were articles in the press about Chrysler entering the European market.

Q. But I put it to you that, in the absence of Mr. Brunet's activities, you would not have sent this memorandum.

A. Probably not, sir. [6]

6 Cross-examination of Burnett at p. 1534 of the transcript.

18 Notwithstanding the issuance of the bulletin Brunet was still able to purchase, with difficulty, Chrysler parts from Chrysler Canada dealers. On September 27, 1987 a second bulletin was issued by Chrysler Canada. [7] This second bulletin was much the same as the first. It emphasized, as did the first, that parts were not to be sold for export and that all requests for parts for export should be referred to the dealer's Regional Manager who, in turn, would refer the matter to the office of Export Sales in Detroit.

7 Exhibit 16.

19 Some time after the May 1987 bulletin, Chrysler Canada commenced a review of all of its dealer agreements which culminated in the re-signing of all the Chrysler Canada dealers to new dealer agreements. A clause was inserted in order to restrict parts sales to the domestic market in the following terms:

> Whereas the parties hereto have heretofore entered into a Sales and Service Agreement relating to, among other things, a means for the sale, in Canada, of parts and accessories and other products and services manufactured or distributed by CHRYSLER....
>
> *And to provide parts to the Canadian domestic market to assure service to those vehicles sold in Canada for the full extent of their service requirements.* [8]

8 *Parts Wholesale Sales Agreement*, Exhibit 6, Tab 338 (underlining added). See also *Parts Merchandising Sales Agreement*, Exhibit 26.

Although no sanctions or penalties have as yet been applied against any of its dealers by Chrysler Canada for breach of the clause, Burnett is of the view that the new agreement gives Chrysler Canada the power to terminate the franchise of a dealer who sells parts to Brunet. Changes were also made to the computerized ordering system of Chrysler Canada to flag atypical orders involving large volumes or unusual parts.

Section 75 of the Competition Act

20 On the basis of the above facts the Director instituted the proceedings pursuant to section 75 of the Act. Section 75 reads:

> 75. (1) Where, on application by the Director, the Tribunal finds that
>
> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
>
> (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
>
> (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and
>
> (d) the product is in ample supply,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.
>
> (2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.
>
> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

21 In order for the Tribunal to exercise its discretion to make an order pursuant to the section the Director must establish all of the elements contained in each of the paragraphs (1)(a) to (1)(d). Paragraphs (1)(c) and (1)(d) are not in serious dispute. The Tribunal is satisfied that Brunet is willing and able to meet the usual trade terms of Chrysler Canada and that the product is in ample supply. No evidence was led to the contrary. Before turning to the determination of whether the elements of (1)(a) and (1)(b) have been met, it is necessary to establish the meaning of "product" and "market".

Product

22 Is the product in question Chrysler Canada auto parts as submitted by the Director, Chrysler auto parts, or auto parts in general as submitted by the respondent? The definition of market is closely tied to the answer to this question. The Tribunal is satisfied that the relevant product is, for the reasons explained below, Chrysler auto parts.

23 Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers.

24 Although Brunet's business is the export of auto parts, the definition of the product in relation to Brunet's dealings with Chrysler Canada depends on the demand of customers who purchased Chrysler auto parts. The issue is whether they treated Chrysler auto parts as a distinct product or as one for which they would readily accept substitutes. The evidence shows that Brunet responded to direct orders of customers, that customers *specified* that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. There was no question of substituting parts of other suppliers for those of Chrysler. The product in question is thus Chrysler auto parts.

25 The respondent submits that subsection 75(2) severely constrains the definition of the product as Chrysler auto parts: "the effect of subsection 75(2) with its reference to class of articles is that the Tribunal must define a product by a genus or class or kind description, unless the product meets the single exception thereto." [9] The applicant takes the position that the subsection "adds little to the analysis. In a buyer-derived demand situation alternative branded goods are of little utility and the particular sought branded goods will always be of importance." [10]

9 Respondent's Memorandum of Law at para. 40.

10 Memorandum of Law of the Applicant at para. 35.

26 In the view of the Tribunal subsection 75(2) does not enter into the definition of the product as Chrysler auto parts. The product is Chrysler auto parts not "*only* because it is differentiated from the other articles in its class by a trade mark, proprietary name or the like". [11] It is not only the existence of the trademark that determines the definition but rather the demand of Brunet's customers. Subsection 75(2) forecloses reliance being placed on trademarks (save for the specified exception) to define products in spite of the existence of acceptable substitutes to customers. This factor, the presence or absence of acceptable substitutes to customers, is of paramount importance in arriving at the appropriate definition of the "product" and was the determining factor in the present case.

11 *Competition Act*, R.S.C. 1985, c. C-34, as am., s. 75(2) (underlining added).

27 The evidence is that it is primarily service parts and within that group mainly captive parts that are ordered from Brunet. This is consistent with the designation of other parts as competitive because for these parts there are numerous alternative sources of supply and active price competition. Looking to the fact that sales by Brunet of the Autopar line, which consists only of competitive parts, were very limited, Chrysler Canada would have the Tribunal exclude the Autopar line from the product definition. The Director has stressed, through the evidence of Brunet, that in Brunet's experience competitive parts are ordered in the same way as captive parts (as a seven-digit number) and with the same insistence on genuine Chrysler parts. Virtually nothing turns on the finding of a distinction; no element of the decision depends on whether the product in question is Chrysler auto parts, captive and competitive, or exclusively captive Chrysler auto parts since the volume of competitive parts ordered from Brunet appears to have been minimal. A finding for Chrysler Canada would require that Brunet's sales and gross profits be modified to excluded sales of Autopar. This was not done by the Respondent's accounting expert. Given the foregoing and the fact that from Brunet's perspective (if not that of his customers insofar as they shop for cheaper sources of supply prior to ordering from Brunet) there is no difference between competitive and captive parts, the Tribunal makes no distinction between captive and competitive Chrysler parts.

28 The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale

of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.

29 This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion.

Market

30 Having defined the product as Chrysler auto parts, the Tribunal must now determine the market in which Brunet buys Chrysler auto parts. The applicant contends that the relevant market comprises Canada, that Chrysler Canada is the sole supplier and Brunet, in the event, is the sole buyer. The respondent submits that the market consists of both the U.S. and Canada, that Chrysler U.S. is the supplier and exporters of Chrysler auto parts are the buyers. The Tribunal is satisfied that the relevant market is Canada, and that the U.S. and Canada are separate markets. This conclusion is discussed in the following section that deals with the differences between purchases from Chrysler Canada and from Chrysler U.S. in small and large volumes.

(a) Parts Purchased in Small Volume

31 This refers to the number of units of each part and to the fact that the parts are individually packaged. It does not refer to the size of the total order.

32 The automotive parts purchased from Chrysler Canada or Chrysler U.S. are physically identical. However, Chrysler Canada and Chrysler U.S. each publish separate price lists for these parts. The evidence is that prices in Canada are established with respect to market conditions in Canada. According to the evidence of Burnett, Chrysler Canada used the U.S. price list as a point of departure and made its modifications to price in the light of domestic conditions, subject to meeting the financial tests within Chrysler.

33 The reason why prices (*denominated in a common currency*) for some parts are cheaper in Canada than in the U.S. was addressed in the evidence of Burnett and, more speculatively, in the evidence of Professors Schwindt and Winter. Burnett states that Canadian prices are primarily cheaper for parts used for older models of cars. He also said that Chrysler Canada tends not to change the prices of inventory until it is necessary to reorder and since the turnover of inventory is much slower in Canada than in the U.S., reordering occurs less frequently and thus price increases lag behind those in the U.S.

34 Winter hypothesizes that parts prices in Canada fell at the time of the decline in the Canadian dollar as compared to the American dollar in late 1970s. He reasons that Chrysler, in common with other companies, is reluctant to incorporate the effect of exchange rate changes in their prices because this would be too disruptive. Professor Richard Schwindt concludes that prices of vehicles and parts in Canada are more sensitive to import competition than in the U.S. and thus tend to be lower. All the explanations share the common feature that, *whatever the cause, market conditions in the U.S. and Canada are different and the differences are reflected in different parts prices*. The percentage of all Chrysler parts that were priced lower in Canada is not in evidence. The only specific evidence is that it is primarily older parts that are affected.

35 The evidence generally indicates that customers tended to buy exclusively or primarily from Brunet those parts that were cheaper to source through Chrysler Canada. Parts that were generally less expensive to source in the U.S. were purchased through other suppliers.

36 In addition to the price differences between Chrysler Canada and Chrysler U.S., there were several other important differences between them as sources of service parts. Chrysler Canada offered Brunet (and thus Brunet's customers) "price protection" against changes in prices between the time of order and delivery. This protection was offered for a period of up to four months, covering two bi-monthly changes in price lists. Only recently, in February 1989, was this protection made available to Brunet by Chrysler U.S.

37 Furthermore, when an order was sent to Chrysler Canada it responded with an "availability report" which identifies the parts that were immediately available and the length of the delay that would be required in supplying each of the remaining parts.

38 Brunet also asserts, with some corroboration from correspondence with customers, that Chrysler Canada offered superior service in other ways. Brunet claims that the percentage of orders immediately filled by Chrysler Canada was much higher than was the case with Chrysler U.S. and that the latter tended to fill orders through a series of relatively small shipments to Brunet's designated port. The result was slower shipment to Brunet's customers and higher costs. Brunet also claims that the accuracy with which orders were filled was higher in Canada than in the U.S. As a result there were fewer customer claims when supply was obtained from Chrysler Canada. The only evidence offered in contradiction is testimony by Burnett to the effect that the "fill rate" on orders received by Chrysler *from dealers* is 95 per cent in the U.S. compared to 96 per cent in Canada. This evidence does not, however, provide any information on Brunet's experience with Chrysler U.S. since Brunet *is not a dealer and does not make typical dealer's orders*.

39 The Tribunal does not accept Brunet's allegations that it is cheaper to ship to European destinations from a port in Montreal rather than a port in New Jersey. This evidence, given by Brunet, is contradicted by the evidence of a Mr. Jansson, a witness from Sweden who imports Chrysler Canada vehicles and Chrysler parts from Canada.

40 The importance to Brunet's customers of all of the foregoing differences between sourcing from Chrysler Canada and Chrysler U.S. that are not directly related to differences in the price lists cannot be accurately assessed. To do so would require evidence on whether Brunet's customers chose to source from Chrysler Canada when its prices were *higher* than those set by Chrysler U.S. In the absence of evidence of this kind, or at least evidence of customer statements that they clearly preferred to source from Chrysler Canada, the Tribunal concludes that these factors *alone* do not create two distinct sources of supply. This conclusion is supported by evidence that Brunet's customers tend to buy parts that are cheaper to source from Chrysler U.S. through other exporters than Brunet. This suggests that whatever problems there might have been in sourcing from Chrysler U.S., they could be overcome by price concessions or other advantages that these other exporters offered Brunet's customers. Insofar as Brunet's customers were concerned, he was a preferred source of supply primarily for parts that are cheaper to source in Canada.

41 Brunet earned a considerably higher profit margin on parts sourced from Chrysler Canada than on U.S. orders as the Canadian price list necessarily included Canadian federal sales tax and duty on parts imported into Canada. The duty and tax did not apply on parts exported from Canada. The duty and sales tax paid by Chrysler Canada were returned to Brunet and constituted the major part of his profit margin. The higher profitability Brunet earned on parts obtained in Canada put him in a position to offer discounts on the published price lists or to absorb some of the cost of higher prices, as may be the case when he buys from dealers. Thus, customers could be encouraged to purchase Canadian-sourced parts when list prices in the U.S. and Canada were similar. Whether discounts were in fact offered by Brunet is less important than his ability to do so.

42 Schwindt is of the view that the separate price lists in the two countries and the other differences discussed above create a separate "product bundle" with respect to Chrysler parts sourced in Canada and those sourced in the U.S., even though the parts are physically identical. He concludes that the differences are sufficiently great to create two distinct markets:

> When sourcing his purchases, Brunet considered a number of elements which were important to his purchase decision. These elements include: the physical characteristics of the automotive part; the delivery point; the probability that the order would be filled in a single delivery; the reliability of the supplier in meeting promised delivery dates; the predictability of trade terms; the probability of unauthorized substitutions; the probability of missing, misplaced or damaged goods; the supplier's cancellation policy; and price. Generally the physical characteristics of Chrysler automotive parts supplied by Chrysler Canada Ltd. were identical to those supplied by Chrysler U.S. However, the other elements of the product bundle could differ significantly between these suppliers. [12]
>
> 12 Exhibit 22: Exhibit "A" to the Affidavit of Richard Schwindt, dated June 4, 1989 at p. 7.

As indicated above, the Tribunal concludes that the critical difference between the two sources of supply is price.

43 Winter concludes that the physical identity of the parts obtained from the two sources is critical in establishing market boundaries, and since the only difference between the two sources is price (or other claimed advantages that can be translated into a price difference), parts supplied from Chrysler Canada and from Chrysler U.S. are in the same market:

> Products that are physically identical, and are perfectly substitutable in their end uses are properly regarded as in the same market unless geographical distance and directly related costs preclude their substitutability. Almost all of the items that Professor Schwindt lists, such as higher handling costs of U.S. sourced product, less price protection, less accommodation of timing requests, a stricter cancellation policy, and the unilateral substitution of technically equivalent parts, are equivalent to a higher cost of purchasing from Chrysler U.S., or a higher price paid to Chrysler U.S. The physical products from the two sources were identical; from the buyer's point of view all differences in terms of trade are equivalent to differences in price. [13]
>
> 13 Exhibit 29: Report Prepared by Ralph A. Winter, dated June 20, 1989 at para. 9.

44 He states that to conclude, as does Schwindt, that Chrysler Canada is in a different market than Chrysler U.S., is to arrive at the odd result that there is one supplier and one customer. He states that the effect of denying Brunet supply from Chrysler Canada is to place Brunet on the same footing as exporters operating from the U.S., whereas before he had the advantage of being able to sell from both price lists and to buy from both sources:

> The prices paid by Brunet to Chrysler U.S. and the trade terms available to Brunet from Chrysler U.S., were the same terms faced by every other distributor of Chrysler parts for export from North America (*supra*, Section II, paragraph 9). If a buyer of a particular article can obtain perfectly substitutable products at a modest or moderate price or cost increase, which price increase puts the buyer on an equal footing with other buyers of the product, then the substitute products should properly be included in the same market definition. The perfect substitutability of the parts from Chrysler U.S. and Chrysler Canada fulfils the essential criterion for inclusion of products in the same market. [14]
>
> 14 *Ibid.* at para. 10.

Whether Brunet is placed on the same footing as exporters in the U.S. (described by Burnett as the "level playing field") is not relevant to a determination of market definition, but may be relevant in deciding whether the Tribunal should exercise its discretion in issuing an order in the event that the applicant is successful in the present proceedings.

45 The existence of separate price lists in the U.S. and Canada and the fact that they are intended, according to the evidence of Burnett, to respond to different market conditions in the two countries strongly implies the existence of

separate markets. No convincing evidence to the contrary has been presented. The price lists are used by the vast dealer networks in the two countries. It is difficult to believe that anyone would question that dealers in the U.S. and Canada are in separate markets with respect to the purchase of their parts. Yet Winter and the respondent submit that Brunet is in the same market as the numerous U.S.-based exporters with whom he competes for non-North American business. The Tribunal does not accept this conclusion, given that Chrysler Canada and Chrysler U.S. are in separate markets.

46 In the case of Brunet it is clear that the market niche he occupies is based on the fact that some Chrysler auto parts are cheaper in Canada than in the U.S. The price differences are maintained by Chrysler for its own purposes. Similarly, the apparently anomalous situation where there is a single seller and a single buyer is also a result of Chrysler corporate policy. The decision to allow Brunet to address the non-North American markets from Canada was taken by Chrysler. It would similarly be able, apart from the question of the application of section 75 of the Act, to decide that all non-North American exports will originate in the U.S.

(b) Interparts - Parts Purchased in Large Volume

47 Are parts purchased under the Interparts programs in the United States in the same market as service parts purchased from Chrysler Canada? Although they are physically identical, parts purchased through Interparts and parts from Chrysler Canada are not generally substitutes and hence are not in the same market. This conclusion follows from the features of the Interparts programs: very large minimum purchase requirements; orders must be placed in advance for later manufacture and hence it may take considerable time for an order to be filled; parts are packaged in bulk rather than individually; prices are much lower than for parts ordered in small volumes. The dollar value of minimum purchases was recently raised by a large multiple in conjunction with the creation of Master Distributors of Interparts. The effect of this change is the virtual elimination of any substitution that may have occurred between sourcing of service parts in Canada and from Interparts.

The Law

48 As previously stated, the present application is made pursuant to section 75 of the Act. In order for the Director to succeed in his present application, he must satisfy the Tribunal of the existence of each element contained in the section.

(a) Business Substantially Affected

49 The establishment of the product and market as being Chrysler auto parts available in Canada allows a consideration of the element found in paragraph 75(1)(a), that is, whether Brunet was "substantially affected" in his "business" by the refusal of Chrysler Canada to supply Brunet with Chrysler auto parts.

50 The applicant submits that the "business" in issue relates to the "specific line or product within the overall enterprise affected by the refusal", that is, Brunet's business is exporting Chrysler Canada auto parts. [15] The respondent submits that a broader interpretation is required in light of the definition of "business" found in subsection 2(1) of the Act which states:

15 Memorandum of Law of the Applicant at para. 42.

"business" includes the business of

(a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and

(b) acquiring, supplying and otherwise dealing in services.

51 The respondent submits that the evidence shows that Brunet's "business" is the "export business" or "conceivably his business of exporting automotive parts". [16]

16 Respondent's Memorandum of Law at para. 25.

52 A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used. It is clear that a fair analysis of the situation in the present case requires that a broader interpretation is required than the one urged by the applicant. The submission of the applicant, if accepted, would be unnecessarily restrictive since this could preclude a proper understanding of the effects of the refusal to supply.

53 This does not mean, however, that the effect of the refusal to supply can be established solely by examining the overall sales and profit figures. To understand the effect of the refusal to supply, it is necessary to answer the following:

(a) does the product in issue account for a large percentage of the overall business?

(b) is the product easily replaced by other products sold by the business?

(c) does the sale of the product use up capacity that could be devoted to other activities?

(d) is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?

54 Reliance on an examination of the overall business result may be appropriate where it is difficult to do a more disaggregated analysis. This is not necessary in the case of Brunet's business; it is very small, he has few customers and it is possible to inquire meaningfully whether there is a relationship between transactions. Under the circumstances the figures on his overall business provide information for only an initial step in the evaluation. The accountants called as expert witnesses by the parties did not have any particular familiarity with the auto parts export business in general, or with Brunet's business in particular. They were not, therefore, in a knowledgable position to give evidence on how the refusal of Chrysler Canada to sell to Brunet affected his overall sales and profits. Similarly, Winter, who stated the hypothesis that the capacity formerly used on the sale of Chrysler Canada-sourced parts was redirected to the sale of parts from other sources, was not in a position to confirm the factual validity of this submission.

55 The figures placed in evidence by the accountants for the two sides were similar and served to confirm that the records maintained by Brunet fairly represented his business transactions. There is agreement that the few discrepancies in their treatments are not of material importance in determining whether Brunet is substantially affected in his business.

56 The respondent stresses that Brunet had larger sales and profit after Chrysler Canada refused to supply Brunet in 1986 (referred to by the Director as the "cut-off") than in the years preceding it and therefore Brunet was not substantially affected by his inability to obtain supply from Chrysler Canada. As noted earlier, in some cases this type of evidence might be conclusive, but only where it is not possible to analyze how the separate parts of the business are related. The Tribunal is satisfied, through the evidence of Brunet, that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of capacity or by way of demand, to the sale of Chrysler parts. The sale of other parts took very little of Brunet's time or that of his assistant and his business could easily have accommodated these additional sales if he had not lost sales of Chrysler parts as a result of his inability to obtain supplies from Chrysler Canada. Similarly, the demand for Chrysler auto parts was independent of the demand for other parts. Accordingly, any changes in the sales of other parts and the gross margins therefrom would have taken place whether or not Brunet's relationship with Chrysler Canada had changed. The same conclusion is applicable with respect to Interparts since service parts and Interparts represent separate markets. There is no reason to believe that Brunet's customers would be influenced to increase their demand for Interparts as a result of Brunet's inability to obtain supply from Chrysler Canada. If the cut-off had any effect on the sale of Interparts it would be a negative one to the extent that Brunet lost customer as a result of Chrysler Canada's refusal to supply auto parts.

57 Large sales of other auto parts to a single customer in 1987 and in 1988 virtually disappeared during the first four months of 1989. The large sales and resulting gross profits from these transactions were an essential part in the overall

sales and gross profit figures that the respondent relies on to state that the cut-off does not have a substantial effect on Brunet's business because overall sales and gross profits did not fall after 1986. The most recent figures submitted show that overall sales and gross profits are much lower, on an annual basis, than before the cut-off.[17] This illustrates the danger of relying on aggregate data when more specific and relevant information is available. The Tribunal is satisfied that the evidence shows that both the increase in the sales of other auto parts and the subsequent decline are unrelated to the extent to which Chrysler parts are available to Brunet in Canada.

17 Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989; Table 1, *supra* at p. 7-8.

58 Following the cut-off Brunet was able to obtain parts from Chrysler Canada dealers. Under his arrangement with them he paid them their acquisition cost plus five per cent. It is noteworthy that Canadian-sourced parts were sufficiently more price attractive than those obtainable from Chrysler U.S. that Brunet and his customers preferred to pay the additional five per cent rather than purchase from Chrysler U.S.

59 A review of the extent to which Brunet was able to replace Chrysler Canada by its dealers must take into account the steps that Chrysler Canada took to discourage its dealers from selling to Brunet. The verbal warnings to particular dealers, the bulletins to all dealers and, finally the re-signing of all dealers to new contracts with a clause that is designed, according to the evidence of Burnett, to give Chrysler Canada the authority to discontinue supplying a dealer in the event that the dealer sells for export, have progressively changed the conditions under which Brunet can buy from Chrysler Canada dealers. Chrysler Canada has modified its computer software to more readily enable it to detect orders that may be intended for export. As a result of these efforts by Chrysler Canada, Brunet is forced to split his orders and to spread them over some time to attempt to avoid detection. There is evidence that three dealers openly sell to Brunet. The evidence is not clear on whether any of them have wholesale dealer status. If they do not, the prices that they pay for captive parts are more than those which Brunet paid to Chrysler Canada. In addition, it must be assumed that the dealers are earning some profit margin on their sales to Brunet, such as the five per cent referred to previously, thus causing Brunet to pay a substantially higher price for the auto parts than that paid by Brunet to Chrysler Canada.

60 Table 2 shows Brunet's gross profit and sales resulting from purchases from Chrysler Canada, Chrysler Canada dealers and Chrysler U.S. from 1984 to May 1989.

TABLE 2

Gross Sales and Profit<*>: Parts Sourced from Chrysler Canada, Chrysler Canada Dealers and Chrysler U.S.

1984-1989

Year	Chrys. Canada	Chrys. Canada Dealers	Gross Profit Chrys. Canada & Dealers	Chrys. U.S.	Gross Profit Chrys. U.S.
1984	300,394		49,161	27,813	1,410
1985	259,892		39,407	20,442	1,019
1986	362,245		47,202	25,180	1,885
1987	99,154	233,495	43,554	24,126	1,555
1988	___	119,310	14,706	52,734	4,321
1989<**>	___	26,618	3,856	67,630	6,140<#>

Notes:
<*>Gross profit (or gross margin or mark-up) is gross sales minus cost of goods sold. The Co
<**>January 1 - May 12.


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<#>Includes purchases from Chrysler U.S. and from Master Distributors of Interparts.
Sources:
Exhibit 10:  Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand for the
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61 The effectiveness of Chrysler Canada's efforts in preventing Brunet from exporting from Canada is shown in the above table. There is a marked decline in sales and profits on purchases of Chrysler auto parts in Canada between 1986 and 1988 and on through somewhat more than the first quarter of 1989. The figures for 1989 are taken as providing only an order of magnitude because the period is relatively short. The 1989 figures are based on an analysis by Mr. Reinke of Arthur Anderson & Co. who appeared as an expert witness on behalf of the respondent. Reinke prepared the figures in response to a request made to him during cross-examination. He examined the ledger cards used by Brunet and included only those transactions for which both a purchase and a sale were recorded. In the view of the Tribunal, this was the only reasonable course. Ledger cards on which only one part of a transaction are recorded cannot be included as part of sales for the period in question. Some transactions started in 1988 are part of the partial 1989 figures and it is to be expected that some transactions started between January 1 and May 12, 1989 will be completed and recorded as such after May 12, 1989. There is no obvious bias imported into the 1989 figures by this factor. The only legitimate concern that the volume of sales is understated relates to the possibility that Brunet failed to make entries on the ledger cards for completed transactions. No evidence of this was presented to the Tribunal.

62 The respondent points to variations in demand that are unrelated to the cut-off as a possible explanation for any decline in sales and gross margins experienced by Brunet. This is a possibility that must be taken into account. Variation in demand certainly accounted for swings in the sale of other auto parts. In considering this factor the Tribunal notes that neither party attempted to provide a benchmark against which the changes in Brunet's sales of service parts might be measured (such as, for instance, the total exports of Chrysler service parts from North America during the years in question). The Tribunal is not satisfied that the large changes in sales experienced by Brunet were caused by variations in demand that are unrelated to the cut-off.

63 To evaluate the changes in sales and profits experienced by Brunet, it is necessary to determine the meaning of "substantially affected". The applicant submits that "substantially affected" simply means more than a *de minimis* effect. This conclusion is based on the fact that an earlier draft of the Act required only that the person be "adversely affected" which could mean a negative effect to a small degree.

64 The respondent submits that "substantially" does not simply mean "some" or "to a degree" but rather "major" or "significant". The respondent takes the position that the ordinary dictionary definition should be used in the absence of strong reasons to the contrary. The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.

65 The cut-off resulted in a decline of over $200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of $30,000. Losses of the order of magnitude of $200,000 in sales and $30,000 in gross profits constitute a substantial effect for a small business such as Brunet's. The figures for more than a third of 1989 and the fact that Chrysler Canada has put in place contracts that will permit it to discipline dealers who sell for export suggest that even greater losses may be anticipated in the future.

(b) Inadequate Competition in the Market

66 The issue as to whether Brunet is unable to obtain supplies because of inadequate competition in the market turns on whether Chrysler Canada dealers are in the same market as Chrysler Canada as suppliers to Brunet. The Tribunal concludes that the restrictions placed by Chrysler Canada on its dealers clearly make them inferior sources of supply to Brunet and that they therefore do not provide adequate competition to Chrysler Canada.

Exercise of Discretion

67 The Tribunal is satisfied that the Director has proven, through the evidence presented, all of the elements of section 75 of the Act. Once this prerequisite is met, the Tribunal has the discretion to issue an order requiring Chrysler Canada to resume supplying Brunet with Chrysler auto parts within a specified time on usual trade terms.

68 There are several areas of evidence and argument that bear on the exercise of the Tribunal's discretion. These are: the reasons behind Chrysler Canada's decision to discontinue supplying Brunet; the market position of Chrysler and the changes that it was making in its distribution system; the long association between Brunet and Chrysler Canada; the unquestioned encouragement that Chrysler Canada provided Brunet; and the manner in which the cut-off was implemented.

(a) The Decision to Discontinue Supply to Brunet

69 The respondent takes the position that the decision to no longer permit Brunet to buy from Chrysler Canada was taken in response to Brunet breaking one of the conditions attached to such supply, that Brunet not sell to franchised dealers outside of North America in competition with Chrysler U.S.

70 The existence of such a condition is in dispute. Brunet alleges that this condition, along with the condition that Brunet not divert supplies into the North American market, were clearly set out in a verbal arrangement between himself and Brunet. There is no written agreement between Chrysler Canada and Brunet. Brunet denies that it was ever understood that he was not to sell to Chrysler dealers outside of North America. The Tribunal accepts his evidence.

71 Associated documentary evidence supports Brunet's position. Correspondence between Chrysler Canada and Brunet corroborates that Chrysler Canada was concerned that parts sold to Brunet not be diverted into the domestic market. Procedures were established to ensure that such diversion was prevented. In contrast, there is no mention in any of the correspondence between Brunet and Chrysler Canada prior to 1986 that the latter was concerned about the possibility that Brunet might be selling to franchised dealers outside of North America. Concern about Brunet competing with Chrysler U.S. is first raised in May 1986 in connection with Brunet's approach to an "Interparts distributor" (rather than a franchised dealer) in Peru:

May 1, 1986

Mr. R. Brunet

R. Brunet Company

Suite 918

360 St. James Street West

Montreal, Quebec

H2Y 1P5

Dear Richard:

This letter will serve to confirm our telephone conversation regarding your letter of March 19, 1986, to Colonial Motors in Peru. Your letter suggests that in some cases, it is more advantageous to purchase parts from yourself than it is to purchase from Chrysler Corporation. Colonial Motors is an authorized Interparts Distributor.

I would like to remind you that when you are representing Chrysler Canada Ltd. in the export market, your objective is to compliment (*sic*) the Corporation's Interparts Division's sales activities, not to compete for their Distributors' business. We would appreciate your co-operation in this matter.

Yours very truly,

CHRYSLER CANADA LTD.

(s) P.R. Williams

National Parts Sales

and Marketing Manager

cc: C.R. Burnett [18]

18 Exhibit 3, Tab 134.

The context and the language of the letter create ambiguities. This sole written reference to the claimed Chrysler Canada understanding with Brunet is not persuasive.

72 Most importantly, sales to a Mr. Karlsson, a franchised dealer in Sweden, took place against a backdrop of a visit by Karlsson to the central Chrysler Canada parts depot. Brunet introduced Karlsson to the manager of the warehouse and sent Brunett a copy of a letter that Brunet sent to the manager following Karlsson's visit. Burnett passed on the letter to Williams, the author of the May 1986 letter referred to above. [19] It is difficult to believe that Brunet would have been so open in presenting and discussing Karlsson if he knew that sales to Karlsson's company would have been in contravention of a condition of purchase from Chrysler Canada. Furthermore, Brunet claims that he was referred to Karlsson by an employee of Chrysler Canada, a Mr. Barton, through a Mr. Hedlund who was acting as Canadian agent for Karlsson. This evidence is not contradicted. It is also undisputed that the same employee, Barton, had referred a Mr. Jansson, a non-franchised dealer in Sweden who had purchased vehicles from Chrysler Canada and needed parts, to Brunet. Burnett states that he did not know that Karlsson was a franchised dealer although Chrysler Canada had access to this information. More critical to the issue is the fact that Burnett never inquired, leaving the impression that whether Brunet was selling to franchised Chrysler dealers outside of North America was of no concern to Chrysler Canada.

19 *Ibid.*

(b) Consolidation of Control of Chrysler Exports

73 Although the evidence does not support the respondent's position that Chrysler Canada had an agreement with Brunet with respect to export to Chrysler franchised dealers, this does not mean that Chrysler was not concerned by such exports. It does not require specific evidence to conclude that the Chrysler export arm would find it embarrassing to have to compete with Brunet for the trade of its dealers. But beyond any such potential embarrassment, it is easy to accept that Chrysler would want to consolidate control of exports in one country and not be concerned with pricing differences between Canada and the United States affecting export markets. One does not have to go so far as Winter and conclude that the motive for consolidating exports is strictly to enhance efficiency in order to conclude that the decision is not solely intended to protect a separate price structure in Canada. Although Burnett denies that the Chrysler organization

was in disarray in the early 1980s when Chrysler was in financial difficulty, the evidence shows that plants outside North America were sold off and the sale of Chrysler vehicles through (foreign) Chrysler franchised dealers was stopped. The evidence shows that, in recent years, Chrysler vehicles are once again being sold through (foreign) franchised dealers. It is easy to understand that Chrysler would want to make organizational changes that can better accommodate its changing distribution system.

74 The respondent has not attempted to provide a cohesive explanation of the Chrysler distribution system. The principal argument put forward is that Brunet was being placed in the same position as U.S.-based exporters who, according to the evidence of Burnett, numbered somewhat more than one hundred and had combined annual sales of $80 million (U.S.). No details were provided regarding who these firms are, who they sell to or their relation with Chrysler U.S.

75 The Tribunal must consider that the respondent has not presented any evidence that the granting of an order pursuant to section 75 of the Act would disadvantage the respondent. A point that has been raised in connection with the attempt to prevent dealers from selling for export is that exporting some parts that are in short supply (this applies particularly to older vehicles) could deprive domestic consumers. It strikes the Tribunal that this concern could most effectively be dealt with by having Brunet deal directly with Chrysler Canada. To the extent that Brunet is successful in buying from dealers, Chrysler Canada cannot identify the orders from dealers that are destined for export, which was not the case when it was selling directly to Brunet.

(c) Brunet's Long Association with Chrysler Canada

76 It is uncontested that Brunet was encouraged throughout his association with Chrysler Canada. A number of actions were taken by Chrysler Canada to accommodate its treatment of Brunet to allow for the needs arising from dealing with customers who faced problems of exchange controls and import permits with time deadlines. Burnett confirmed that Chrysler Canada had encouraged Brunet in his efforts to expand the sale of Chrysler Canada auto parts. Chrysler Canada on occasion referred potential customers to Brunet. In spite of this long and friendly relationship, no attempt was made by Chrysler Canada to resolve any problems that they perceived in Brunet selling to Karlsson in Sweden or attempting to sell to Colonial Motors, an Interparts dealer in Peru. There was no warning that he might be cut off and there was no face-to-face meeting to discuss the situation. Brunet was shown little consideration apart from Burnett agreeing to fill orders received by him prior to the cut-off date.

Conclusion

77 Section 75 is different than other sections in Part VIII of the Act. The test for whether the elements in the section are satisfied is not the effect on competition or efficiency. These considerations enter, where applicable, in the exercise of discretion. The Tribunal accepts that Chrysler or Chrysler Canada does not occupy a very strong market position in the automobile industry (even though, as might be expected, it is in a very strong position with respect to the distribution of its products) and that it may have legitimate business interests that it is trying to protect. Weighing against this consideration is the long relationship between Brunet and Chrysler Canada, the manner in which sales to Brunet were terminated, and the fact that the respondent has not made any effort to establish that the granting of an order by the Tribunal would prejudice it in any way. Brunet has been substantially affected by the denial of supplies. He merits relief and it will be provided in the order.

78 The Tribunal is of the view that a proper balancing of interests in this case might be better accomplished with an order that was limited with respect to time, or perhaps with respect to the category of buyers that would be open to Brunet. Such an order could probably best be achieved through negotiations between the parties.

79 The Tribunal is satisfied, however, that its authority under section 75 is limited to the issue of an order that requires the respondent to supply Brunet Chrysler parts under the usual trade terms as it had done up to October 1986. Such an order shall issue.

80 There shall be no order as to costs. The Tribunal is satisfied that it does not have the jurisdiction to order the payment of costs.

81 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT Chrysler Canada Ltd. accept Richard Brunet as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with Brunet as the said terms existed prior to August, 1986.

82 DATED at Ottawa, this 13th day of October, 1989.

83 SIGNED on behalf of the Tribunal by the presiding judicial member.

Footnotes

12

2013 Comp. Trib. 10
Competition Tribunal

Commissioner of Competition v. Visa Canada Corporation

2013 CarswellNat 11422, 2013 CarswellNat 3285, 2013 Comp. Trib. 10

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an application by the Commissioner of Competition pursuant to section 76 of the Competition Act

In the Matter of certain agreements or arrangements implemented or enforced by Visa Canada Corporation and MasterCard International Incorporated

The Commissioner of Competition, (applicant) and Visa Canada Corporation MasterCard International Incorporated, (respondents) and The Toronto-Dominion Bank The Canadian Bankers Association, (intervenors)

Michael L. Phelan J., Wiktor Askanas Member, Keith L. Montgomery Member

Heard: May 8, 2012; May 9, 2012; May 10, 2012; May 14, 2012; May 15, 2012; May 16, 2012; May 17, 2012; May 22, 2012; May 23, 2012; May 24, 2012; May 25, 2012; May 28, 2012; May 29, 2012; May 30, 2012; May 31, 2012; June 1, 2012; June 4, 2012; June 5, 2012; June 6, 2012; June 7, 2012; June 18, 2012; June 19, 2012; June 20, 2012; June 21, 2012
Judgment: July 23, 2013
Docket: CT-2010-10

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Mahmud Jamal, Michelle Lally, Jason MacLean, for Intervenor, Canadian Bankers Association
F. Paul Morrison, Christine Lonsdale, Adam Ship, for Intervenor, Toronto-Dominion Bank

Subject: Corporate and Commercial; Intellectual Property; Criminal

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Price maintenance — General principles

Table of Authorities

Cases considered:

B-Filer Inc. v. Bank of Nova Scotia (2006), 2006 Comp. Trib. 42, 2006 CarswellNat 6422 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Canada Pipe Co. (2006), 2006 FCA 233, 268 D.L.R. (4th) 193, 49 C.P.R. (4th) 241, 2006 CarswellNat 4554, 2006 CAF 233, 2006 CarswellNat 1763, 350 N.R. 291, [2007] 2 F.C.R. 3 (F.C.A.) — followed

Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289, 1992 CarswellNat 1630 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Canada Pipe Co. (2007), 371 N.R. 399 (note), 2007 CarswellNat 1107, 2007 CarswellNat 1108 (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289, 1992 CarswellNat 1628 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. (1997), 73 C.P.R. (3d) 1, 1997 CarswellNat 3120 (Competition Trib.) — distinguished

Commissioner of Competition v. CCS Corp. (2012), 2012 Comp. Trib. 14, 2012 CarswellNat 4409 (Competition Trib.) — referred to

Commissioner of Competition v. CCS Corp. (2013), 2013 FCA 28, 2013 CarswellNat 1400, 360 D.L.R. (4th) 717, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261 (F.C.A.) — referred to

Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007), 168 L.Ed.2d 623, 127 S.Ct. 2705, 75 U.S.L.W. 4643 (U.S. C.A. 5th Cir.) — considered

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2009), 2009 CarswellNat 5934, 2009 Comp. Trib. 6 (Competition Trib.) — considered

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2011), 2011 FCA 188, 2011 CarswellNat 2032, 2011 CarswellNat 2033, 419 N.R. 333 (F.C.A.) — referred to

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2011), 2011 CarswellNat 5305, 2011 CarswellNat 5306, 431 N.R. 398 (note) (S.C.C.) — referred to

R. v. Lohnes (1992), 10 C.R. (4th) 125, [1992] 1 S.C.R. 167, 132 N.R. 297, 109 N.S.R. (2d) 145, 297 A.P.R. 145, 69 C.C.C. (3d) 289, 1992 CarswellNS 11, 1992 CarswellNS 350 (S.C.C.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Skapinker v. Law Society of Upper Canada (1984), 1984 CarswellOnt 800, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161, 53 N.R. 169, 3 O.A.C. 321, 20 Admin. L.R. 1, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 1984 CarswellOnt 796 (S.C.C.) — referred to

Statutes considered:

Bank Act, S.C. 1991, c. 46
s. 409(2)(d) — referred to

Sched. I — referred to

Budget Implementation Act, 2009, S.C. 2009, c. 2
Generally — referred to

Combines Investigation Act, R.S.C. 1952, c. 314 (Supp.)
Generally — referred to

s. 38 — considered

s. 38(1)(a) — considered

Commerce Act, 1986, No. 5
Generally — referred to

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

Pt. VIII — referred to

s. 7 — referred to

s. 61 — considered

s. 61(1)(a) — considered

s. 74.1 [en. 1999, c. 2, s. 22] — referred to

s. 75 — referred to

s. 75(1)(e) — considered

s. 76 — considered

s. 76(1) — considered

s. 76(1)(a) — considered

s. 76(1)(a)(i) — considered

s. 76(1)(a)(ii) — considered

s. 76(1)(b) — considered

s. 76(2) — considered

s. 76(3) — considered

s. 76(3)(b) — considered

s. 77(2)(c) — referred to

s. 79 — referred to

s. 79(1)(b) — considered

s. 82 — referred to

s. 83(1) — referred to

s. 86(1)(a) — referred to

s. 90.1(4) [en. 2009, c. 2, s. 429] — referred to

s. 93 — referred to

s. 96 — referred to

s. 100 — referred to

s. 103.1 [en. 2002, c. 16, s. 12] — considered

s. 106.1 [en. 2002, c. 16, s. 14] — referred to

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I
s. 8.1 [en. 2002, c. 16, s. 17] — referred to

s. 9(3) — considered

Financial Consumer Agency of Canada Act, S.C. 2001, c. 9
s. 3(3)(c) — referred to

Interpretation Act, R.S.C. 1985, c. I-21
s. 14 — referred to

Payment Card Networks Act, S.C. 2010, c. 12, s. 1834
s. 6 — considered

Trade Practices Act, S.B.C. 1974, c. 96
Generally — referred to

Rules considered:

Federal Courts Rules, SOR/98-106
Generally — referred to

R. 400 — considered

R. 407 — considered

Tariffs considered:

Federal Courts Rules, SOR/98-106

Tariff B, Table, column III — referred to

Decision of the Board:

I. Introduction

1 The Commissioner of Competition has brought an application in which she is seeking an Order from the Tribunal prohibiting Visa Canada Corporation and MasterCard International Incorporated from implementing or enforcing rules which prohibit merchants who accept Visa and MasterCard credit cards from declining to accept particular Visa or MasterCard credit cards, applying a surcharge for those customers paying with credit cards, or engaging in other forms of discrimination. The Commissioner asserts that each of the Respondents has engaged in price maintenance and has brought the application in accordance with section 76 of the *Competition Act*, R.S.C. 1985, c. C-34.

II. The Parties and Intervenors

2 The Commissioner of Competition has filed this application in accordance with her mandate of enforcing and administering the *Competition Act* (see: s. 7 of the *Competition Act*).

3 The Respondent Visa Canada Corporation is an unlimited liability company formed by amalgamation under the laws of Nova Scotia, with offices in Toronto. It is a wholly-owned subsidiary of Visa Inc., a Delaware corporation.

4 The Respondent MasterCard International Incorporated ("MasterCard") is headquartered in the United States. MasterCard Canada, Inc., is a subsidiary of MasterCard.

5 The Canadian Bankers Association (the "Bankers Association") and the Toronto-Dominion Bank (the "TD Bank") were granted leave to intervene in these proceedings in accordance with subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

6 The Bankers Association is a national organization which represents the Canadian banking industry. Its members consist of 51 domestic chartered banks, foreign bank subsidiaries, and foreign bank branches operating in Canada. The TD Bank is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46, and is one of the largest banks in Canada.

7 The Bankers Association and the TD Bank have supported the position taken by the Respondents in these proceedings.

III. The Background Facts

8 Before examining the rules that have been challenged in this application, it is important to sketch the background against which the application is brought.

A. Credit Card Network and Its Participants

9 While Visa and MasterCard credit card networks are commonly referred to as "four party" networks, it was agreed that they require in fact the participation of five players: (i) cardholders; (ii) issuers; (iii) merchants; (iv) acquirers and (v) credit card networks.

(1) Cardholders and Issuers

10 Neither Visa nor MasterCard issue credit cards. For the purposes of this decision, the expression "credit card" refers to the general purpose credit card that is accepted as a form of payment at many unrelated merchant locations across a wide geographic area.

11 Credit cards are issued by financial institutions, known as "Issuers", such as the TD Bank, and the *Bank Act* permits them to do so (see: s. 409(2)(*d*) of the *Bank Act*).

12 Visa and MasterCard enter into agreements with Issuers authorizing them to enter into agreements with cardholders in Canada for the use of credit cards bearing the Visa or MasterCard brand.

13 Issuers market and issue credit cards to cardholders and manage the relationship with the cardholders, including the provision of credit, interest rate, the monthly fees (if any), the cardholder benefits (e.g. the funding of rewards), the foreign exchange markup rate and monthly statements.

14 Both Visa and MasterCard have a long list of requirements and rules with which each Issuer must comply in order to be able to issue the credit card product. They can set minimum reward requirements in relation to each credit card product. For example, Visa has four categories of consumer credit cards that Issuers may offer to cardholders: Classic, Gold, Platinum and Infinite. Each category has its own set of minimum reward requirements which the Issuer must respect (e.g. at the Visa Classic level, Issuers are required to provide cardholders with a basic selection of customer support services, whereas at the Infinite level, Issuers must provide a significantly increased level of services, including dedicated telephone lines and improved service standards, concierge service and emergency medical evacuation. Issuers can, however, provide enhanced benefits, such as reward points and welcome bonus rewards.

15 A business or consumer to whom a credit card has been issued is known as a Cardholder.

(2) Credit Card Networks

16 Visa operates the electronic payment system network by which transactions involving payment with a Visa payment card, including credit, debit or prepaid cards, are authorized and paid as between Cardholders' and merchants' financial institutions. As the network operator, Visa establishes rules to ensure the efficient and secure operation of its network. Visa also engages in other activities such as the marketing and promotion program to support the Visa brand and insists in product, platform and processing enhancements to improve the quality and security of the network.

17 MasterCard operates its own network by which MasterCard credit card transactions are authorized and paid. It also establishes rules to ensure the efficient and secure operation of its network and is also engaged in the marketing and promotion of the MasterCard brand.

18 The operations of both Visa and MasterCard are sufficiently similar that any differences are immaterial to this proceeding.

(3) Merchants and Acquirers

19 Sellers of goods and services are known as "Merchants" in the credit card network world. The Merchants are the primary day-to-day commercial interface with the Cardholder. Merchants wishing to accept a credit card as a form of payment enter into an agreement with an "Acquirer", an entity that provides Merchants with services enabling them to accept Visa and MasterCard branded credit cards for payment. They provide, *inter alia*, the technology and hardware to accept credit card payments. Moneris, Chase Paymentech, and Global Payments are all Acquirers.

20 The services provided by Acquirers in Canada vary from Acquirer to Acquirer and a Merchant is free to select the Acquirer and the services of which they would like to take advantage. For example, at the hearing, the Tribunal heard evidence regarding the services the TD Bank provides as an Acquirer.

21 The TD Bank, through its TD Merchant Services, provides acquiring services to Merchants. Mr. van Duynhoven, the President of TD Merchant Services, explained that the TD Bank maintains its own network which is supported by an extensive infrastructure and which directly interfaces with over a dozen different payment card networks, including

Visa, MasterCard, American Express, Interac and Discover, as well as supporting numerous payment systems and technologies that support private label, gift and loyalty cards.

22 The services provided by Acquirers will be examined in more detail in paragraphs 147 to 152 of this decision.

B. Credit Card Transaction and Fees

23 A typical credit card transaction involves the participation of all five participants. The important steps of a transaction can be summarized as follows:

Authorization

1. After the Cardholder has provided his credit card for the purchase, the Merchant, using the point-of-sale technology supplied by the Acquirer, seeks authorization from the Acquirer for the transaction. The authorization request flows from the Merchant's point-of-sale device to the Acquirer's network.

2. The Acquirer will identify the applicable payment network for the pending transaction and then "routes" the authorization request to that network. For example, the Acquirer will identify that particular card as a Visa card and then route the transaction to the Visa network.

3. Visa and MasterCard, through their electronic networks, forward the authorization request to the applicable Issuer in order to obtain authorization.

4. The Issuer determines whether to authorize or decline the transaction and communicates that determination through the Visa or MasterCard network and ultimately traverses the Acquirer's network.

Clearing

5. Upon receipt of an authorization or decline, the Acquirer communicates the message to the Merchant through the point-of sale technology. The transaction is then "cleared".

6. The Cardholder is then charged with the cost of the transaction.

Settlement

7. An Acquirer, such as TD Merchant Services, receives typically at the end of each business day, a batch of all the cleared transactions via the Merchant's payment terminal from the Merchant. The Acquirer will settle all of the Merchant's customer payment network transactions, including Visa and MasterCard transactions, and deposits into the Merchant's account the total value of the transactions, less any reserves held for security/risk purposes. Acquirers in Canada typically pay their Merchants 100% of their transaction values on a daily basis.

8. Typically, the Acquirer charges the Merchant for its service fees at the end of the month.

24 The Issuer must pay Visa and MasterCard a network fee (the "Issuer Network Fees") for each transaction.

25 The Acquirer, in accordance with its agreements with Visa and MasterCard, must pay Visa and MasterCard a network fee (the "Acquirer Network Fees"), which is set as a percentage of the transaction.

26 In addition to the "Acquirer Network Fees", Acquirers also pay fees known as "Interchange Fees" for each transaction. Visa and MasterCard each set default Interchange Fees applicable to credit cards involving their own brands of credit cards. However, they do not receive any revenue from the Interchange Fees, these fees are provided to the Issuers. The Interchange Fees are also set as a percentage of the value of the transaction and depend, for example, on the type of credit card used and the Merchant's business status.

27 In Canada, default Interchange Fees are rarely, if ever, departed from by individual financial institutions although such departure is legally possible.

28 As a result, the Acquirer for each transaction has to pay an Acquirer Network Fee and an Interchange Fee.

29 Acquirers will generally speaking simply pass on the Interchange Fees and the Acquirer Network Fees to the Merchants. In additions to these fees, an Acquirer also charges another fee for the services that they provide to the Merchants (the "Acquirer Services Fees"). As a result, it is said that the fees paid by the Merchants, known as the "Merchant Discount Fees" or "Card Acceptance Fees", consist of three components:

(1) the Interchange Fees;

(2) the Acquirer Network Fees; and

(3) the Acquirer Services Fees

30 The Interchange Fees constitute the largest component of the Card Acceptance Fees (for the purposes of this decision, we[1] shall use "Card Acceptance Fees" to refer to the total fees paid by Merchants to Acquirers).

1 We note that where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

31 Prices charged by Acquirers for the services they provide to Merchants are negotiated between the two parties and are incorporated in a written agreement. Pricing for acquiring services can vary widely but the two predominant pricing models in Canada are known as "blended pricing" and "interchange plus pricing".

32 Blended pricing consists of an Acquirer charging Merchants a Card Acceptance Fee for each credit card brand in the form of a single percentage fee. This blended rate includes the Interchange Fee, the Network Fees and the Acquirer Services Fees. Some Acquirers may even have the same Card Acceptance Fees for different credit cards. Blended pricing is the most common pricing model in Canada and is the prevalent method of merchant pricing for medium and smaller sized Merchants.

33 In interchange plus pricing, the Acquirer passes through to the Merchant the actual ad valorem Interchange Fee and quotes the Merchant unbundled fees such as the Network Fees and the Acquirer Service Fees. While generally not as widespread as the blended pricing model, interchange plus pricing is common for very large Merchants (in terms of dollar sales). According to Mr. van Duynhoven, interchange plus pricing is applied to approximately *[CONFIDENTIAL]* of the TD Bank's merchant customer locations. Given the size of Merchant customers who are on interchange plus pricing, this type of pricing arrangement represents approximately *[CONFIDENTIAL]* of the TD Bank's total Visa and MasterCard transaction volume.

34 Mr. Jordan Cohen of Global Payments Canada also stated that approximately *[CONFIDENTIAL]* of the purchase volume that GPC processes would be on an interchange plus pricing methodology. Mr. van Duynhoven also indicated that interchange plus pricing had become more prevalent in recent years as Merchants seek greater transparency as regards to actual interchange rates.

C. The Contested Rules

• *No-Surcharge Rule*

Visa

35 The Visa International Operating Regulations (the "Visa Regulations") set out the conditions that Issuers and Acquirers, participating in the Visa network system, must meet. They include the so-called "No-Surcharge Rule", which has existed for over 30 years:

> Visa merchants agree to accept Visa cards for payment of goods or services without charging any amount over the advertised price as a condition of Visa card acceptance, unless local law requires that merchants be permitted to engage in such practice.

36 The Visa Regulations require that, as a term of their own contracts with Merchants, Acquirers must require Merchants to comply with the No-Surcharge Rule.

MasterCard

37 MasterCard's No-Surcharge Rule is found in section 5.11 of its Operating Rules, entitled "Prohibited Practices", and the Operating Rules provide that an Acquirer must ensure that none of its Merchants engage in any of the prohibited practices listed in section 5.11. Section 5.11 provides as follows:

> A Merchant must not directly or indirectly require any Cardholder to pay a surcharge or any part of any Merchant discount or any contemporaneous finance charge in connection with a Transaction.
>
> [...]
>
> For purposes of this Rule:
>
> > 1. A surcharge is any fee charged in connection with a Transaction that is not charged if another payment method is used.
> >
> > 2. The Merchant discount fee is any fee a Merchant pays to an Acquirer so that the Acquirer will acquire the Transactions of the Merchant.

• *The Honour All Cards Rule*

Visa

38 The Visa Regulations also provide that Merchants are prohibited from refusing to accept a valid Visa credit card (the "Honour All Cards Rule"):

> Honor All Cards Properly Presented
>
> Honoring All Visa Cards
>
> Visa merchants may not refuse to accept a Visa product that is properly presented for payment, for example, on the basis that the card is foreign-issued, or co-branded with a competitor's mark.

39 Acquirers are required by agreement with Visa to ensure that Merchants comply with the Honour All Cards Rule.

40 The Honour All Cards Rule has existed since the creation of Visa in 1976.

MasterCard

41 Rule 5.8.1 of MasterCard's Operating Rules sets out its Honour All Cards Rule:

> A Merchant must honor all valid Cards without discrimination when properly presented for payment. A Merchant must maintain a policy that does not discriminate among customers seeking to make purchases with a Card. A

> Merchant that does not deal with the public at large (for example, a private club) is considered to comply with this rule if it honors all valid and properly presented Cards of Cardholders that have purchasing privileges with the Merchant.

42 Under the Operating Rules, each Acquirer must ensure that each Merchant complies with the Honour All Cards Rule.

• *The No-Discrimination Rule*

MasterCard

43 Section 5.11 of MasterCard's Operating Rules also prohibits Merchants from discriminating amongst MasterCard's credit cards (the "No-Discrimination Rule"):

> **5.11.1 Discrimination**
>
> A Merchant must not engage in any acceptance practice that discriminates against or discourages the use of a Card in favor of any other acceptance brand.

44 Again, Acquirers must under contract terms ensure that no Merchant engages in such a practice.

45 The Visa Regulations do not contain a No-Discrimination Rule.

46 The No-Discrimination Rule, the Honour All Cards Rule and the No-Surcharge Rule shall be referred to as the "Merchant Rules". The operation of these Merchant Rules is the matter which the Commissioner seeks to prohibit.

D. Background in Canada and Elsewhere

(1) Canada

47 On March 19, 2008, Visa became a publicly traded corporation. Prior to that, it functioned as a joint venture between thousands of independent financial institutions across the world.

48 In the spring 2008, Visa introduced a new premium credit card, the Visa Infinite, which had higher Interchange Fees than the other Visa credit cards. Evidence adduced at the hearing establishes that in March 2008, TD launched its first Visa Infinite card. The Infinite Card was structured to offer various rewards and benefits to Cardholders in order to attract "high income" and "high spend" Cardholders. Chris Hewitt, the Associate Vice President of Direct Marketing at the TD Bank, explained that the TD Bank set this early launch date in order to attract as many Cardholders as possible before competitor Issuers launched their own Visa Infinite cards.

49 Visa also moved from 2 formulae for calculating default interchange rates to 21 formulae. Some of the new rates were based on the applicable Merchant's industry segment, some were based on the nature of the underlying transaction, and some were based on the Merchant's total annual sales volume. For some transactions, the rate went up, while for others, the rate went down.

50 In April 2008, MasterCard began assessing additional fees on all MasterCard credit transactions and, in July 2008, introduced the "MasterCard High Spend Program" with higher Interchange Fees than the standard MasterCard credit card. In November 2008, MasterCard launched a premium credit card with Interchange Fees much higher than those associated with a standard MasterCard credit card.

51 In the fall of 2008, MasterCard also made significant changes to its Interchange Fees. The number of formulae for calculating default Interchange Fees went from 2 to 11.

52 This series of events in 2008, generally hidden from Merchants in advance of implementation, became the lightning rod for opposition not only to the increases in fees to be paid by Merchants, but also opposition to the whole Merchant Rules system. Developments in other countries, to which reference will be made, also had significant influence on the debate about the efficacy, fairness and legality of the Merchant Rules.

53 In the fall of 2008, the Retail Council of Canada and a coalition known as the Stop Sticking it To Us Coalition, a group of 29 Canadian member organizations and backed by over 200,000 businesses, engaged in various activities regarding the increase in Card Acceptance Fees.

54 In November 2008, the Competition Bureau ended its preferences for non-duality (the principle that an Issuer could only issue cards of one credit card network), thereby allowing Issuers to issue both Visa and MasterCard credit cards to consumers and Acquirers to acquire transactions for multiple credit card networks. This decision was largely based on the transitions of Visa and MasterCard from member-owned associations to publicly held corporations that were not controlled by their Issuers or Acquirers.

55 The Stop Sticking it To Us Coalition testified before the Standing Senate Committee on Banking, Trade and Commerce in the spring of 2009, which had been mandated with the task of reporting on the credit and debit card systems in Canada and their relative rates and fees, in particular for businesses and consumers. Amongst the recommendations made by the Committee in its Report of June 2009, was the creation of an "oversight board" that would establish a code of conduct for payment systems participants, and the recommendation that the federal government take "appropriate action to permit surcharging and/or discounting by merchants" and prohibit any honour-all-cards rules. (See Senate, Standing Senate Committee on Banking, Trade and Commerce, *Transparency, Balance and Choice: Canada's Credit Card and Debit Card Systems* (June 2009)). The Senate Committee's recommendations did not, however, echo those made by the Coalition when the latter recommended that the Federal Government regulate Interchange Fees based on costs and, in that regard, use the Australian regulatory experience.

56 In the summer of 2009, the House of Commons Standing Committee on Industry, Science and Technology and the Committee on Finance commenced a study on credit card Interchange Fees and the debit payment system in Canada. Around the same time, the Canadian Federation of Independent Businesses ("CFIB") proposed a Code of Conduct to address its concerns about rising Interchange Fees. In its Code, it made 10 recommendations, including the rights of Merchants to refuse cards and to surcharge or discount. The Code of Conduct was to be adopted by credit card companies, processors and banks, together with federal oversight. CFIB stated that it would encourage the government to intervene if the credit card companies and banks were unwilling to negotiate a workable Code of Conduct for the industry on a voluntary basis.

57 On November 19, 2009, the Federal Minister of Finance released for public consultation a Draft Code of Conduct for the Credit and Debit Card Industry. Stakeholders were invited to provide their views on the proposed document. The voluntary Code of Conduct for the Credit and Debit Card Industry in Canada (the "Code of Conduct") was released in April, 2010, and after some minor revisions were made, it was adopted by the payment card networks, the major credit and debit card issuers and payment processors, and came into force in August 2010.

58 The extent to which this Code of Conduct may be classified as "voluntary" is very much in doubt. The evidence establishes that the credit card industry was to accept either this Code or face possibly even more stringent regulation. The Code has all the hallmarks of a regulation.

59 Brian Weiner, the Head of Strategy and Interchange at Visa Canada Corporation, testified that he had attended various meetings with the Department of Finance on behalf of Visa and that those meetings had included discussions regarding surcharging, discounting and the Honour All Cards Rule. The Department of Finance had also met with other stakeholders such as Issuers, Acquirers, Merchants and consumers to develop the Code.

60 The Financial Consumer Agency of Canada monitors the Code of Conduct (see: *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, at para. 3(3)(*c*)).

61 The Code of Conduct provides for greater transparency and disclosure by payment card networks and Acquirers to Merchants by, for example, requiring payment card networks to make applicable interchange rates easily available on their websites. Under section 5 of the Code of Conduct, payment card network rules must ensure that Merchants can provide discounts for different methods of payment and also differential discounts among different payment card networks. Further, the payment card network rules will ensure that a Merchant can choose to accept only credit or debit payments from a payment card network without having to accept both.

62 On July 12, 2010, the *Payment Card Networks Act*, S.C. 2010, c. 12, received Royal Assent and section 6, which is not yet in force, provides that the Governor in Council, on the recommendation of the Minister of Finance, may make regulations respecting payment card networks.

63 On June 18, 2010, the Minister of Finance also launched the Task Force for the Payments System Review (the "Task Force") which received the mandate of reviewing the payments system. In its discussion paper, "The Way We Pay — Transforming the Canadian Payments System", the Task Force discussed the possibility of increasing fairness in credit and debit card networks and noted the fact that the Commissioner had brought a section 76 application before the Competition Tribunal.

64 The Minister unfortunately made statements directly related to the matters before the Tribunal during the final days of the Tribunal's hearing between the close of evidence and the opening of final argument. The Respondents and the Bankers Association used these statements in final argument.

65 As an independent quasi-judicial/judicial tribunal, the Tribunal as a matter of law is not bound by these statements nor can it be influenced by them. Those statements, presumably not intended to impact this process, were unhelpful but more importantly irrelevant to the Tribunal's decision. The comments were noted but played no part in the Tribunal's decision making process.

(2) Other Jurisdictions

66 The Tribunal heard evidence about the regimes and results in other systems which is helpful in considering the "but for world" in terms of what has or will happen to the competitive environment if the Merchant Rules were not in place and if the Commissioner were successful in this application.

67 The Tribunal has had to be careful in assessing the experience of other jurisdictions in part because no witness from any of the other jurisdiction's regulatory authorities gave evidence here. The evidence of the various reports and experience was largely third hand from persons who had a particular viewpoint. While admissible as evidence in this Tribunal, that evidence and the lessons which can or should be drawn does not have the same weight as if the Tribunal had had the benefit of direct evidence.

68 However, the evidence did underscore the need for effective regulation in this field.

Australia

69 In 2001, the Reserve Bank of Australia ("RBA") began a lengthy reform project regarding the payments system in Australia. The original motivation for the reform stems from the findings and recommendations of the Financial Systems Inquiry ("Inquiry") released in 1997 which found that while earlier deregulation had improved competition and efficiency in Australia's payments system, further gains were possible.

70 In accordance with the recommendations of the Inquiry, a Payments System Board ("Board") within the RBA was established in 1998. At that time, the government also provided the RBA with specific powers to regulate the payments

system in order to implement the Board's policies. The most relevant powers in the context of the card payment reforms are those set out in the Payment Systems (Regulation) Act 1998 (Cth.) ("PSRA"). The PSRA, among other things, provides the RBA with the authority to designate a payment system for regulation, to create regulatory standards for a designated payment system, and to ensure that actors within a designated payment system comply with regulatory standards.

71 In April of 2001, the MasterCard and Visa credit card networks were designated by the RBA as payment systems or "schemes" under the PSRA. The designation came following a March 2000 investigation by the Australian Competition and Consumer Commission ("ACCC") which concluded that the collective setting of interchange fees by the credit card networks was in breach of the price-fixing provisions of the Trade Practices Act 1974 (Cth.). Following discussions with the banks, the ACCC asked the RBA to consider using its powers to address the issue of interchange fees. Accordingly, Visa and MasterCard were designated as payment systems and lengthy consultations in respect of possible reforms ensued. On August 27, 2002, the RBA released its reforms of the credit card payment systems. The reforms, among other things, regulated interchange fees and prohibited the no-surcharge rule.

72 The Setting of Wholesale ("Interchange") Fees Standard ("Interchange Standard"), which came into effect on July 1, 2003, regulated the default interchange fees set by Visa and MasterCard. The Interchange Standard required that an objective, transparent and cost-based benchmark be used to determine a weighted cap on the level of interchange fees applicable to Visa and MasterCard credit card transactions. Under the Interchange Standard, the weighted average interchange fee applicable to such transactions was 0.55%. A revised standard effective November 1, 2006 reduced the interchange fee benchmark to 0.50%. The 0.50% benchmark still applies today.

73 While Visa and MasterCard have both been designated as payment systems under the PSRA, American Express and Diners Club have not and are thus not subject to the Interchange Standard.

74 The RBA imposed a standard requiring the removal of the no-surcharge rules in the MasterCard and Visa credit card networks effective January 1, 2003. The standard provided that "[n]either the rules of the Scheme nor any participant in the Scheme shall prohibit a merchant from charging a credit cardholder any fee or surcharge for a credit card transaction". Again, American Express and Diners Club are not subject to this regulation but they have provided the RBA with written undertakings that they will not prohibit merchants from surcharging.

75 In mid-2011, the RBA decided to conduct a public consultation on potential modifications to the standard relating to surcharging. The RBA had been concerned about excessive surcharging and an increased tendency for surcharges to be "blended" across card networks (cards from different schemes are surcharged at the same rate despite significant differences in acceptance costs).

76 Excessive surcharging became an increasing problem. While the Commissioner disputes some of the excessive surcharging evidence, we are persuaded that it became a problem in Australia and the extent of it was encapsulated by Karen Leggett of the National Bank of Canada:

> The RBA's *Payments System Board Annual Report* for 2011 notes that the average fee paid by merchants to acquirers for accepting MasterCard and Visa credit card transactions in 2010/2011 was 0.81% of the value of transactions. However, many Australian merchants.surcharged more, and sometime much more, than their costs of accepting credit cards. For example, Australian taxi operators regularly impose a 10% surcharge on credit card payments

77 The RBA ultimately determined that it will modify the standard to allow Visa and MasterCard to limit surcharges to an amount reasonably related to the cost of acceptance.

New Zealand

78 The New Zealand Commerce Commission ("Commission") began an investigation into interchange fees and surcharging in 2003. In November 2006, the Commission filed a civil claim under the Commerce Act 1986 (N.Z.),

1989/5 against Visa International, MasterCard Incorporated and others seeking an order to, *inter alia*, prohibit Visa and MasterCard from enforcing their no-surcharge rule and honour all cards rule in New Zealand.

79 In August of 2009, the Commission settled its litigation with Visa and MasterCard. Under the terms of the settlement, Visa and MasterCard agreed not to (1) enforce any rule which prohibits or prevents surcharging by merchants in respect of New Zealand acquired transactions or (2) require or encourage acquirers to include any provision to that effect in any merchant agreement, or take steps to enforce any such provision in an existing merchant agreement. Nothing in the settlement prevents Visa and MasterCard from implementing or enforcing rules that oblige merchants to clearly disclose surcharges and that ensure that the surcharges bear a reasonable relationship to the cost of acceptance.

The United Kingdom

80 After receiving a recommendation from the Mergers and Monopolies Commission ("MMC") that MasterCard and Visa not be allowed to prohibit surcharging, in February of 1991, Parliament passed "The Credit Card (Price) Discrimination Order" which made it unlawful for any person to make or carry out an agreement relating to credit cards to the extent that it imposes or requires the imposition of a "no discrimination" or "no surcharge" rule. Thus surcharging on credit cards has been permitted in the United Kingdom since 1991.

81 In March of 2011, "Which?", a not-for profit consumer organization, filed a super complaint with the Office of Fair Trading regarding surcharging practices in the travel industry and improper disclosure of surcharges. The Office of Fair Trading responded to the complaint in June of 2011 and recommended that merchants seek to improve the transparency and overall presentation of payment surcharges in the transport sectors. The United Kingdom government subsequently stated that it would introduce legislation to prohibit surcharging that was beyond the reasonable cost of card acceptance.

European Community

82 In order to address merchant concerns as expressed by the European Commission ("EC") in the context of the EU investigation of multilateral interchange fees, MasterCard decided to remove its no-surcharge rule in the European Economic Area effective January 1, 2005. MasterCard modified its rule to provide that if a surcharge is applied, it must be clearly indicated to the cardholder at the point of sale and it must bear a reasonable relationship to the merchant's cost of accepting cards as a method of payment.

83 Thereafter, the EC continued its investigation of MasterCard relating to interchange fees and in December of 2007 decided that MasterCard's multilateral interchange fees for cross-border payment card transactions with MasterCard and Maestro branded debit and consumer credit cards in the European Economic Area violated EC Treaty rules on restrictive business practices. The EC's decision against MasterCard was affirmed on May 24, 2012.

84 The EC examined Visa's no-surcharge rule, honour all cards rule and interchange fees and in 2002, granted Visa a limited exemption to allow it to maintain its rules. As part of the resolution, Visa agreed to reduce its interchange fees. In 2007, the exemption expired at which point the EC commenced proceedings against Visa. Those proceedings included an investigation of the no-surcharge rule, the honour all cards rule and the setting of interchange fees. An agreement was reached in respect of the honour all cards rule in debit transactions. However, the EC's investigation in respect of the rules and interchange fees for credit transactions appears to be ongoing.

United States

85 On October 4, 2010, the United States Department of Justice ("DOJ") filed a civil antitrust lawsuit against Visa, MasterCard and American Express challenging certain of the defendants' rules, policies and practices that impede merchants from providing discounts or benefits to promote the use of a competing card that costs the merchant less to accept. At the same time, the DOJ announced that it had reached a settlement with Visa and MasterCard and filed a proposed final judgment. The final judgment was approved on July 20, 2011. As part of the settlement, Visa and MasterCard agreed not to adopt, maintain or enforce any rule or agreement which would prevent merchants from

offering consumer discounts or rewards based on card type, expressing their preference for or promoting a particular card type and providing information about card costs.

86 The prohibition on surcharging was not challenged in the complaint filed by the DOJ. In the final judgment, the DOJ reserved its right to investigate and bring actions to prevent or restrain violations of antitrust laws concerning any rule of Visa or MasterCard.

87 Visa, MasterCard and other defendants including certain financial institutions were involved in class proceedings before the U.S. District Court for the Eastern District of New York. The proceedings began in May 2005 after approximately 55 complaints, all but 10 of which were styled as class actions, were filed in U.S. federal district courts on behalf of merchants. The cases alleged, *inter alia*, that Visa's and MasterCard's setting of interchange fees and their no-surcharge rule violated antitrust laws.

88 On July 13, 2012, Visa and MasterCard entered into a Memorandum of Understanding in respect of a settlement in these proceedings. The settlement terms include a cash payment, a reduction in interchange fees for several months and reforms to the Visa and MasterCard rules including the no-surcharge rule. Surcharges, subject to certain conditions such as disclosure and a cap, will be allowed.

89 It is instructive that in all of the jurisdictions to which the Tribunal was referred, no proceedings or regulatory actions were based on "price maintenance". Frequently the proceedings or actions were based on price fixing, or collusion or conspiracy — but not price maintenance.

IV. The Application

90 On December 15, 2010, the Commissioner filed an application under section 76 of the *Competition Act*, the new price maintenance provision, challenging the Merchant Rules. The application alleges that the agreements entered into by Visa and MasterCard with Acquirers, which require Acquirers to impose the Merchant Rules on Merchants, influence upward or discourage the reduction of the Card Acceptance Fees. The Commissioner submits that without these rules, Merchants would have the ability to constrain Card Acceptance Fees, by imposing a surcharge or by encouraging their customers to use lower-cost methods of payments.

V. Evidence

91 Thirty-one individuals testified at the hearing, including eleven experts. They are as follows:

A. The Lay Witnesses

(1) The Commissioner of Competition

92 Ten lay witnesses appeared on behalf of the Commissioner. Eight of the ten witnesses worked for Canadian Merchants — with one exception those Merchants were from large corporations:

1. Mario de Armas - Senior Director of International Payments with Wal-Mart Stores, Inc.

2. Tim Broughton - Co-Owner of the Restaurant "C'est What?"

3. Craig Daigle - Senior Director, Treasury and Risk Management, Shoppers Drug Mart

4. Pierre Houle — Treasurer at Air Canada

5. Candice Li - Vice President, Treasurer, WestJet Airlines, Ltd.

6. Charles Symons - Tax and Treasury Manager, IKEA

7. Michael Shirley - Vice President Finance and Controller, Best Buy Canada Ltd.

8. Paul Jewer - Chief Financial Officer, Sobeys Inc.

93 Douglas Swansson, who is head of Payment Services at Coles Supermarkets Pty Ltd., one of Australia's largest retailers, also testified. The Tribunal also heard from Marion van Impe, the Director of Student Accounts & Treasury at the University of Saskatchewan.

(2) The Respondents

94 Visa called William Sheedy, Group President of Americas of Visa Inc., Elizabeth Buse, Group President, Asia-Pacific, Central Europe, Middle East and Africa, with Visa Inc., and Brian Weiner, Head of Strategy and Interchange at Visa Canada Corporation.

95 Kevin Stanton, President of MasterCard Advisors, and Betty K. Devita, President of MasterCard Canada Inc. testified on behalf of the Respondent MasterCard. MasterCard also called Jordan Cohen, the President of Global Payments Canada, a merchant Acquirer and processor in Canada, as a witness.

(3) The Intervenors

96 The TD Bank introduced the evidence of Jeff van Duynhoven, President of TD Merchant Services, and Chris Hewitt, Associate Vice President, Direct Marketing at the TD Bank.

97 Karen Leggett, Executive Vice-President, Marketing, National Bank of Canada, and Robert Livingston, President of Capital One Bank, testified on behalf of the Bankers Association.

B. The Expert Witnesses

(1) The Commissioner of Competition

98 Dennis Carlton was tendered, and accepted by the Respondents, as an expert in the areas of industrial organization and antitrust economics as applied to payments systems.

99 Ralph Winter was qualified as an expert to provide testimony and opinion evidence in the area of economics and Canadian competition policy.

100 Alan Frankel testified as an expert witness qualified to give opinion evidence in the areas of antitrust economics and the economics of payment systems.

101 Mike McCormack who works as the Managing Director of Palma Advisors, a Florida-based consultancy specializing in the payments transaction industry, was qualified as an expert to give opinion evidence with respect to the payment card transaction industry and the acquiring industry.

102 Michael Kemp provided opinion evidence on survey evidence, including survey methods and the principles governing the design and management of survey research.

(2) The Respondents

103 Kenneth Elzinga was qualified as an expert witness to give opinion evidence in the areas of industrial organization and antitrust economics, generally, and as applied to payment systems.

104 Jeffrey Church gave opinion evidence as an expert in the field of competition policy and economics.

105 Michael S. Mulvey appeared as an expert witness in the field of consumer research and consumer behaviour. Benoît Gauthier was qualified as an expert witness to give opinion evidence in respect of survey research and design.

106 Peter Dunn was qualified to give expert evidence with respect to the payments industry and payment systems.

(3) The Intervenors

107 Balaji Jairam was qualified to give opinion evidence as an expert in payment systems and the payments industry in Canada.

VI. The Relevant Legislation

108 Section 76 reads as follows:

> 76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
>
> (a) a person referred to in subsection (3) directly or indirectly
>
> (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
>
> (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
>
> (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.
>
> (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.
>
> (3) An order may be made under subsection (2) against a person who
>
> (a) is engaged in the business of producing or supplying a product;
>
> (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or
>
> (c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.
>
> 76. (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois:
>
> a) que la personne visée au paragraphe (3), directement ou indirectement:
>
> (i) soit, par entente, menace, promesse ou quelque autre moyen semblable, a fait monter ou empêché qu'on ne réduise le prix auquel son client ou toute personne qui le reçoit pour le revendre fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada,
>
> (ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure discriminatoire à son endroit, en raison de son régime de bas prix;

> > b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.
>
> (2) Le Tribunal peut, par ordonnance, interdire à la personne visée au paragraphe (3) de continuer de se livrer au comportement visé à l'alinéa (1)a) ou exiger qu'elle accepte une autre personne comme client dans un délai déterminé aux conditions de commerce normales.
>
> (3) Peut être visée par l'ordonnance prévue au paragraphe (2) la personne qui, selon le cas:
>
> > a) exploite une entreprise de production ou de fourniture d'un produit;
> >
> > b) offre du crédit au moyen de cartes de crédit ou, d'une façon générale, exploite une entreprise dans le domaine des cartes de crédit;
> >
> > c) détient les droits et privilèges exclusifs que confèrent un brevet, une marque de commerce, un droit d'auteur, un dessin industriel enregistré ou une topographie de circuit intégré enregistrée.

109 The parties disagree on the interpretation to be given to section 76. The Respondents submit that in order for section 76 to apply, the applicant must establish the resale of a product. The Commissioner disagrees.

A. The Interpretation and Application of Section 76

(1) The Requirement of a Resale?

110 It is well established that the principles of statutory interpretation require that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as cited in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21).

111 Further, it is presumed that the legislature does not speak in vain and that every word found in a statute is supposed to have a meaning and a function (see: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada, 2008) at p. 210).

112 Headings should be distinguished from marginal notes. Headings may be used as intrinsic aids but the weight to be given to headings in a statute will depend on a number of factors including the degree of difficulty by reason of ambiguity or obscurity in construing the section (see *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357 (S.C.C.); *R. v. Lohnes*, [1992] 1 S.C.R. 167 (S.C.C.)) contrary to the Commissioner's submissions. Marginal notes are inserted for convenience of reference only and do not form part of the enactment (see: s. 14 of the *Interpretation Act*, R.S.C. 1985, c. I-21).

113 Counsel for the Commissioner argues that Parliament intended to set out two distinct prohibitions in paragraph 76(1)(*a*)(*i*) and that while both prohibitions require a vertical relationship, only one of the two prohibitions requires a resale. The first prohibition refers to the person's customer and does not require a resale whereas the second prohibition does require a resale because it relates to a person to whom the product comes for resale:

> The first prohibition provided for in s. 76(1)(a) is against influencing upward or discouraging the reduction of "the price at which the person's customer ... supplies or offers to supply **a product** within Canada". [emphasis added] The second prohibition interdicts the influencing upward or discouraging the reduction of "the price at which any other person to whom **the product** comes for resale supplies or offers to supply **a product** within Canada".
>
> [...]
>
> The first half of subsection 76(1)(a)(i) does not require that a product be resold. Rather, it requires that the person whose prices are being influenced upward or discouraged be a "customer". A plain reading of section 76 shows that

> it is applicable to agreements that influence upwards the price at which a person's customer sells ***a*** product. [...] What is prohibited is the influencing upward or discouragement of the reduction by a supplier of the price at which *any* product is supplied or offered for supply by a customer within Canada.
>
> [...]
>
> With respect to the second half of the provision (after the "or"), it is clear that a reseller need not be selling the very same product or set of services that the reseller obtains from its supplier in order for section 76 to apply. The second half of subsection 76(1)(a)(i) explicitly refers to conduct that influences upwards or discourages the reduction of the price that "any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada" [emphasis added], as opposed to "the product", "that product" or "the same product" as that supplied by the supplier. Had Parliament intended to require that a reseller must be selling precisely the same product or set of services — no more and no less — than are supplied by the supplier in order for section 76 to apply, it would have said so using explicit limiting language.
>
> [Closing Submissions of the Commissioner of Competition, at pp. 142-144]

114 Counsel for the Commissioner submits that the above interpretation is supported by the use of the heading "Price Maintenance" (instead of "Resale Price Maintenance") and the relevant legislative history. It is further argued that succumbing to the Respondents' interpretation would render paragraph 76(3)(*b*), which provides that an order can be made against a person who is engaged in the credit card business, devoid of any meaning and would lead to absurd consequences.

115 The Tribunal has carefully considered the Commissioner's submissions, but finds that a resale is required under section 76 of the *Competition Act*. The resale of a product does not require that the product be identical. However, the Tribunal concludes, as is illustrated by the caselaw referred to by the parties, that in many instances, the product will be identical or substantially similar on the important characteristics of the product.

116 An ordinary reading of paragraph 76 (1)(a)(*i*) leads the Tribunal to conclude that the word "resale" applies to both "customer" and "other person" given the presence of the word "other" . The presence of the phrase "or any other person to whom the product comes for resale", suggests that the product has also come for resale to the person's customer. The words "to whom the product comes for resale" modifies both the "customer" and the "other person" rather than creating two types of persons caught under the provision — any customer who obtains the product even for their own use and other persons who intend to resell the product.

117 We note that a reference to any "other" person ("autre personne") is absent in the French version of the paragraph. None of the parties drew the Tribunal's attention to this issue. However, our interpretation of the English provision, which narrows the application of the provision, can be supported by a reading of the French version and is also supported by the legislative history of the price maintenance provision.

118 From 1951 until 1976, the *Combines Investigation Act* contained a criminal prohibition of resale price maintenance. Canada was amongst the first countries to enact such a prohibition in 1951 and the enactment followed the Report of the MacQuarrie Committee which had found that the prescription and the enforcement of minimum resale prices must be viewed as "manifestations of a restrictive or monopolistic practice which does not promote general welfare" (see: Committee to Study Combines Legislation, *Interim Report on Resale Price Maintenance* (Ottawa: Queen's Printer, 1951) and R.D. Anderson and S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Resale Price Maintenance", Canadian Competition Policy Record, vol. 6, no. 4, December 1985, 1 at 6.).

119 In 1976, the provision was broadened to also apply to horizontal price maintenance. The word "resale" was removed from the price maintenance section. A provision was also added to provide that the section would apply to persons engaged in businesses relating to credit cards. Section 38 of the *Combines Investigation Act* read as follows:

38. (1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade mark, copyright or registered industrial design shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

[...]

[emphasis added]

38(1) Quiconque exploite une entreprise de production ou de fourniture d'un produit, offre du crédit, au moyen de cartes de crédit ou, d'une façon générale, exploite une entreprise dans le domaine des cartes de crédit, ou détient les droits et privilèges exclusif que confère un brevet, une marque de commerce, un droit d'auteur ou un dessin industriel enregistré ne doit pas, directement, ou indirectement,

a) par entente, menace, promesse ou quelque autre moyen semblable, tenter de faire monter ou d'empêcher qu'on ne réduise le prix auquel une autre personne exploitant une entreprise au Canada fournit ou offre de fournir un produit ou fait de publicité au sujet d'un produit au Canada; ni

b) refuser de fournir un produit à une autre personne exploitant une entreprise au Canada, ou établir quelque autre distinction à l'encontre de celle-ci, en raison du régime de bas prix de celle-ci.

[nos soulignements]

120 The then Bureau of Competition Policy of Consumer and Corporate Affairs Canada described the amendments as follows:

The amendments have further extended the scope of the provision by deleting the definition of "dealer" and expanding the application of the prohibitions in this section not only to a person engaged in the business of producing or supplying a product (previously defined as a "dealer") but also to a person extending credit by means of credit cards and to holders of intellectual property rights. Since the Act no longer refers to a dealer requiring resale at a specified price, the prohibition applies equally to any person attempting to influence upward a selling price of a product irrespective of whether that person is the supplier of the product. It might apply, for example, to a situation where one supplier of a product sought by agreement to influence upward the price at which his competitor supplied the same or similar products. It is also anticipated that this amendment will effectively curtail the practices engaged in by a firm providing credit card services for retailers of preventing a retailer from giving a discount for cash. This provision will, therefore, be of benefit not only to retailers but also to consumers.

[emphasis added]

(Canada, Department of Consumer and Corporate Affairs (Bureau of Competition Policy)*, Stage 1- Competition Policy Background Papers* (Ottawa: Consumer and Corporate Affairs, 1976) at 55.)

121 The criminal prohibition therefore not only caught resale price maintenance, but also horizontal price maintenance. In 1986, the provision became section 61 of the *Competition Act*.

122 From the early 1980s until 2008, various studies were commissioned. Often the authors would question whether resale price maintenance should be criminalized (see e.g. *Report of the Royal Commission on the Economic Union and Development Prospects for Canada* (Ottawa: Supply and Services Canada, 1985) at p. 224). In 1999, the Commissioner of Competition engaged Professors VanDuzer and Paquet to conduct an independent study of the provisions of the *Competition Act* dealing with anticompetitive pricing and their enforcement by the Competition Bureau. The Professors concluded that vertical price maintenance should be subject to civil review and should not be a criminal offence. They found that the *per se* prohibition of vertical resale price maintenance was inconsistent with economic analysis.

123 The Standing Committee on Industry, Science and Technology made similar recommendations in its 2002 Report "A Plan to Modernize Canada's Competition Regime":

> That the Government of Canada repeal the price maintenance provision (section 61) of the *Competition Act*. In order to distinguish between those practices that are anticompetitive and those that are competitively benign or pro-competitive, that the Government of Canada amend the *Competition Act* so that: (1) price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provision (section 45); and (2) price maintenance agreements between a manufacturer and its distributors (i.e., vertical price maintenance) be reviewed under the abuse of dominant position provision (section 79).
>
> (see: House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, April 2002)

124 The Competition Policy Review Panel, in its final report "Compete to Win" issued in June 2008, also recommended that the price maintenance provision be decriminalized:

> The resale price maintenance provisions of the *Competition Act*, broadly speaking, address pricing issues that can arise between suppliers and resellers of a product, but do so as a criminal offence under the legislation. This is an area of Canadian competition law that is more restrictive than comparable US law. Other provisions of the *Competition Act*, such as those relating to refusal to deal and exclusive dealing, address competition issues between suppliers and resellers as civil matters. The Panel believes that resale price maintenance should also be treated as a civil matter.
>
> . . .
>
> The Panel recommends that:
>
> 14. The Minister of Industry should introduce amendments to the Competition Act as follows:
>
> [...]
>
> (e) repeal the existing resale price maintenance provisions and replace them with a new civil provision to address this practice when it has an anti-competitive effect. This new provision should be subject to the private access rights before the Competition Tribunal;
>
> (see: Canada, Competition Policy Review Panel, *Compete to Win* (Ottawa: Industry Canada, 2008)

125 The reference to the US law in the above report referred to the fact that in 2007, the Supreme Court of the United States had rejected the *per se* illegality of resale price maintenance in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (U.S. C.A. 5th Cir. 2007)

126 Less than one year after the release of the Panel's report, the *Budget Implementation Act*, S.C. 2009, c. 2, received Royal Assent and made important amendments to the *Competition Act*. The Act repealed the criminal price maintenance provision and added a new price maintenance provision, at section 76, to Part VIII of the *Competition Act* ("Matters

Reviewable by the Tribunal"). The repealed provision and the new provision are set out in the table below — the changes have been underlined:

61. No person who is engaged in the business of producing or supplying a product, [...] shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

[...]

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

61. (1) Quiconque exploite une entreprise de production ou de fourniture d'un produit [...] ne peut, directement ou indirectement:

a) par entente, menace, promesse ou quelque autre moyen semblable, tenter de faire monter ou d'empêcher qu'on ne réduise le prix auquel une autre personne exploitant une entreprise au Canada fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada

76. (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois:

a) que la personne visée au paragraphe (3), directement ou indirectement:

(i) soit, par entente, menace, promesse ou quelque autre moyen semblable, a fait monter ou empêché qu'on ne réduise le prix auquel son client ou toute personne qui le reçoit pour le revendre fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada,

[...]

b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

127 The Tribunal concludes that Parliament's intent was to return to resale price maintenance. Support for this interpretation is also found in documents released at that time.

128 The Competition Bureau, at the time, described section 76 as "designed to provide resellers of products with the freedom to set their own prices and to provide suppliers with the ability to compete through low-pricing policies." (see: *A Guide to Amendments to the Competition Act*, Competition Bureau (April 22, 2009)).

129 The two-prong prohibition interpretation advanced by the Commissioner is not supported by any documents or studies released around the time the amendments were made to the *Competition Act* or before that time. On the contrary, the documents and papers introduced at the hearing show that Parliament intended to return to the traditional focus of the resale price maintenance.

130 The ill which Parliament sought to address is adverse effects in the price of products for resale not the control of adverse effects of price *per se*. If that had been the intent, then the words "for resale" would be entirely redundant.

131 Counsel for the Commissioner emphasised that the heading of the provision refers to "Price Maintenance". However, as stated above, the weight to be given to headings in a statute will depend on a number of factors.

132 The Commissioner's submission that refusing to agree with her interpretation would lead to absurd consequences because it would mean that the provision, in this case, would not apply to businesses involved in the credit card business, should also be rejected. Those businesses are subject to section 76, as directed under paragraph 76(3)(*b*). However, this does not entail that in all cases, an order shall be issued — this will depend on the particular facts of a case.

133 Further, the Commissioner has provided no justification why Parliament intended to subject customers and persons other than customers to different criteria.

134 The Tribunal therefore finds that section 76 requires a resale of a product. The resale of a product does not require that the product be identical. However, in many instances, the product should be identical or substantially similar on the important characteristics of the product. Dr. Church expressed the view that the product being resold should be in the same product market as the product supplied and the Respondents reiterated that view. A conclusion on this point is not necessary to decide the case before us.

135 The Commissioner's interpretation leads to a result which, while not absurd as she suggests for other interpretations, are far more intrusive than would be reasonable. The Commissioner's interpretation would mean that Canada has embarked on a form of price control where any increase in a price — an increased input — would be subject to section 76 consideration.

136 If Parliament had intended to extend the reach of section 76 so far beyond what had been the traditional area of competition policy and law, clear language would be required.

137 The Commissioner's concern appears to be more directed to abuse of dominance by the two credit card companies. This was acknowledged by Dr. Carlton in responses to questions from the Tribunal:

> JUSTICE PHELAN: Taking that, you had a discussion about franchises and using the franchise example where a franchisor imposes restrictions on a franchisee, and that may be, in fact, more costly. Is the problem that we're talking about really a problem of dominance by Visa and MasterCard in the market?
>
> DR. CARLTON: I think it is, because if Visa and MasterCard weren't dominant, they couldn't impose these types of conditions. That is the whole point of why, you know, you ask: Are there so many alternatives that, you know, someone could just say, I'm not interested in you, Visa?

[...]

> JUSTICE PHELAN: Without taking you into legal definitions, from an economic perspective, would you describe what is happening here as an abuse of the dominant position that Visa and MasterCard have?
>
> DR. CARLTON: Yes, you could certainly describe it that way.

138 That concern may be related to the interpretation that abuse of dominance requires the practice of anti-competitive acts, in accordance with paragraph 79(1)(*b*), and the purpose of an anti-competitive act must be an intended predatory, exclusionary or disciplinary negative effect on a *competitor*, as held by the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (F.C.A.), leave to appeal to SCC refused, 31637 (May 10, 2007) [2007 CarswellNat 1107 (S.C.C.)].

139 However, any gap in the provisions governing abuse of dominance does not justify an overreaching interpretation of section 76.

VII. Analysis: The Elements of Section 76 and the Issues to Be Determined

A. Paragraph 76(1)(a)

140 The central issue in this case is: "Has the Commissioner established that each of the Respondents, directly or indirectly, by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada?"

(1) Requirement of a resale

141 The Commissioner submits that Visa and MasterCard do supply "Credit Card Network Services" to be resold by Acquirers to Merchants and those services have been described as follows:

> Visa and MasterCard provide Acquirers with direct access to their respective networks so as to permit Acquirers to supply merchants with the services required in order to allow merchants to accept credit card payments, including "authorization", "clearing" and "settlement" services (collectively referred to by the Commissioner as "Credit Card Network Services").
>
> Broadly speaking, "authorization", "clearing" and "settlement" refer to the basic steps in a credit card transaction that involve authorizing the credit card transaction, collecting the value of the transactions from the cardholder's bank, and reimbursing the merchant for the transaction conducted using a Visa or MasterCard-branded credit card.

142 The Commissioner submits that the services are the "main, primary and critical input supplied to Acquirers". In that regard, the Commissioner relies on the evidence before the Tribunal with respect to the small proportion of value-added by Acquirers as reflected in the component of Card Acceptance Fees typically allocated for Acquirer services. The Commissioner alleges that the Acquirers purchase what she defines as Credit Card Network Services from the Respondents and resell them to Merchants.

143 The Respondents submit that Acquirers sell Merchants the ability to accept Visa, MasterCard and other payment cards for payment and that they do not resell authorization, clearance and settlement services to Merchants. In that regard, they turn to and rely on the evidence adduced by the Intervenor, the TD Bank.

144 At the hearing, the Tribunal heard evidence from Jeff van Duynhoven, President of TD Merchant Services, TD's acquiring business. The Tribunal also heard from Jordan Cohen, the President of Global Payments Canada, another Canadian Acquirer.

145 The Commissioner also called Mike McCormack of the United States who was qualified to give opinion evidence on the payment card transaction industry and the acquiring industry.

146 These witnesses gave slightly varying descriptions of the industry and of the nature of the services provided by the various participants. Where there is a conflict, the Tribunal prefers the evidence supportive of the Respondents' position. In particular, the Tribunal found Mr. van Duynhoven of TD Bank to have current, direct and Canadian experience and knowledge. The Tribunal found that the Respondents' witnesses on this issue better withstood cross-examination and were more cogent and consistent.

147 The Tribunal has carefully reviewed the evidence adduced regarding the products sold by Visa and MasterCard and those sold by Acquirers. It finds that the products sold by the Respondents to Acquirers can be described as "Credit Card

Network Services" and those sold by Acquirers to Merchants can be described as "Credit Card Acceptance Services". These services are different and Acquirers do not resell either Visa or MasterCard Credit Card Network Services.

148 Visa and MasterCard operate their respective networks by which MasterCard or Visa card transactions are authorized and paid. They supply authorization, clearance and settlement of transactions services to Acquirers over their respective network ("Credit Card Network Services"). Acquirers, on the other hand, provide to Merchants services that enable them to accept credit cards ("Credit Card Acceptance Services"), which services are different than those of Visa and MasterCard.

149 The role of an Acquirer was clearly explained by Mr. van Duynhoven who stated as follows:

> Instead, as discussed elsewhere in this Witness Statement, Canadian Acquirers provide a bundle of services, including, but not limited to: leasing and selling point-of-sale equipment, such as countertop terminals, wireless terminals and internet-based technology; providing guaranteed payment and credit services, including the assumption of risk of fraud and "chargeback" inherent therein; ongoing training, service and support of equipment and sales staff, including the maintenance of call centres and technical personnel; and development of loyalty and specialty programs for Merchant Customers.

150 The Tribunal found Mr. van Duynhoven, who worked in the Canadian payments industry for approximately 20 years, to be a knowledgeable witness and his evidence was cogent. He explained that Acquirers build and operate proprietary networks of their own and deploy point-of-sale technology to Merchants in order to enable transactions:

> JUSTICE PHELAN: So you have described that you have your own network —
>
> MR. VAN DUYNHOVEN: Correct.
>
> JUSTICE PHELAN: — for these things, in the sense that it connects up to the Visa or MasterCard network?
>
> MR. VAN DUYNHOVEN: Right. And a number of other networks, as well.
>
> JUSTICE PHELAN: And a number of others. And that is essentially the same structure for your competitors. They have their own networks that connect in a similar fashion?
>
> MR. VAN DUYNHOVEN: Yes. One of the chief functions that an acquirer does is trying to simplify the process for a merchant. So rather than having a Visa point-of-sale device on the merchant's counter for the checkout, a MasterCard one, one for American Express, one for Interac, et cetera, et cetera, we provide all of that functionality to the merchant and connect to a variety of different networks. So the merchant doesn't have to worry about how all of that works, from a technological standpoint.

151 These networks facilitate connections between Merchants, payment card networks such as Visa and MasterCard and the Issuers around the globe who ultimately provide authorization for individual transactions. Merchants do not connect or interface with the Visa and MasterCard networks. Clearing and settlement between Issuers and Acquirers and between Acquirers and Merchants are separate activities. Acquirers communicate with Issuers over the Respondents' networks. Merchants communicate only with their respective Acquirers.

152 M. van Duynhoven also explained that as an Acquirer, TD remains financially responsible for the transactions it acquires. This means that the TD Bank remains responsible for any transaction that results in a "charge-back" from the Issuer and that it undertakes "accounts receivable risk" in that it has "floated" for its Merchants all the Interchange Fees for the month but will not collect any fees until after its billing process is complete at the end of the month.

153 The evidence of Mr. van Duynhoven was contradicted by that of Mr. McCormack who expressed the view that Acquirers resell the services provided by the Respondents and that the Acquirer merely provides ancillary services, such as POS (point of sale) terminal rentals and reporting services.

154 However, as indicated earlier, the Tribunal preferred the evidence of Mr. van Duynhoven, a knowledgeable witness with profound knowledge of the Canadian Acquiring industry. On the other hand, Mr. McCormack had not listed any Canadian experience on his *curriculum vitae* and was not as familiar with the Canadian payments industry as Mr. van Duynhoven and thus made various errors regarding the role of Canadian Acquirers.

155 The Commissioner has also suggested that the fact that an Acquirer's share of the Card Acceptance Fees is rather small shows that the services provided by Visa and MasterCard are the critical and main input supplied to Acquirers and that the latter only provide a small proportion of value-added services.

156 The Tribunal agrees with the TD Bank in that the profit margins of the Acquirers are not a proper lens through which to determine whether there is a "resale". Further, much of the Card Acceptance Fees accrues to Issuers in the form of Interchange Fees; by the Commissioner's standards, this would imply that Issuers are much more important than either the networks of the Acquirers. Finally, if one were to use revenue shares to measure the relative value-added of the credit card networks and the Acquirers, the relevant comparison would be between the fraction of the Card Acceptance Fee that accrues to Acquirers and the fraction of the Card Acceptance Fees that accrues to the credit card networks, both of which are relatively small in comparison to the Interchange Fees.

157 The Tribunal therefore finds that the requirement that a product comes for resale to a customer has not been established. This finding is fatal to the Commissioner's application. Therefore, on this finding, the Commissioner's application will be dismissed.

(2) The meaning of "*has influenced upward*" *the price v. adverse effects*

158 However, in the event that we are wrong in our conclusions with respect to the legal interpretation of paragraph 76(1)(*a*)(*i*) or in our finding that the requirement has not been met, we continue with our analysis. This, in light of the fact that the parties adduced evidence and made submissions with respect to the other requirements.

(a) Overview of parties' submissions

159 The Commissioner alleges that Visa and MasterCard, by requiring Acquirers to implement the Merchant Rules, have indirectly influenced upward, and do influence upward the price for Credit Card Network Services. She submits that in the absence of the Merchant Rules, Merchants could constrain Card Acceptance Fees by surcharging or threatening to surcharge certain credit cards or declining to accept higher-cost credit cards. In that regard, reference is made by the Commissioner to expert evidence adduced at the hearing and evidence from other jurisdictions (Australia, United Kingdom) relating to the "but for" world that would exist without the Merchant Rules.

160 In the Commissioner's view, the Merchant Rules remove or reduce the incentive on the part of Visa and MasterCard to compete through lower fees to Merchants. She also says that the Merchant Rules allow the Respondents to maintain higher prices for their services, without facing meaningful countervailing pressure from Merchants, as would normally occur when a firm charges higher prices in a competitive market. Card Acceptance Fees are also influenced upwards, according to the Commissioner, because Merchants typically pass some or all of the increased costs resulting from high Card Acceptance Fees on to all of their customers regardless of the means of payment they use in the form of higher prices for goods and services. This means that the Respondents have a stronger incentive to increase their fees.

161 The Respondents deny that they have engaged in conduct that has influenced upward, or has discouraged the reduction of, the price at which Acquirers supply or offer to supply or advertise a product within Canada and they submit the condition in paragraph 76(1)(*a*) has not been met. The Respondents dispute both the product market definition and the Commissioner's theory of how the No-Surcharge Rule lessens competition between them. They submit that the Tribunal cannot reach such a conclusion if the evidence does not establish that they have attempted to prevent Acquirers or Merchants from offering to sell their products at whatever price they see fit. They further allege that the Commissioner's interpretation turns section 76 in an open-ended vertical restraint provision as most anti-competitive

conduct will have influenced prices upward. In their view, the reference to "has influenced upward or discouraged the reduction of the price of" cannot refer to the anti-competitive effects of a vertical restraint.

(b) Analysis

162 We agree with the Respondents that the "influencing-upward" condition must mean something other than the consequences that flow from a company's exercise of market power which results in adverse effects on competition in the form of an increase in prices in the downstream market. If not, section 76 would turn into an open-ended provision. There is no support, in the legislative history, other decisions, or commentary, for such an interpretation.

163 As the Federal Court of Appeal noted in *Canada Pipe*, given a provision's multi-element structure, "[e]ach statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant." Under the Commissioner's interpretation, in various factual scenarios, simply showing that conduct has resulted in an adverse effect on competition resulting in an increase in prices would be sufficient to meet the criteria set out in paragraph 76(1)(*a*)(*i*). This interpretation would render the requirement of adverse effects, found in paragraph (*b*), devoid of any meaning in various factual scenarios. It would also invite the Tribunal to read into paragraph (*a*) a reference to an agreement, threat or promise that had the "effect" of influencing a price upwards. The word "effect" or "effects" is used in various provisions of the Act (see e.g.: 74.1, 75, 77(2)(c), 79, 82, 83(1), 86(1)(a), 90.1(4), 93, 96, 100, 106.1) and is even found in paragraph 76(1)(*b*), but is absent in preceding paragraph (*a*)(*i*).

164 Professor Côté commented as follows on the presumption against the addition or deletion of words:

> Assuming a statute to be well drafted, any interpretation which adds terms or provisions, or deprives terms or provisions of their meaning or utility should be considered dubious.
>
> [...]
>
> Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislature wanted to say: "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."
>
> [...]
>
> It must also be assumed that each term, each sentence and each paragraph have been deliberately drafted with a specific result in mind. The legislature chooses its words carefully: it does not speak gratuitously.
>
> (see: Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011, at pp. 293-295)

165 We should also note that private parties can file applications for leave to commence a section 76 application under section 103.1 of the *Competition Act*. Under the Commissioner's interpretation, a corporation could seek leave to file a section 76 application with respect to various types of conduct other than conduct associated with typical resale price maintenance (for example, in our case, Canadian Merchants could have filed an application for leave with the Tribunal directly). In the past, notwithstanding support for making the abuse of dominance provision open to private party litigation, the legislator has not yet done so. It is unlikely that the legislator would have opened up an extremely broad price maintenance provision to private party litigation, without using clearer language to that effect.

166 As a result we cannot espouse the interpretation advocated by the Commissioner. We further note that we conclude that "the conduct", referred to in paragraph 76(1)(*b*) refers to the conduct set out in paragraph (*a*)(*i*) or (*a*)(*ii*).

167 To the extent that the Commissioner's application is based on this interpretation, her application must also fail on this basis. However, as explained above, the parties adduced evidence and made submissions with respect to the requirements and raise novel issues. As a result, we continue with our analysis.

168 As the Commissioner's analysis commences with an assessment of the relevant geographic and product markets as well as market power, to then determine whether prices have been influenced upwards, we will do the same.

(3) Relevant Geographic Market

169 The parties agree that the relevant geographic market is Canada and the Tribunal accepts this submission.

(4) Relevant Product Market

(a) Overview of the Parties' Submissions

170 The Commissioner submits that the relevant market for the purpose of assessing the competitive effects of the Merchant Rules consists of general purpose Credit Card Network Services. In support of this submission, she notes that credit cards have features that clearly distinguish them from other methods of payment, that Merchants have continued to accept the Respondents' credit cards notwithstanding increasing Card Acceptance Fees, and that the Respondents' proposed market definition has been consistently rejected in other jurisdictions. She also relies on the application of the hypothetical monopolist test.

171 The Respondents submit that the Commissioner's proposed product market has been defined too narrowly. In that regard, Visa submits that it competes for transaction volume with payment methods that include cash, debit, cheque, other credit card companies and new entrants such as PayPal. MasterCard, in its closing submissions, alleges that the market for payment services is the relevant product market.

172 The Respondents further allege that the Commissioner's market definition is incorrect because it fails to take into the consideration the fact that they operate two-sided platforms. In their view, the application of the hypothetical monopolist test, as performed by the Commissioner's expert economists, is flawed.

(b) Analysis

173 The Tribunal generally applies the hypothetical monopolist test when defining relevant markets (see: *Commissioner of Competition v. CCS Corp.*, 2012 Comp. Trib. 14 (Competition Trib.), at para. 58, aff'd 2013 FCA 28 (F.C.A.)). Under this approach, as is explained in the *Merger Enforcement Guidelines*, a relevant product market is defined as the smallest group of products in which a sole profit-maximizing seller (the hypothetical monopolist) would impose and sustain a small but significant and non-transitory increase in price (the "SSNIP") above competitive levels (see: Competition Bureau, *Merger Enforcement Guidelines* (October 6, 2011). Often, for the purposes of determining the SSNIP, objective benchmarks such as a 5 % increase in price lasting one year are used (see: *CCS Corp.*, at para. 60). In the determination of whether a SSNIP would be profitable, the hypothetical monopolist test makes use of demand elasticity and cross-elasticity evidence as well as what are known as practical indicia.

174 In the case at hand, the application of the hypothetical monopolist test leads the Tribunal to consider the following three questions:

(i) the application of the test to two-sided forums;

(ii) the stage in the vertical chain at which the test should be applied; and

(iii) the appropriate price to be used.

(i) The application of the test to two-sided forums

175 Both the Commissioner's and the Respondents' expert economists agree that credit card networks are examples of two-sided platforms. They agree that a characteristic of two-sided platforms is that the attractiveness of the platform to potential users on one side depends on the number of users there are on the other side. For example, a newspaper, recognized by the experts as a reasonably representative example of a two-sided platform, is more valuable to advertisers the more readers it has and can be more valuable to readers the more advertisers it has. For that reason, the response to a change in the price charged to users on one side of the platform can also affect demand on the other side of the platform. A consequence of this interdependence or feedback effect is that it may be optimal from the perspective of maximizing use of the platform concerned, for users on one side of it to bear a disproportionate fraction of platform costs.

176 The Commissioner and the Respondents agree that Cardholders find themselves on one side of the credit card network platform and that Merchants are on the other. They also agree that a card becomes more valuable to a Cardholder as the number of Merchants accepting it increases and that the benefit to a Merchant from accepting a particular card increases with the number of individuals holding and using the card. Merchants and Cardholders pay different prices for their use of the platform. Cardholders may pay annual fees and interest and may also receive rewards based on their card usage. Merchants pay Card Acceptance Fees which include an Interchange Fee that accrues to Issuers. Interchange Fee revenue may be used, in part, by Issuers to fund rewards or other benefits to Cardholders. The Interchange Fee is an example of a balancing payment whereby users on one side of a platform may subsidize the use of its other side.

177 The Commissioner's position is that it is appropriate to apply the hypothetical monopolist test to one side of the platform, that is, the supply of Credit Card Network Services by the Respondents to Acquirers. The Respondents emphasize the complexities involved in applying the hypothetical monopolist test to two-sided platforms. There is at least some agreement from the Commissioner's experts that this is the case. For example, Dr. Carlton notes that because changes in one price in a two-sided market may affect the price on the other side of the market, market definition in two-sided markets may be more difficult, and may have different implications than in a typical case.

178 The Respondents submit that in this case, the application of the hypothetical monopolist test cannot be confined to one side of the credit card payment network platform. They maintain that it is wrong to focus only on the acceptance side of the platform and on the price charged either to Merchants or Acquirers rather than on the sum of the prices charged to the acquiring and issuing sides together. They further contend that substitution in favour of alternative means of payment in response to a price increase on one side of the platform can induce similar substitution on the other side of the platform with a resulting loss of profit on both sides. This may also set off subsequent rounds of feedback effects. These feedback effects may be amplified by network effects. If the interdependence of demand on both sides of the platform and feedback effects are ignored, then there is the potential to define the market much too narrowly.

179 Dr. Carlton agreed that the hypothetical monopolist test should take account of any cross-platform demand interdependence and feedback effects arising from the application of a SSNIP to one side of the platform. Dr. Carlton stated explicitly that he had done so:

> MR. KENT: This is what I'm getting at. You have to take that into account, right? You have to take into account the negative impact on the opposite side of the platform that comes with raising a price on the first side of the platform?
>
> DR. CARLTON: Yes. In a sense, you have to take account of, if you were running a paper, all of your revenue sources. So when I went through my example in my direct testimony and I said I raised the price from 20 cents to 21 cents, what happens to total volume of credit card purchases? Do you think it is going to plummet?
>
> I have taken into account that, yes, a merchant could say "no". That will cause a reduction in the number of customers who say, No, I don't want a credit card. That will cause a subsequent reaction by merchants who say they don't. I am saying, taking all of that feedback or loop, as you put it, into account, do I expect such

> a large reduction to make the price increase unprofitable? I'm saying, looking at the evidence, it is pretty clear what the answer is. No, because I have seen such price increases occur over — in Canada.

180 The Respondents' expert economists, Dr. Church and Dr. Elzinga, also opined on the application of the hypothetical monopolist test to two-sided platforms. Dr. Church stated that, given that the hypothetical monopoly credit card network supplies Credit Card Network Services to both Issuers and Acquirers, the correct approach to product market definition is to apply the hypothetical monopolist test to both sides of the platform. This means that the SSNIP should be applied to the sum of the Acquirer Network Fee plus the Issuer Network Fee, which is the total amount paid by Issuers and Acquirers for the use of the credit card network platform and the test should assess the effect of the SSNIP on the combined profitability of both sides of the platform.

181 Dr. Church did not actually perform the test or suggest what the relevant product market, as a result of such a test, might be. He confined himself to stating that the relevant product market cannot be as narrow as Dr. Winter defined it. In cross-examination, however, Dr. Church did appear to concede that the hypothetical monopolist test could be applied to one side of the platform provided the cross-platform interdependence of demand and feedback effects are taken into account. When asked his opinion about the application of the test to each side of a payment card platform by the United States Department of Justice, Dr. Church's response was that "there is more than one way to skin a cat":

> MR. FANAKI: You have no reason to disagree that was the approach the Department of Justice applied in that case?
>
> PROFESSOR CHURCH: Well, what would be interesting to know is, when they applied the hypothetical monopolist on one side versus the other side, whether they took into account the feedback effects from one side to the other and the lost margin from those feedback effects when they did it on one side.
>
> MR. FANAKI: Well, let's talk about feedback effects in one minute if we could, because I promised you I would come back to that. You have no reason to disagree this was the approach the DOJ took to define the relevant market in this case?
>
> PROFESSOR CHURCH: I think what is interesting about it is, as in most things, there is more than one way to skin a cat, and even within a one-sided market analysis, if you did the right margins and did the right elasticity measures, you could get the same answer as you would with a two-sided market.

182 In the context of the related question of whether the SSNIP should be applied to the price charged to customers on one side of the platform or the sum of the prices charged to customers on both sides of the platform when performing the hypothetical monopolist test, Dr. Church also stated:

> **PROFESSOR CHURCH**:... When we were doing the two-sided market analysis, there is a total price for the whole network that is divided between the two sides. When you go to raise the price to 5 percent of the total network, you still have to divide it between the two sides. And if you look at the literature — the economics literature as opposed to the Antitrust Law Journal written by lawyers, but economics literature which shows you how to do this — you will find that you raise the price to 5 percent, and then you divide between the two sides based on their relative elasticities, based on the price increases that they face.
>
> So it is not — you know, I think the way to think about this is to think there are two prices running around. The price for the margin is the price that is relevant to — is just the network access fees and figuring out the profit-maximizing implications.
>
> The change in the price to issuers and acquirers is the change in their price, as suggested by this paragraph. So, you know, <u>I don't think that there is this — there's unlikely to be this distinction that you are trying to raise between the one-sided and two-sided approach. If the one-sided approach is done correctly, you can get very close, if not exactly the same, answer as you would get on the two-sided approach.</u>

[emphasis added]

183 Dr. Elzinga was of the view that credit card networks compete as platforms with other payment platforms such as debit cards, cheques and cash in the market for payment services. In his opinion, it is incorrect to apply the hypothetical monopolist test to one side of a two-sided platform. Dr. Elzinga defined the price of a credit card transaction as the sum of the prices charged on to Cardholders and Merchants, that is, Card Acceptance Fees plus cardholder fees less cardholder rewards. In Dr. Elzinga's opinion, it is the sum of the prices charged on each side of the market that is relevant for antitrust purposes. The Tribunal takes this to mean that he would apply a SSNIP to the sum of the prices charged to Merchants and Cardholders and that their response would be such as to make this unprofitable, thus implying a broader product market.

184 Dr. Elzinga did not explore the consequences of applying a SSNIP to the sum of the prices charged to Cardholders and Merchants. Instead, he suggested that a one-sided hypothetical monopolist test, in the form of a surcharge imposed on Cardholders by Merchants would show that Cardholders would respond by substituting in favour of other modes of payment in sufficient numbers to imply that the Commissioner has defined the market too narrowly:

> To see whether the Commissioner's proposed credit card market passes the "one-sided hypothetical monopolist test," would mean investigating how tenaciously consumers would cling to their credit cards if it meant paying 5% or 10% more than with an alternative payment mechanism at the point of sale.

185 Dr. Elzinga concluded that enough consumers would switch to other modes of payment if they were subject to a 2 per cent surcharge (let alone a 5 or 10 per cent surcharge) on credit card transactions to make it unprofitable for a hypothetical monopolist to impose a price increase of this magnitude. To Dr. Elzinga, this implied that the relevant market must be broadened to include some of the alternative modes of payment to which consumers would switch.

186 As Dr. Frankel points out in his Reply Report, however, the 2 per cent surcharge on the value of the goods and services purchased with a credit card assumed by Dr. Elzinga is not the same as a 2 per cent increase in either the net fees paid by Cardholders for the use of their cards or the price of a credit card transaction as Dr. Elzinga has defined it. The Tribunal finds Dr. Frankel's critique persuasive.

187 In sum, with respect to the question of whether the product supplied to customers on one side of a two-sided platform can be a candidate relevant product market, the Tribunal's understanding of the evidence of the expert economist witnesses is as follows: the opinion of the Commissioner's three expert economists is that one side of a two-sided platform can be a relevant product market and that the SSNIP can be applied to the price charged to customers on one side of the platform. All three of them apply the hypothetical monopolist test to the card acceptance or acquisition side of the credit card network platform. One of the Commissioner's experts, Dr. Carlton, explicitly agreed that cross-platform demand interdependence and feedback effects must be taken into account when applying the hypothetical monopolist test to one side of a two-sided platform.

188 The opinion of both of the Respondents' expert economists is that the smallest candidate relevant product market encompasses both sides of a card network platform and that the hypothetical monopolist test should assess the profitability to the platform as a whole of an increase in the sum of the prices paid by users on both sides of the platform. Neither performs a test of this nature. Moreover, one of the Respondents' experts, Dr. Church, appears to concede that provided cross-platform feedback effects are properly taken into account, the application of the hypothetical monopolist test to one side of a two-sided platform can yield the same conclusion with respect to market definition as applying it to the platform as a whole. For his part, Dr. Elzinga does do a hypothetical monopolist test but it is a "one-sided" test, applied to the cardholder fees. This test also appears to be methodologically flawed.

189 Given the evidence before us, we find that one side of the platform can be a candidate relevant product market for the purposes of the hypothetical monopolist test and that the SSNIP can be applied to the price charged to customers

on that side of the platform provided both the interdependence of demand, feedback effects and ultimately changes in profit on both sides of the platform are taken into account.

190 We now turn to the remaining two questions with respect to the application of the hypothetical monopolist test.

(ii) The stage in the vertical chain at which the test should be applied; and

(iii) The appropriate price to be used.

191 The Commissioner submits that the hypothetical monopolist test should be applied to the Credit Card Network Services supplied by the Respondents to Acquirers. She further submits that in applying the SSNIP test, one must use the price paid by Acquirers to the Respondents, which is comprised of the Interchange Fee and the Acquirer Network Fee. She disagrees with the contention that, in this case, the appropriate price for the purposes of the SSNIP test is the Acquirer Network Fee, and she notes that the "relevant price is the total price charged to Acquirers or to merchants, regardless of whether that price [...] may ultimately be divided into Interchange Fees or Network Fees."

192 The Commissioner further alleges that Acquirers would pass on the applicable increase to their Merchant customers in the form of higher Card Acceptance Fees and she notes that Credit Card Network Services are an example of derived demand, since demand for these services by Acquirers is ultimately derived from the demand of Merchants for credit card acceptance. She thus concludes that the relevant question to be asked under the test is whether so many Merchants would decline to accept credit cards in response to an increase in Card Acceptance Fees so as to render that price increase unprofitable.

193 Professor Winter performs his hypothetical monopolist test in the upstream market in which the credit card networks are the sellers and the Acquirers are the buyers, but adds that his conclusions would remain the same if the test had been performed in the downstream market in which Acquirers sell services to Merchants. The price used by Dr. Winter is the current average price paid by Acquirers to the Respondents, the "Acquirer Fee", which is the sum of the Interchange Fee and the Acquirer Network Fee.

194 Both Dr. Frankel and Dr. Carlton perform the hypothetical monopolist test in the downstream market in which Acquirers provide services to Merchants. Thus, they assume that a hypothetical monopoly Acquirer raises the Card Acceptance Fee it charges Merchants by a SSNIP.

195 The Respondents submit that the hypothetical monopolist test, a market definition analysis, should be conducted on the market in which the Respondents participate, not a downstream market in which they do not participate.

196 We agree with the Respondents that the appropriate market to use for the purposes of the hypothetical monopolist test is the market in which the Respondents compete. The Respondents compete on one side of their respective platforms to supply Credit Card Network Services to Acquirers. This leads the Tribunal to conclude that the appropriate relevant candidate product market for the purposes of the hypothetical monopolist test is the supply of Credit Card Network Services to Acquirers. The Tribunal recognizes, however, that the response of Acquirers to a change in the price of Credit Card Network Services is essentially determined by the response of their customers, the Merchants, to the price change passed on to them.

197 The choice of the price to which the SSNIP should be applied is also at issue. The price that the customers (Acquirers) pay for the services provided by the hypothetical monopoly credit card network is the sum of the Acquirer Network Fee and the Interchange Fee. The price the credit card network receives from Acquirers is the Acquirer Network Fee. The Interchange Fee is remitted to Issuers. Dr. Winter applied the SSNIP to the sum of the Acquirer Network Fee and the Interchange Fee. Dr. Church expressed the view that in the context of a one-sided hypothetical monopolist test, the relevant price is the price received by the hypothetical monopolist and this would be the Acquirer Network Fee. He stated that the Interchange Fee is irrelevant to the profits of the hypothetical credit card network monopolist.

198 The Tribunal holds the view that the purpose of the hypothetical monopolist test is to determine the extent to which customers in the candidate market will switch to other products in response to a SSNIP. Market definition is based on substitutability and focuses on demand responses to changes in prices (see, e.g., the Competition Bureau's *Merger Enforcement Guidelines*, October 2011). The SSNIP must therefore be applied to the price that is being paid by the purchasers of the candidate product. Acquirers are the purchasers of Credit Card Network Services and the price they pay for these services is the Acquirer Fee (Interchange Fee and Acquirer Network Fee).

199 It is also true, however, that the hypothetical monopolist test turns on whether a SSNIP would be profitable. This requires that the hypothetical monopolist receive all the proceeds of the SSNIP. The Respondents and their experts have correctly pointed out that the hypothetical credit card network monopolist does not receive the proceeds of an increase in the Interchange Fee. To the extent that the SSNIP in the Acquirer Fee is the result of an increase in the Interchange Fee, the hypothetical monopolist network's profit margin does not increase. One way to satisfy the assumption underlying the hypothetical monopolist test is to assume, as Dr. Winter suggests, that the sum of the Interchange Fee plus the Acquirer Network Fee increases by a SSNIP that is due entirely to an increase in the Acquirer Network Fee [2] . As will be discussed in greater detail below, this requires a very large percentage increase in the Acquirer Network Fee.

2 Although they conduct their hypothetical monopolist tests at a different stage in the vertical chain, both Dr. Carlton and Dr. Frankel also suggest assuming that the SSNIP is due to an increase in the Acquirer Network Fee.

200 Dr. Church was asked in cross-examination to comment on an excerpt from an article dealing with defining relevant product markets in electronic payment network cases in the United States and which dealt indirectly with the above issue. The excerpt addressed the question of what the relevant price should be:

> MR. FANAKI: So if we could come back to document 530, which — it is just the last exhibit we marked, Mr. LaRose. If we look at page 728, just at the bottom part of the page is the page we left off on last time. You see here the division is discussing this issue. It states that, "The Division also confronted the issue..."

[...]

> MR. FANAKI: "The division also confronted the issue of which fee to use when it applied the hypothetical monopolist test - the switch fee, the interchange fee, or both. Because the network retains only the switch fee, and not the interchange fee, one could argue that the switch fee is the appropriate measure of network market power and, therefore, that a SSNIP analysis should focus on the switch fee alone. Such an approach, however, is incorrect. While the industry developed in a way that resulted in most networks delineating separate interchange and switch fees, when networks set their fees and when merchants and issuers decide which networks to join, they base their decisions on the sum of the two fees. Merchants look at the total price, which consists of the sum of the interchange and the switch fees. Because issuers receive the interchange fee as a pass-through payment, issuers consider the interchange fee minus the switch fee. A network can exercise market power against a merchant by increasing the switch or interchange fee, and against an issuer by raising the switch fee or lowering the interchange fee. Consequently, as a practical matter, it makes little sense when defining product markets in the industry to consider either the switch or interchange fee in isolation (even though the network does not ultimately retain the interchange fee)." Do you see all of that?
>
> PROFESSOR CHURCH: I do.
>
> MR. FANAKI: And, again, you have not reason to disagree that in approaching the definition of the relevant market, that the United States Department of Justice considered the relevant price to be the network fee and the interchange fee as opposed to focussing only on the network fee?
>
> PROFESSOR CHURCH: So this is what they say that they did. I would just like to add a comment on it.

> I think the distinction here is that when you think about the profit margin, you should be using the price that accrues to the supplier, which doesn't include interchange.
>
> But when you think about the demand elasticity and the size of the magnitude of the change in demand from the price increase, that price increase, as this paragraph suggests, should be the price increase faced by the customer on that side.
>
> When we were doing the two-sided market analysis, there is a total price for the whole network that is divided between the two sides. When you go to raise the price to 5 percent of the total network, you still have to divide it between the two sides. And if you look at the literature — the economics literature as opposed to the Antitrust Law Journal written by lawyers, but economics literature which shows you how to do this — you will find that you raise the price to 5 percent, and then you divide between the two sides based on their relative elasticities, based on the price increases that they face.
>
> So it is not — you know, I think the way to think about this is to think there are two prices running around. The price for the margin is the price that is relevant to — is just the network access fees and figuring out the profit-maximizing implications.
>
> The change in the price to issuers and acquirers is the change in their price, as suggested by this paragraph.
>
> So, you know, I don't think that there is this — there's unlikely to be this distinction that you are trying to raise between the one-sided and two-sided approach. If the one-sided approach is done correctly, you can get very close, if not exactly the same, answer as you would get on the two-sided approach.
>
> [emphasis added]

201 Dr. Church suggests that an alternative way of conducting a one sided hypothetical monopolist test would be to apply the SSNIP to the Acquirer Network Fee. This has the virtue of being the price the hypothetical monopoly card network actually receives from Acquirers. The problem with it is that, as will be discussed in greater detail below, a SSNIP in the Acquirer Network Fee results in a miniscule percentage increase in the Acquirer Fee.

202 The differences between Dr. Church and Dr. Winter can be illuminated using the Acquirer Fee and Acquirer Network Fee assumed for the purposes of illustration by Dr. Winter in his reports and also by Dr. Church in his report. This is a 200 basis point Acquirer Fee, which is comprised of an Acquirer Network Fee of 5 basis points and an Interchange Fee of 195 basis points. Under Dr. Winter's approach, a 5% SSNIP in the Acquirer Fee would be 10 basis points which would require a 200% increase in the Acquirer Network Fee. Under Dr. Church's approach, a 5% SSNIP in the Acquirer Network Fee would be $^{1}/_{4}$ of a basis point or a one-eighth of a percent increase in the Acquirer Fee. The Commissioner argues that a percentage price increase of this magnitude would be all but undetectable and would therefore not generate a demand response and the Tribunal is inclined to agree.

203 Dr. Church also suggests that in the event that a SSNIP is applied to the Acquirer Fee it would be more appropriate to assume that the network receives only a pro rata share (5/200) of this increase with the balance going to Issuers. The Tribunal is not persuaded that it is preferable to assume that a hypothetical monopoly network would increase the Acquirer Fee by 10 basis points and keep only .25 basis points for itself rather than keeping it all.

204 Given that the application of the SSNIP to the Acquirer Network Fee would likely yield the same definition of the relevant product market as that proposed by the Commissioner and that Dr. Church appears to have accepted Dr. Winter's treatment of the SSNIP in the Acquirer Fee as being due to an increase in the Acquirer Network Fee, the Tribunal also accepts Dr. Winter's approach.

Application of the hypothetical monopolist test

205 For the purposes of the application of the test, the Tribunal's findings are that: (1) the test can be applied on the card acceptance side of the credit card network platform provided cross-platform demand interdependence and feedback effects are taken into account; (2) the candidate product market should be a market in which the Respondents compete and this is the supply of Credit Card Network Services to Acquirers and; (3) the SSNIP should be applied to the Acquirer Fee but is assumed to be entirely attributable to an increase in the Acquirer Network Fee.

206 The hypothetical monopolist test may define the relevant market too broadly in the presence of what is known as the cellophane fallacy. The cellophane fallacy can lead to an overly broad market definition if the price to which the SSNIP is applied is already above the competitive level. In this case, the hypothetical monopolist may find that a further price increase is unprofitable leading to the incorrect conclusion that the relevant market is broader. In the Commissioner's view, the prevailing Acquirer Fee is already above the competitive level so that a hypothetical Credit Card Network Services monopolist who finds it profitable to raise the prevailing Acquirer Fee by a SSNIP would also find it profitable to increase the Acquirer Fee above the competitive level by more than a SSNIP. The Commissioner regards her hypothetical monopolist test as conservative in that it would err in favour of the broader market definition advocated by the Respondents. The Tribunal accepts that to the extent that the prevailing Acquirer Fee is above the competitive level, the Commissioner's conclusion that the supply of Credit Card Network Services to Acquirers is a relevant product market is strengthened.

207 For the purposes of the hypothetical monopolist test, we will continue to use the "price" of the candidate product used for purposes of illustration by Dr. Winter in his reports and also by Dr. Church in his report. This is a 200 basis points Acquirer Fee, which is comprised of an Acquirer Network Fee of 5 basis points and an Interchange Fee of 195 basis points. The Respondents' experts, for the purposes of their response, appear to have accepted that number.

208 A 5 per cent SSNIP in the price of the candidate product would be 10 basis points (200×0.05) and this price increase could be achieved by increasing the Acquirer Network Fee by 10 basis points (200%) while holding the Interchange Fee constant. This would satisfy the requirements of a proper hypothetical monopolist test in that the proceeds of the SSNIP would accrue entirely to the hypothetical credit card network monopolist. The price of the candidate product would be increased by 5% and the additional revenue derived from this price increase would accrue entirely to the hypothetical credit card network monopolist. We must determine what Acquirers would do in the face of an increase of the Acquirer Fee of 10 basis points.

209 The evidence establishes that Acquirers would likely pass on the 10 basis point increase in the Acquirer Fee in the form of higher Card Acceptance Fees. Depending on how Acquirers determine their prices, this increase could be a 5% increase in the Card Acceptance Fee or it could be less. In the Tribunal's view, any difference would not be sufficient to affect the outcome of the test.

210 The hypothetical monopolist test asks whether substitution away from the candidate product in response to a SSNIP would be such that either the SSNIP would be unprofitable or a smaller price increase would be more profitable. In an attempt to provide a rough idea of the percentage loss in transaction volume a hypothetical monopolist would have to lose before a SSNIP became unprofitable, Dr. Winter estimated what is known as the Break-Even Critical Sales Loss ("BECSL"). The BECSL is the loss in sales at which a SSNIP would become unprofitable. Dr. Winter calculates that a 5 percent increase in the Acquirer Fee would be unprofitable only if card transaction dollar volume fell by more than 50 percent. Dr. Winter opines that for reasons given below a 5 percent increase in the Acquirer Fee (passed through by Acquirers to Merchants) would not result in a reduction in credit card acceptance of this magnitude. Hence a SSNIP would be profitable and the relevant product market is no broader than Credit Card Network Services sold to Acquirers.

211 The Respondents, MasterCard in particular, disagree with Dr. Winter's use of the BECSL test. They cite the expert evidence of Dr. Church in support of their argument. There are three main points of disagreement. The first is that Dr. Winter ignores the Cardholder side of the platform when he applies the test. The second is that Dr. Winter does not estimate the BECSL correctly. The third is that the BECSL test is not the correct test to use.

212 With respect to the application of the hypothetical monopolist test to one side of a two-sided platform, the Tribunal has already found that it is permissible to apply the hypothetical monopolist test to one side of a two sided platform, provided cross-platform demand interdependence and feedback effects are taken into account.

213 With respect to his estimation of the BECSL, Dr. Winter makes use of approximate values for the Acquirer Fee, the Acquirer and Issuer Network Fees and the network contribution margin to illustrate the differences between Dr. Church and himself. The Tribunal is satisfied that nothing of substance turns on the use of these approximations. Dr. Winter assumes that the prevailing Acquirer Fee is 200 basis points. The SSNIP in the Acquirer Fee is then 10 basis points. As the test requires, Dr. Winter assumes that this 10 basis point increase in the Acquirer Fee accrues entirely to the hypothetical monopoly network. Dr. Winter assumes that the network's contribution margin (margin on variable cost) is under 10 basis points. Given an initial gross margin of under 10 basis points and a 10 basis point increase in the Acquirer Fee (all of which is retained by the card network), the network's gross margin more than doubles. This fee increase would then be unprofitable only if card transaction dollar volume fell by more than 50%.

214 Dr. Winter also reaches the same conclusion using the formula for the BECSL that can be found in a textbook which Dr. Church co-authored.[3] Dr. Winter assumes that the sum of the Acquirer Network Fee and the Issuer Network Fee is 12 basis points and that the network contribution margin on the combined network access fees is *[CONFIDENTIAL]* percent or *[CONFIDENTIAL]* basis points *[CONFIDENTIAL]*. He then expresses this as a margin on the Acquirer Fee. This comes to *[CONFIDENTIAL]* which Dr. Winter rounds to *[CONFIDENTIAL]*. Plugging this contribution margin estimate into the BECSL formula yields a break even critical sales loss of *[CONFIDENTIAL]* (BECSL = SSNIP/(SSNIP + MARGIN) = *[CONFIDENTIAL]*.

3 In the case of a linear demand schedule, this formula can be written as BECSL = (SSNIP)/(SSNIP + MARGIN). It can be found in Jeffrey Church and Roger Ware, *Industrial Organization: A Strategic Approach* (New York: Irwin McGraw Hill, 2000), at p.609.

215 The Tribunal accepts the logic of Dr. Winter's expression of the network contribution margin as a fraction of the Acquirer Fee for purposes of this calculation.

216 MasterCard emphasizes that the *[CONFIDENTIAL]* margin on which Dr. Winter relied is a contribution margin not a profit margin. The Tribunal accepts that this is a margin on direct costs and that it shows the fraction of network revenue that is available to cover fixed costs as well as profit. It need not imply anything about network profitability, supra-normal or otherwise. The Tribunal is also of the view, however, that the contribution margin is appropriate for Dr. Winter's purposes, that is, for the calculation of the BECSL. The contribution margin shows what the hypothetical monopolist stands to forego, in terms of coverage of overhead and profit, if it chooses to raise its price. The Tribunal also agrees that if Dr. Winter were to assume a lower contribution in his BECSL calculation, it would strengthen his conclusions.

217 Dr. Church suggests that it would be more appropriate to assume that the network receives only a pro rata share (5/200) of the increase in the Acquirer Fee with the balance going to Issuers. This yields a BECSL of 2.51% and Dr. Church states that it is not obvious that merchant card acceptance would not fall by this amount in response to a 5% increase in the Acquirer Fee. As stated above, the Tribunal is not persuaded that it is preferable to assume that a hypothetical monopoly network would increase the Acquirer Fee by 10 basis points and keep only .25 basis points for itself rather than keeping it all.

218 Dr. Church's preferred approach is to apply the SSNIP to the sum of the Acquirer Network Fee and the Issuer Network Fee which are the prices the hypothetical monopoly network actually charges to Acquirers and Issuers and receives for its services. On the assumption of a 5% SSNIP and an *[CONFIDENTIAL]* contribution margin, the BECSL formula yields a break-even critical sales loss of *[CONFIDENTIAL]* (BECSL= SSNIP/(SSNIP + MARGIN)

= *[CONFIDENTIAL]*. A SSNIP would be unprofitable if it resulted in a decrease in card transaction dollar volume in excess of *[CONFIDENTIAL]* percent. This is obviously much lower than Dr. Winter's BECSL estimate.

219 The Commissioner argues that Dr. Church's approach is "simply wrong" and should be dismissed out of hand. The Tribunal would not go that far. The Commissioner and Dr. Winter also point out, however, that a SSNIP in the sum of the Acquirer Network Fee and the Issuer Network Fee would result in a miniscule percentage increase in the Acquirer Fee. On the assumption that the Acquirer Network Fee and the Issuer Network Fee sum to approximately12 basis points, a 5% increase in this sum would amount to less than one basis point (actually 0.6 basis points).

220 Dr. Church suggests that according to the economic theory of two-sided markets, the hypothetical monopolist would then find the most profitable allocation of this .6 basis point increase between the Acquirer Network Fee and the Issuer Network Fee. Even if this entire increase is allocated to the Acquirer Network Fee, raising it from 5 basis points to 5.6 basis points, the Acquirer Fee would only increase from 200 basis points to 200.6 basis points or 0.3%. It is hard to imagine that this would be noticeable by Merchants let alone induce a 5.8% reduction in credit card transactions they accept.

221 With respect to the question of whether the BECSL is the proper way to interpret the hypothetical monopolist test, the Tribunal agrees with Dr. Church that the correct question is whether a SSNIP would be the hypothetical monopolist's profit-maximizing choice not whether a SSNIP would just break-even. The sales loss at which a SSNIP would maximize the hypothetical monopolist's profits is smaller than the sales loss at which a SSNIP would become unprofitable. The sales loss at which a SSNIP maximizes the hypothetical monopolist's profits is called the critical sales loss. Although neither Dr. Winter nor Dr. Church chose to do so, the critical sales loss can be calculated using a formula in the textbook co-authored by Dr. Church[4] .

4 In the case of linear demand, the critical sales loss (CSL) can be written as CSL = SSNIP/(2xSSNIP + MARGIN). It can be found in Jeffrey Church and Roger Ware, *Industrial Organization: A Strategic Approach* (New York: Irwin McGraw Hill, 2000), at p.608.

222 Using this formula we note that the critical sales loss under Dr. Winter's approach is 33% and the critical sales loss under Dr. Church's approach is 5.5%.[5] This means that the hypothetical network monopolist's profit-maximizing increase in the Acquirer Fee would exceed 5% for sales losses less than 33% under Dr. Winter's approach and that the hypothetical network monopolist's profit-maximizing increase in the sum of the Acquirer Network Fee and the Issuer Network Fee would exceed 5 % for sales losses under 5.5% using Dr. Church's approach.

5 Using Dr. Winter's approach CSL = SSNIP/(2xSSNIP + MARGIN) = *[CONFIDENTIAL]*. Using Dr. Church's approach, CSL = *[CONFIDENTIAL]*.

223 Dr. Winter accepts that the critical sales loss (what the hypothetical monopolist would do) is the appropriate way to apply the hypothetical monopolist test but states that his conclusions would not have changed if he had used the critical sales loss test. Dr. Winter's view is that given the minimal likely sales losses involved, the hypothetical credit card network monopolist's profit-maximizing price increase would not be less than 5% and that Dr. Church has not provided any evidence to the contrary.

224 The Tribunal agrees that it is appropriate to focus on what the hypothetical monopolist *would* do. As to whether this would lead to different conclusions than those reached by Dr. Winter, with respect to the definition of the relevant product market, this depends on the likely response of Merchants to a 10 basis point increase in the Acquirer Fee passed along to them in the form of an increase in the Card Acceptance Fee.

225 We agree that merchant card acceptance would have to drop by a considerable amount either to render a 10 basis point increase in the Acquirer Fee unprofitable for a hypothetical credit card network monopolist or to render an Acquirer Fee increase of less than 10 basis points more profitable than a 10 basis point increase.

226 We now turn to the evidence regarding the likely response of merchant card acceptance to a 10 basis point increase in the Acquirer Fee passed through to them by Acquirers as a 10 basis point increase in the Card Acceptance Fee. The evidence we consider includes: (1) evidence on the distinct characteristics of credit cards as a means of payment; (2) evidence from Merchant witnesses as to whether they would decline to accept credit cards in response to an increase in the Card Acceptance Fees and; (3) evidence of past response to Card Acceptance Fee increases. Our assessment of this evidence leads us to conclude that with the Merchant Rules in place, very few Merchants would cease accepting credit cards in response to a 10 basis point increase in the Card Acceptance Fee.

227 We agree with the Commissioner that credit cards have distinct attributes from the perspective of Merchant's customers. Unlike payment methods such as debit cards or cash, credit cards allow the Cardholder to make a purchase without accessing the Cardholder's funds at the time of purchase and allow the Cardholder to pay outstanding balances over time. Credit cards can be used to make purchases remotely and also provide protection against fraudulent transactions. Cardholders of some credit cards receive reward points or other benefits that generally are not offered by other methods of payment.

228 These distinct features have been recognized by the Respondents' own representatives. *[CONFIDENTIAL]*

229 Notes prepared for the testimony of the President of MasterCard Canada before the Standing Senate Committee on Banking, Trade and Commerce in November 2010, include the following:

> Why are credit card interchange fees so much higher than those for debit?
>
> • Because they are completely different transactions.
>
> • A credit card purchase is an unsecured loan.
>
> • Furthermore, a credit card transaction has features that simply do not exist for a debit purchase, like fraud monitoring, charge-back protection, zero liability, and so on.

230 Further, there is also evidence with respect to the reactions by Canadian Merchants. At the hearing, various lay witnesses testified on behalf of Merchants detailing how it is virtually impossible to discontinue the acceptance of credit cards as they have become ubiquitous. Ms. Li, WestJet's Treasurer, stated that "[d]espite [the] costs, as a practical matter, WestJet is unable to stop accepting credit cards."

231 The Chief Financial Officer of Sobeys, Mr. Paul Jewer, explained that it is virtually impossible for grocers to discontinue their practice of accepting credit cards:

> Despite the high costs associated with credit cards, as a practical matter, Sobeys and other grocers cannot discontinue acceptance of Visa or MasterCard credit cards, even if Card Acceptance Fees exceed their profit margins. Customers have come to expect that their credit cards will be accepted in grocery stores.

232 Representatives of other Merchants, such as IKEA, Best Buy, and Shoppers Drug Mart, provided testimonies in the same vein. They also stated that in the face of increasing Card Acceptance Fees, they continued to accept credit cards. Ms. Li stated that the average Card Acceptance Fees paid by WestJet, for Visa transactions, increased from *[CONFIDENTIAL]* in 2007 to *[CONFIDENTIAL]* in 2011. To mitigate the costs of credit card acceptance, some Merchants have entered into agreements to offer co-branded credit cards; as part of the agreement, the Merchant often pays reduced Card Acceptance Fees.

233 Tim Broughton, a co-owner of a restaurant in Toronto, stated that the basic rate for credit card transactions had increased from *[CONFIDENTIAL]* in April 2009, to *[CONFIDENTIAL]* for a Visa credit card transaction and to *[CONFIDENTIAL]* for a MasterCard credit card transaction. He added that factoring in all of the fees paid to the Acquirer, the restaurant's effective cost of credit card acceptance has increased from *[CONFIDENTIAL]* for each credit card transaction in December 2008 to *[CONFIDENTIAL]* in December 2011. The restaurant, however, continued to accept credit cards notwithstanding this increase of 25% over a period of three years.

234 The Tribunal exercises caution with respect to the conclusions that can be drawn, for the purposes of the hypothetical monopolist test, from the historical evidence that Merchants have continued to accept credit cards in spite of Card Acceptance Fee increases of more than 10 basis points. The relevance of these observations is limited given that these increases were often the result of increases in the Interchange Fee which accrues to Issuers and which could have been used to increase cardholder benefits or to promote credit cards as a means of payment. In such a case, we would be observing the combined effect of a SSNIP coupled with an increase in the attractiveness of credit cards rather than a "pure SSNIP effect".

235 However, evidence was adduced with respect to a "natural experiment" that appears to hold card characteristics constant. Certain portfolios of credit cards had been converted by MasterCard to "premium" designations with higher Interchange Fees. When those portfolios were converted, however, some Cardholders were not issued new credit cards, nor were benefits changed for some Cardholders. In an e-mail of a MasterCard employee regarding the possibility of such a transfer, one can read as follows:

> "For high spend programs, there is no difference in the rewards offered to those cardholders receiving HSP [high-spend premium] interchange and those receiving core. The decision to enroll cardholders into ALM and make them eligible for HSP interchange is based entirely on our requirements for reaching a spend or income threshold. There is no additional communication to cardholders. **[CONFIDENTIAL]**

236 In other e-mail correspondence between MasterCard's Director of Communications and other employees, dated February 2011, one can infer that the transfer has actually taken place:

> From: McLaughlin, Richard
>
> Sent: Wednesday, February 23, 2011 4:47 PM
>
> To: Sasha Krstic; Krstic, Sasha; Maraschiello, Tony
>
> Cc: Lapstra, Scott; richard.mclaughlin@mastercard.com
>
> Subject: RE: Premium card messaging for government
>
> [...] Our practice as described is pretty hard to defend. [...]
>
> . . .
>
> From: Maraschiello, Tony
>
> Sent: Wednesday, February 23, 2011 03:54 PM
>
> To: McLaughlin, Richard; Sasha Krstic; Lapstra, Scott
>
> Subject: RE: Premium card messaging for government
>
> Thanks Richard. Finance originally wanted something back by today, but with Betty at the Task Force I've asked if we can have until Monday.

I think we all agree that our current practices are susceptible to criticism. But this issue isn't going away, so I think by being as forthright as possible at this level (Finance) we can get a better sense as to where their painpoints are and make any necessary adjustments (if possible) before we're dragged in by Flaherty with an ultimatum

[...]

. . .

From: Krstic, Sasha

Sent: Thursday, February 24, 201 1 9:38 AM

To: McTague, Tom

Subject: Fw: Premium card messaging for government

Hi Tom

Head's up. ....Tony may ask you to participate in a mtg with Betty etc. on Fri to review our response to a gov't question re premium cards in mkt. We're trying to figure out how to address the topic of HSP **[CONFIDENTIAL]**

Multiple issuers are doing this, **[CONFIDENTIAL]** I thought it would be helpful to have your view in the mtg.

[...]

[emphasis added]

237 We further note that the President of MasterCard did not explicitly deny that the practice had taken place:

> MR. THOMSON: ...Based on all of that, Ms. Devita, I am obliged to put this to you, and so I am going to, which is that what's gone on here is that in the period after 2008, MasterCard has put in place a program that allows for substantially higher interchange fees to be paid to issuers in respect of these high-spend cards, with no identifier on the card, with no re-issuance of the card, with no requirement that the issuer provide additional benefits associated with those additional high rates, all of which ended up being passed into the laps of the merchants and the merchants got stuck with that situation.
>
> Do you accept that? That is what gave rise to the merchant concerns in the marketplace in 2008, 2009, 2010, 2011, and gave rise to the risk of regulatory intervention; fair comment?
>
> MS. DEVITA: Well, I mean, I think it is one side of the story, frankly. I don't think that it talks to the compliance with the code with regard to these people having spend that is above a core spend. So these people had to be either **[CONFIDENTIAL]** per year of spend and/or made meet income thresholds.
>
> Those were the practices at the time. They were code compliant.
>
> When I came in as the president, we reviewed it. We made some changes, and the transparency issue and badging issue will be eliminated.

238 Notwithstanding these changes, merchant acceptance of MasterCard credit cards continued to increase. This illustrates that Merchants, in a world holding Cardholder benefits constant, continued to accept credit cards notwithstanding an increase in Card Acceptance Fees as a result of an increase in Interchange Fees. Merchants who have testified also pointed out that they have no option but to continue accepting credit cards.

239 Dr. Frankel also cites the results of what he calls the natural experiment that occurred when Interac debit cards were introduced in 1994. He argues that if they were close substitutes, Visa and MasterCard might have been expected to reduce their Interchange Fees to compete with Interac's much lower interchange fee but instead they continued to trend upward instead. A problem with this type of evidence is that we do not know the counterfactual. That is, Visa and MasterCard Interchange Fees might have increased faster in the absence of competition from Interac. Another problem could be that Visa and MasterCard might also have responded to the entry of Interac by reducing cardholder fees or increasing cardholder rewards or both. As a result, we accord no weight to this experiment.

240 Given the above, we agree with the Commissioner that, initially, few if any Merchants would respond to the SSNIP contemplated by refusing to accept the hypothetical monopolist's credit cards. Now we must address the question of whether this evidence properly takes cross-platform demand interdependence and subsequent feedback effects into account.

241 To the extent that the SSNIP reduces the number of Merchants accepting the hypothetical monopolist's credit card(s), credit cards become less attractive to consumers as a means of payment. To the extent that Cardholders or potential Cardholders adopt other modes of payment (debit, cash, cheque), there is a further reduction in the demand by Acquirers for the hypothetical monopolist's Credit Card Network Services. This is called a cross-platform feedback effect.

242 There can be many rounds of feedback effects. In the first round, some consumers respond to the initial reduction in the number of Merchants accepting the hypothetical monopolist's credit cards by adopting other modes of payment. This feeds back to the Merchant side where additional Merchants respond to the reduction in the number of consumers carrying credit cards by ceasing to accept them. This, in turn, induces additional consumers to respond to the further reduction in the number of Merchants accepting credit cards by ceasing to carry them.

243 Feedback effects may get successively smaller over repeated rounds until they become infinitesimally small. The result is a new equilibrium demand for the hypothetical monopolist's Credit Card Network Services. This demand is lower than it would be if only the initial response by Merchants were taken into account. The implication is that while a SSNIP may be profitable if only the initial merchant response is taken into account, it may not be profitable once feedback effects are taken into account. Indeed, if subsequent feedback effects do not become successively smaller the result would be a "death spiral" in which the SSNIP resulted in a complete loss of business by the hypothetical Credit Card Network Services monopolist.

244 Dr. Carlton acknowledged the conceptual requirement to take cross-platform feedback effects into account and states that he has done so although, as the Respondents point out, there is no reference to this in his report. The Commissioner argues, however, that since Merchants would "have no choice" but to continue to accept credit cards in the event that a SSNIP was passed on to them in the form of higher Card Acceptance Fees, "few if any" would respond by refusing to accept credit cards. Given the minimal initial response by Merchants to the SSNIP any cross-platform feedback effects would also be very small. That is, since few if any Merchants would respond to the SSNIP by ceasing to accept credit cards, credit cards would not become less attractive to consumers as a means of payment. Hence, the cross-platform demand effect is minimal and there would be no further feedback effect. Thus, as a practical matter, cross-platform demand and interdependence can be ignored.

245 We conclude that cross-platform effects will be minimal so that the ultimate effect of the contemplated SSNIP on the volume of credit card transactions is likely to be very small. This implies that the contemplated SSNIP would be profitable and a greater percentage increase in the Acquirer Fee might be even more profitable. This further implies that the relevant product market is no broader than the candidate product market which is the supply of Credit Card Network Services to Acquirers and the Tribunal so finds.

246 We shall now turn to the question of whether each of the Respondents exercises unilateral market power in the market of Credit Card Network Services sold to Acquirers.

(5) Assessment of Market Power

(a) Overview of the Parties' Submissions

247 The Commissioner submits that each of Visa and MasterCard exercises market power within the relevant market and she relies, in that regard, on the following indicators:

• Visa and MasterCard have each been able to increase prices above competitive levels, and sustain those price increases, without suffering any appreciable loss of transaction volume;

• the prices set by Visa and MasterCard are unrelated to costs, and are designed to extract as much of a Merchant's "willingness to pay" as possible;

• Visa and MasterCard have each engaged in extensive price discrimination by establishing fees that vary significantly based on the category of the Merchant, as well as the size and type of transaction;

• the primary constraint on Visa's and MasterCard's pricing is not competition within the relevant market, but the threat of regulatory action to curb Interchange Fees;

• the market for the supply of Credit Card Network Services is highly concentrated and each of Visa and MasterCard holds a substantial market share;

• the profit margins for Visa and MasterCard are very high; and

• barriers to entry into the relevant market for the supply of Credit Card Network Services are very high, as confirmed by the fact that there has not been a new entrant in Canada for at least 25 years.

248 The Respondent Visa alleges that the Commissioner's market power analysis is flawed and raises, in particular, the following points:

• The Commissioner's references to increases in Merchants' costs of acceptance are not evidence of market power — in particular, given the two-sided nature of the industry, these increases cannot be considered in isolation;

• Interchange Fees do not generate revenues directly for Visa and MasterCard, and as such it would be incorrect as a matter of economics to rely on increases in Interchange Fees as evidence of market power. They have no interest in seeing interchange higher or lower, provided that it maximizes transaction volume on the network.

• There is no evidence demonstrating that Visa's margins have increased steadily over time; nor is there any analysis of whether such margins were used to fund investments in infrastructure, R & D or innovation;

• Visa's and MasterCard's market shares should be considered separately;

• There is vigorous competition between Visa and MasterCard and they face significant competitive restraints from others such as Amex, Interac. They also face significant pressures to remain competitive because of technological advances by new and potential entrants (e.g. PayPal, Microsoft, mobile companies, etc.).

249 The Respondent MasterCard has adopted Visa's submissions and underlines that since each Respondent must be considered separately to determine whether they individually enjoy market power, the 30% market share of transaction volume of the Credit Card Network Services, attributed by the Commissioner to MasterCard, is not sufficient to be indicative of unilateral market power, particularly in the absence of evidence of barriers to new entry or expansion.

250 With respect to barriers to entry, MasterCard submits that Discover and Interac represent two potential entrants in the credit card industry and that there is evidence of the accelerated pace of competition from new technologies, mainly mobile phone payments. It notes that PayPal's recent entry into Canada is further evidence of the market's dynamic.

(b) Analysis

251 A company that enjoys "market power" is a company that has the "ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation) for an economically meaningful period of time" (*CCS*, at para. 371).

252 In *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.), the Tribunal commented as follows on market power (at p. 325):

> In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the *ability* to earn supra-normal profits by reducing output and charging more than the competitive price for a product. As was said in the *NutraSweet* decision: "Market power is generally accepted to mean an *ability* to set prices above competitive levels for a considerable period."
>
> (emphasis added)
>
> As was also stated in the *NutraSweet* decision:
>
> > 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 or market power will vary from case to case.
>
> A *prima facie* determination as to whether a firm is likely to have market power can be made by considering the share of the relevant market held by that firm. If that share is very large the firm will very likely have market power. But other considerations must also be taken into account including: how many competitors there are in the market and their respective market shares; how much excess capacity the firms in the market have and how easily a new firm can establish itself as a competitor.
>
> . . .
>
> Market share is only a *prima facie* indication of market power. As has been noted, other considerations must also be taken into account. One of these is barriers to entry: how easily can a firm commence business in the relevant market and establish itself there as a viable competitor? The term "entry" for an economist when used in the phrase "barriers to entry" is a term of art which carries with it the connotation of sustainability. The term "entry" will be used in that sense in these reasons. Related words such as "to enter" or "entrant" are used in their non-technical sense as meaning "to begin" or "to commence".

253 With respect to market share, the Tribunal stated in *Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.), that "market share is not necessarily a reliable determinant of market power" and that as an indicia of such it may either overstate or understate a firm's market power" (at p. 318).

254 In this case, the parties agree that the issue to be decided is whether Visa and MasterCard each possess unilateral market power. There is no allegation that the Respondents have jointly exercised market power.

255 Visa and MasterCard each have market power in the sense that their behavior differs from that of a textbook perfectly competitive firm. Their products are differentiated from each other. Each of them has price-setting discretion (setting network fees and default Interchange Fees) as opposed to being a price-taker. *[CONFIDENTIAL]* As the Commissioner notes, they charge different markups to different classes of customers based on willingness to pay and this is a form of price discrimination.

256 Dr. Elzinga observes that many firms in differentiated products markets have pricing discretion. Dr. Winter concedes that there are many markets that economists would classify as competitive which involve prices substantially above operating cost. The Commissioner and her experts maintain that there is more to it than this.

257 The Commissioner cites evidence that both Visa and MasterCard have operating and contribution margins respectively that, when expressed as a percentage of revenue, are well in excess of a percentage margin in accounting profit that the Tribunal deemed in its *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Competition Trib.), decision to be "extraordinarily high." The fact situation in *Tele-Direct (Publications) Inc.* appears to differ from the present case. In this regard, MasterCard emphasizes that its contribution margin is what is available to cover fixed costs as well as profit.

258 The Tribunal is of the view, however, that while a high gross or contribution margin is an indicator of the ability to set and maintain prices above marginal cost, this does not necessarily imply that either network's prices exceed their respective average costs plus a normal profit. The prevalence of sustained supra-normal profits (called "economic profits") can be an indicator of the existence of market power but there does not appear to be any evidence before the Tribunal as to whether either Visa or MasterCard is earning a supra-normal rate of return on investment on a sustained basis.

259 Viewed from the perspective of market structure, the Respondents are the only two suppliers in the upstream market for the supply of Credit Card Network Services to Acquirers. Unlike the Respondents, American Express has direct acquiring relationships with Merchants. American Express does enter into routing agreements with Acquirers permitting them to offer American Express functionality through their terminals, but they play no role in cardholder authorization, financial settlement, or merchant billing for American Express transactions. As a result of its vertical integration, American Express cannot be viewed as a participant in the market for Credit Card Network Services supplied to Acquirers. Of course, American Express does compete with Visa and MasterCard Acquirers in the downstream market for Credit Card Acceptance Services sold to Merchants.

260 The relevant product market as defined by the Commissioner is a differentiated product duopoly in which one duopolist, Visa, has two-thirds of the market with MasterCard holding the balance. This is obviously a very highly concentrated market.

261 Product differentiation (branding) implies that the Visa and MasterCard networks are not perfect substitutes for each other. To some degree this would insulate them from price competition from each other even in the absence of the Merchant Rules. The pricing discretion of Visa and MasterCard may be enhanced to the extent that their Cardholders single-home (use one card exclusively). In that case each network is the "gatekeeper" of its Cardholder base and with the Merchant Rules in place, it can offer this base to individual Merchants on an all-or-nothing basis.

262 An illustration of the pricing discretion of MasterCard is the "interchange fee gap" episode during which MasterCard was able to raise its Interchange Fees and thus its Acquirer Fees relative to Visa apparently without any loss of market share.

263 While there are a number of factors at work to attenuate the competitive pressure on the Respondents to undercut each other's Acquirer Fees, Dr. Carlton emphasizes that price competition is still sufficient to keep Acquirer Fees below the level a monopolist would set and thus to oblige the Respondents to "leave money on the table."

264 Barriers to entry into the supply of Credit Card Network Services must be regarded as high. Considerable capital is required, the minimum viable scale is significant relative to the size of the market and the chicken and egg problem (i.e. convincing Merchants to accept a card that is not held by many Cardholders, and convincing consumers to hold and use a card that is not accepted by many Merchants) implies that it could take a long time to reach the break-even point. Taken together, this implies significant fixed, sunk entry costs, investment that would not be recovered in the event that entry was not successful. With respect to minimum viable scale, Dr. Frankel cites a document from MasterCard stating that its card would not be viable in a national market with market share of much less than 35 percent:

> In 1998, when there was no duality in Canada (i.e., banks could only issue either MasterCard or Visa branded credit cards, but not both), MasterCard was concerned about the possibility that a proposed bank merger between the Royal Bank and the Bank of Montreal ("BMO") would result in the largest MasterCard issuer (i.e., BMO) becoming a Visa issuer. MasterCard explained that at the smaller network scale that would result from this change in Canada, "MasterCard anticipates there would be further erosion over a short time, to approximately 7% MasterCard, with Visa at 93%. At that level of participation in the marketplace," MasterCard explained, "MasterCard would no longer be a viable competitive alternative." Indeed, MasterCard disclosed then that "MasterCard's Global Board has determined that, as a long-term proposition, the card is not viable in a market with much less than a 35% share."

265 With respect to potential competition from new payment technologies, the Tribunal accepts that payment technologies are evolving and that the Respondents are under competitive pressure to invest in technological improvements. The evidence adduced by the Respondents is insufficient, however, to support an inference that alternative payment technologies pose a competitive threat to them.

266 In light of the foregoing behavior and structural considerations, the Tribunal concludes that with approximately two-thirds of the relevant market, Visa has unilateral market power.

267 Given its one-third share of the relevant market and its apparent concern about whether a market share of this magnitude is sufficient for long-term viability, MasterCard might be regarded as being in a different situation. While it is true that the *Merger Enforcement Guidelines* state that a market share under 35% do not normally raise unilateral market power concerns, this does not mean that it can never do so. Taking into account MasterCard's pricing discretion, its margins and the very high barriers to entry, the Tribunal concludes that MasterCard also has market power in the relevant market.

268 We now turn to the question of whether Visa and MasterCard have each directly or indirectly by agreement or any like means influenced upward, or have discouraged the reduction of the price at which an Acquirer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada. We will assume that Acquirers are reselling the Credit Card Network Services to Merchants.

(6) Evidence regarding the requirement that each Respondent has influenced upward the price

269 In a typical price maintenance case, the analysis of whether prices have been influenced upwards is relatively uncomplicated. For example, a manufacturer sets a minimum price at which its dealers may sell its product. This price is above the price at which its dealers would otherwise sell the product thereby directly influencing its resale price upward. It necessarily prevents resellers of the product from competing with each other by cutting their prices below the stipulated minimum price. While resale price maintenance softens intra-brand price competition downstream, it can increase the incentive for resellers to engage in non-price inter-brand competition and can therefore be demand-increasing. In this case there would be an upward influence on price but no adverse effect on competition. Under some circumstances, however, resale price maintenance can reduce both intra-brand and inter-brand competition and is demand-restricting as a consequence. In this case there would be both an upward influence on price and an adverse effect on competition.

270 In this case, however, the Commissioner submits that the Merchant Rules have the effect of influencing the price at which Acquirers resell Credit Card Network Services upward. Her theory of the case is that "but for" the Merchant

Rules, both the price at which the Respondents sell Credit Card Network Services to Acquirers (the Acquirer Fee) and the price at which Credit Card Network Services are then resold to Merchants by Acquirers (the Card Acceptance Fee) would be lower.

271 Given the Commissioner's theory of the case, the Tribunal is asked under paragraph 76(1)(*a*) to determine whether the Merchant Rules have had the effect of influencing both Acquirer Fees and Card Acceptance Fees upwards. We shall first turn to the question of whether the No-Surcharge Rule has influenced these prices upward.

(a) The No-Surcharge Rule

272 The Commissioner alleges that surcharging is effective at steering transactions to lower cost methods of payment and that the ability of Merchants to surcharge or threaten to surcharge on credit cards constrains the level of Card Acceptance Fees. In that regard, she relies on evidence coming from other jurisdictions and expert evidence. She submits that in the absence of the No-Surcharge Rule, Merchants could constrain Card Acceptance Fees by surcharging or threatening to surcharge certain credit cards. She alleges that by requiring Acquirers to implement the No-Surcharge Rule, the Respondents have influenced upward the price for Credit Card Network Services.

273 Dr. Winter posits two mechanisms through which the Merchant Rules (both the No-Surcharge Rule and the Honour All Cards Rule) influence the price at which Credit Card Network Services are resold upwards:

(i) the Merchant Rules suppress price competition between credit card companies; and

(ii) the "cost-externalization" mechanism.

274 The first means by which the Merchant Rules are alleged to enable the Respondents to influence upwards the price at which Acquirers resell Credit Card Network Services (the Card Acceptance Fees) is by suppressing price competition between the Respondents in the upstream market for Credit Card Network Services sold to Acquirers. A consequence of this suppression of price competition between Visa and MasterCard is that the price of Credit Card Network Services sold to Acquirers and the price at which Credit Card Network Services are resold by Acquirers are both higher than they would be absent the Merchant Rules.

275 According to the Commissioner, the No-Surcharge Rule suppresses price competition between Visa and MasterCard in the market for Credit Card Network Services sold to Acquirers by preventing Merchants from playing one credit card network off against the other by surcharging or threatening to surcharge one but not the other. The Merchant Rules also reduce the incentive of either Visa or MasterCard from seeking competitive advantage over the other by offering to discount its Acquirer Fee which would be passed along by Acquirers in the form of a lower Card Acceptance Fee in return for either avoiding a Merchant surcharge or a reduction in a surcharge already imposed by a Merchant.

276 The second mechanism by which the Merchant Rules are alleged to influence Card Acceptance Fees upward is the cost-externalization or cross-subsidization mechanism. As Dr. Winter explains it, this mechanism operates through the No-Surcharge Rule. When a credit card network raises its Acquirer Fee in the presence of the No-Surcharge Rule, Merchants are obliged to pass on some of the cost of the resulting increase in Card Acceptance Fees to customers who purchase with cash or debit cards. As a consequence, Cardholders bear only part of the cost of higher Card Acceptance Fees and this reduces the sensitivity of their card use to changes in these Fees. Dr. Winter opines that this cost-externalization reduces the resistance of both Cardholders and Merchants to higher Card Acceptance Fees and thus leads to higher Acquirer Fees than would otherwise prevail.

277 The distinction between the Commissioner's competition-suppressing mechanism and her cost-externalization mechanism is that the competition suppressing mechanism insulates each of the Respondents from price competition from the other (price competition in the relevant market) while the cost-externalization mechanism insulates both of the Respondents from price competition from substitute means of payment. The competition-suppressing mechanism

focuses on the ability of Merchants to use surcharging to steer their customer from higher cost to lower cost brands of credit cards. The cost-externalization mechanism focuses on the use of surcharges on credit cards by Merchants to steer their customers to lower cost means of payment such as cash and debit cards.

278 According to the Commissioner's theory, the cost-externalization mechanism serves to increase the unilateral market power of each of the Respondents by reducing the pricing discipline imposed on each of them by substitute means of payment. It need not have any effect on the pricing discipline that the Respondents impose on each other, that is, on price competition within the relevant market. For this reason, the Tribunal sees the relevance of the Commissioner's cost-externalization mechanism as being to the question of whether the No-Surcharge Rule influences upward the resale price of Credit Card Network Services under paragraph76(1)(*a*). Dr. Carlton is explicit about this:

> Now, there is one other thing that the surcharge is doing. Let's forget about competition between Visa and MasterCard. The merchant might not like taking credit cards and, to dissuade customers, he might want to put a surcharge on credit cards. Under the no-surcharge rule, he can't. If he can't, that means he can't switch customers from credit card to cash. That means the merchant response, when, say, its merchant fees go up on credit cards, is not as strong as it would otherwise be in his ability to substitute away from high-cost credit cards.
>
> So from my point of view, what I think is pretty clear is that the no-surcharge rule reduces this competition between Visa and MasterCard, and also reduces the merchant response to a high credit card fee in general.

279 Dr. Winter suggests in his report that the cost-externalization mechanism adversely affects competition among Merchants. However, the Commissioner has not established that "merchants" is a relevant market for purposes of the analysis of anti-competitive effects.

280 The competition suppressing mechanism is used by the Commissioner both under paragraph 76(1)(*a*) to demonstrate that prices are influenced upward and under (*b*) to demonstrate an adverse effect. Under the Commissioner's theory, the Merchant Rules are alleged to affect price competition adversely in the relevant market (paragraph 76(1)(*b*), that is, between Visa and MasterCard), and this influences the price in the relevant market upward (paragraph 76(1)(*a*)).

281 The Tribunal agrees with the Respondents that the Commissioner's competition suppressing theory cannot be used to satisfy both the upward influence requirement under paragraph 76(1)(*a*) and the adverse effect requirement under paragraph 76(1)(*b*).

282 The Tribunal is of the view, however, that provided she meets her burden of proof, the Commissioner's cost-externalization mechanism could be taken to satisfy the upward influence requirement under paragraph 76(1)(*a*) and the competition softening mechanism could be taken to satisfy the adverse effect requirement under paragraph76(1)(*b*).

283 The Tribunal turns first to the question of whether each Respondent, through the implementation of the No-Surcharge Rule, has influenced upward the price at which Acquirers resell Credit Card Network Services to Merchants via the cost-externalization mechanism.

284 As explained above, according to the Commissioner, one means by which the No-Surcharge Rule enables the Respondents to influence upwards the price at which Acquirers resell Credit Card Network Services is what Dr. Winter called "cost externalization." The Commissioner also calls it "cross-subsidization". The Tribunal agrees with the Respondents that the issue is not one of cross-subsidization per se. Rather, it is that credit card users are likely to be insensitive to changes in Card Acceptance Fees because they pay only a fraction of them with the balance being paid by customers who use other means of payment.

285 Cost-externalization means simply that Merchants are obliged by the No-Surcharge Rule to pass-on higher Card Acceptance Fees in the form of higher prices to all their customers regardless of the mode of payment they use. For example, the result of a 2% Card Acceptance Fee on credit card transactions accounting for 25% of a Merchant's sales would be that the price the Merchant charges to all its customers would be 0.5% higher. Since credit card users pay a

small fraction of the cost of choosing this mode of payment and even this is not transparent to them, they are less resistant to increases in Card Acceptance Fees than if surcharging were allowed. As a consequence, a network contemplating an Acquirer Fee increase (passed along as a Card Acceptance Fee increase) could do so in the expectation that this would have little or no effect on Cardholders' decisions to use their cards and thus on competitive necessity of Merchants to accept them.

286 In essence, the cost-externalization mechanism reduces the substitutability between the Respondents' cards and other modes of payment. This increases the profit-maximizing price of Credit Card Network Services and thus the Card Acceptance Fee for a given level of competition between Visa and MasterCard.

287 Dr. Winter discusses the conceptual foundations of the cost-externalization mechanism in more detail:

> As a general economic principle, if the costs of a price increase by a supplier are borne downstream not just by the customers in its own supply chain, but by other consumers as well, then fewer customers will penalize the supplier (by declining to purchase the product) when the supplier increases its price. As a consequence, where a portion of the cost increases are borne by customers outside of the supplier's supply chain, the supplier has a greater incentive to set prices at higher levels. For example, if the impact of an increase in the price of coffee beans is shared by tea drinkers (because of a vertical restraint that the price of brewed coffee not exceed the price of tea) then a monopoly supplier of coffee beans has an incentive to set a higher price.
>
> Suppose, for example, that the supplier's own downstream customers bear only 50 percent of the cost of a price increase, because the supplier imposes a restraint that the price of its product (purchased by half of the buyers at the downstream firm) cannot exceed the price of another product sold downstream. The supplier will face a smaller drop in demand from any price increase than if that supplier's own downstream customers bear 100 percent of the cost of a price increase. The supplier will therefore have an incentive to set its price at a higher level.
>
> . . .
>
> When a credit card company increases its prices, instead of downstream customers who use credit cards bearing the entire cost of a price increase, consumers from outside of the credit card system bear a portion of these costs. The price increases for consumers outside the system do not carry the penalty of decreased demand for the credit card company. This source of discipline against price increases by the credit card company is suppressed. A profit-maximizing credit card firm will necessarily set higher prices in the presence of the Merchant Rules.

288 Counsel for Visa accepted that Merchants do, in fact, pass their costs of credit card acceptance on in the form of higher prices to all their customers. Visa's position is that there is nothing in the Merchant Rules that obliges them to do so:

> Card acceptance fees are a cost of doing business, no different than any other business cost that merchants incur. Just as acquirers can reasonably be expected to pass on their costs to their merchant customers, merchants can reasonably be expected to pass on their card acceptance costs to their customers. And all of the evidence in this case shows that that is precisely what merchants do. It will be suggested to you that the point of this case is to ensure that credit card users pay the costs associated with credit card use. Guess what?
>
> They already do.
>
> The fact that non-credit card users share in the costs of credit card use has nothing to do with Visa. It has nothing to do with Visa cardholders. That's a decision that merchants make to spread their costs across all their sales.

289 At the hearing, Merchant witnesses testified that they typically pass some or all of the increased costs resulting from high Card Acceptance Fees onto all their customers in the form of higher retail prices for goods and services. For example, Mr. Broughton indicated that "all consumers end up paying higher prices as a result of the costs associated

with premium credit cards". Mr. Daigle, a Senior Director at Shoppers Drug Mart, stated that "higher costs, such as increased Card Acceptance Fees, are passed on to consumers in the form of higher retail prices". Mr. Houle stated as follows in paragraph 46 of his witness statement:

> Whenever possible, increasing Merchant Services Fees are passed on to all of Air Canada's customers in the form of higher ticket prices, otherwise they are absorbed by Air Canada as a lower profit margin. Customers paying with Interac debit and other low-cost forms of payment are therefore subsidizing consumers paying with credit cards, particularly those consumers paying with more expensive credit cards.

290 The Tribunal agrees that Merchants must cover their costs to remain in business. The evidence before the Tribunal is that Merchants have typically passed on some or all of Card Acceptance Fees costs in the form of higher prices to all their customers including those who use debit cards or cash to make purchases. On the evidence, cash and debit card customers subsidize credit card customers. What remains to be determined is whether this is a consequence of the No-Surcharge Rule.

291 The Respondents regard the Commissioner's cross-subsidization theory as absurd. First, they point out that Merchants commonly forego the opportunity to charge their customers separate prices for each individual service they supply them. Second, the magnitude of any cross-subsidy to Cardholders from customers using alternate means of payment is in doubt. Each means of payment involves costs and benefits for the Merchant. The cross-subsidy from cash customers to Cardholders, for example, would be the difference between the net costs to the Merchant of credit card acceptance and cash acceptance respectively. Efficient choice among alternative means of payment would ideally require that the consumer be exposed to the Merchant's net cost (or relative net cost) of each alternative. Simply surcharging credit cards does not do this. Third, mere threats to surcharge would not eliminate cross-subsidization because there would still be no signaling of the Merchant's cost of card acceptance to Cardholders.

292 The Tribunal agrees that it is not uncommon for businesses to price a set of services as a package and that this can result in the subsidization of one type of customer by another. This is a choice made by the individual businesses concerned. In the case at hand, however, the No-Surcharge Rule does not permit Merchants to choose whether to charge their customers according to the payment method they use.

293 The Tribunal also agrees that each method of payment entails its own costs and benefits to Merchants and that the magnitude of any cross-subsidy depends on the difference in the respective costs of accepting each mode of payment net of any benefits to the merchant concerned. It may be that debit card customers are subsidizing both cash and credit card customers. It may also be that insofar as consumer choice of payment mechanisms is concerned, the elimination of the No-Surcharge Rule would simply replace one set of distorted incentives by another. As we explain below, however, that is beside the point.

294 To some extent, the impact of cross-subsidization is attenuated by the fact that the payment method is the customers' choice. Many consumers have both debit and credit cards as well as cash. They choose to use one form of payment or another for numerous reasons. For one purchase the customer is being cross-subsidized; for another purchase the customer cross-subsidizes.

295 With respect to the Respondents' argument that the mere threat of surcharging cannot eliminate cross-subsidization because the Cardholder does not pay the cost of using her card, this is true as far as it goes. If the threat of surcharging would have constrained past increases in Card Acceptance Fees, however, the magnitude of any subsidization of card users by cash and debit users would be smaller. More importantly, paragraph 76(1)*(a)* does not require either that there would be no cross-subsidization or that the choice of means of payment would be efficient in the absence of the No-Surcharge Rule. It requires only that each of the Respondents, through the implementation of the No-Surcharge Rule, has influenced upwards the price at which Acquirers supply or offer to supply Credit Card Network Services. In this case, given the Commissioner's theory, it means that absent the No-Surcharge Rule, Card Acceptance Fees would have been lower.

296 The Respondents argue that the Merchant Rules do not prevent Merchants from taking measures other than surcharging that would eliminate cost-externalization. They argue that Merchants could eliminate the cross-subsidization of their credit card customers by offering discounts or equivalent rewards to customers paying by means other than credit cards. They also submit that the Merchant Rules do not prevent Merchants from informing their customers about the relative costs of alternative means of payment.

297 The Respondents maintain that a discount is arithmetically equivalent to a surcharge and that Merchants have "long been able to discount for cash, debit or other forms of payment" under the Merchant Rules. The Tribunal agrees that offering discounts for alternative means of payment could eliminate cost-externalization in theory. The question is whether this is a practical alternative.

298 The Commissioner argues that offering discounts to customers choosing alternative means of payment is impractical for Merchants and would in any event not be as effective in steering consumers as surcharging. According to the Commissioner, offering discounts for lower cost forms of payment would be competitively disadvantageous because it would require the "inflation" of a Merchant's base or advertised price to cover the revenue lost by discounting. The Commissioner also tendered evidence from Merchant witnesses, from the Respondents' documents and from research in behavioural economics that consumers are more responsive to surcharges than they are to discounts.

299 Merchant witnesses gave evidence regarding their experiences with discounting and surcharging.

300 With respect to the relative effectiveness of discounting and surcharging, Mr. Jewer of Sobeys explained that Sobeys, in some of its stores, had offered a discount of $0.05 to customers for each plastic bag that they brought to the store and used for groceries. While this policy had very little impact on the consumption of plastic bags, he explained that after a $0.05 surcharge was introduced on plastic bags in Toronto, plastic bag consumption dropped by more than 60%.

301 Also regarding the relative effectiveness of surcharging and discounting, Mr. Symons of IKEA explained that in the period of 2004 to 2010, the IKEA Group in the United Kingdom applied a surcharge of 70 pence (approximately $1.10) to all credit card transactions at its retail operations. As a result, in 2005, the volume of credit card transactions at those retail stores was reduced by 37% and the number of debit transactions increased by 16%. He further testified that the IKEA Group had used discounts in the past, but found such discounts to be ineffective or not as effective as surcharging in encouraging customers to use lower-cost payment methods and were not as clear to customers.

302 Merchants also testified about the commercial impracticability of offering discounts for alternative means of payment. In particular, they explained that in order to offer a discount to customers using non-credit card payment methods, they would first have to raise their base price and then discount depending on the payment method used. For example, one can read as follows in paragraphs 39 to 41 of the witness statement of Mr. Shirley of Best Buy:

> Best Buy Canada has also considered introducing a discounting policy to encourage its customers to use less expensive forms of payment, like cash or Interac debit. However, Best Buy Canada is not convinced that discounting is effective as a means of encouraging customers to use lower-cost payment methods.
>
> First, Best Buy Canada would have to inflate its base prices for all customers in an effort to encourage customers paying with a credit card to use a different payment method. For example, to offer a $5 discount for a customer who is purchasing a $95 product with cash or debit, Best Buy Canada would have to increase the price of this product from $95 to $100, and then offer a $5 discount to only those customers paying with cash or debit. This is not a viable option as, given the highly competitive markets in which Best Buy Canada operates, Best Buy Canada must advertise the lowest prices available.
>
> In addition, a discount would be more costly to implement. To try and induce those customers currently using credit cards to switch to lower cost payment methods, Best Buy Canada would also have to provide a discount to the **[CONFIDENTIAL]** of customers that are already paying with cash, Interac debit, the Best Buy Card or the Future

Shop Card. The costs of providing this discount would be prohibitive. This may be contrasted with a more targeted surcharge that focuses only on those customers paying with higher-cost credit cards

303 Mr. Daigle of Shoppers Drug Mart also commented on the commercial practicality of offering discounts for payment other than by credit card in his witness statement, at paragraphs 40 to 42:

> First, Shoppers would be discounting from a "shelf price", whether on a fixed or percentage basis. Shoppers would have to set this shelf price based on an estimate of the mix of payment methods that would be used, which could vary significantly with location and in response to issuer marketing campaigns, prevailing card rewards levels and other factors. The variation in card fees and types means that it would be difficult to establish a standard discount, exacerbated by the fact that a payment card may carry different fees depending on its use, for example, "card present" versus "card not present" transactions.
>
> Second, given the competitive nature of retail sectors in which Shoppers competes, it must be able to advertise the lowest possible prices, not a price that will be further discounted depending on the payment method selected by the customer.
>
> Third, the discount would have to be offered to all customers, including those that otherwise would have paid with cash, Interac debit or lower-cost credit cards. In this regard, Interac debit accounted for about **[CONFIDENTIAL]** of Shoppers' sales in 2011.

304 The Respondents describe the Merchants' statements that they would have to inflate their base price in order to offer a discount as "ridiculous", arguing that Merchants provide discounts of one form or another all the time (e.g. loyalty programs, coupons, promotions) and that the advertised or base price would presumably also have to be raised to cover their cost. They argue further that Merchants need not and do not confine themselves to advertising a single base price. The Respondents also observe that some Merchants have historically offered discounts for cash and that a number of the Merchant witnesses offer discounts to customers choosing to pay with their co-branded credit cards, that is, to steer their customers toward credit cards rather than away from them.

305 The Respondents cite the survey conducted by Mr. Gauthier and interpreted by Dr. Mulvey as supporting their assertion that consumers would be more responsive to the offer of a discount for using a lower cost means of payment than they would to the imposition of a surcharge on a higher cost means of payment. This survey asked participants how they would respond to a rebate for paying by means other than a credit card and to a surcharge for paying with a credit card respectively. The Commissioner and her experts are very critical of the methodology employed in the Gauthier survey. The Tribunal finds some of these criticisms telling and, as a consequence, is inclined to put little weight on Mr. Gauthier's findings. The Tribunal was particularly troubled by the lack of context (survey respondents had no idea whether or not other Merchants they might patronize were also surcharging) and the assumption that the discount and surcharge are applied to the same base price.

306 The Tribunal is persuaded that while the use of discounts to signal consumers as to the relative costs of alternative means of payment has a role to play in some instances, there are both doubts as to its efficacy and significant practical barriers to its widespread use. This leads us to reject the Respondents' argument that Merchants could eliminate the cross-subsidization of their credit card customers using discounts alone.

307 The Respondents also argue that, as a matter of practice, the elimination of the No-Surcharge Rule would not have the disciplinary effect on their pricing that the Commissioner is claiming for it. The Respondents contest the Commissioner's allegation that Card Acceptance Fees would be lower in the absence of the No-Surcharge Rule. They argue that the Commissioner's submissions rely on factual assumptions that are entirely speculative in nature. More particularly, they argue as follows:

> • The evidence does not establish that Merchants would actually surcharge, let alone that surcharging would be widespread;

- The evidence does not establish that there would be an actual or anticipated significant loss of transaction volume on the Respondents' networks so as to provide them with incentive to reduce Interchange or Network Fees;
- The evidence does not establish that they would lower the default Interchange Fees and/or Network Fees in the face of surcharging;
- If Interchange Fees or Network Fees were to be reduced, the evidence does not establish that Acquirers will lower Card Acceptance Fees to their Merchant customers.

308 Visa argued that it would not necessarily fear a loss in its transaction volume due to surcharging if Cardholders could simply patronize non-surcharging Merchants. This would be the case if surcharging were not widespread. Visa noted that its business continued to grow in Australia despite the introduction of surcharging there. Again noting its Australian experience, Visa argued that surcharging might not induce it to reduce its Interchange Fees. The reason is that since surcharges tend to be well in excess of Card Acceptance Fees, it would have no reason to expect that a reduction in Card Acceptance Fees would result in a lower surcharge.

309 With respect to the likelihood that, if permitted by the Merchant Rules, Merchants would either surcharge the Respondents' credit cards or could credibly threaten to do so in order to constrain increases in Card Acceptance Fees, Merchant witnesses indicated that they would consider both surcharging and the threat of it. However, some witnesses recognized that the "firstmover" problem (being the first to surcharge) might inhibit the actual implementation of surcharges.

310 *[CONFIDENTIAL]* stated that *[CONFIDENTIAL]*, without the Merchant Rules, would threaten to surcharge or actually surcharge. *[CONFIDENTIAL]* indicated that *[CONFIDENTIAL]* would also use the absence of the No-Surcharge Rule in negotiations with the Respondents regarding fees. Ms. Li stated that WestJet would seriously consider assessing reasonable user fees for payments made using credit cards. Testimonies of other witnesses were to the same effect.

311 The Commissioner underlined that according to a recent Australian study, 30% of Merchants surcharged at least one of the credit cards they accepted in December 2010, compared with just over 8 % in June 2007. Surcharging credit cards has been permitted in Australia since 2003. Dr. Frankel opined that it may take some time for surcharging to become widespread.

312 With respect to the likely effect of surcharging on the Respondents' transaction volume, the Tribunal finds, first, that the continued growth of Visa's transaction volume in Australia after surcharging was permitted could have occurred for a variety of reasons such as the growth of on-line shopping. Second, the evidence that while 30% of Australian merchants surcharged at least one credit card, only 5% of transactions were actually surcharged is consistent with substitution by consumers in favour of other means of payment as well as with a shift in patronage toward non-surcharging merchants. Third, in support of his opinion that the relevant product market includes all payment platforms, the Tribunal takes Dr. Elzinga to be implying that a 2% surcharge could result in a significant diversion of transaction volume in favour of alternative means of payment.

313 The Tribunal finds that if the Merchant Rules permitted it, surcharging would ultimately be sufficiently widespread to make threats to surcharge with concomitant losses in credit card network transaction volume credible.

314 With respect to the Respondents' assertion that they would not respond to threats to surcharge or to actual surcharges by lowering default Interchange Fees, this is contradicted by the Respondents' own documents as well as by Merchant testimony.

315 In submissions that it made to the Reserve Bank of Australia ("RBA"), MasterCard acknowledged the link between Card Acceptance Fees on one hand and both discounting and either actual or threatened surcharging on the other:

> MasterCard considers that the ability of merchants to discourage card use, by such means as cash discounts and surcharging, should be more than sufficient to avoid excessive interchange fees. Credit card schemes have an interest in avoiding discouragement by merchants, because it lessens card use. It should not, therefore, be surprising that schemes will set interchange fees to dissuade widespread discouragement practices by merchants. A low level of discouragement might therefore simply reflect that merchants are not unhappy with their current merchant fees relative to the benefits they obtain from accepting cards. That is simply the nature of bargaining — one does not need to exercise an option for it to have value to the merchant.
>
> The threat of discouragement has value to the merchant (in restraining merchant fees) as long as it is credible, even if it is not exercised.

316 In an expert report, prepared for MasterCard and submitted to the RBA, Professor Christian von Weizsäcker made the same points:

> Price competition of payment systems for merchants is enhanced by the fact that surcharges (and cash discounts, etc.) are possible. From the point of view of the payments system, surcharging of the system by many merchants is to be avoided. The attractiveness of cards among cardholders is negatively affected by widespread surcharging... Therefore the risk of increased surcharging after an increase of fees is one of the most powerful forces to keep merchant fees low. We would expect that actual surcharging is rather infrequent because payment systems have a great interest to avoid merchant surcharging of their system. But nevertheless, merchants' right to surcharge imposes substantial downward pressure on merchant fees. The same analysis would apply with respect to discounts for preferred forms of payment like cash.

317 Ms. Van Impe, the Director of Student Accounts & Treasury at the University of Saskatchewan, stated that the threat to surcharge had a salutary effect on her negotiations with Visa. She described in her witness statement the negotiations that were held between the University, its Acquirer, Moneris, and Visa with respect to the Card Acceptance Fees. At the time, the University was considering imposing an additional fee on credit card transactions to offset the increasing costs of credit card acceptance and she described the negotiations as follows:

> Moneris also arranged a conference call with myself and Chris Renton of Visa Canada on March 22, 2010. During this conference call, Mr. Renton stated that Visa would not allow the University to impose an additional fee for use of a Visa credit card.
>
> Visa's stated position was made publicly known in an article written by Brian Weiner, head of interchange for Visa Canada, to the Saskatoon StarPhoenix newspaper. ....Visa believed that the 1% fee proposed by the University constituted a "surcharge". According to Visa, a surcharge is a practice whereby an additional fee is levied on purchasers when they pay with a particular card. Surcharging is prohibited by Visa's Merchant Rules. Visa was willing to discuss potential reductions in the Merchant Service Fees charged to the University and offered us a significant reduction in our Merchant Service Fee for large dollar tuition payments in order to offset our desire to impose a 1% administration fee on students who choose to pay with a credit card.
>
> However, because Visa can increase its fees at any time, the University determined that Visa's proposal would not give the University any control or certainty over its Merchant Service Fees.

318 In the light of the foregoing, we find that in the absence of the No-Surcharge Rule, either surcharging or the threat of it would steer or threaten to steer credit card network transaction volume to other means of payment and this would either constrain increases or bring about reductions in the Interchange Fees and thus to the Acquirer Fees.

319 With respect to the Respondents' assertion that any reduction in Acquirer Fees would not necessarily be passed along to Merchants in the form of lower Card Acceptance Fees, the evidence establishes that although they are not contractually obliged to do so, Acquirers would be obliged by competitive forces to pass on changes in Acquirer

Fees in the form of commensurate changes in Card Acceptance Fees. The parties, in fact, agreed that the credit card acquiring business is very competitive. Mr. Van Duynhoven described Acquirers as being "fiercely competitive" and "highly competitive" and the Respondent Visa stated, in its closing submissions (at p. 142), that "Acquirers operate in a highly competitive market in which their margins are very small." The Merchants also described the market for Credit Card Acceptance Services as being a very competitive environment for Acquirers.

320 With respect to the Respondents' line of argument that there is no factual basis for any of the assumptions underlying the Commissioner's theory that the No-Surcharge Rule has had the effect of influencing Card Acceptance Fees upwards, the Tribunal finds that there is evidentiary support for each of the requisite assumptions.

321 Expressed in terms of the Commissioner's cost-externalization theory, we find that the No-Surcharge Rule effectively constrains Merchants to pass on higher Card Acceptance Fees to all customers, independent of the method of payment used so that an increase in the Card Acceptance Fee does not affect the means of payment chosen by a Merchant's customers. In particular, Cardholders have no reason to reduce the use of their cards in response to an increase in the Card Acceptance Fee. When contemplating an increase in their respective Acquirer Fees, each of the Respondents would be aware that the resulting increase in their Card Acceptance Fees would not affect their Cardholders' decisions to use their cards and that, as a consequence, Merchants would have "little choice" but to continue to accept their cards. The No-Surcharge Rule thus reduces the discipline on the Respondents' pricing that would otherwise come from substitution or threatened substitution in favour of other means of payment and this results in Acquirer Fees (and Card Acceptance Fees) that are higher than would otherwise prevail.

322 Each Respondent has therefore indirectly influenced upward, through the implementation of the No-Surcharge Rule, the price at which the Acquirers sell Credit Card Network Services to Merchants.

323 The Commissioner's experts were unable to quantify the extent to which Card Acceptance Fees have been influenced upward by the No-Surcharge Rule. Interchange Fees have risen over time from an average of *[CONFIDENTIAL]* in the nineties to an average of *[CONFIDENTIAL]* for Visa and *[CONFIDENTIAL]* for MasterCard in 2012 according to Mr. McCormack but the magnitude and causes of this increase are disputed. Attribution of this increase to the No-Surcharge Rule is difficult because it has been in place for a great number of years so that there is no "before and after" benchmark. The Tribunal is of the view that the No-Surcharge Rule has amplified the effect of other developments such as dual issuing and possibly increased single-homing, on Interchange Fees and thus on Card Acceptance Fees. In any event, paragraph 76(1)(*a*)(*i*) requires only a finding that the Respondent has influenced upward the price and we find that this influence to have been more than just *de minimis*.

324 We now turn to the Honour All Cards Rule in order to determine whether, by implementing the Honour All Cards Rule, each Respondent has indirectly influenced prices upward.

(b) The Honour All Cards Rule

325 The Commissioner alleges that the Honour All Cards Rule has two main aspects: (i) an "all products" aspect that prohibits a Merchant from accepting some types of Visa or MasterCard credit cards, but not others; and (ii) an "all issuers" aspect that prohibits a Merchant from accepting some credit cards, but not others, based on the identity of the Issuer.

326 With respect to the first aspect, the Commissioner submits that by eliminating an option for Merchants to selectively accept only some of either Respondent's credit cards, the Honour All Cards Rule allows the Respondents to maintain higher Card Acceptance Fees than they otherwise could. In the absence of the Honour All Cards Rule, Merchants could make separate acceptance decisions with respect to different card types, and selectively refuse, for example, a premium MasterCard credit card carrying a very high Interchange Fee, based on the Merchant's own evaluation of the costs and benefits of accepting those particular cards.

327 In his report, Dr. Winter discusses the Honour All Cards Rule in connection with his competition suppression mechanism. He states that in the absence of the Honour All Cards Rule, selective refusal to accept certain cards within a brand would be the most important source of competitive discipline:

> 83. The weak remaining source of competitive discipline against high prices under the Merchant Rules, the ability merchants to refuse a credit card, is further diminished by another of the Merchant Rules: the Honour-All-Cards Rule. The anticompetitive impact of the Merchant Rules is strongest for premium credit cards because these cards impose the highest cost on merchants. It is precisely these credit cards for which the option of merchants to decline to accept certain credit cards within a brand would be the most important source of competitive discipline. Under the Honour-All-Cards Rule, merchants cannot selectively decline to accept premium credit cards. Merchants that are forced into a choice of accepting all Visa credit cards or no Visa credit cards, for example, are much less likely to respond to an increase in the Interchange Fee on premium Visa credit cards than if they had the option to drop only premium cards. The cost to a merchant of dropping all Visa credit cards is higher than the cost of dropping only premium credit cards, making the merchant less responsive to increases in the cost of any one type of credit card.

328 With regard to the second aspect, the Commissioner submits that eliminating the Honour All Cards Rule would make the development of intra-brand price competition between Issuers possible. If a Merchant could make separate acceptance decisions based on Issuer identity, each Issuer would have an increased incentive to compete with one another over the fees charged to Merchants.

329 The Respondents submit that the Honour All Cards Rule has a pro-competitive business rationale and that the Commissioner's theory depends on factual assumptions that are entirely speculative. They assert that:

• The evidence does not establish that the refusal of Merchants to accept certain types of credit cards would be widespread or feared by the Respondents to be widespread;

• The evidence does not establish that in the face of those refusals, there would be an actual or anticipated significant loss of transaction volume on the Respondents' networks.

• The Respondents would lower the default Interchange Rates and/or Network Fees as a result; and

• The Acquirers would, in turn, lower Card Acceptance Fees to their customers.

330 The Respondents also submit that the ability of Merchants to refuse the cards of selected Issuers would make it much more difficult for new Issuers to enter the market.

331 With respect to the ability of Merchants to discriminate among Issuers, the Commissioner has not defined a market within which the Tribunal could assess the state of competition among Issuers. In any event, there is insufficient evidence to establish that prices of Credit Card Network Services have been influenced upward by each Respondent on the basis that the Honour All Cards Rule has prohibited Merchants from accepting some credit cards, but not others, based on the identity of the Issuer.

332 With respect to the ability of Merchants to discriminate among types and brands of cards, we must determine the role the Honour All Cards Rule plays in influencing Card Acceptance Fees upwards through both the suppression of competition mechanism and the cost-externalization mechanism.

333 There is very little evidence before the Tribunal regarding the role that the Honour All Cards Rule might play in facilitating the operation of the cost-externalization mechanism.

334 Dr. Winter agreed on cross-examination that the Honour All Cards Rule plays only a supporting role in his analysis and that his concerns would be addressed if the No-Surcharge Rule were removed.

335 Dr. Winter does not mention the Honour All Cards Rule in his explanation of the cost externalization mechanism.

336 Dr. Frankel states in his report that the Honour All Cards Rule makes demand facing each network less elastic but provides no analysis or other support for this statement. He also states that the elimination of the Honour All Cards Rule would provide Merchants with "another competitive tool" in the form of selective refusal of premium cards.

337 Evidence regarding the Honour All Cards Rule from Merchant witnesses was largely confined to statements that they would consider declining to accept certain types of credit cards.

338 Cross-subsidization would appear to continue to exist as long as the credit cards accepted by Merchants are more costly to them than other means of payment. The Tribunal is left to speculate as to how the Respondents might reprice their remaining card offerings given selective refusals to accept their premium cards.

339 The Tribunal concludes that there is not sufficient evidence to support the argument that by implementing the Honour All Cards Rule the Respondents have influenced Card Acceptance Fees upward via the cost-externalization mechanism.

340 The possibility remains that the Honour All Cards Rule may have facilitated a suppression of price competition between the Respondents thereby influencing Card Acceptance Fees upward. As stated above, however, the finding of an adverse effect on price competition cannot be used to satisfy both the upward influence requirement under paragraph 76(1)(*a*) and the adverse effect requirement under paragraph76(1)(*b*). Since a finding that the Honour All Cards Rule had an adverse effect on competition between the Respondents would have to do double duty, the Tribunal does not pursue this question further.

(c) The No Discrimination Rule

341 As explained above, the Commissioner also alleges that MasterCard, by implementing the No-Discrimination Rule, has influenced upwards the price at which Acquirers sell Credit Card Network Services to Merchants. The Visa Regulations do not contain a similar Rule.

342 While the Commissioner refers briefly to the No-Discrimination Rule in her closing submissions and oral argument, the bulk of her submissions were focused on the No-Surcharge Rule and the Honour All Cards Rule. In her closing submissions, while explicit reference is made to how the latter two allegedly influenced prices upwards, no similar submissions are found for the No-Discrimination Rule. In other paragraphs, the Commissioner refers to the Merchant Rules collectively. In these circumstances, it is difficult for us to reach a conclusion with respect to this issue as there is so little emphasis on this Rule and its effects. Nonetheless, the Tribunal recognizes the logical possibility that MasterCard's No Discrimination Rule could have had an impact on the magnitude of any adverse effect on price competition arising from the implementation of the No-Surcharge Rule. We discuss this matter briefly when drawing our conclusions under paragraph 76(1)(*b*).

(d) Conclusion

343 We conclude that the criteria under paragraph 76(1)(*a*) have been met with respect to the No-Surcharge Rule. We shall now examine whether the conduct has had, is having or is likely to have an adverse effect on competition in a market.

B. Paragraph 76(1)(b)

(1) Position of the Commissioner

344 As explained above, the Commissioner states that the relevant market for the purpose of assessing the competitive effects of the No-Surcharge Rule consists of general purpose Credit Card Network Services. The Commissioner further

states that the evidence before the Tribunal demonstrates that Visa and MasterCard each exercise market power within the relevant market.

345 As regards to adverse effects, the Commissioner submits that the elimination of the Merchant Rules would unleash competitive forces that have been lacking in the market for Credit Card Network Services for years. She contends that the Merchant Rules have adverse effects on competition by substantially reducing or eliminating the incentives of the Respondents to reduce fees, by distorting the price signals that are provided to customers when electing to use a payment method at the point of sale and by suppressing competition between Visa and MasterCard with respect to those fees.

346 The Commissioner also argues that the Merchant Rules increase barriers to entry and impede competition from other existing or new payment providers and networks. Through this, the Commissioner argues that the Merchant Rules preserve and enhance the Respondents' market power.

347 Other arguments put forth by the Commissioner are that the Merchant Rules (1) have harmed consumers including consumers who pay for goods and services using less expensive forms of payment (sometimes referred to as the cross-subsidization theory of harm); (2) have undermined the transparency in the industry and (3) have undermined the ability of Merchants to protect themselves in a meaningful fashion, including by steering consumer effectively towards other lower-cost forms of payment.

348 The Commissioner also states that the Respondents' purported defences or justifications are irrelevant to the question of whether the Merchant Rules contravene section 76 and are merely self-serving assertions that are unsupported by the evidence and in many cases, are fundamentally at odds with market realities.

(2) Position of the Respondents

349 The Respondents submit that the Commissioner has failed to establish that the Merchant Rules adversely affect competition in any market. They raise a number of deficiencies in the Commissioner's "adverse effects" analysis including the following:

- The Commissioner's failure to consider the impact of the alleged conduct on all facets of competition (e.g. price, quality, service, consumer choice and innovation).

- The Commissioner's failure to consider the two-sided nature of the market.

- The Commissioner's failure to consider the pro-competitive and efficiency enhancing aspects of the Merchant Rules. They state that the evidence in this proceeding demonstrates that the rules are pro-competitive and efficiency enhancing business practices based on sound economic logic. The Merchant Rules balance the credit card system, protect legitimate franchisor interests and protect the Respondents from reputational damage. It also affirms that no evidence of anti-competitive motive underlying the No-Surcharge Rule or the Honour All Cards Rule has been tendered.

- The Commissioner's suppression of competition theory is dependent on proof, on a balance of probabilities, that several speculative steps will result in lower Card Acceptance Fees. The Respondents state that there are significant deficiencies with each step in the causal chain and as such the Commissioner's suppression of competition theory is unsustainable.

- The Commissioner's cross-subsidization theory has nothing to do with whether there are adverse effects on competition and it is impossible to prove adverse effects under this theory. Further, the Respondents submit that there was no evidence to show that retail prices are higher as a result of the Merchant Rules and, in any event, the retail industry is not a relevant market for purposes of paragraph 76(1)(*b*).

(3) The Meaning of "adverse effect on competition in a market"

350 The expression "adverse effect on competition in a market" has been interpreted by the Tribunal in the context of paragraph 75(1)(*e*) of the Act in *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 (Competition Trib.). Paragraph 75(1)(*e*) also requires an adverse effect on competition, but is limited to two time frames. In *B-Filer Inc.*, the Tribunal held that the provision requires an assessment of the competitiveness of a market with, and without, the practice, and, more particularly, that the remaining market participants must be placed in a position, as a result of the practice, of created, enhanced or preserved market power:

> Thus, we conclude that paragraph 75(1)(e) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal. This raises the question of what is meant by "competitiveness".
>
> . . .
>
> Aside from the jurisprudence cited above, which indicates that a relative assessment of market competitiveness has to do with an assessment of market power, and how it may have changed, this is also suggested by the very nature of the various means by which firms compete.
>
> Adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.
>
> Product variety (including variety in terms of differing geographic locations in which the product is sold) in a market characterized by differentiated products is the most obvious potential factor that might be adversely affected in the absence of an exercise of market power. A business' product can be eliminated or made less commonly available through a refusal to deal without the remaining market participants exercising market power. However, in a market that remains competitive subsequent to a refusal to deal, the effect of the disappearance of one firm's product on consumers is negligible. This is the very nature of competitive markets: no single seller has any influence over price or any other factor of competition, including variety. In such a market, one less firm selling a product in a relevant market will either go unnoticed or will allow for a profitable opportunity for entry.
>
> This is similarly the case in regard to the impact of a refusal to deal on price, product quality, and any other factor of competition. Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

351 The Tribunal further held that "adverse" is a lower threshold than substantial.

352 The above approach was confirmed by the Tribunal in *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 (Competition Trib.), aff'd 2011 FCA 188 (F.C.A.), leave to appeal to SCC refused, 34401 (December 22, 2011) [2011 CarswellNat 5305 (S.C.C.)].

353 The Tribunal must thus compare the level of competitiveness of the market in the presence of the conduct with that which would exist in its absence, and then determine whether the effect on competition, if any, is adverse. This comparison must be done with reference to actual effects in the past and present, as well as likely future effects (see *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (F.C.A.) , leave to appeal to SCC refused, 31637 (May 10, 2007)).

(4) Analysis

354 When determining whether the conduct has adversely affected price competition between the Respondents in the market for Credit Card Network Services sold to Acquirers, we recognize that any adverse effect on price competition between the Respondents would involve an upward influence on their respective Acquirer Fees.

355 According to the Commissioner, the No-Surcharge Rule reduces price competition between Visa and MasterCard in the market for Credit Card Network Services sold to Acquirers by preventing Merchants from playing one credit card network off against the other by surcharging or threatening to surcharge one but not the other (differential or selective surcharging). The Merchant Rules also reduce the incentive of either Visa or MasterCard to seek competitive advantage over the other by offering to discount its Acquirer Fee (which would be passed along by Acquirers in the form of a lower Card Acceptance Fee) in return for either avoiding a Merchant surcharge or securing a reduction in a surcharge already imposed by a Merchant:

> 488. In the "but for world" without the Merchant Restraints, Visa and MasterCard would have a substantially greater incentive than they now do to ensure that Card Acceptance Fees are set at competitive levels. For example, in the absence of the Merchant Restraints, Visa could reduce Interchange Fees to eliminate or reduce the likelihood that merchants would surcharge on Visa credit cards while continuing to surcharge on MasterCard credit cards. As in a normal competitive market, the lower price set by Visa would attract a higher volume of transactions and gain additional market share. Cardholders that held Visa credit cards even before the reduction or removal of the surcharges would respond to the reduced or eliminated surcharges by using those Visa credit cards for more transactions. Other consumers would obtain Visa credit cards, in order to have access to a credit card that attracts lower (or no) surcharges.
>
> 489. These sources of increased demand that result from undercutting higher Card Acceptance Fees would prevent the Respondents from imposing or sustaining supracompetitive Card Acceptance Fees. As Dr. Winter concludes: "[i]n a world with surcharges, the ability to differentially surcharge between Visa and MasterCard credit cards would be a significant source of competitive discipline that would keep Merchant Service Fees at competitive levels".

356 Dr. Winter provided more detail as to how the elimination of the No-Surcharge Rule would intensify price competition between Visa and MasterCard with respect to the fees they charge to Acquirers in his Expert Report:

> 72. Consider the nature of competition between Visa and MasterCard in a four-party credit card system without the Merchant Rules. In a market without the Merchant Rules, merchants could surcharge on credit card transactions. Visa and MasterCard would be competing in the relevant market on the basis of prices, i.e., fees charged to Acquirers (as well as the proportion of the price allocated to Issuers). In the absence of the Merchant Rules, a supra-competitive price by either firm could not be sustained. A supracompetitive price charged by Visa, for example, would give MasterCard an incentive to reduce the fees it charges to Acquirers, in order to undercut Visa's price and thus reduce the likelihood of, or level of, surcharging by merchants. MasterCard's lower Acquirer Fee would be passed on by Acquirers to merchants in the form of lower Merchant Service Fees, given the significant competition between Acquirers. Merchants would, in turn, pass on some or all of the lower Merchant Service Fees in the form of lower prices on MasterCard transactions, either by not surcharging MasterCard credit cards or by applying a lower surcharge on MasterCard credit cards than on Visa credit cards. The lower fee for MasterCard credit card transactions would then attract a greater volume of transactions — a higher market share — from three sources: (a) those consumers who had MasterCard credit cards even before the reduction or removal of surcharges would respond to the reduced surcharges by using their MasterCard credit cards for more transactions. This would be potentially a very strong source of increased market share for MasterCard because the consumer holding multiple credit cards would, at the point of sale, have the opportunity to buy the same product, but at a lower total price. Approximately one-half of all credit card holders in Canada carry more than one brand of credit card, such as both a Visa and a MasterCard credit card; (b) additional consumers would obtain MasterCard credit cards, attracted by lower surcharges or the absence of surcharges; and (c) some of the merchants that did not accept MasterCard credit cards would begin to accept them, since they would face lower Merchant Service Fees. The merchants would also

respond to the fact that MasterCard would be more popular among cardholders (because of the effects described in subparagraphs (a) and (b), above).

73. All of these sources of increased demand that result from undercutting high Acquirer Fees would prevent credit card companies from imposing or sustaining supracompetitive Acquirer Fees in a competitive market for Credit Card Network Services supplied to Acquirers. In a world with surcharges, the ability to differentially surcharge between Visa and MasterCard credit cards would be a significant source of competitive discipline that would keep Merchant Service Fees at competitive levels.

357 In his testimony, Dr. Carlton traced the effect of the No-Surcharge Rule on competition between Visa and MasterCard as follows:

So in the context of credit cards, let's suppose Visa wanted to stimulate the usage of Visa cards and it cuts the service fee. Well, it cuts the service fee, that will lead to lower merchant fee, if we're using Visa cards. Well, maybe that means the merchant wants to say to a customer, Gee, I would like you to use your Visa card, not your MasterCard, because now Visa is real cheap for me to use. The merchant can't do that with the no- surcharge rule. So it diminishes the incentive of Visa to cut price. So what the no-surcharge rule is doing is diminishing the incentive to compete between Visa and MasterCard on service fees and interchange.

358 In his report, Dr. Frankel also explained how selective surcharging could stimulate inter-brand competition if it were permitted:

131. Because higher fees lead to more surcharging (and at higher amounts) — when surcharging is permitted — and because more surcharging leads to less usage of the surcharged cards, the credit card networks have a strong economic incentive to keep fees lower when merchants can surcharge than when they cannot. This is why they have a correspondingly strong economic incentive to enforce no-surcharge rules.

[...]

139. In short, the credit card networks and their consultants have repeatedly acknowledged the economic reality that merchant surcharging intensified competition over the level of interchange fees — the largest component of Card Acceptance Fees. <u>The competitive logic is straightforward: as Card Acceptance Fees for a brand or a particular set of a brand's cards increases, merchants will have an increased incentive to surcharge the cards, and at higher rates for more costly cards.</u> Evidence confirms that this in fact occurs. Consumers confronted by surcharges — and differential surcharges — at the point of sale will have an economic incentive to reduce their use of surcharged cards or cards carrying the highest surcharges. Again, evidence confirms that this occurs.

140. Finally, card networks confronted by reduced usage of their branded cards due to surcharging induced by high Card Acceptance Fees for their brand will have an economic incentive to reduce those fees that does not exist in the presence of no-surcharge rules. Once again, evidence confirms this effect.

[emphasis added]

359 The Respondents dispute the Commissioner's contention that the Merchant Rules adversely affect competition fundamentally on the grounds that she ignores one side of the platform. The Respondents also argue that even if the Commissioner's competition suppression theory were correct, its effect in the market for Credit Card Network Services sold to Acquirers would be undone by competition in the market for credit card network services sold to Issuers where the Merchant Rules don't apply.

360 For reasons given above, the Tribunal accepts the Commissioner's position that the relevant product market is the supply of Credit Card Network Services to Acquirers and that the Respondents have each market power in this market. It remains to be determined whether the No-Surcharge Rule has either preserved or enhanced this market power. In

this regard, the Tribunal does not view the possibility that the Merchant Rules may have affected competition in other, undefined markets as a relevant consideration.

361 Accepting the Commissioner's market definition for purposes of argument, the Respondents maintain: (1) that for a variety of reasons, the No-Surcharge Rule is generally pro-competitive in intent and effect; (2) that the Commissioner's case is about bilateral bargaining between Merchants and card networks rather than about competition; and (3) that the evidence does not support the series of assumptions underlying the Commissioner's contention that there would have been more price competition in the relevant market in the absence of the No-Surcharge Rule.

362 While we have serious doubts about the appropriateness of considering all of these allegations under paragraph 76(1)(*b*), as opposed to considering them as relevant factors when exercising our discretion in determining whether an order should issue, we will assume for the purposes of this decision that they can be considered as part of the adverse-effect-analysis.

Pro-competitive rationale

363 The Respondents cite the expert reports of Dr. Elzinga and Dr. Church to the effect that the Merchant Rules have an efficiency-enhancing, pro-competitive business rationale. Dr. Elzinga calls them "cardholder assurances". They are intended to prevent merchant hold-up and free-riding:

> Merchants (especially those that do not expect repeat business) have an incentive to engage in hold up, i.e., add a surcharge, after the consumer has taken steps to acquire the product or service in question. This type of conduct creates an inherent incentive to free ride on the investments made by the card network and other merchants that abide by the Visa Rules and do not surcharge: the free riding occurs because the merchants who engage in hold up benefit from the increase in system demand that emanates from the expectation that all forms of payment will be accepted and that cardholders will not be surcharged. The free riding merchant is able to increase its profits by switching the customer to a less costly form of payment or by adding a surcharge.

364 The Respondents further argue that no evidence has been found in any of the documents they were obliged to produce that the Merchant Rules were intended to prevent or reduce competition between them. Moreover, the Respondent Visa observes that the Merchant Rules have been in place for more than thirty years thus stemming from a period well before Visa was alleged to have market power. As well, smaller competing payment platforms with no market power currently apply rules similar to the Merchant Rules.

365 The Commissioner counters that the consumer protection justification for the Merchant Rules is a mere pretext. Among the Commissioner's arguments are, first, that a surcharge is not a hold-up if consumers are informed of it in advance. Second, concern over acquiring a reputation for opportunistic behaviour should deter Merchants from hold-ups in the form of surprise or excessive surcharges much as it deters hold-up strategies with respect to other services such as parking. Third, initial surprise over being surcharged should decline as surcharging becomes more common. Fourth, the discipline of reputation effects could be supplemented by a requirement for proper disclosure of surcharges as is the Respondents' apparent practice in Australia and New Zealand. Fifth, the Respondents have adduced no evidence of bait and switch or other misleading tactics among Merchants charging convenience fees in jurisdictions where they are allowed.

366 The Tribunal agrees with the Commissioner that a surcharge (or a refusal to accept a card) does not formally qualify as a hold-up if Cardholders are properly informed of it in advance. The Tribunal also accepts that reputation effects and contractual requirements to disclose card surcharges and acceptance policies can diminish the incidence of surprise surcharges or refusals to accept a card. We are also of the view that conduct that is pro-competitive under one set of market circumstances can be anti-competitive under another.

367 The Respondents extend their consumer protection justification of the No-Surcharge Rule to the prevention of excessive surcharging by Merchants. They cite concerns in both Australia and the United Kingdom over surcharges that

are apparently well in excess of merchants' costs of card acceptance. The Commissioner argues that the Respondents have not established either that a substantial fraction of the "merchant sector" possesses market power or that allowing Merchants to surcharge bestows market power on them. Rather, surcharging is the normal passing on of the cost of a service (means of payment) a customer has selected.

368 It is the Tribunal's understanding that while permitting a Merchant to surcharge does not bestow market power on that Merchant, it does open another margin on which a Merchant with market power could extract profits. This is confirmed by Dr. Church in his response to a question from the Tribunal:

> JUSTICE PHELAN: Okay. How does the no-surcharge rule change things? If they've got market power now, they would presumably be extracting the maximum that they can. And so if you impose a surcharge on them, are you just changing the way in which they maximize?
>
> PROFESSOR CHURCH: No, because you're giving — so consumers have a demand curve for card usage, and it allows surcharges. Then it allows for the merchants to exercise their market power, if they have any, on that demand curve; whereas, if you ban surcharges, then they can't do it.

369 The Commissioner argues that estimates of the magnitude of excess surcharges in Australia may be overstated. The Commissioner states the East & Partners study of surcharging in Australia is not an "apples to apples" comparison in that it compares the surcharges of merchants who surcharge with the average Card Acceptance Fee. If merchants who surcharge pay a higher than average Card Acceptance Fee then the excess surcharge estimate is too high. The Commissioner does not present any further evidence on this matter and no one who was directly involved in estimating the extent and magnitude of surcharging in Australia gave evidence before the Tribunal. All that can be said is that the magnitude of excess surcharges in Australia is in dispute.

370 As we have stated above, the parties have not established that "merchants" is a market within which the extent of market power can be assessed. The statements of Merchant witnesses that they face intense competition are not sufficient in this regard. For this reason, the Tribunal has no basis for assessing the weight, if any, to attach to assertions by the Respondents that the No-Surcharge Rule is pro-competitive in the sense that it is intended to protect Cardholders from excessive surcharges. What is apparent and what the Tribunal will revisit in its discussion of the exercise of its discretion is that allegations of excessive surcharging appear to constitute significant concerns for public policy in Australia and the United Kingdom.

371 The Respondents argue that the Merchant Rules are pro-competitive in effect in that they have increased output in the relevant market. Dr. Elzinga observes that a "necessary corollary of card acceptance fees that are too high, as the Commissioner alleges, is that transaction volume in the networks must be too low. Anticompetitive conduct in any market, whether real or hypothetical, always results in output being restricted."

372 Dr. Elzinga examined a number of measures of the volume of credit card transactions. Dr. Elzinga's evidence is that both Visa and MasterCard dollar transaction volume as a percentage of personal consumption expenditure increased over the period 2003-2010 although they both declined over the period 2008-2009. The number of Merchants accepting Visa and MasterCard declined between 2003 and 2004, grew steadily between 2004 and 2009 and appeared to level off between 2009 and 2010. While he concedes that there could be other factors influencing the volume of credit card transactions, Dr. Elzinga concludes that the evidence shows no sign of output restriction, rather "the economic track record is one of increasing output."

373 The Tribunal agrees that supra-competitive pricing and output restriction go hand-in-hand although if demand is inelastic the output restriction involved could be quite small. The Tribunal is also of the view, however, that the observed growth in the use of credit cards could have occurred for a variety of reasons and does not, by itself, imply that the Merchant Rules have not had an output-restricting effect. The observation that demand in a market has grown over time need not say anything about the presence or absence of market power or about whether the price in the relevant

market is above the competitive level or not. The presence of market power implies that the market price is higher and the demand is lower than it would be under competitive conditions at any point in time. It does not imply that demand is not growing. The demand for Credit Card Network Services could have increased (shifted outward) for a variety of reasons such as increased on-line shopping or increased use of electronic payment in parking lots or vending machines or general changes in preferences regarding carrying cash (loonies and toonies) or writing cheques.

374 The Merchant Rules may also have contributed to the observed increase in demand for Credit Card Network Services. Indeed, it is hard to imagine that either network would have agreed to set higher default Interchange Fees unless it anticipated that this would increase network volume. To the extent that they have resulted in higher Interchange Fees than would otherwise have prevailed, the Merchant Rules may have provided Issuers with both the means and incentive to promote card use more heavily. In the Tribunal's view, this should not be interpreted as an offsetting pro-competitive effect of the No-Surcharge Rule. The softening of price competition between the Respondents is a reduction in inter-brand competition in the relevant market. It is not a defence for conduct that lessens inter-brand competition that it also provides an incentive for additional promotion of market demand.

The Commissioner seeks to increase the bargaining leverage of individual Merchants rather than increase competition between Visa and MasterCard

375 The Respondents argue that the Commissioner's case is more about increasing the bargaining leverage that individual Merchants have over Visa and MasterCard than it is about competition between Visa and MasterCard. They submit that rebalancing the respective negotiating positions of two individual entities is not the aim of the *Competition Act*.

376 The Tribunal observes that it is not being asked to intervene in negotiations between two entities. The Order that is being sought by the Commissioner would apply to all transactions in the market for Credit Card Network Services sold to Acquirers. The Tribunal also observes that any increase in competition among sellers increases the leverage of buyers in the sense that they have better alternatives and are able to get a better deal whether this involves formal negotiation or not. The remedy sought by the Commissioner can be viewed both as enabling Merchants to induce the Respondents to compete more intensively on price and as increasing the incentive of the Respondents to compete more intensively on price.

The evidence does not support the Commissioner's theory that price competition between the Respondents would have been more intense absent the No-Surcharge Rule.

377 The Respondents submit that Dr. Winter's suppression of competition theory relies on the following factual assumptions which have not been established (the gist of their submissions follows the factual assumption):

- Removing the Merchant Rules will lead to Merchants sending "price (payment cost) signals" to customers via surcharges.
    - Other price signals, such as discounting, disclosing card acceptance information to the public, refusing to accept Visa or MasterCard credit cards, exist.
- This surcharging would be widespread, or threat of it being widespread would be sufficient to accomplish the same objective.
    - There is no evidence in this regard. Several witnesses discussed the "first mover" problem (i.e. if they were the first to surcharge, they would risk losing sales to a competitor who did not surcharge) and the Respondents are of the view that most Merchants would not surcharge.

• This widespread surcharging will be precise enough for customers to distinguish between Card Acceptance Fees associated with Visa and MasterCard (along with other credit networks, cash and debit) as well as between Card Acceptance Fees associated with standard and premium credit cards.

• There is no evidence in this regard. Rather, the evidence is that, where surcharging is permitted, Merchants are more likely to engage in blended surcharging and/or excessive surcharging.

• This accurate and widespread surcharging or discrimination (or the threat thereof) will lead to a significant reduction in cardholder usage of the relevant brand of card and will lead to fewer Canadians enrolling for membership of the relevant brand of card, i.e. lower transaction volume.

• The evidence from Australia does not suggest that surcharging is likely to lead to lower volume on a network that is surcharged; in fact, quite the opposite. There are various other outcomes when a customer is faced with a surcharge (e.g. he may proceed with the purchase, may go to another store that does not surcharge).

• In the face of this reduced cardholder usage and enrolment, Visa and MasterCard would each lower default (or specific) interchange rates and/or Network Fees in order to stem the tide of the volume losses on their network or out of fear of significant volume losses on their network.

• The Respondents are not likely to lower Interchange Fees or Network Fees in response to surcharging.

• This lowering of default interchange rates or Network Fees would be passed on to Merchants by Acquirers in the form of lower Card Acceptance Fees rather than being retained by Acquirers.

• There is no evidence to substantiate this assertion. The Merchant Rules do not require Acquirers to pass on reductions to Merchants and no Acquirer has testified that all savings in Acquirers' costs would be passed on to Merchants.

• These lower Card Acceptance Fees would be passed on to consumers in the form of lower prices at retail rather than being retained by Merchants.

• There is no evidence to substantiate this assertion.

378 Some aspects of the Respondents' line of argument regarding the absence of evidence to support the Commissioner's theory of the case have already been addressed in connection with the Tribunal's assessment of the Commissioner's theory that the No-Surcharge Rule has had the effect of influencing Card Acceptance Fees upward via the cost-externalization mechanism. There are, however, some aspects of the Respondents' arguments that are specific to the Commissioner's suppression of competition theory and these are dealt with below.

379 With respect to the argument that the Merchant Rules permit Merchants to use selective discounting or the threat of it (rather than surcharges) to stimulate price competition between the Respondents, the Tribunal agrees that in theory, Merchants could seek a discount from either Visa or MasterCard in return for passing this discount on to customers who pay with the card of the network offering the discount. The Commissioner counters that offering discounts for payment by a type or brand of credit card or for alternative modes of payment is impractical for Merchants and would in any event not be as effective in steering consumers as surcharging. The Tribunal agrees that in practice, the ability of Merchants to offer discounts for payment by lower cost types or brands of credit cards has not been sufficient to mitigate the adverse effect of the No-Surcharge Rule on competition in the relevant market.

380 With respect to the question of whether Merchants would surcharge or could credibly threaten to do so, the Tribunal found above that over time surcharging would become sufficiently widespread that the threat of it would be credible. More relevant to the suppression of competition theory is the question of whether Merchants would engage in the type of selective (brand and card type specific) surcharging that would be required to play one of the Respondents

off against the other. In this regard, the Respondents observe that, as implemented in Australia, surcharges do not differentiate between types of credit cards (they are called blended surcharges) or between the Visa and MasterCard brands.

381 The Tribunal agrees that the Commissioner's suppression of competition mechanism relies on selective surcharging to stimulate price competition in the relevant market and on its absence under the No-Surcharge Rule to inhibit it. While recognizing the apparent prevalence of blended surcharging in Australia, the Tribunal also notes the differential surcharging of Amex cards in Australia as well as the statements of Merchant witnesses that see selective surcharging as a plausible business strategy.

382 Mr. Symons of IKEA testified as follows in that regard:

> Similarly, selectively surcharging one credit card networks' products, such as imposing a surcharge on Visa credit cards but not on MasterCard credit cards, will create a significant incentive for that network to compete through reduced Card Acceptance Fees and improved service.

383 *[CONFIDENTIAL]* gave similar statements.

384 It would appear to be in the self-interest of Merchants to make what use they can of both actual and threatened differential surcharging to obtain lower Card Acceptance Fees.

385 With respect to the question of whether actual or threatened selective surcharging of one brand of credit card would result in an actual or threatened loss of transaction volume of the credit card network concerned, the Tribunal found above that surcharging would result in a shift of transaction volume toward non-surcharged means of payment. This would include a shift toward brands or types of credit cards not subject to surcharge.

386 With respect to the question of whether an actual or threatened loss of transaction volume would either constrain increases or induce reductions in the Acquirer Fees of the credit card network concerned, the Tribunal found above that a response of this nature would likely occur. As well, one interpretation of Amex' reduction of its card acceptance fees in Australia is that this was a response to the differential surcharges imposed by merchants on its cardholders.

387 With respect to the questions of whether reductions in Acquirer Fees would be passed onto Merchants and whether reductions in Card Acceptance Fees would be passed on to consumers, the Tribunal found above that reductions in Acquirer Fees would be passed along in the form of lower Card Acceptance Fees. Section 76 does not require a finding that reductions in Card Acceptance Fees would ultimately be passed along to consumers by Merchants in the form of lower prices.

388 In conclusion, the Tribunal is not persuaded by the Respondents' line of argument that there is no evidence to support the assumptions underlying the Commissioner's proposition that the conduct of each Respondent has had an adverse effect on competition in the relevant market. The evidence does, in fact, support the Commissioner's allegation that the No-Surcharge Rule has had the effect of suppressing price competition between the Respondents in the market for Credit Card Network Services sold to Acquirers.

389 The Tribunal has concluded that each of the Respondents has enjoyed and continues to enjoy market power in the market for Credit Card Network Services. We have also found that the No-Surcharge Rule has inhibited price competition in this market and that this constitutes an enhancement of the market power. More particularly, referring to the three timeframes found in paragraph 76(1)(*b*) and assessing the market with and without the conduct at issue for these timeframes, we find that there has been an adverse effect on competition in the market for Credit Card Network Services in the past, present and that it is likely to occur in the future.

390 Before turning to the Tribunal's overall conclusion, a few words need to be said about the interplay between the No-Surcharge Rule and the No-Discrimination Rule. As explained above, the Commissioner examined the Merchant

Rules mostly collectively and no exhaustive analysis was performed with respect to each separate Rule and its effect on the other Rules. While no explicit argument was made to the effect, an argument could have been made that in the but-for-world which would have existed in the absence of the No-Surcharge Rule, Merchants could have threatened to only surcharge Visa credit cards but could not have threatened to surcharge only MasterCard credit cards because of MasterCard's No-Discrimination Rule. However, no evidence was adduced with respect to this issue. In our view, even if Merchants would have faced obstacles in threatening to selectively surcharge MasterCard credit cards, our above conclusion regarding an adverse effect on competition would remain unchanged.

C. Conclusion

391 We engaged in the above analysis in the event that we are wrong in our conclusions with respect to the legal interpretation of section 76 or in our finding that the requirement of a resale has not been met. Under this alternative analysis, we find that each Respondent has indirectly (by contractually implementing the No-Surcharge Rule) influenced upward the price at which Acquirers supply or offer to supply Credit Card Network Services within Canada and that this conduct has had, is having and is likely to have an adverse effect on competition in the market of Credit Card Network Services.

392 However, even under this alternative scenario, an order under section 76 would not have issued because we would have been of the view that this is not a proper case to exercise our discretion.

VIII. Exercise of Discretion

393 The relief set out in section 76 of the Act is discretionary in nature and the Respondents as well as the TD Bank submit that even if all the elements in subsection 76(1) have been met, the Tribunal should not grant the relief sought by the Commissioner. In that regard, they submit that the Tribunal should consider the following factors:

• An Order granting the relief sought will call for ongoing supervision and enforcement and the Tribunal has already stated that such ongoing supervision is not desirable;

• Merchants will likely levy surcharges in excess of their costs of acceptance (excessive surcharging), with the true intention of earning additional profit rather than steering Cardholders to alternative forms of payment. Surcharging will give Merchants a new profit centre to exploit;

• If the Order sought is granted, competing networks such as Amex will obtain an unfair competitive advantage and will increase their market share;

• If surcharging is allowed, the technological obstacles to differential surcharging will result in blended rates being employed;

• Merchants currently have the right to steer to forms of payment other than credit cards, including the right to provide discounts;

• The regulatory intervention which has occurred so far through the Code of Conduct, should be allowed to take effect before further intervention is contemplated — the Commissioner's application is premature;

• Merchants do not intend to actually surcharge — they are really asking the Tribunal to provide them with negotiating leverage. Where the beneficiaries of the discretionary order do not even intend to exercise the powers that would be granted to them, this should militate against the issuance of that order;

• The Order sought has the potential to reduce credit card transaction volumes — the Tribunal cannot ignore the tangible economic detriment likely to be the result for the Canadian economy; and

• The Order sought will lead to an adverse effect on competition (e.g., the order sought would make the payment system less competitive and less efficient and it would decrease output, eliminating the Honour All Cards Rules would undermine the foundation of the credit card networks).

394 We are unanimously of the view that even if the requirements under section 76 had been met, this is not a proper case to grant discretionary relief. Given the evidence adduced, it is clear that the proper solution to the legitimate concerns raised by the Commissioner of Competition is going to require a regulatory framework. We are typically reluctant to decline to exercise our discretion in favour of regulation as we agree that generally speaking even very imperfect competition is preferable to regulation.

395 However, this is an exceptional case and we are convinced that it makes more sense to begin with a regulatory approach rather than to back into it. A section 76 Order would be a blunt instrument and there will be technical hitches, unforeseen consequences, a need for ongoing adjustment and stakeholder consultation. The experience in other jurisdictions such as Australia and the United Kingdom shows that concerns will be raised by consumers regarding surcharging and possible gouging, and rather sooner than later, intervention will have to take place by way of regulation.

396 The "but for" world that the Commissioner postulates does not take sufficient account of the negative competition impacts or the effects on customers. It does not address the negative experiences of other countries. The order sought would apply to a broad swath of the Canadian economy which the Commissioner categorizes as "the merchant sector" and simply assumes to be uniformly competitive. To the extent that markets within "the merchant sector" depart from this assumption, the order sought by the Commissioner risks replacing one set of distorted incentives by another.

397 The powers of the Tribunal to effectively fashion a remedy are limited. Ongoing monitoring and enforcement are impossible. The "merchants" are not before the Tribunal, so the effectiveness of the remedy or the necessary safeguards cannot be assured.

398 The Tribunal is mindful that a change in one part of the credit card system is likely to have consequences in other parts, such as cardholder fees and benefits while price reductions to consumers may be undetectable. The law of unintended consequences is likely to be a significant force. It is uncertain that the supposed "cure" will not be worse than the "disease".

399 The credit card environment still is marked by significant competition and increasing supply — an unusual circumstance in anti-competitive scenarios.

400 We further note that the exercise of our discretion is encumbered by our finding that the Commissioner has failed to establish that MasterCard has engaged in price maintenance through the implementation of the No-Discrimination Rule. This would mean that Merchants may have difficulties differentially surcharging MasterCard credit cards even in the absence of the No-Surcharge Rule.

401 With all the uncertainties and infirmities of the Commissioner's case, the proposed remedy is not an attractive one absent some form of regulatory supervision, of which there is some but which, for policy choices, did not deal with the issues in this case.

IX. Costs

402 The Tribunal may award costs in accordance with the provisions governing costs in the *Federal Courts Rules*, 1998 (see: s. 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.)). Costs are sought by the Respondents and the TD Bank.

403 The Tribunal has full discretionary power over the amount and allocation of costs under Rule 400. Rule 407 provides that unless the Tribunal provides otherwise, party-and-party costs shall be assessed in accordance with column

III of the table to Tariff B. As stated in *B-Filer et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26, the Tribunal has followed the jurisprudence to the effect that there must be sound reasons to depart from Rule 407.

404 We are of the view that sound reasons exist to depart from Rule 407.

405 In considering costs, the Tribunal observes that this is a case of mixed result (in the alternative findings). The case is novel and does not mirror the legal basis on which similar cases proceeded in other jurisdictions as Canadian law is different from that of the other jurisdictions. Novelty is not necessarily a bad thing.

406 The Commissioner advanced a case which should be brought; even if she was not entirely successful. Competition law in Canada will not advance if a Commissioner is afraid to lose cases which ought to be brought. The courage to advance these cases is in the public interest. Gaps in our laws and policy will not be identified or remedied. Canadian competition law will develop more opaquely behind the scenes.

407 There is a broad public interest in bringing this case. It is even so for the Respondents as it may add some certainty to their position. The public debate on the issues in this case and more broadly are enhanced by this proceeding.

408 Therefore the Tribunal will make no award of costs.

Therefore, the Tribunal Orders That:

409 The Commissioner's application for an order pursuant to section 76 is dismissed without costs.

Footnotes

13

2004 Comp. Trib. 24
Competition Tribunal

Mrs. O's Pharmacy v. Pfizer Canada Inc.

2004 CarswellNat 5216, 2004 CarswellNat 8150, 2004 Comp. Trib. 24, 35 C.P.R. (4th) 171

In the Matter of the Competition Act, R.S.C. 1985, c. C-34

In the Matter of an application by Mrs. O's Pharmacy ("Mrs. O's") for an order pursuant to section 103.1 of the Competition Act granting leave to bring an application under section 75 of the Act

Mrs. O's Pharmacy, (applicant) and Pfizer Canada Inc., (respondent)

Blais Presiding Member

Judgment: September 20, 2004
Docket: CT-2004-003

Counsel: Mark Adilman, D.H. Jack, for Applicant, Mrs. O's Pharmacy
Philip Spencer, Q.C., Emily Winter, for Respondent, Pfizer Canada Inc.

Subject: Intellectual Property; Property; Corporate and Commercial

Headnote

Commercial law --- Trade and commerce — Restraint of trade — General principles

Commercial law --- Trade and commerce — Competition and combines legislation — Practice and procedure — Pleadings

Table of Authorities

Cases considered by *Blais Presiding Member*:

Allan Morgan & Sons Ltd. v. La-Z-Boy Canada Ltd. (2004), 2004 Comp. Trib. 4, 29 C.P.R. (4th) 559, 2004 CarswellNat 1219 (Competition Trib.) — distinguished

Barcode Systems Inc. v. Symbol Technologies Canada ULC (2004), 2004 Comp. Trib. 1, 29 C.P.R. (4th) 554, 2004 CarswellNat 1227 (Competition Trib.) — distinguished

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — considered

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77, (sub nom. *National Capital News Canada v. Milliken)* 2002 Comp. Trib. 41, 2002 CarswellNat 4487 (Competition Trib.) — considered

Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd. (2004), 35 C.P.R. (4th) 517, 2004 Comp. Trib. 15 (Competition Trib.) — considered

Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd. (2004), 2004 Comp. Trib. 13 (Competition Trib.) — considered

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
s. 75 — considered

s. 103.1 [en. 2002, c. 16, s. 12] — referred to

s. 103.1(7) [en. 2002, c. 16, s. 12] — considered

***Blais Presiding Member*:**

Application

1 The applicant, Mrs. O's Pharmacy Inc. (Mrs. O's) is a corporation incorporated under the laws of the Province of Ontario, carrying on business in the Town of Fort Erie, Ontario.

2 The respondent, Pfizer Canada Inc. (Pfizer) is a corporation incorporated under the laws of Canada. Pfizer carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

3 Mrs. O's operates a retail pharmacy in Fort Erie. The pharmacy offers a wide selection of products and services, including prescription and over the counter medicines. The pharmacy is located in downtown Fort Erie, about two miles from the Peace Bridge. Every summer, an influx of Americans doubles Fort Erie's population of about 25,000. Mrs. O's began operating in January 2004.

4 Pfizer previously supplied a number of key products to Mrs. O's: Lipitor (for high cholesterol), Accupril and Norvasc (for high blood pressure), Ministrin and Loestrin (for birth control), Bextra and Arthotec (for arthritis) and Detrol (for bladder incontinence). These important therapeutic products represented a significant portion of Mrs. O's gross sales. In the industry, such products represent about 20 per cent of gross annual sales for an Ontario pharmacy.

5 In a letter dated March 11, 2004, without prior notice, Pfizer advised Mrs. O's that it was not in compliance with Pfizer's terms of trade, namely selling or distributing Pfizer products only to persons in Canada. Consequently, the pharmacy was no longer approved to purchase Pfizer pharmaceutical products from Pfizer authorized distributors.

6 Mrs. O's argues that it has never exported Pfizer products out of Canada. Pfizer offered to reinstate supplies if Mrs. O's agreed to four annual audits by Pfizer. Mrs. O's contends that such a requirement is not a usual term of trade, and breaches the pharmacy's professional obligations of privacy and confidentiality to its customers. Pfizer also required that the pharmacy sign a declaration stating that the pharmacy would not export Pfizer products nor sell to anyone where there was reason to believe that such a person would export Pfizer products.

7 Pfizer occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Its products are widely available in the Fort Erie region. Pfizer's actions have had a significant impact on Mrs. O's growth. Patients who cannot fill all their prescriptions at the pharmacy take their business elsewhere. Thus, Mrs. O's claims its financial viability is threatened by Pfizer's actions.

Respondent's Position

8 Pfizer Canada Inc. (respondent) opposes the application, arguing that the applicant has not established that its business has been substantially affected by the respondent's decision to cease supplying its products.

9 The respondent submits that despite a restatement, couriered on February 20, 2004, of the requirement for all Pfizer products purchased to be sold only in Canada (requirement in existence since 2000), the respondent was made aware of a website registered to Mrs. O's. The respondent then advised the applicant that it was not in compliance with the Terms and Conditions of the purchasing agreement.

10 The applicant was given the opportunity to be supplied with Pfizer's products provided it complied with the Terms and Conditions. Pfizer would be willing to reinstate supply provided that the applicant be subject to certain report and audit requirements, for the sole purpose of confirming that the applicant complies with the respondent's Terms and Conditions.

11 The respondent submits that the applicant has not met the test stated in subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), for leave to apply under section 75, because the applicant has not provided sufficient credible evidence that its business has been directly and substantially affected by the respondent's conduct. The impact stated in the affidavit and Statement of Grounds and Material Facts is "overstated, unreasonable and based on insufficient and speculative information."

12 The respondent states the following facts to support this argument:

1) Since it began operating, the applicant has only purchased $10,000 of the respondent's products.

2) The applicant does not provide hard data as to actual sales lost as a result of the respondent's decision to cease supply. The applicant relies only on forecasts made prior to opening its business.

3) The applicant claims that eight products it attributes to the respondent represent some 20 per cent of a pharmacist's gross annual sales; the respondent submits that figure is not substantiated.

4) Two of the eight products attributed to the respondent have been divested to another corporation.

5) Based on data generated by IMS, an independent third party pharmaceutical data collection service, the six products identified by the applicant represent only 12 per cent of sales to Ontario pharmacists and to the applicant.

13 The applicant bases its losses on projections, not actual figures. It plans to service downtown Fort Erie, which has been without a pharmacy for ten years. Clearly, states the respondent, the community has relied on other pharmacy options for that period. Given the market, the applicant's forecasts are unreasonable, and cannot support a claim for loss of sales.

14 The respondent contends that the term "substantial" has been interpreted by the Competition Tribunal (the "Tribunal") as meaning a much more significant impact than that reported by the applicant. Moreover, the applicant had ample opportunity to comply with Pfizer's usual trade terms, which are reasonable terms of trade.

Analysis

15 Section 103.1 of the Act is a new section which has been the basis of a few decisions so far.

16 In *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41 (Competition Trib.), Justice Dawson found that the refusal to grant the applicant full access to the Parliamentary Press Gallery was entirely within the privilege of Parliament, as vested in the Speaker, and thus could not be subject to an order under section 75 since the Tribunal did not have the jurisdiction, any more than the courts, to examine that particular exercise of the privilege. For this reason, the requirement of subsection 103.1(7) was not met.

17 In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1 (Competition Trib.) , Justice Lemieux granted leave to Barcode, having found sufficient credible evidence to give the Tribunal reason to believe that

the applicant may have been directly and substantially affected. There was evidence that on petition of the Royal Bank of Canada, an interim Receiver had been appointed for all property, assets and undertakings of Barcode. Barcode also asserted in its materials that it had laid off half of its employees.

18 In *Allan Morgan & Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (Competition Trib.) (Justice Lemieux), the applicant Allan Morgan and Sons Ltd. filed an application under section 103.1 for leave to make an application under section 75, alleging that the respondent La-Z-Boy Canada Ltd., by terminating its right to act as representative of the respondent, had directly and substantially affected its business.

19 The applicant presented various tables to show sales by category, gross profits and estimates of profit loss due to the respondent's restrictions which occurred before the contract was terminated. Based on these figures, Justice Lemieux found that there was sufficient credible evidence to satisfy himself that the applicant "may have been directly and substantially affected by the actions of La-Z-Boy." He then added: "Morgan's Furniture, at the leave stage, is not required to meet any higher standard of proof threshold."

20 Madam Justice Simpson has recently rendered two decisions on section 103.1 applications, *Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13 (Competition Trib.) and *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.* (2004), 2004 Comp. Trib. 15 (Competition Trib.). In both cases, leave was granted. Justice Simpson indicated that leave requirements set in subsection 103.1(7) of the Act had been met; she then added that under section 75, an order could issue, because for each condition the Tribunal could conclude that the condition was satisfied.

21 In this case, I believe the applicant has failed to meet the test of "directly and substantially affected in the applicant's business." It is therefore not necessary to consider whether an order could issue under section 75. The applicants must show sufficient credible evidence of a direct and substantial effect. In *Barcode*, for example, the company was in receivership and fifty per cent of the employees had been laid off. In *La-Z-Boy*, the applicant had figures showing a 46 per cent decrease in its sales. There was thus a credible basis as to substantial effect.

22 The Tribunal has never defined specifically what was to be considered "substantial"; however, it stated as follows in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.):

> The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.
>
> The cut-off resulted in a decline of over $200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October, 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of $30,000. Losses of the order of magnitude of $200,000 in sales and $30,000 in gross profits constitute a substantial effect for a small business such as Brunet's.

23 The applicant submits that Pfizer's actions have significantly limited the growth of the pharmacy. However, no figures are provided. Based on the evidence in the supporting affidavit, the direct effect on the business of the applicant has been that it has been unable to fulfill the expectations of the business plan. After some 5 months in business, the pharmacy had forecast filling 50 prescriptions a day; it is only filling 20.

24 The Tribunal cannot rely on such evidence to grant the leave. No figures are provided as to the loss of prescription sales due to the respondent's actions. The applicant states that customers fill multiple prescriptions, and may take their business elsewhere if part of the prescription is not filled at the applicant's pharmacy. However, no evidence is provided

of the number or percentage of such multiple prescriptions, nor how often these multiple prescriptions include the respondent's products.

25 The test, as stated by Justice Dawson in *National News* and repeated by Justice Lemieux, is that there be "sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice." I understand this to mean that the Tribunal must have reason to believe that there exists a causal relationship between the action of the respondent and the business consequences for the applicant. In this case, the causality is speculative. Many factors could have an impact on the growth or lack thereof of a new business. There is no convincing evidence to lay the blame on the respondent.

Therefore the Tribunal Orders That:

26 Leave to make an application under subsection 75 is dismissed.

14

2009 Comp. Trib. 6
Competition Tribunal

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.

2009 CarswellNat 5934, 2009 CarswellNat 7069, 2009 Comp. Trib. 6

In the Matter of the Competition Act, R.S.C. 1985, C. C-34, as amended

In the Matter of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Order pursuant to section 75 of the Competition Act

In the Matter of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Interim Order pursuant to section 104 of the Competition Act

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited, (applicant) and Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire, and Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc., (respondents)

Edmond P. Blanchard Presiding Member, Henri Lanctôt Member, P. André Gervais Member

Heard: November 17 - December 3, 2008
Judgment: June 8, 2009
Docket: CT-2008-004

Counsel: Leah Price, Ron Folkes, Andrea McCrae, Joshua Freeman, for Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited
Eric C. Lefebvre, Martha Healey, Denis Gascon, Alexandre Bourbonnais, Geoffrey Conrad, for Respondent, Groupe Westco Inc.
Olivier Tousignant, for Respondent, Groupe Dynaco, Coopérative Agroalimentaire
Valérie Belle-Isle, for Respondent, Volailles Acadia S.E.C., Volailles Acadia Inc./Acadia Poultry Inc.

Subject: Criminal; Corporate and Commercial

Headnote

Commercial law --- Trade and commerce — Definitions — Miscellaneous definitions

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — General principles

Table of Authorities

Cases considered:

B-Filer Inc. v. Bank of Nova Scotia (2006), 2006 Comp. Trib. 42, 2006 CarswellNat 6422 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1, 1990 CarswellNat 1368 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83, 1990 CarswellNat 1372 (Competition Trib.) — considered

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — considered

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1991), (sub nom. *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd.)* 38 C.P.R. (3d) 25, (sub nom. *Chrysler Canada Ltd. v. Director of Investigation & Research)* 129 N.R. 77, 1991 CarswellNat 1118 (Fed. C.A.) — considered

Fédération des producteurs de volailles du Québec c. Pelland (2005), [2005] 1 S.C.R. 292, 332 N.R. 201, 2005 SCC 20, 2005 CarswellQue 1155, 2005 CarswellQue 1156, 251 D.L.R. (4th) 577 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — considered

Sears Canada Inc. v. Parfums Christian Dior Canada Inc. (2007), 2007 CarswellNat 1610, 2007 Comp. Trib. 6 (Competition Trib.) — considered

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

s. 1.1 [en. R.S.C. 1985, c. 19 (2nd Supp.), s. 19] — referred to

s. 75 — pursuant to

s. 75(1) — referred to

s. 75(1)(a) — referred to

s. 75(1)(a)-75(1)(e) — referred to

s. 75(1)(b) — referred to

s. 75(1)(c) — referred to

s. 75(1)(d) — referred to

s. 75(1)(e) — referred to

s. 75(3) — referred to

s. 79(1)(c) — referred to

s. 104.1 [en. 2000, c. 15, s. 15] — referred to

Farm Products Agencies Act, R.S.C. 1985, c. F-4

Pt. II — referred to

s. 16 — referred to

s. 21 — referred to

s. 21(a) — referred to

s. 22(1) — referred to

Limited Partnership Act, S.N.B. 1984, c. L-9.1
Generally — referred to

Rules considered:

Competition Tribunal Rules, SOR/2008-141
R. 68-70 — referred to

Regulations considered:

Farm Products Agencies Act, R.S.C. 1985, c. F-4
Canadian Chicken Licensing Regulations, SOR/2002-22

Generally — referred to

Canadian Chicken Marketing Quota Regulations, SOR/2002-36

Generally — referred to

s. 9 — referred to

Chicken Farmers of Canada Delegation of Authority Order, SOR/2003-274

s. 2(1) — referred to

Chicken Farmers of Canada Proclamation, SOR/79-158

Generally — referred to

Decision of the Board:

I. Introduction and Summary of Conclusions

1 Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (the "Applicant" or "Nadeau") brings an application for an order directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms. The application is made pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

2 In the reasons that follow, we[1] find that:

1 We note that, where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

(a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;

(d) The Applicant has not established that the product is in ample supply; and

(e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

3 Since the Act requires that all of the requirements of subsection 75(1) be met for an order to issue, it follows that the application will be dismissed.

II. Background Facts

A. The parties

4 The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited, is a corporation incorporated under the laws of the Province of New Brunswick and is a wholly-owned subsidiary of Maple Lodge Holding Corporation ("Maple Lodge"), which is one of Canada's largest chicken processors.

5 Maple Lodge employs about 2,300 people and owns 100% of the shares of two chicken processing facilities in Canada, one in Norval, Ontario, which is operated by Maple Lodge Farms Ltd. ("Maple Lodge Farms"), and one in St-François de Madawaska, New Brunswick (the "St-François Plant"). The St-François Plant is operated by the Applicant.

6 The Respondent Groupe Westco Inc. ("Westco") is a corporation incorporated under the laws of the Province of New Brunswick. Westco is highly integrated in the chicken industry. It owns or controls egg hatching production quota, farms, chicken production quota and chicken production farms. Through its subsidiaries, Westco owns or controls around 50.9% of New Brunswick's chicken production.

7 The Respondent Groupe Dynaco, Coopérative Agroalimentaire ("Dynaco"), is a co-operative registered in the Province of Quebec. Dynaco has interests in certain chicken production facilities in the Province of New Brunswick. Dynaco is highly integrated in a number of industries, including the chicken industry. Dynaco is the [TRANSLATION] "fifth most significant co-operative in the Province of Quebec".

8 The Respondent Volailles Acadia S.E.C., created under the laws of the Province of Quebec, is registered as an extra-provincial limited partnership in the Province of New Brunswick, and the Respondent Volailles Acadia Inc./Acadia Poultry Inc., incorporated under the laws of Canada, is registered as an extra-provincial corporation in the Province of New Brunswick (collectively, "Acadia"). Acadia's main activity is the production of chicken and turkey.

B. The poultry supply management system

9 The events underlying this proceeding occurred in the context of Canada's poultry supply management system. It is therefore useful to understand the workings of that system.

10 Under Canada's supply management system, the typical set of market-determined economic arrangements is replaced with a detailed and complex set of regulations, akin to a centrally planned economic system. It has been described as being, in effect, a state-mandated cartel arrangement.

11 Supply management in the poultry sector evolved as a policy response to the interprovincial competition in chicken and egg marketing; also known as the "chicken and egg wars". The policy regime originated in the early to mid-1970s and replaced open, and at times aggressive, competition with mandated market shares enforced by provincial and producer marketing quotas. As a result, the poultry sector is likely the most highly regulated industry in the Canadian economy.

12 Supply management is commonly said to rest on three pillars, namely production control, price control and import control. We will briefly deal with each of these in turn.

13 Chicken farmers or producers are limited to producing their quota amounts, which are measured in kilograms of live weight. A producer receives a single quota applicable to all of his or her production regardless of the intended destination. Non-compliance can give rise to penalties. National quotas are set by a federal marketing agency, the Chicken Farmers of Canada (the "CFC"). Its prime responsibility is to ensure that Canadian chicken producers supply a sufficient quantity of product to ensure that the domestic market meets consumer demand. The CFC then allocates provincial quotas of chicken to the provinces. In turn, the provincial marketing boards set individual quotas for producers. Unlike some other provinces, New Brunswick currently does not have regulations requiring producers to direct their live chicken supply to any particular processor. Since 1995, the national quota or the quantities of chicken required have been determined at the provincial level through a process known as the "bottom-up" approach. Under this approach, provincial processors negotiate with provincial marketing boards to determine provincial quota requirements. The provincial requirements are then aggregated and adjusted, if necessary, by the CFC. The national quota is thus the aggregate of provincial requirements and is set periodically, "every 6 or 7 weeks depending on the year of production" according to the expert evidence adduced.

14 While there is no legislation preventing the interprovincial trade of chickens, the evidence indicates that relatively few chickens move across provincial borders. In 2005, interprovincial trade in chickens involved only 4% of total Canadian production. A producer wishing to export chickens to another province must obtain a license from the CFC. The license is issued by the CFC as long as the producer is in compliance with statutory regulations.

15 Farmers may buy and sell their quotas, but certain restrictions apply. One such restriction is that owners themselves must be engaged in the production of chickens. New entrants have little option but to purchase quota from existing farmers, which can prove costly. The cost of quota for an average-size chicken farm in 2007 climbed to $2.25 million. In certain provinces new quotas are reserved for new entrants at no cost, but these quotas are limited. In most jurisdictions, free entry involves a very long wait and is not a realistic option for new entrants. The more realistic approach has been for new entrants to purchase existing quotas from producers. Most new quota allocations are issued to existing producers.

16 The minimum price at which chickens may be sold in respective provinces is set by provincial marketing boards. Under law, the provincial boards are charged with the task of restricting production so that farmers can earn a reasonable margin, but at the same time they must prevent prices from rising so high that demand is choked off. The evidence would suggest that the boards have been successful, since chicken production in Canada has risen by 77% in the last 15 years. Certain provinces have used the price negotiated in Ontario as the benchmark price for their own negotiations. Since May 2003, the price in Ontario is established by a formula which includes taking into account market conditions, input costs based on a cost-of-production formula, and prices set in neighbouring provinces.

17 Protection from imports from other countries is also an important feature of the supply management scheme. To import chickens into Canada, a special permit is required. Import quotas, also known as "tariff rate quotas" ("TRQs"), specify the quantity of imports that are allowed, and are allotted annually and not permanently. These quotas are managed by the federal Department of Foreign Affairs and International Trade, whose role it is to allocate the TRQs to individual firms and set and maintain the rules by which they are administered. The TRQs are automatically set at 7.5% of the previous year's production. Allocation procedures vary by commodity and are affected by increases or decreases in demand of the commodity in question and other factors. For the most part, quota holders are likely to have their import quota allotment renewed or re-allocated in subsequent years.

18 Given the significance of the supply management system and its impact on this case, we shall conduct a comprehensive review of the legislative and regulatory framework of the system later on in these reasons and particularly in those parts relating to paragraphs 75(1)(*b*) and (*d*) of the Act.

C. Nature of the Applicant's business

19 The Applicant is a primary processor that slaughters live chickens and sells them (in whole or in parts) to further processors and other customers. The Applicant's only business is the St-François Plant, which was acquired in 1989. At the time of the acquisition, the former owner was insolvent. The Applicant has invested millions of dollars over the years to improve and maintain the St-François Plant. It has been the only chicken processing plant in New Brunswick since 1992 and has been slaughtering all of the chickens produced in New Brunswick since 1998.

20 In February 2002, the St-François Plant was damaged by a fire that resulted in the closure of operations. It was rebuilt as a "broiler plant" and was up and running again in November 2002. During the rebuilding period, the Applicant continued to purchase all of New Brunswick's live chicken production and arranged to have the chickens slaughtered at other processing plants. According to the Applicant, the newly rebuilt St-François Plant is the most modern and efficient chicken processing facility in Canada.

21 The Applicant currently has about 375 employees. It is the largest employer in the St-François community. At present, it runs one production line with two shifts, averaging sixty hours a week, five days a week.

22 The Applicant states that it requires a full range of birds within certain weight tolerances in order to meet its customers' specifications. The Applicant offers both air-chilled and water-chilled chicken. Air-chilled chickens, which are considered to be "premium" chickens, are cooled after being eviscerated by using cold air, rather than water. This method prevents the absorption of water thus reducing the amount of moisture in the chicken. Having both systems at the St-François Plant gives the Applicant increased flexibility to satisfy its customers' needs.

23 The majority of the Applicant's arrangements with its customers are verbal agreements that are entered into by way of a "handshake deal". The only written contract between the Applicant and any of its customers is a *[CONFIDENTIAL]* contract between the Applicant and *[CONFIDENTIAL]* relating to the sale of chicken by *[CONFIDENTIAL]* to *[CONFIDENTIAL]*. The Applicant also has written agreements with *[CONFIDENTIAL]* and *[CONFIDENTIAL]* with regard to their respective specifications and pricing requirements.

D. Nature of the Respondents' businesses

(1) Westco

24 Westco is a group of chicken and turkey producers. Westco's head office is located in St-François de Madawaska. Through its subsidiaries, it currently owns or controls 50.9% of New Brunswick's quota, which represents an annual volume of 19,367,920 kg of live chickens. Westco presently has approximately 200 employees.

25 Westco (formerly called Fermes Waska) was created in 1984 by the consolidation of a dozen New Brunswick chicken producers who wanted to increase their buying and negotiating power vis-à-vis egg and meal producers, chick breeders, carriers and processors. A further consolidation of production quotas occurred during the 1990s, mainly between 1994 and 1998, resulting in an increase in Westco's quota. The consolidation was encouraged by Maple Lodge in order to bring production quota closer to the St-François Plant.

26 In the early 1990s, Westco started to pursue a project of vertical integration. Westco's vertical integration started gradually, beginning with the purchase of trucks making it possible to transport chips and meal and continuing with the consolidation of meal purchasing to facilitate negotiations for its fabrication and price. Westco then constructed hatcheries, reproduction farms and transport facilities. During Westco's vertical integration, the size of farms also dramatically increased.

27 Westco is now involved in almost all phases of the production of live chickens including the organic production of manure, the purchase of wholesale grains, egg production, the manufacture of meal, fecundation, chick production, poultry production and transportation. According to Westco, the only phases in which it is not involved are the processing of live chickens and distribution of processed chicken to the retail market.

(2) Dynaco

28 Dynaco is an agricultural co-operative with over 1,500 members, 655 of which are agricultural producers. It is involved in other fields such as home renovation centers, the sale of petroleum products and transportation.

29 Dynaco's poultry production represents 1.6% of its total sales figure and Dynaco owns 6.22 % of New Brunswick's chicken production quota.

30 Dynaco holds 100% of the shares of Les Fermes J.J.C. Bolduc inc. and Les Fermes avicoles Bolduc ("Fermes Bolduc") and also owns 25% of the shares of Cormico Inc. ("Cormico"). Cormico's other shares are owned by La Coop Fédérée ("Coop Fédérée") (25%) and the Cormier family (50%). Its chicken production quota represents 4.98% of New Brunswick's supply. Coop Fédérée is Canada's largest firm in the chicken sector: with revenues of $2.9 billion, this poultry co-operative ranks second amongst all co-operatives. The quota held by Fermes Bolduc is, however, the only New Brunswick production quota over which Dynaco has control with respect to the slaughtering destination.

(3) Acadia

31 Acadia was created in 2006 to acquire poultry and pig production facilities. Acadia's main activity is chicken and turkey production. It operates four chicken production sites in New Brunswick. Its pig production has been abandoned.

32 Acadia currently owns or controls 16% of New Brunswick's chicken production quota. Since 2006, Acadia has also been producing the quota for Slipp Farms, a New Brunswick chicken producer, under a leasing agreement. Its quota represents 1.01% of New Brunswick's supply or about 3,679 chickens per week. Acadia does not exert any control over where Slipp Farms' production is processed.

E. Relationship between the Respondents

33 Westco owns one of Dynaco's 734 shares. Dynaco is a member of Coop Fédérée. Dynaco is also indirectly related to Olymel S.E.C. ("Olymel"), given that Coop Fédérée owns 60% of Olymel. Olymel is a limited partnership formed under the laws of Quebec. It is a primary and secondary chicken processor and is the Applicant's primary competitor in Quebec and the eastern provinces. Olymel currently owns two chicken processing plants, one in Berthierville and another in St-Damase, Quebec. On average, the aforementioned plants process approximately 1.3 million chickens per week. Olymel also owns 50% of Volaille Giannone inc., which operates a chicken processing plant in St-Cuthbert, Quebec.

34 The shareholders of Volailles Acadia Inc./Acadia Poultry Inc. are the same as the limited partners of Volailles Acadia S.E.C. Acadia is jointly owned by Coop Fédérée (30%), Dynaco (30%), Purdel Coopérative Agro-Alimentaire ("Purdel") (15%) and Westco (25%). Purdel is also a member of Coop Fédérée. Acadia is thus also indirectly affiliated with Olymel, as three of its four co-owners are related to Coop Fédérée.

35 Rémi Faucher, who testified on behalf of both Acadia and Dynaco in these proceedings, has worked for each of these Respondents. Mr. Faucher was president and administrator of Acadia from May 2006 to July 2008 and was also president and general manager of Dynaco from September 1998 to February 2008.

F. The Applicant's supply of live chickens

36 When the St-François Plant was acquired in 1989, the birds in the province were split between northern and southern New Brunswick (50/50). At that time, there was another processing plant in Sussex, New Brunswick, which was

processing birds from southern New-Brunswick, while the St-François Plant was processing birds from the province's northern part. In 1989, the St-François Plant was in financial difficulty as a result of problems between the previous owners and producers. Consequently, many producers from northern New Brunswick were shipping their birds to Quebec and Ontario for processing.

37 In or about June 1990, the Applicant entered into negotiations with New Brunswick producers that were shipping their production out-of-province. The Applicant wanted to bring the New Brunswick birds back to New Brunswick to be processed at the St-François Plant. The Applicant agreed to pay the producers $0.065 over the Ontario price instead of the price set by the New Brunswick chicken marketing board, which was about $0.04 over the Ontario board price. The negotiations thus raised the New Brunswick board price (the "NB Board Price") by $0.025.

38 The Sussex plant closed in 1992, making the St-François Plant the only chicken processing plant in New Brunswick. In late 1995, as a result of poor markets and the suggestion of the then Deputy Minister of Agriculture, the Applicant introduced a "relocation bonus" whereby it split its transportation costs for transporting birds from southern New Brunswick to northern New Brunswick with producers from the north who bought quota from the south. The agreement was that the Applicant would pay $0.03/kg for three years from the date the producer purchased the quota. Payments under the program started in about 1996 and the last of the quota was purchased in 1998. Accordingly, the program was completed by 2001. As of 1998, the Applicant was processing the totality of the New Brunswick production.

39 The Applicant began receiving supply from the Respondents in 1990 and was processing the totality of their production at the time the Applicant filed its Notice of Application with the Tribunal on March 17, 2008. The Respondents' production facilities are currently all located within 30 km of the St-François Plant. The Applicant does not have any written contracts with New Brunswick producers, including the Respondents, specifying the number and size of chickens that are to be supplied by those producers to Nadeau. There are also no contractual arrangements between the parties specifying a term for supply.

40 From 1990 to January 2007, the Applicant always paid its producers the NB Board Price for their chickens, which is $0.065 above the regulated Ontario minimum price. In January 2007, the Applicant developed a market-based incentive plan for producers in New Brunswick (the "Incentive Plan").The Incentive Plan cost the Applicant $*[CONFIDENTIAL]* in 2007, of which $*[CONFIDENTIAL]* went to the Respondents collectively. Westco gained $*[CONFIDENTIAL]* from the Incentive Plan that year.

41 Prior to May 2007, the Applicant obtained all of its live chickens from New Brunswick producers, with almost 75% being supplied by the Respondents or their quota-holding predecessors. Due to a plant closure in Nova Scotia in May 2007, the Applicant began to obtain supply from Nova Scotia and Prince Edward Island. When the Notice of Application in this case was filed, the St-François Plant was processing on average about 565,800 chickens per week from the following sources:

Westco	186,230
Acadia	58,670
Dynaco	26,450
New Brunswick, other	94,450
Prince Edward Island	40,000
Nova Scotia	160,000

42 The Applicant began receiving an additional 25,000 birds per week from Nova Scotia in June 2008 and another 6,250 birds per week in September 2008.

43 In order to accommodate the surplus of birds coming from Nova Scotia and Prince Edward Island, the Applicant started a second shift, which required it to hire approximately 130 new employees. In order to offset the additional costs incurred by running a second shift, the Applicant needed some assurance that it would receive the Nova Scotia birds for

a reasonable time period. The Applicant therefore made a "handshake deal" with certain Nova Scotia producers under which they would send Nadeau their chickens for a period of three years. This "handshake deal" was entered into in May 2007.

G. The termination of the supply relationship

(1) Westco

44 In January 2007, Westco advised the Applicant of its interest in buying or investing in the St-François Plant. Westco submits that the only way to ensure its future in the poultry industry is to proceed with a complete vertical integration of its operations, which requires Westco to acquire an existing slaughterhouse or to build a new one. During a meeting which was held in Atlanta on January 25, 2007, Anthony Tavares, the president and CEO of Maple Lodge at the time, informed Westco that Maple Lodge's shareholders would likely not be interested in selling the St-François Plant. Mr. Tavares further stated that a structure that would result in Westco owning a percentage of the St-François Plant and retaining 100% of its live production assets would result in non-aligned shareholder interests and would likely eventually lead to conflicts.

45 Shortly after the meeting in Atlanta, Mr. Tavares met with the Board of Directors of Maple Lodge, which decided that it was not interested in selling to Westco. The Board, however, indicated that it would be prepared to look at an ownership structure in which Nadeau and Westco assets would be pooled and Westco and Maple Lodge would each own a part of the combined operations. This proposal was communicated to Westco, but there was no agreement.

46 Westco approached Olymel in March 2007 in order to develop a partnership so as to complete its strategy of vertical integration. As mentioned above, Olymel is a chicken processor in Quebec and competes with the Applicant in Quebec and the eastern provinces. The purpose of the partnership was to acquire the assets or shares of the Applicant or to acquire property and construct, start up, own and operate a new chicken processing plant. Westco and Olymel thus worked out a business plan envisaging the acquisition of the St-François Plant or, in the event that negotiations failed with the Applicant, the construction of a new processing plant in New Brunswick. The partnership between Olymel and Westco is the Sunnymel Limited Partnership ("Sunnymel") which was created pursuant to the New Brunswick *Limited Partnership Act*, S.N.B. 1984, c. L-9.1.

47 Thomas Soucy, Chief Executive Officer of Westco, contacted Mr. Tavares in mid-August 2007 and said that he wanted Mr. Tavares to meet with him and Réjean Nadeau, President and Chief Executive Officer of Olymel. At the meeting, Mr. Tavares was advised that Westco and Olymel wanted to buy the St-François Plant. He was told that if the Applicant was not willing to sell the St-François Plant, all of the chickens produced by Westco would be diverted to Quebec and Sunnymel would then build its own plant in New Brunswick.

48 Mr. Tavares met with Westco representatives again on September 6, 2007. During the meeting, Mr. Tavares told Westco's representatives that he was shocked by their decision to partner with Olymel and also stated that he was of the opinion that it was a poor business decision. Westco's representatives did not reconsider.

49 Following the September 6, 2007, meeting, Mr. Tavares advised Mr. Soucy that although its first choice was to maintain the status quo, Maple Lodge's Board of Directors had, given the circumstances, instructed him to assemble a negotiating team.

50 On November 6, 2007, the parties started negotiations for the sale of the St-François Plant. The purchase price offered by Sunnymel was less than 25% of the value attributed to the St-François Plant by the Applicant. The negotiations therefore broke down and, on January 17, 2008, Westco gave written notice that it would cease supplying its live chickens to the Applicant, effective July 20, 2008, and that its chickens would be diverted to Olymel in Quebec pending Sunnymel's construction of a new slaughterhouse in New Brunswick.

51 During the negotiations, the Applicant filed complaints with the New Brunswick Minister of Agriculture and Aquaculture and with Chicken Farmers of New Brunswick (sometimes "CFNB").

(2) Dynaco

52 The Applicant submits that during the negotiations for the acquisition of the St-François Plant, Mr. Soucy affirmed that he had the authority to speak on behalf of Dynaco and that that is why Dynaco was referenced in the Applicant's correspondence with the Minister of Agriculture and Aquaculture. Dynaco states that Mr. Soucy never had the authority to speak on its behalf. Notwithstanding an apology by the Applicant for the mistaken reference to Dynaco in the letter to the Minister, Dynaco confirmed by two letters dated March 6, 2008, that its chickens would cease arriving at Nadeau, effective September 15, 2008.

(3) Acadia

53 By letter dated February 28, 2008, Acadia gave the Applicant formal notice that it would cease supplying it with live chickens, effective September 15, 2008. Acadia submits that this was a business decision and states that its decision to cease supplying the Applicant was not influenced by the negotiations that took place between the Applicant and Westco regarding the acquisition of the St-François Plant.

H. History of the proceeding and relief sought

54 This proceeding is brought pursuant to the Tribunal's order of May 12, 2008, which granted the Applicant leave to apply for an order under section 75 of the Act. The Applicant seeks an order requiring the Respondents to continue supplying the Applicant with live chickens on the usual trade terms and in the numbers previously provided by the Respondents.

55 On June 26, 2008, the Tribunal granted the Applicant's request for interim relief pursuant to section 104.1 of the Act (the "Interim Supply Order"). The Respondents were ordered to continue to supply the Applicant with live chickens on usual trade terms at the level of weekly supply that was in place at that time, namely 271,350 live chickens, pending the hearing of the main application.

56 On November 4, 2008, the Applicant filed a motion for an order requiring the Respondents to show cause why they should not be held in contempt of the Interim Supply Order ("Show Cause Motion"). The Applicant alleged that the Respondents breached and are continuing to breach the Interim Supply Order, as the Applicant has been and will continue to be significantly short on deliveries of chicken.

57 On November 6, 2008, Westco filed a motion for an order or direction regarding the interpretation of the Interim Supply Order. Westco seeks an order to confirm its view that the weekly number of chickens ordered to be delivered to the Applicant is a notional figure based on a hypothetical average weight of 2 kg and that the volume of live chickens to be supplied to the Applicant by the Respondents will:

i. be decreased by the volume of replacement chickens obtained by the Applicant;

ii. vary proportionally and in accordance with the periodic fluctuation of the Respondents' production quotas; and

iii. reflect the Respondents' production schedules.

58 On February 26, 2009, the Tribunal dismissed the Show Cause Motion with respect to Acadia and Dynaco. It granted the motion with respect to Westco and ordered a show cause hearing. The show cause hearing has not yet taken place and the matter is still outstanding before the Tribunal. Westco's motion for an order or direction regarding the interpretation of the Interim Supply Order will be argued at the show cause hearing.

III. Legislative Framework

59 The refusal to deal provision is contained in section 75 of the Act. It reads as follows:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> > (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (b) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (c) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
> >
> > (d) the product is in ample supply, and
> >
> > (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.
>
> (2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.
>
> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.
>
> (4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.
>
> 75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:
>
> > a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
> >
> > b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
> >
> > c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
> >
> > d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

(2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

(3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

IV. The Parties' Witnesses

60 Before turning to the analysis of the merits of the application before us, it is important to identify all the witnesses who appeared before the Tribunal. A detailed description of their testimony appears in Schedule A to these reasons.

A. The Applicant

(1) Experts

61 Dr. Richard Barichello, Dr. Roger Ware and Mr. Grant Robinson filed expert reports and testified as experts on behalf of the Applicant.

62 Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. The Tribunal found that he was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. The Respondents did not take issue with Dr. Barichello's qualifications to give an expert opinion on these matters.

63 Dr. Roger Ware is a professor of economics at Queen's University. With the parties' agreement, the Tribunal recognized Dr. Roger Ware as an expert in the areas of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms.

64 Grant C. Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. The Tribunal found that he was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry.

(2) Lay witnesses

65 Seventeen other individuals appeared on behalf of the Applicant.

66 Two members of the Applicant's management team testified. The Applicant called Yves Landry, the Applicant's general manager, and Denise Boucher, its office manager.

67 Anthony Tavares, the former president of the Applicant and Chief Executive Officer of Maple Lodge, and John Feenstra, the former general manager of the Applicant, also gave evidence.

68 The Applicant called three members of its procurement team to testify about the Applicant's efforts to procure chickens from Quebec. Those members were Tina Ouellette, Léonard Viel and Réjean Plourde.

69 Further processors of chickens and other customers of the Applicant also appeared before the Tribunal. They are:

(i) Guy Chevalier, President, Service Alimentaire Desco Inc. ("Desco"). Desco is a further processor and distributor of chicken;

(ii) Terry Ellis, President, Sunchef Farms Inc. ("Sunchef"). Sunchef is a further processor of chicken;

(iii) Lyndsay Gazzard, Senior Purchasing Manager responsible for poultry purchases for the Unified Purchasing Group of Canada ("UPGC"). UPGC operates as the purchasing agent for YUM! Restaurants International Canada Ltd.;

(iv) Corey Goodman, General Manager, UPGC, and Chief Purchasing Officer, Priszm;

(v) Debbie Goodz, President and CEO, Poulets Riverview Inc. ("Riverview"). Riverview is a further processor and distributor of chicken; and

(vi) Jeffrey Lloyd McHaffie, the *de facto* vice-president of Puddy Bros. Limited ("Puddy"), in charge of sales and the purchase of poultry products. Puddy is a further processor of chicken.

70 Kevin Thompson, Executive Director, Association of Ontario Chicken Processors, and Bruce McCullagh, Senior Vice President and General Manager, Poultry Operations, Maple Leaf Consumer Foods ("Maple Leaf"), also testified on behalf of the Applicant. Maple Leaf is a large poultry processing company located in Ontario.

71 Finally, Andre Merks, a Nova Scotia chicken farmer, and Michael Donahue, Vice-President, Agri Stats, Inc. ("Agri Stats"), were called by the Applicant. Agri Stats is a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America.

B. The Respondents

(1) Expert

72 Margaret Sanderson was called as an expert by the Respondent Westco. Ms. Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. The Tribunal accepted Ms. Sanderson as an expert in the area of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms. The Applicant consented to Ms. Sanderson's expertise.

73 Ms. Sanderson was the only expert to testify on behalf of the Respondent Westco. Dynaco and Acadia did not call any experts.

(2) Lay witnesses

(a) Westco

74 Five lay witnesses appeared on behalf of Westco. Westco called two individuals who testified about its operations. They were Thomas Soucy, Westco's Chief Executive Officer and President, and Bertin Cyr, a member of Westco's Board of Directors.

75 Westco also called two Olymel employees. The vice-president of Olymel's chicken procurement division, Yvan Brodeur, and another Olymel employee, Julie Desroches, gave evidence.

76 Richard Wittenberg was the last lay witness to testify for Westco. He is a Nova Scotia chicken farmer.

(b) Dynaco

77 Gilles Lapointe and Rémi Faucher testified on behalf of Dynaco. Gilles Lapointe is Dynaco's chief financial officer and Rémi Faucher is Dynaco's former chief executive officer.

(c) Acadia

78 As stated above, Rémi Faucher also testified for Acadia as he acted as Acadia's president from 2006 until 2008. He was the only witness called by Acadia.

79 Before turning to the elements of section 75 and the issues to be determined, we dispose of an outstanding matter: the ruling with respect to objections made by Westco to certain paragraphs found in certain witness statements.

V. The Ruling With Respect to Westco's Objections to Witness Statements

80 Prior to the hearing of the Application, the parties filed witness statements setting out the lay witnesses' evidence in chief in full pursuant to the *Competition Tribunal Rules*, SOR/2008-141 (Rules 68-70). The parties were provided with an opportunity to raise objections with respect to the admissibility of the witnesses' statements or parts thereof. Both the Applicant and Westco raised such objections. In its order dated October 31, 2008, the Tribunal dealt with some of the objections raised by the parties but it reserved its ruling on three of Westco's objections until the final reasons. What follows is the ruling on those objections.

81 Westco argued that certain statements made in the witness statements of Yves Landry (paras. 74-79), Réjean Plourde (paras. 7-9) and Lyndsay Gazzard (paras. 9-12) (the "Contested Statements") consisted of hearsay evidence and were consequently inadmissible. Westco further stated that the individuals mentioned in the Contested Statements were not identified as witnesses scheduled to appear during the hearing.

82 The Applicant indicated that the Contested Statements did not consist of hearsay as they were not put into evidence for the purpose of proving the truth of their contents. The Applicant argued that the Contested Statements were rather offered as proof that the assertions were made to these witnesses. The Applicant submitted that the assertions were fact evidence that could be given orally by the witnesses during the hearing and stated that there was no requirement that persons named in a witness statement appear on a party's witness list. The Applicant further argued that the Contested Statements were relevant to the issues in the litigation and had probative value.

83 With respect to paragraph 77 of the statement of Mr. Landry, the Applicant argued that it did not constitute hearsay evidence as Mr. Landry was providing his own testimony as to the identity of Mr. Morin.

84 Hearsay is testimony or written evidence of a statement made to a witness by a person who is not called as a witness, the statement being offered to show the truth of the matter stated therein. The main concern underlying the admissibility of hearsay lies in the inability to test the truth of the statement or assertion through cross-examination. Therefore, written or oral statements "are inadmissible, if such statements [...] are tendered either as proof of their truth or as proof of assertions implicit therein." (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham: Butterworths, 1999) at 173).

85 Upon reviewing the Contested Statements and considering the arguments of the parties, we admit the statements for the purpose of establishing the fact that they were indeed made and not to prove the truth of their contents. To that end, the Contested Statements are not hearsay. We now turn to the elements of section 75.

VI. The Elements of Section 75 and the Issues to Be Determined

A. Onus and standard of proof

86 The burden of proof rests on the Applicant who must establish each constituent element contained in paragraphs (*a*) through (*e*) of subsection 75(1) of the Act on the balance of probabilities.

B. Has the Applicant established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms pursuant to paragraph 75(1)(a) of the Act?

87 Market definition is the first issue. This question will be assessed from two perspectives: the product market and the geographic market where the Applicant might reasonably be expected to look for supplies of live chickens. We will deal with each in turn.

(1) The relevant product market

88 In its Notice of Application, the Applicant seeks an order "directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms, in the numbers previously provided to Nadeau by the Respondents." In its Notice of Application and Reply (the "Pleadings"), the Applicant deals only with numbers of live chickens and does not mention that the chickens must be within a given weight range. However, in its submissions, the Applicant takes the position that the "product" for the purposes of paragraph 75(1)(*a*) is live broiler chickens, in a full range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg.

89 The Respondents are of the view that the "product" is clearly live chickens since this is the product described in the Applicant's Pleadings. Further, the Respondents contend that this is the product that meets the test for determining the product market articulated in *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 (Competition Trib.).

90 In *B-Filer*, the Tribunal adopted the approach to the definition of product market in the context of paragraph 75(1)(*a*) set out in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), aff'd, (1991), 38 C.P.R. (3d) 25, [1991] F.C.J. No. 943 (Fed. C.A.), where it is stated that the ultimate test concerns the effect on the business of the person refused supplies. In *B-Filer*, the Tribunal restated the test in the following terms at paragraphs 79 and 80 of its reasons:

> [79] For purposes of clarity, we articulate the "*Chrysler* test" as follows: For the purposes of 75(1)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.
>
> [80] In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*), as noted by the Tribunal in *Chrysler* at page 23, "[t]he Tribunal agrees that 'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

91 It is noteworthy that the Tribunal in *B-Filer* took into consideration whether the addition of paragraph 75(1)(*e*) had changed the context and purpose of section 75. The Tribunal ruled that the market of concern in 75(1)(*e*) need not be the market of concern in paragraphs 75(1)(*a*) and 75(1)(*b*), and therefore the addition of 75(1)(*e*) did not change the ultimate concern of 75(1)(*a*). We are also of that view.

92 The Tribunal finds that the proper test for determining the product market is the above-stated test articulated in *B-Filer*, which is based on the substitutability of products. The application of that test to the evidence leads us to

the conclusion that the relevant product market here is live chickens without regard for weight. Our reasons for this conclusion now follow.

93 The evidence indicates that a number of the Applicant's customers require chickens that meet certain specifications particularly in respect to size. *[CONFIDENTIAL]*.

94 Since its reconstruction after the 2002 fire, the St-François Plant has been producing only "broiler chickens". Mr. Feenstra's evidence, on cross-examination at the hearing, is that broiler chickens range in size between 1.7 and 2.4 kg live weight. We note that a "broiler" is defined under Order II of the New Brunswick Chicken Marketing Board as a chicken which is not more than 2.65 kg live weight.

95 The above evidence is of little assistance in determining whether chickens in the Applicant's stated size range, namely a minimum of 1.71 kg and a maximum of 2.4 kg, can be substituted by smaller or larger chickens without substantially affecting the Applicant's business. The Applicant has not established the impact of losing supply of live chickens within the stated size range on its business. For instance, we do not know if the Applicant had the option of processing and marketing larger or smaller birds in the event that it lost its supply of all chickens in the stated size range. The Applicant's evidence focuses essentially on the loss of live chickens, not live chickens of a given size.

96 While there is some evidence relating to the Applicant's size requirements, the Applicant's expert, Dr. Ware, made no case for a narrower market. Dr. Ware does not explicitly refer to the size of chickens. In discussing the product market under paragraph 75(1)(*a*), he refers only to the "market for selling live chicken". At paragraph 35 of his report, he acknowledges the difficulty in obtaining birds that meet the size and quality requirements of the Applicant's customers, but no further discussion on the issue is found in his report. Ms. Sanderson, in her expert report, expresses the view that "the relevant product market is not in dispute here, it is live chicken". We find there is insufficient evidence to establish that chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg cannot be substituted by other chickens.

97 Further, the Applicant's Pleadings do not specify that the live chickens at issue are chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg. As stated above, the Notice of Application deals with a broader product market, live chickens. It would have been open to the Applicant to move to amend its Pleadings, but it did not. In the absence of such an amendment, it is our view that it would be unfair for the Respondents to be required to address the issue of a narrower product market without notice.

98 The Applicant has therefore failed to establish that the product market is defined more narrowly to include only those birds in the stated size range. In this respect, the Applicant has failed to meet its onus. We therefore find the product market for the purposes of paragraph 75(1)(*a*) of the Act to be "live chickens".

(2) The relevant geographic market

(a) Positions of the parties

99 There is no agreement between the parties as to the definition of the relevant geographic market.

100 It is the Applicant's position that the relevant market is limited to the Province of New Brunswick. The Applicant argues, in the alternative, that even assuming replacement supply can be obtained from Quebec producers, this supply cannot be obtained on usual trade terms. The Applicant's expert, Dr. Ware, expresses the opinion that, because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it is "neither economic nor efficient" for the Applicant to replace the Respondents' supply with supply from locations farther away in Quebec. In reaching this conclusion, Dr. Ware points to the level of interprovincial trade. He notes that, at present, between 4% and 5% of Quebec-grown chickens are shipped outside the province and that this level will reach 14% if the Respondents' supply is replaced with supply from Quebec. In Dr. Ware's view, it is unlikely that such a level of export would be permitted by the Quebec governmental agencies in the long run.

101 The Respondents contend that the relevant geographic market includes New Brunswick, Quebec, Nova Scotia and Prince Edward Island, and submit that the Applicant can source live chickens from producers in Quebec without being substantially affected. Ms. Sanderson is of the opinion that Quebec producers can provide a ready alternative to replace the Respondents' supply and, in support of her conclusion, points to the following factors:

(i) The Applicant's current live chicken shipments include shipments from more distant locations, such as Nova Scotia and Prince Edward Island;

(ii) A substantial volume of chickens is produced in regions that are located within a reasonable distance from the St-François Plant such as the Quebec City, Beauce and Central Quebec regions;

(iii) There are no regulatory restraints preventing the Applicant from sourcing chickens in Quebec;

(iv) The Applicant's survey indicates that Quebec producers are willing to supply Nadeau live chickens at a reasonable cost; and

(v) The costs associated with Quebec supply such as shrinkage, transportation and birds that are dead on arrival at the processing plant ("DOAs") are not so high as to make it uneconomic for the Applicant to source chickens from Quebec.

(b) Analysis

102 There is no dispute that New Brunswick forms part of the geographic market. However, at the outset, we reject the contention that the geographic market in the instant case is confined to New Brunswick. At a minimum, the market would include Prince Edward Island since Nadeau has obtained and expects to continue to obtain supply from that province. Both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens. The undisputed evidence is that Prince Edward Island is a long term supplier.

103 It is useful to discuss the approach we adopt in order to define the geographic market. The Tribunal acknowledged in *Chrysler* that, because of the language used in paragraph 75(1)(*a*), the market definition analysis under that paragraph would be different from the analysis usually performed under other sections of the Act. The Tribunal held at page 10 as follows:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(l)(*a*), the ultimate test concerns the effect on the business of the person refused supplies.

104 As stated above, the Tribunal relied, in *B-Filer*, on the above paragraph in *Chrysler* and developed the "*Chrysler* test" to determine the relevant product market under paragraph 75(1)(*a*). While the Tribunal was not required to consider the geographic market definition, it nevertheless noted that the "correct test for defining *markets*" (our emphasis) for the purposes of paragraph 75(1)(*a*) is the *Chrysler* test which it articulated as follows:

> For the purposes of 75(l)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

105 In *Chrysler*, the Tribunal did not explicitly allude to the proper test for defining the relevant geographic market. It based its conclusion on the geographic market on functional indicators, in particular, the existence of different price lists from Chrysler, the only supplier for Canada and the United States. The existence of price differences is one of

the functional indicators referred to in the Competition Bureau's *Merger Enforcement Guidelines*. Therefore, the test in *Chrysler* for defining the geographic market essentially consisted of the simple application of these functional indicators.

106 In the instant case, there is evidence of functional indicators which support the contention that parts of Quebec should be included in the geographic market. These indicators are those summarized from the evidence of Ms. Sanderson at paragraph 101 above and which essentially consist of the location of current suppliers; the relative proximity of potential Quebec suppliers to the St-François Plant based on the Applicant's survey; significant volumes of chickens in Quebec being located at a reasonable distance, around 500 km, from the St-François Plant; and the absence of regulatory restraints preventing the Applicant from sourcing chickens in Quebec.

107 We are of the view that consideration of these functional indicators is the preferred approach to defining the geographic market in the instant case. These indicators will be comprehensively dealt with below. As will be seen, they clearly support including that part of Quebec within 500 km from the St-François Plant as part of the geographic market. We find support for our position in the results obtained in the procurement survey conducted by the Applicant, which indicate that numerous Quebec suppliers within 500 km of the St-François Plant are willing to supply chickens to the Applicant. Indeed this radius was acknowledged in Ms. Sanderson's report; she states that "... chicken from Quebec (at the very least from within 500 km of St. Francois) should comprise part of the relevant geographic market for Nadeau's live chicken volumes."

108 In the circumstances of this case, the proper approach is to consider the above-mentioned functional indicators discussed in Ms. Sanderson's evidence. We find support for our approach to defining the geographic market in the expert evidence adduced before us.

109 Neither Ms. Sanderson nor Dr. Ware expressed a formal opinion as to the limits of the relevant geographic market for the purposes of paragraph 75(1)(*a*). Nor did they explicitly set out the test that should be applied to determine the market. While they were silent on the exact parameters of the relevant geographic market, both experts did address the question of whether the Applicant can obtain supplies in Quebec.

110 Dr. Ware testified that the determination of the relevant geographic market in this case poses some difficulties:

> But the important point here is, especially with respect to the geographic market, is that it really is a construct; that we — it's not actually the case that necessarily a supplier who is just outside that boundary plays no role in this market at all. Neither is it the case that every supplier that's inside that boundary plays an equal role in competition.

111 To the extent that geographic market definition is a pre-condition for analysis under paragraph 75(1)(*a*), it is to suggest a definition that includes a geographic area within which an applicant might reasonably be expected to look for supplies following a refusal to deal. This geographic market may include areas from which supplies of live chickens are currently obtained by the Applicant and could, in this case, therefore include New Brunswick, Prince Edward Island and Nova Scotia. Further, the geographic market could also include areas where an applicant might reasonably be expected to seek supplies and may therefore include, pursuant to the evidence adduced, geographic areas that are similarly placed in relation to an applicant's existing sources of supply. This method reflects the approach adopted by the experts who gave their opinions before the Tribunal.

112 We are of the view that, in this case, the geographic market also includes parts of Quebec. Both Dr. Ware and Ms. Sanderson turned to that province to determine whether obtaining supplies from that province is a reasonable possibility for the Applicant. Mr. Robinson, an expert who testified on behalf of the Applicant, based one of his four scenarios on the assumption that the Applicant can replace the Respondents' supply with Quebec-grown chickens and examined the effect of such replacement supply on the Applicant's business.

113 We agree that the geographic market includes parts of Quebec where the Applicant might reasonably be expected to look for supplies of live chickens. The evidence adduced shows that many producers in Quebec located within 500 km of the St-François Plant are no farther than the distance between the Applicant's current suppliers and its St-François

Plant. For example, the Applicant processes chickens from Prince Edward Island producers, and the distance between these producers and the St-François Plant is approximately 650 km. As explained above, both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens.

114 Further, as stated above, there are no regulatory impediments to interprovincial shipments. A producer must obtain a license from the CFC pursuant to the *Canadian Chicken Licensing Regulations*, SOR/2002-22. After having obtained such a license, the producer can export chickens in accordance with the conditions set out in the *Canadian Chicken Licensing Regulations*.

115 Dr. Ware, however, expressed the opinion that, if the Applicant were to replace the Respondents' supply with Quebec-grown chickens, an intervention by Quebec governmental agencies would be likely. In his view, the resulting increase in interprovincial trade will have a direct impact on Quebec's VAG ("volume d'approvisionnement garanti"). The Quebec Chicken Marketing Board, under the VAG, fills interprovincial demands of processors located outside the province, before allocating live chicken supply to Quebec processors under the Quebec processor allocation system. Therefore, the greater the volume of supply sold to processors located outside Quebec is, the smaller the volume available to Quebec-based processors will be. In Dr. Ware's view, it is unlikely that a high level of interprovincial trade, around 14%, would be permitted by the Quebec governmental agencies in the long run.

116 To support his view, Dr. Ware refers to the Applicant's submissions in an application brought before the Chicken Farmers of New Brunswick in which it stated that "... the industries in Ontario and Quebec undertook negotiations because interprovincial trade reaching 5 to 7% of total production was considered a crisis situation." In his examination in chief, he admitted that he was not an expert in this particular field.

117 After a careful review of the evidence, we conclude that it is insufficient to support Dr. Ware's hypothesis. The evidence establishes that provincial processing associations have expressed concerns about interprovincial trade. Mr. McCullagh testified that the Quebec and Ontario processing associations have approached their respective governments to advise them "that interprovincial trade has the jeopardy of creating an unsustainable premium war". According to Mr. Brodeur, over the last few years, attempts have been made to address these concerns, but, up until now, no solution has been found. Mr. Robinson, the Applicant's expert who was recognized by this Tribunal as having expertise in the chicken processing industry, stated that the increase in interprovincial trade would have a significant impact on the competitive price to acquire live supply, but he did not confirm the evidence adduced by Dr. Ware according to which Quebec stakeholders would intervene to limit such trade.

118 We find that there are no regulatory impediments to interprovincial trade and that while processing associations have expressed concerns about interprovincial trade, the evidence is insufficient to conclude, on the balance of probabilities, that an increase in interprovincial trade between Quebec and New Brunswick would induce a drastic intervention by Quebec governmental agencies.

119 In summary, given the absence of regulatory restrictions and the proximity of many Quebec producers to the Applicant's St-François Plant, we agree that parts of Quebec should be included in the geographic market for the purposes of the analysis performed under paragraph 75(1)(*a*).

120 Regarding Nova Scotia chickens currently processed by the Applicant at its St-François Plant, apart from the three-year arrangement involving the delivery of 160,000 chickens per week, there is evidence of limited supply being sourced from Nova Scotia. In June and September 2008, the Applicant sourced an additional 31,250 chickens per week from Nova Scotia. While there is a paucity of evidence regarding Nova Scotia supply, we nevertheless conclude that Nova Scotia is part of the geographic market because chickens are currently being sourced from there and because the evidence also indicates that the Applicant is not processing these chickens at a loss.

121 The geographic market will therefore comprise New Brunswick, Prince Edward Island, parts of Quebec which extend to a radius of 500 km of the St-François Plant and Nova Scotia. The parties did not suggest that any other geographic areas be considered.

122 We now turn to the analysis under paragraph 75(1)(*a*) and consider the following question.

(3) Is the Applicant substantially affected in its business because of its inability to obtain adequate supplies of live chickens anywhere in a market on usual trade terms?

123 The analysis under paragraph 75(1)(*a*) sets out a number of components that require definition, in particular the phrases "substantially affected" and "usual trade terms".

(a) The meaning of "substantially affected"

124 We turn first to the meaning of "substantially affected". The Tribunal dealt with the expression in the *Chrysler* case, and concluded that the ordinary dictionary meaning should be given to the word "substantially", and that it required showing "more than something just beyond *de minimis*". The Tribunal, in that case, went on to state that, "[w]hile terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations" (*Chrysler*, at p. 23). In *Sears Canada Inc. v. Parfums Christian Dior Canada Inc.*, 2007 Comp. Trib. 6 (Competition Trib.), the Tribunal also held that the term "substantial" in respect to the expression "substantially affected" carries meanings such as "important" and "significant" (*Sears*, at para. 31).

125 The parties disagree on the meaning to be given to this phrase. The Applicant submits that terms such as "large, significant, important and substantial" capture the concept of a substantial effect on a business. In support of its argument, the Applicant points to the *Chrysler* case.

126 The Respondent Westco adopts a different approach. In its submissions, it argues that the Tribunal has never really dealt with or specifically defined "substantially affected" or any of the various components of paragraph 75(1)(*a*) and invites the Tribunal to do so in this case.

127 The Respondent Westco argues that paragraph 75(1)(*a*) contemplates two circumstances: first, that the refusal substantially affects the Applicant in "his business" ("son entreprise"), and second, that it precludes "a person" from "carrying on business" ("ne peut exploiter une entreprise"). In the latter case, the Respondent contends that this could only mean that the refusal would effectively preclude a new entrant from entering the market because no reference is made to the Applicant's existing business ("his business"). In the Respondent's view, the rules of statutory interpretation require that the terms "substantially affected" and "precluded from carrying on business" be read together. The Respondent contends that this approach is consistent with the case law, since the term "substantially affected" would be given its usual and ordinary meaning in accordance with the case law (*Chrysler* and *Sears*), but would be qualified by the expression "precluded from carrying on business". Consequently, the required magnitude of the "substantial effect" would be such that it would approach an applicant being unable to continue in business. The Respondent therefore submits that an enterprise that is not affected to the point of it being unable to carry on business does not meet the test of "substantially affected" for the purposes of paragraph 75(1)(*a*).

128 With respect, and for the reasons that follow, we reject the Respondent's above interpretation of "substantially affected" in paragraph 75(1)(*a*).

129 The applicable principle of statutory interpretation, also known as "the modern approach to interpretation", was endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.). At paragraph 21 of that decision, Mr. Justice Iacobucci wrote:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter

"*Construction of Statutes*"); Pierre-André Coté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)); Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

130 In accordance with this approach to statutory interpretation, we will first consider the words of paragraph 75(1)(*a*), and in particular the following words which are at issue: "a person is substantially affected in his business or is precluded from carrying on business". The sole issue here is whether the two circumstances contemplated in the provision should be read together as suggested by the Respondent. In our view, the above-cited words, read in their grammatical and ordinary sense, contemplate two separate circumstances. The phrase "substantially affected in his business" is not qualified by the phrase "*or* is precluded from carrying on business" (emphasis added). Had Parliament intended this to be so, it would have used the word "and" and not "or" in linking the two phrases. Support for the proposition that Parliament intended two separate scenarios by the provision is found in the 1975 House of Commons committee debates. The Minister responsible for the legislation, in response to questions from committee members, indicated that the purpose of the clause was to protect someone who was in business from being put out of business and to allow the entry of others in the market. We reproduce below the relevant passages from the transcripts of the committee debates.

> Mr. Clarke (Vancouver Quadra): What was the intent of the clause then?
>
> Mr. Ouellet: Well, under certain conditions to make sure that the refusal to deal could become a reprehensible action.
>
> Mr. Clarke (Vancouver Quadra): But was it the purpose of that clause to protect someone who was in business from being put out of business?
>
> Mr. Ouellet: Yes. But we would like to allow the entry of others, because if we add too many conditions the refusal to deal will never become a reprehensible activity.
>
> Mr. Clarke (Vancouver Quadra) Did the Minister say, Mr. Chairman, that they did want to prevent the entry of others or they did not want to prevent the entry of others?
>
> Mr. Ouellet: To facilitate the entry of others.
>
> Mr. Clarke (Vancouver Quadra): That is what I thought. But the way I read the recommendations from the Senate Committee they are suggesting the present wording would discriminate against someone who wanted to enter that field and their recommendation was designed, in their description, to facilitate the entry of someone into the field. Their criticism is - and I will see how it is worded here. It says:
>
> > The Committee does not consider that the reviewable practice jurisdiction should be available to someone who has never been in business.
>
> And it recommends the deletion of the words "or is precluded from carrying on business".
>
> Mr. Ouellet: The way the proposal made by the Senate has to be understood is that they want to deal with people that are already in the business. We feel it would be too restrictive.
>
> Mr. Clarke (Vancouver Quadra): Do you mean that the Senate recommendation is the opposite of what I have been saying?

> Mr. Ouellet: As suggested by the Senate, it will narrow the protection that we are giving, and we do not want to go that far.
>
> Mr. Clarke (Vancouver Quadra): Perhaps the definition hangs on the word "precluded" — precluded from carrying on business, and the way you are reading that is, "or is prevented from entering business,"? Is that the idea?
>
> Mr. Ouellet: Yes.

(Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl. 1st Sess., No. 46 (May 12 1975) at 46:14 - 46:15).

131 In this case, the Applicant is already in the business of processing chickens and is not seeking to enter the market. In order to meet the test of "substantially affected" for the purposes of paragraph 75(1)(*a*), the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way. This interpretation is in accordance with the above-cited principle of statutory interpretation and with the case law of the Tribunal.

132 Having defined "substantially affected", we now turn to the meaning of "usual trade terms".

(b) The meaning of "usual trade terms"

133 "Usual trade terms" is relevant to section 75 in three ways. First, under paragraph 75(1)(*a*), it must be established that an applicant is unable to obtain adequate supplies on the usual trade terms; second, an applicant must be willing under paragraph 75(1)(*c*) to meet those trade terms as a condition of supply; and third, any order issued under section 75 must be based on the usual trade terms. We turn now to the paragraph 75(1)(*a*) requirement.

134 Subsection 75(3) of the Act defines trade terms as follows:

> **75(3)** For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.
>
> **75(3)** Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

135 Paragraph 75(1)(*a*) speaks of supply of a product on "usual" trade terms. Reference to the dictionary definition of "usual" is helpful. The *Canadian Oxford Dictionary* (2004) defines "usual" as follows: "such as commonly occurs or is observed or done, customary, habitual ...". *Webster's Ninth New Collegiate Dictionary* (1986) provides the following definition: "Normal; commonly or ordinarily used; found in ordinary practice or in the ordinary course of events".

136 The term "usual" qualifies the statutorily defined expression "trade terms" in paragraph 75(1)(*a*). Applying the ordinary meaning to the term, we are left with trade terms that are ordinarily used or found in ordinary practice in a market. The specific terms which are ordinarily used will, of course, vary and depend on the circumstances in each case. Further, there may be a need to interpret the words and phrases used in the definition of "trade terms" found in subsection 75(3), in particular, for our purposes: "terms in respect of payment".

137 The parties disagree on the elements to be included in defining "usual trade terms". In reference to the statutory definition in subsection 75(3), the Applicant argues the term "usual trade terms" must have a correlative meaning and therefore refers to the practice that had been in place between the contending parties in terms of price, units, etc. before the refusal to supply. It is the Applicant's contention that the "usual trade terms" in place between each of the Respondents and the Applicant entailed the following elements:

(a) delivery of chickens in a full range of broiler sizes, namely, from 1.71 kg to 2.4 kg;

(b) the CFNB regulated price, which equates to the Ontario base price plus $0.065/kg, plus applicable CFNB size premiums, where applicable;

(c) delivery of chickens grown within 30 km of the St-François Plant, thus resulting in minimal transportation costs, minimal DOAs, and minimal shrink;

(d) payment pursuant to the Marketing Orders of the CFNB, namely net 7 days; and

(e) delivery each and every week of chickens in numbers averaging about:

(i) from Westco, 186,230 chickens per week;

(ii) from Acadia, 58,670 chickens per week; and

(iii) from Dynaco, 26,450 chickens per week,

for a total supply from the Respondents of about 271,350 chickens per week.

138 The Respondents argue that subsection 75(3) provides a complete definition of "trade terms" and as such can only refer to "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". The Respondents contend that the definition does not include price or volume and that, had Parliament wanted price to be included in "trade terms", it would have said so expressly and not used the phrase "terms in respect of payment" in its definition. Further, the Respondents argue that since paragraph 75(1)(*d*) requires that the product be in ample supply, it was not contemplated that volume be a concern. It is consequently argued that the Tribunal would not have the jurisdiction to grant the Applicant's request and order the Respondents to continue to supply "in the numbers previously provided to Nadeau by the Respondents". It is also argued that since the product market is live chicken, and not chickens of a specified weight, there is no basis here to support size or weight of the chickens as a usual trade term.

139 We are of the view that "usual trade terms" must be determined in relation to a defined market at a particular time. The applicable time frame in this case is generally at about the time the Respondents gave notice of their refusal to continue to supply. For the purposes of this application, we have also determined above that the product is live chickens and that the geographic market includes parts of the Province of Quebec as well as New Brunswick, Nova Scotia and Prince Edward Island.

140 What then are the applicable "usual trade terms" that are ordinarily used or found in ordinary practice in the geographic areas? We do not accept the Applicant's submission that the applicable terms are those which reflect the very agreements, in terms of price, units supplied etc., that prevailed between the Respondents and the Applicant prior to the refusal. Parliament did not provide that the Applicant need only establish its inability to obtain supply on the "same" trade terms, for the purposes of paragraph 75(1)(*a*). Had it intended this, it would have expressly provided so, as it did elsewhere in the Act. See section 80 of the Act where reference is made to "same" trade terms.

141 In our view, the plain reading of the provision leaves no doubt that the trade terms are not those specific to the parties, but rather those that are viewed from the perspective of all processors competing for live chickens in the defined market generally. In such a market, the usual trade terms are identified and customarily come to be expected by suppliers of live chickens.

142 Price is clearly the most important element influencing trade in chickens. It is a commodity product and is sold largely on the basis of price. In the context of supply management, if price were not important, the marketing board would have felt no need to set a minimum price. It is difficult therefore to divorce trade terms from price. The issue here is whether the expression "terms in respect of payment" is to be interpreted to include price and, in particular, premiums.

We respectfully reject the Respondents' position on the question and, for the reasons that follow, find that "terms in respect of payment" must be interpreted to include price in the circumstances.

143 We acknowledge that the issue has never been dealt with before by the Tribunal. In *Chrysler*, the Tribunal ordered Chrysler Canada to accept the complainant as a customer for the supply of Chrysler parts "on trade terms usual and customary to its relationship with [the complainant] as the said terms existed prior to [the date that the complainant was first refused supply]" (at p. 28). In that case, there was but one supplier and one customer. The Tribunal has not yet identified the "usual" trade terms involving a business with multiple suppliers and customers. If "terms in respect of payment" includes price, it could be argued that the Tribunal's order in *Chrysler* prevented Chrysler Canada from ever raising its price to the complainant. Since the Tribunal recognized the regular fluctuation in Chrysler Canada's prices, this would appear not to have been the Tribunal's intention. If price, however, is not to be included as a usual trade term, there would be nothing to prevent a supplier, even one subject to a section 75 order, from raising its prices to a person to the point that this person can no longer afford to purchase from the supplier. This would render the provision ineffective, particularly in cases where a complainant was the sole purchaser in a market.

144 While there is no dispute that "terms in respect of payment" includes credit terms and acceptable methods of payments, in the context of paragraph 75(1)(*a*), we are of the view that price is also included. Otherwise, a complainant who is unable to obtain adequate supplies in a market because prices are higher than the usual price would have no possibility of relief under the provision, simply because other usual terms of payment are in place. For example, in the instant case, it would matter little if the credit terms and the methods of payment available in the market for processors were the usual terms prevailing in that market, if the amount to be paid in order to obtain live chickens was increased by suppliers to an amount higher than the usual price paid for live chickens in that same market. In essence, the only term of payment that really matters in the circumstances here is price.

145 Under supply management, price is essentially the principal trade term. As discussed above, the minimum price is set by the respective provincial marketing boards. Whether this minimum price set by the marketing board translates into a usual trade term will depend on the circumstances. In this case, the ultimate price paid by chicken processors in the market may be higher than the minimum price. This will depend on a number of factors, not the least of which is the premium paid to producers. A premium is an amount over the board price paid by processors to producers. Therefore, the notion of price as a "usual trade term" is best expressed, for our purposes, in terms of a range of prices. This approach recognizes the dynamic reality of a competitive market and would be particularly helpful in the event that the Tribunal were to issue an order to continue supply on "usual trade terms", since it would allow for flexibility by not binding the parties to a fixed price. The range of prices for our purposes would include minimum board prices set by the provincial marketing boards from time to time, plus the applicable premium, which would likely also vary by reason of competitive market forces.

(c) Applicant's inability to obtain adequate supplies on usual trade terms

146 Having determined the meaning of "substantially affected" and "usual trade terms", we will now turn to the question of whether the Applicant has established that it is substantially affected in its business because of its inability to obtain adequate supplies anywhere in a market on usual trade terms.

147 The parties disagree markedly on whether the suppliers are likely to provide adequate replacement supplies on usual trade terms. Quebec is important in the instant case because it is the most likely source of replacement chickens for the Applicant.

148 The Applicant, at the time it filed its application, processed around 94,450 chickens from southern New Brunswick, 40,000 chickens from Prince Edward Island, and 160,000 chickens from Nova Scotia. On the evidence, there is no dispute that it is unlikely the Applicant can obtain the required additional volumes of chickens to replace the Respondents' chickens from southern New Brunswick or Prince Edward Island. In respect to New Brunswick and Prince Edward

Island, the evidence shows that the Applicant currently processes all of the New Brunswick and Prince Edward Island supply.

149 The 160,000 chickens from Nova Scotia were to be made available for a period of three years, and there is little evidence to indicate whether this volume of chicken would be available in the long term. Since the Interim Supply Order, the Applicant has secured an additional supply of around 31,250 chickens per week from Nova Scotia. However, we do not know the terms, if any, on which the Nova Scotia producers that are continuing to supply ACA Co-Operative Ltd. ("ACA"), the only Nova Scotia processor, would be willing to switch to the Applicant. No survey of Nova Scotia producers was conducted by the Applicant in order to ascertain the availability and terms of supply from Nova Scotia, as was done in Quebec. Nor did the experts address this issue. As a consequence, we are unable to make a finding regarding the terms on which additional supply could be acquired from Nova Scotia.

150 This leaves Quebec as the only source of additional supply about which we actually know the possible terms of supply. Therefore, producers located in parts of Quebec are the most likely source of replacement supply for the Applicant. In order to determine whether the Applicant can obtain supplies from these producers on the usual trade terms, it is useful to define the relevant usual trade terms that are applicable to live chickens in Quebec.

(i) The relevant usual trade terms

151 In order to determine whether the Applicant has met its burden in establishing that it is unable to obtain adequate supplies of live chickens anywhere in the market on "usual trade terms", it is necessary to clearly define the usual trade terms in this case. By definition, "trade terms" includes "terms in respect of payment", which we have interpreted to include price. It also includes "units of purchase" and "reasonable technical and servicing requirements". No issues regarding technical and servicing requirements are raised in this case. The only issue in respect to trade terms is the price of the replacement chicken.

152 In order to assess whether the Applicant is able to obtain adequate supplies "on usual trade terms", the usual price for live chickens in the market must be determined. As stated above, in the circumstances, that price will consist of a range of prices. In order to determine the usual range of prices, we turn to the evidence adduced and in particular the evidence regarding premiums.

153 Determining the range of prices for live chickens in those relevant parts of Quebec will indicate the "usual trade terms" for those chickens. The price usually paid by the Applicant is not necessarily the applicable "usual trade term". It is rather the usual price for live chickens paid by processors in the market. For our purposes, these processors are mostly Quebec-based processors and, as indicated in our earlier analysis on the geographic market, these processors would be competing in the area where the Applicant is likely to find its replacement chickens. They are paying the Quebec board price set by the Quebec marketing board, Les Éleveurs de volailles du Québec, which is $0.065 below the NB Board Price, plus a premium. Significant evidence was adduced regarding premiums. Premiums currently being paid by Quebec processors will afford the best evidence of the usual prices being paid by processors in the market and are the best indicator of usual trade terms.

154 The evidence on premiums stems principally from efforts made by the Applicant's procurement team following the Tribunal's Interim Supply Order dated June 26, 2008. The Applicant's management team instructed the procurement team to begin making efforts to inquire about the availability of chickens from Quebec producers. Initially, calls were made to a list prepared by the Fédération des producteurs de volailles du Québec in the year 2000 containing the names of 700 Quebec producers. In total, attempts were made to contact 454 producers. Many could not be contacted by reason of incorrect phone numbers, phone line disconnection and number changes. This comes as no surprise, given that the list of names and contact information was over eight years old. Many producers did not respond to the initial telephone message, and of those that did, only 67 requested a meeting with a procurement agent of the Applicant. Call logs were kept and turned over to the Applicant's procurement agents for follow-up. These call logs were eventually filed in evidence.

155 The Respondents contend that the Applicant's procurement effort or survey of Quebec producers was essentially undertaken as a result of the Tribunal's Interim Supply Order and was not a serious effort to obtain replacement chickens in Quebec. In its Interim Supply Order, the Tribunal found that there was a duty to mitigate damages. At paragraph 37 of its reasons it wrote:

> I reject the Applicant's contention that it had no duty to mitigate. It could not sit idly by and make no attempt to secure additional live chickens when faced with the loss of about half of its supply. However, what is adequate mitigation will turn on the circumstances of each case.

156 The Respondents point to a number of deficiencies in the Applicant's procurement effort. They argue that the Applicant's procurement team did not have a mandate to close a deal or sign contracts for supply with any of the Quebec producers called. They point to Mr. Feenstra's testimony, where he attests that the procurement team was "[t]o gauge what the opportunities are to procure chickens in Quebec". He also asserted on examination for discovery that he was not hopeful of the outcome of the procurement survey and that he would not initiate negotiations with Quebec producers who were not willing to sell their supply of live chickens at a price that is equal to or lower than the NB Board Price. They point to the testimony of Ms. Ouellette, where she attests that Mr. Landry had ordered her to end her calls to Quebec producers even though 196 producers had yet to be contacted by the Applicant's procurement team.

157 There is evidence, essentially uncontested, to support a finding that the Applicant's procurement effort was not designed with the objective of securing sufficient live chickens from Quebec to replace all the chickens lost as a result of the Respondents' refusal to supply. However, whether or not the Applicant's efforts were genuinely motivated by a desire to obtain replacement chickens from Quebec is essentially not material to the question of whether replacement chickens are actually available on usual trade terms from Quebec. While the procurement effort is not a perfect gauge of the opportunities available in Quebec, it does provide evidence to assist in answering the question. The call logs reflect information obtained as a result of the procurement efforts. While this information has been interpreted differently by the experts, it is essentially unchallenged. Further, the members of the procurement team consisting of Ms. Ouellette, Mr. Plourde and Mr. Viel gave testimony regarding the procurement efforts. In our view, they did so in a forthright manner, and we find their testimony to be credible.

158 Ms. Ouellette was tasked with placing the initial call to producers in Quebec for the purpose of inquiring as to whether they were interested in meeting with the Applicant to discuss the possibility of supplying chickens. In determining which producer to call, Ms. Ouellette attests that she considered the geographic location of each producer *vis-à-vis* the location of the St-François Plant. She stated that the majority of the calls were placed to producers that were located east of Montreal. Ms. Ouellette kept call logs for each call placed. Of the producers with whom she spoke, 67 requested a meeting with a "Nadeau procurement agent". She then gave the call logs containing the contact information of each interested producer to either Mr. Plourde or Mr. Viel, who were responsible for the follow-up.

159 Mr. Plourde eventually met with 39 producers between July 14 and September 19, 2008. During these meetings, he made detailed notes which were annexed to the call logs. Mr. Plourde attests that the Quebec producers he met demanded the following pricing arrangements before they would agree to moving their production to the Applicant, namely *[CONFIDENTIAL]*; and payment of premiums in addition to the Quebec board price, ranging from $*[CONFIDENTIAL]* to $*[CONFIDENTIAL]*/kg.

160 Mr. Viel, who is the Applicant's manager of sales and transportation, assisted the procurement team when Mr. Plourde was on vacation. He met with 11 Quebec producers in the week of July 21, 2008, and also made detailed notes during these meetings, which notes he attached to the call logs provided by Ms. Ouellette. Mr. Viel attests that the producers he met with indicated they would consider moving their production to the Applicant on pricing arrangements which would include *[CONFIDENTIAL]* and premiums ranging from $*[CONFIDENTIAL]* to $*[CONFIDENTIAL]*/kg. Mr. Viel further stated that each producer would be able to supply between *[CONFIDENTIAL]* and *[CONFIDENTIAL]* heads per eight-week quota period.

161 As indicated above, in order to determine the usual trade terms for live chicken in Quebec, it is helpful to examine evidence of the "usual" premium paid by processors in that geographic area. The survey of the Applicant's procurement team tabulated data of premiums actually paid by Quebec processors to producers in that province. This evidence was considered by the experts. Ms. Sanderson attested that among all of the producers who offered the Applicant supply at a requested premium of $*[CONFIDENTIAL]*/kg, the highest premium that the producer receives from its current Quebec customer is $*[CONFIDENTIAL]* above the Quebec board price. Based on the procurement surveys conducted by the Applicant, Ms. Sanderson aggregated the premiums that are currently received from Quebec processors and divided these by the total number of kilograms offered. She found that the weighted average premium that is currently received by the surveyed producers from processors is $*[CONFIDENTIAL]*/kg above the Quebec board price. The evidence indicates that the survey conducted by the Applicant's procurement team covered less than *[CONFIDENTIAL]*% of the Quebec quota owned by producers located within 500 km of the Applicant's plant in St-François. The producers surveyed that did not specify a premium and those that indicated that they would not supply the Applicant represented *[CONFIDENTIAL]*% of the total quota within 500 km of the St-François Plant.

162 While it is difficult to determine from the above evidence what premium would be sought by those producers that were not surveyed, the evidence provides a good indication of the premiums currently being paid by Quebec processors to producers in the relevant area of Quebec. Further, the evidence adduced in respect to the "Projet Westco" (the "Projet Westco Report"), a 2007 report prepared by Olymel regarding a possible partnership with Westco, indicates that the premiums paid by Olymel for its Quebec live supply in 2006 is $*[CONFIDENTIAL]*/kg above the Quebec board price. Mr. Brodeur's witness statement confirms that Olymel's current premium is in the order of $*[CONFIDENTIAL]*/kg above the Quebec board price.

163 The above evidence in respect to premiums paid by Quebec processors is not speculative, nor is it contested. It represents direct evidence of premiums that are actually being paid by processors in the relevant areas of Quebec. While the survey does not tabulate the premiums paid by all processors in Quebec, the data is sufficiently complete to allow us to determine a range of premiums that are usually paid by processors in that part of the Quebec market covered by the Applicant's procurement survey, which includes that area within 500 km of the St-François Plant. We find that premiums range from $*[CONFIDENTIAL]* and $*[CONFIDENTIAL]* over the Quebec board price. It follows that usual trade terms for Quebec chickens, in this instance, would include prices within that stated range of premiums above the Quebec board price.

164 We note that Quebec prices including the premiums are very close to the NB Board Price. As mentioned above, both the Quebec board price and Ontario board price are $0.065 below the NB Board Price. The Serecon Report, a consultant's report on the assessment of the broiler chicken industry in Nova Scotia published in July 2008, indicates that "there is no real historical pattern of a consistent spread in price between Nova Scotia and Ontario" and that "[f]or the past few periods (about the past year), the spread has been somewhat consistently 6.5 cents". We also know that the Applicant pays Nova Scotia producers the NB Board Price. Mr. Wittenberg testified that the Nova Scotia board price was "somewhat higher" than the NB Board Price, but he did not know the exact board price. Mr. Merks testified that "historically", the Nova Scotia board price was $0.02 below the NB Board Price. We are satisfied on the evidence that the Nova Scotia and New Brunswick board prices are very close.

(ii) Are supplies available on usual trade terms?

165 We now turn to considering whether the Applicant is able to obtain supplies of chickens in Quebec on usual trade terms or within the stated price range. Both Mr. Robinson and Ms. Sanderson considered the data obtained from the Applicant's procurement survey.

166 In his expert report on behalf of the Applicant, Mr. Robinson made certain assumptions in respect to the replacement of the Respondents' birds with birds from Quebec. He assumed this chicken could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would

be responsible for DOAs, transportation cost and shrink; and that the appropriate chickens can be found for the sizes necessary for the customers. Mr. Robinson assumed, based on conversations the Applicant's management team had with Quebec producers, that a minimum premium of $*[CONFIDENTIAL]*/kg over the Quebec board price would have to be paid.

167 Ms. Sanderson stated that because of the assumptions adopted in both the Ware and Robinson reports, these reports overstate the potential impact that the loss of the Respondents' supply of live chickens would have on the Applicant. She stated that the assumed premium is far above the premiums currently and historically paid in Quebec. She first estimated the premium needed to obtain chickens from Quebec producers to be in the area of $*[CONFIDENTIAL]*/kg. After corrections were made in the affidavits of Ms. Boucher, Mr. Viel and Mr. Plourde, and based on additional testimony, Ms. Sanderson revisited her opinion on the premiums that the Applicant would have to pay above the Quebec board price in order to obtain chickens from Quebec. Her revised opinion was that that premium would be in the area of $*[CONFIDENTIAL]*/kg. She explained that in coming to this opinion, she assumed that the producers in Quebec that the procurement team did not meet or contact would respond in the manner as those that were contacted. In other words, the premiums requested by the producers that did respond were extrapolated and applied for the purpose of her analysis to all producers from Quebec in the market.

168 The parties therefore take different approaches in reviewing the data obtained from the Applicant's procurement survey. On premiums, each of the two experts disputes the appropriateness of the different assumptions made by the other. In the end, we note that neither expert takes issue with the accuracy of the data collected. It is not disputed that, at a minimum, a premium of at least $*[CONFIDENTIAL]*/kg would have to be paid, which is higher than the premiums we have determined to be within the usual trade terms (i.e. $*[CONFIDENTIAL]*/kg -$*[CONFIDENTIAL]*/kg).

169 The Applicant contends that two other factors bear on the question of whether the Applicant can obtain chickens in Quebec on usual trade terms. First, the concerns expressed by a number of witnesses regarding interprovincial trade and premium wars; second the specific characteristics of co-op producers and their significance in the market place. It is useful to review the evidence adduced in respect to these factors.

(iii) Premium wars

170 There is significant evidence adduced, essentially on behalf of the Applicant, regarding concerns in respect to growing interprovincial trade in live chickens. Mr. McCullagh, the vice-president of Maple Leaf, expresses the view that increased interprovincial trade is "a jeopardy to processing companies". He says that the supply management system affords protection to Canadian chicken producers and allows for sustainable farm earnings. He attests that the system further insulates chicken farmers from competition by reason of the national quotas which are allocated to provinces based upon a market share system and governed by an interprovincial agreement.

171 Mr. McCullagh expresses the view that any attempts by the Applicant to source chickens from Quebec would be very expensive and that such a strategy is highly unlikely to succeed. If, however, the strategy were successful, he attests that Quebec processors who lose supply to the Applicant would seek to regain chickens by offering premiums to producers in other provinces, such as Ontario. According to Mr. McCullagh, the outcome would be that downstream processors, retailers, food service operators and consumers would incur greater costs, and chicken producers would receive an unfair financial benefit by leveraging power allotted to them through the quasi-monopoly afforded to them through supply management regulations.

172 At the hearing, Mr. McCullagh testified that Maple Leaf was extremely concerned with the developments in interprovincial trade because of the tremendous risk that premiums will be driven to unsustainable levels for the industry. *[CONFIDENTIAL]*. He also expressed the view that this premium war had the potential, by reason of the limited supply of chickens owing to quotas, to escalate to encompass the entire industry.

173 The executive director of the Association of Ontario Chicken Processors, Mr. Thompson, expressed similar views in regard to premium wars. He explained that under supply management, no province is able to increase its share of national chicken production beyond its historical market share. Processors that lose supply to an interprovincial competitor have little choice but to retaliate by providing increased premium incentives to induce local producers to return to processors within their own province, if they wish to stay in business.

174 Mr. Thompson expresses the view that the interprovincial movement of chicken is a weakness in the regulated supply system. He attests that the provincial percentage share of national production is effectively fixed. He argues that because of this, the only avenue outside of consolidation where processors may seek additional supply is by "raiding" the producers selling to their competitor in neighbouring provinces.

175 This aspect of interprovincial trade in chicken is also acknowledged by Mr. Brodeur, who testified on behalf of the Respondent Westco. In his testimony, he attests that the pressure from Ontario processors attempting to source chickens from Quebec is now very strong and growing. He recognized that this could have an upward effect on premiums. He also testified that it was essentially smaller processors that were involved in Quebec-Ontario interprovincial trade of chickens and that the "big players" were essentially not involved. He considered Olymel, Exceldor, Maple Leaf and Maple Lodge to be the big players. He testified that Maple Lodge and Exceldor did trade but only for smaller volumes.

176 Both Mr. Tavares and Mr. Feenstra testified to the effect that increased interprovincial trade in chickens would spark a price war that would increase costs for any processor and would further erode profits. They expressed the general reluctance of major processors to become involved in interprovincial trade of chickens for this reason. Mr. Feenstra stated that he had been involved in premium wars in the past and that the net effect of a premium war is a huge hit on the processing sector because if they want supply, processors have no choice but to pay the premiums demanded by the producers.

177 Professor Barichello stated in his report that relatively little interprovincial trade in chickens takes place in Canada. The bulk of this movement is between Ontario and Quebec. He reported that in 2005, interprovincial trade in chickens involved only 4% of total Canadian production. He is of the opinion that because the quantity of output is fixed under supply management, producers can only increase their margin by demanding a higher price from the processor, or by making their operations more efficient, or both.

178 Dr. Ware, in examination in chief, explained that even if the Applicant were able to source all of the Respondents' chickens from Quebec, this would represent an increase in demand for supply of chicken from Quebec by about 10%. He says that in a supply management system where the total amount of chicken produced in Quebec is regulated and cannot be expanded, this could only occur by bidding supply away from other chicken processors. This would cause price increases in the form of escalating premiums.

179 While there are no regulatory restrictions on interprovincial trade in chickens, *[CONFIDENTIAL]*. We know that under supply management, supply is limited. In these circumstances, it is understandable that to attract supply away from other processors, a higher price would have to be offered.

180 We are prepared to accept that the evidence supports the contention that circumstances surrounding interprovincial trade in live chickens and premiums could lead to upward pressure on the price of live chickens in the market. In our view, however, this is no more than the result of competition between processors in a market where the aggregate supply of live chickens remains unchanged. The underlying theme of the evidence of processors and their representatives cited above is that processors should not have to compete for live chickens because such competition would result in higher prices and a "premium war" amongst processors. This evidence is self-serving. It should come as no surprise that in a market where supply is limited, competition for that supply usually results in higher prices. In the instant case, the issue is not about "premium wars", but rather the supply of live chickens. The issue of the supply of live chickens will be comprehensively dealt with below when we consider the "ample supply" requirement under paragraph 75(1)(*d*) of the Act.

(iv) Co-op producers and their significance in the market place

181 The evidence indicates that the Exceldor co-op is an important processor with approximately 47% of the Quebec slaughter. This is similar to Olymel's share. The Exceldor co-op is made up of and owned by 260 member suppliers or producers. The Exceldor producers receive a dividend based on the Co-op's performance at the year's end. In his report, Mr. Robinson expresses the view that Exceldor's status as a co-op represents yet another barrier to the Applicant in its effort to source chickens from Quebec. He refers to the philosophy of co-op members that would favour having their product processed in a plant they own so that they may benefit from year-end dividends. Apart from making up these dividends, the Applicant would have to overcome this different philosophy of co-op members who favour the co-op business model over the Applicant's for-profit model. Mr. Robinson expresses the view that it may not be possible to entice any significant number of producers or chickens from Exceldor members no matter what price is paid by the Applicant. Given the significance of Exceldor's share of Quebec slaughter, this represents another significant hurdle for the Applicant.

(v) Conclusion regarding the Applicant's ability to obtain chickens in Quebec on usual trade terms

182 The evidence reviewed above indicates that even if the Applicant were able to access the necessary volume of chickens to replace the Respondents' from Quebec producers, it would only be able to do so at premiums that exceed those considered within the range of usual trade terms. Ms. Sanderson conceded that the Applicant would have to pay a premium of $*[CONFIDENTIAL]* above the Quebec board price to obtain replacement supplies, whereas we have found the usual trade terms in that market regarding premiums to be between $*[CONFIDENTIAL]* and $*[CONFIDENTIAL]* above the Quebec board price. In all of the circumstances, we find that the Applicant is unable to obtain adequate supplies of live chickens anywhere in the market on usual trade terms.

(d) Is the Applicant substantially affected in its business?

183 We now turn to the question of whether the Applicant is substantially affected in its business due to its inability to find adequate supplies of live chickens anywhere in the market on usual trade terms. We will first review the evidence adduced by the parties, in particular the expert reports.

(i) The Applicant's evidence

184 The reports of Mr. Robinson and Dr. Ware deal directly with the elements of paragraph 75(1)(*a*). We turn first to the evidence of Dr. Ware.

185 Dr. Ware notes that the Respondents supply almost one half of the chickens processed by the Applicant and that if this supply were redirected to rival processing facilities, the Applicant would lose over half its revenue. Dr. Ware indicates that "[t]here is no economically feasible source of supply whereby Nadeau can make up this shortfall in supplies of live chicken". He further states that replacing such a volume would take at least months if not years and that the only economically comparable replacement would have to come from New Brunswick. With respect to the market for selling live chickens, Dr. Ware is of the opinion that the Applicant would not be able to bid supply away from producers outside New Brunswick because those producers are already contractually committed to other processors; that not all producers raise chickens that meet the Applicant's size and quality requirements; and that very high premiums would have to be paid to producers in Quebec to attract them away from current processors. Dr. Ware relies on the affidavit evidence of Mr. Tavares in support of these claims. He also indicates that because of high transportation costs "it is neither economic nor efficient for [the Applicant] to replace the large amount of supply from the respondents with supply from greater distances."

186 With respect to the market for purchasing live chickens, Dr. Ware's observations are not based on any independent analysis. He does not seek to quantify the costs the Applicant would incur to replace the Respondents' live chicken supply.

187 Mr. Robinson gave evidence with respect to projected earnings of the Applicant. He was asked to review the Applicant's operations to assess the impact of the withdrawal of the Respondents' birds, namely 271,350 birds per week. Mr. Robinson approached his task by developing the following four different scenarios involving:

1. the loss of the Respondents' chickens;

2. replacement of the Respondents' birds with birds from Quebec;

3. the loss of the Respondents' birds and Nova Scotia birds; and

4. replacement of the Respondents' birds with birds from Quebec and loss of Nova Scotia birds.

188 In developing the four models, Mr. Robinson used the 12-month period ending June 30, 2008, as the base period for his analysis (the "Base Period"). This period included supply from the Respondents as well as Nova Scotia and Prince Edward Island. Mr. Robinson reasoned that this period represented an appropriate base since it not only represented the current operations of the Applicant but was also representative of the performance the Applicant could achieve "on a long term basis" through good and poor periods. In his testimony, Mr. Robinson refers to very strong prices in the poultry market for the first six months of the Base Period ending December 31, 2007, and a very weak market for the remainder of the period.

189 Mr. Robinson made certain assumptions in respect to the replacement of the Respondents' birds with birds from Quebec. He assumed that these chickens could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; and that the appropriate chicken could be contracted for the sizes necessary for the customers. As stated above, Mr. Robinson assumed, based on conversations the Applicant's management team had with Quebec producers, that a minimum premium of $*[CONFIDENTIAL]*/kg would have to be paid on the Quebec board price. He also assumed that, as a result of having to haul the birds up to six hours, the Applicant would have to compensate producers for higher DOAs, higher transportation costs and higher shrink. This would amount to an additional $*[CONFIDENTIAL]*/kg on top of the live price premium.

190 Mr. Robinson concluded that in all four scenarios, the Applicant's operations are negatively impacted to a significant degree.

(ii) The Respondents' evidence

191 Ms. Sanderson acknowledges that certain costs are higher when sourcing live chicken from Quebec rather than from New Brunswick, such as transportation costs, shrink and mortality. She notes that the regulated minimum board price paid to Quebec producers is $0.065/kg lower than that paid to New Brunswick producers. Ms. Sanderson factors in the additional costs to the Applicant to purchase replacement chickens for volumes lost because of increased mortality and shrink for more distant shipments. She is of the opinion that the Applicant would be able to replace all of the Respondents' chickens with chickens from Quebec at an additional cost of approximately $*[CONFIDENTIAL]*. This would cover additional costs associated with premiums, shrink, DOAs and transportation. In Ms. Sanderson's view, this would still leave the Applicant with operational earnings of approximately $*[CONFIDENTIAL]*, which is more than *[CONFIDENTIAL]*% over the Applicant's average earnings from operations between 1998 and 2007.

192 Ms. Sanderson expresses the opinion that, because of the assumptions essentially about the size of the premiums in the Robinson and Ware reports, their estimate of the potential impact on the Applicant from the Respondents' shifting their supply of live chickens from the Applicant to Sunnymel is overstated.

(iii) Positions of the parties

193 It is the Applicant's position that it is substantially affected by the refusal and relies on the evidence of Mr. Robinson. Mr. Robinson testified that without the Respondents' supply, the Applicant's earnings from operations would drop by $*[CONFIDENTIAL]* from $*[CONFIDENTIAL]* to $*[CONFIDENTIAL]* using the Base Period as a comparator. He testified that, assuming that the Applicant incurred additional costs for transportation and for DOAs and shrink, and assuming that the Applicant would be required to pay a premium of $*[CONFIDENTIAL]* over the Quebec board price to access replacement chickens in Quebec, the Applicant's earnings from operations would drop by $*[CONFIDENTIAL]* from $*[CONFIDENTIAL]* to $*[CONFIDENTIAL]*.

194 The Respondents argue that the Applicant is not substantially affected by the refusal. They contend that the evidence supports their submission that the Applicant would be able to replace the Respondents' chickens with chickens from Quebec and in doing so would be able to maintain historic levels of processing which would result in earnings that would allow it not only to survive but also to be viable.

195 The Respondents point to the Applicant's own procurement initiative, which concluded that within a 600 km radius of the Applicant's plant in St-François, a significant volume of live chickens is available from Quebec producers upon payment of certain premiums over the Quebec board price.

196 The Respondents also rely on the opinion of the Applicant's expert, Mr. Robinson, who testified using the same approach as that used by Ms. Sanderson, that the Applicant would incur additional costs of $*[CONFIDENTIAL]* in order to procure replacement chickens from Quebec and would be left with earnings of over $*[CONFIDENTIAL]*. The Respondents argue that even earnings of this magnitude approach the Applicant's average yearly earnings prior to the arrival of the Nova Scotia and Prince Edward Island chickens, and that the Applicant therefore cannot be "substantially affected" by their refusal even if the Applicant had to replace all the Respondents' chickens with chickens from Quebec producers.

197 The Respondents essentially argue that chickens are available in the market to replace the chickens currently supplied by the Respondents in sufficient quantities and on trade terms that would allow the Applicant not only to survive but to be viable based on the survival and viability thresholds set by Mr. Tavares in his testimony. Mr. Tavares attested that the Applicant "requires a guarantee of 350,000 chickens per week to stay viable", but later stated that a weekly supply of 300,000 live chickens would allow the Applicant to get by, that "getting by" referred to "viability in the long term" and that "[d]epending on the markets, it could mean losing a lot of money".

198 Further, the Respondents contend that even if the Applicant failed to replace any of the Respondents' chickens, its current supply from Nova Scotia and Prince Edward Island and other producers in New Brunswick would allow the Applicant to maintain processing such that it would achieve 108.5% and 93.05% of its self-declared survival ("getting by") and viability thresholds respectively. In the Respondents' view, given the above considerations, the Applicant cannot be substantially affected in its business by reason of the refusal.

199 The Respondents Dynaco and Acadia argue that their respective refusals cannot substantially affect the Applicant's business because of their small numbers.

(iv) Analysis

200 Earnings are a meaningful indicator of the performance of an enterprise. In order to assess the impact of the refusal at issue on the Applicant's business, it is therefore useful to consider the Applicant's earnings over time. The projected impact on future earnings by the refusal will be a helpful guide in determining whether the Applicant's business is substantially affected by the refusal.

201 The evidence of both Mr. Robinson and Ms. Sanderson addresses the question of projected earnings of the Applicant. As discussed above, various models were developed by Mr. Robinson and reviewed by Ms. Sanderson. We review below certain relevant aspects of this evidence.

202 Mr. Robinson's first scenario involved the loss of the Respondents' chickens. He concluded that without those chickens, the Applicant's earnings would drop by $*[CONFIDENTIAL]* from $*[CONFIDENTIAL]* to $*[CONFIDENTIAL]* using the Base Period as a comparator. Ms. Sanderson assumed that the Applicant would be able to replace the Respondents' chickens with Quebec-sourced chickens, and she did not provide an estimate of the Applicant's earnings if it could not obtain supply on usual trade terms. She is of the opinion that the Applicant would incur an additional cost of almost $*[CONFIDENTIAL]* if it were to replace the Respondents' chickens with Quebec-sourced chickens.

203 Of the four scenarios considered by Mr. Robinson, the one that least affects the Applicant's business is the second scenario, which assumes that the Respondents' birds are replaced with Quebec birds and that the Nova Scotia and Prince Edward Island birds continue to be processed by the Applicant. If the Applicant can demonstrate that under this scenario its business is substantially affected by the refusal, there will be no need to consider the other scenarios developed by Mr. Robinson, including his first scenario in which the Applicant's earnings will drop to $*[CONFIDENTIAL]*.

204 In the second scenario, Mr. Robinson makes the following assumptions: that chicken could be obtained in Quebec but that premiums would have to be paid to Quebec producers to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; that the appropriate chickens could be contracted for the sizes necessary for the Applicant's customers. As mentioned above, Mr. Robinson assumed a premium of $*[CONFIDENTIAL]*/kg of live chicken based on conversations between the Applicant's management and Quebec producers.

205 As a result of this analysis, Mr. Robinson identified that the earnings from operations would drop by $*[CONFIDENTIAL]* from $*[CONFIDENTIAL]* to $*[CONFIDENTIAL]* and that the St-François Plant would continue to operate *[CONFIDENTIAL]*. In Mr. Robinson's opinion, under this scenario, as with the other three he developed, the removal of the Respondents' chickens would have a significant impact on the profitability of the operations and, by extension, on the viability of one of the "most efficient processing plants in Canada".

206 Ms. Sanderson disagreed with the size of the premium that Mr. Robinson assumed would have to be paid by the Applicant to Quebec producers. Initially, she was of the view that a more realistic premium would be $*[CONFIDENTIAL]* over the Quebec board price. Ms. Sanderson was of the opinion that after taking into account the differences in board prices, premiums and transportation costs, and the cost of purchasing additional chickens to replace the lost volumes from increased mortality and shrink, the total incremental cost to the Applicant to source live chickens from Quebec instead of the Respondents is $*[CONFIDENTIAL]*/kg of live weight, which represents *[CONFIDENTIAL]*% of the Applicant's total cost of sales for the 12-month period ending June 2008. In Ms. Sanderson's opinion, this would leave the Applicant with earnings of $*[CONFIDENTIAL]* for the period, as opposed to over $*[CONFIDENTIAL]* estimated by Mr. Robinson.

207 As discussed earlier, these figures were revised by Ms. Sanderson as a result of corrected data adduced during the trial. As explained above, her estimate of earnings for the period was revised to $*[CONFIDENTIAL]* after corrections were made to affidavits and additional evidence was provided. This now represents a drop of approximately $*[CONFIDENTIAL]* from estimated earnings of $*[CONFIDENTIAL]*. Her revised opinion was that the premium would be in the area of $*[CONFIDENTIAL]*.

208 On cross-examination, Ms. Sanderson agreed that a reduction in earnings of "*[CONFIDENTIAL]*" is in an order of magnitude of *[CONFIDENTIAL]* %. She acknowledged that *[CONFIDENTIAL]* % is "a large number" (the actual reduction is in the order of *[CONFIDENTIAL]* %). She nevertheless went on to express the opinion that the Applicant would not be substantially affected or precluded from carrying on business by reason of the refusal, because its earnings from operations would be comparable with historical levels.

209 Ms. Sanderson stated her opinion as follows on examination in chief at the hearing:

> Yes. So — given I find that they're going to be able to earn profits — earnings from operations that are in the range of **[CONFIDENTIAL]**, which is **[CONFIDENTIAL]**percent higher than the average over '98 through to 2007 and about, if you exclude the year of the fire. So given that their earnings are within the range of historical levels, they're certainly not precluded from carrying on business if they get replacement supply.
>
> And I would also conclude that they're not substantially affected given their earnings are comparable to historical levels.

210 It is noteworthy that Mr. Robinson's assessment regarding the Applicant's reduction in earnings relative to the Base Period is in the order of a *[CONFIDENTIAL]* % reduction.

211 In terms of transportation costs, Ms. Sanderson compared the live-haul cost of chickens from Quebec with the Applicant's average live-haul cost for all of New Brunswick. Mr. Robinson accepts Ms. Sanderson's live-haul cost of $[CONFIDENTIAL]/kg for Quebec chickens, but argues that she should have compared that cost with the live-haul cost for the Respondents' chickens. Had this been done by Ms. Sanderson, Mr. Robinson maintains that the result of her analysis would have essentially been the same as his. If the analysis undertaken by both experts assessed the incremental costs of replacing the Respondents' chickens with Quebec chickens, then the approach advocated by Mr. Robinson would necessarily produce a more accurate result in terms of incremental costs, as it relates to the replacing of the Respondents' birds.

212 While we agree with Mr. Robinson's approach, we disagree with his estimate ($*[CONFIDENTIAL]*) of the live-haul cost for the Respondents' chickens. We agree with Ms. Sanderson that this estimate must be incorrect because Mr. Landry testified that the cost of transporting live chickens from southern New Brunswick to the St-François Plant varies between $*[CONFIDENTIAL]* and $*[CONFIDENTIAL]*, and that 15% of the Applicant's New Brunswick supply comes from southern New Brunswick. He added that the Applicant's average transportation cost for New Brunswick chickens is around $*[CONFIDENTIAL]*/kg. The freight costs associated with the Respondents' live chickens must therefore be approximately $*[CONFIDENTIAL]*/kg, since the Respondents' supply represents 85% of the Applicant's New Brunswick supply. The incremental transportation costs of supplying the replacement birds, approximately $*[CONFIDENTIAL]*/kg, are therefore part of the additional costs of replacing the Respondents' birds, and these costs, together with premiums, constitute the main factors affecting the cost of live chickens to be obtained from Quebec. Premiums also represent the main area of disagreement between the two experts.

213 It is not disputed that Nadeau will incur additional costs when sourcing chicken in Quebec because of DOAs and shrinkage. With respect to DOAs, Mr. Landry testified that if a load arrives at the St-François Plant with a DOA rate of 1% or more, the Canadian Food Inspection Agency will conduct an investigation. If this rate is 3% or higher, the Agency will impose a fine.

214 There is general agreement between Mr. Robinson and Ms. Sanderson in respect of DOA/shrink costs. Mr. Robinson finds that Nadeau's shrink and DOA percentages would be *[CONFIDENTIAL]*%. There is, however, a different approach in respect to losses associated with replacing DOAs and shrink. Ms. Sanderson does not factor in lost profits, since these chickens are replaced with new purchases.

215 Both experts agree that, as a result of the Applicant having to replace all of the Respondents' chickens with chickens from Quebec, earning from operations will drop, relative to the Base Period, to a range from $*[CONFIDENTIAL]*to $*[CONFIDENTIAL]*. Ms. Sanderson's opinion acknowledges this reduction in earnings but reasons that the Applicant is not substantially affected or precluded from carrying on business as a result, because this range of earnings is comparable with historic levels. Historic levels are defined by Ms. Sanderson as the average earnings between 1998 and 2007, excluding the year of the fire.

216 The Tribunal accepts that the approach taken by both parties regarding the Applicant's earnings is the correct one for assessing the projected earnings of the Applicant as a result of the refusal. With respect, however, we reject Ms. Sanderson's conclusion on "substantial effect" for the reasons that follow.

217 On cross-examination, Ms. Sanderson agreed that a *[CONFIDENTIAL]*% reduction in earnings is "a large number" but was of the opinion that the Applicant was not substantially affected. Her opinion is based on the choice of a different comparator period. In her analysis, Ms. Sanderson adopts the period 1998-2007 in support of her conclusion. In her view, excluding the year of the fire, this period reflects the historic performance of the Applicant in terms of earnings. Her analysis consequently fails to take into account the subsequent period, when earnings from operations were significantly higher as a result of the arrival of additional chickens from Nova Scotia and Prince Edward Island. In our view, this approach does not fairly reflect the Applicant's circumstances. It is an approach that would purport to measure the impact of the refusal on the basis of the Applicant's historic performance and not its current circumstances. Such an approach would not allow for consideration of growth and dynamic expansion of an enterprise in assessing the effect of a refusal to deal under paragraph 75(1)(*a*). We agree, however, that current earnings should not be considered if they reflect unusual or non-recurring circumstances.

218 Here, for reasons that are particular to this case, the Applicant saw its processing capacity increase significantly for a three-year period as a result of certain agreements with Nova Scotia and Prince Edward Island producers. A second shift had to be set up at the Applicant's plant and additional employees had to be hired. In many ways, this was a planned expansion of production, although potentially not for an indefinite period. This is not comparable with an exceptional event such as a fire or other act of God, which arguably would not be reflective of normal operations.

219 While the Applicant's earnings from operations since 2007 indicate a significant increase in earnings over prior years, they are nevertheless earnings that resulted from business decisions which were made in the context of an expansion of operations owing to particular circumstances. The substantial effect on the Applicant's business by reason of the Respondents' refusal must, in our view, be considered in the context of this increased capacity and, by extension, the Applicant's increased earnings, because this is the Applicant's current business situation. To conclude otherwise would be inconsistent with the provision which requires that the Applicant be substantially affected in "his business". The fact that the Applicant's earnings are above its historic average is of no consequence. What matters, for the purpose of paragraph 75(1)(*a*), is the effect of the refusal on the Applicant's current business. In our view, it is therefore appropriate to consider the Applicant's recent increase in earnings in assessing the effect of the refusal on the Applicant's business.

(v) Conclusion on paragraph 75(1)(a)

220 In summary, we agree with Mr. Robinson that the Base Period is the appropriate comparator period in the circumstances. The increase in earnings over the historic average, reflected in the selected Base Period, is representative of the Applicant's current business earnings and is therefore a proper basis upon which to consider the effect on the Applicant's business that may be caused by reason of the Respondents' refusal to supply.

221 In the result, we find that a reduction in earnings of *[CONFIDENTIAL]*% relative to the Base Period is significant and important in the circumstances of this case. We therefore find that, on the basis of the evidence and arguments adduced, replacing the Respondents' chickens with Quebec chickens will have a substantial impact on the Applicant's business. Given our above determinations, we find that the Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies anywhere in a market on usual trade terms. Because of the effect of the refusal on earnings explained above, we are of the view that our conclusion would have been the same under any of the Robinson scenarios. Therefore, by reason of the projected impact on the Applicant's earnings, the Applicant would be substantially affected in its business.

222 Certain other options in terms of supply, which are potentially plausible, were simply not argued before the Tribunal: for instance, the possibility of replacing one half of the Respondents' supply from Quebec producers, as

opposed to all of it. The impact on the Applicant's business was not considered by the experts, nor did the parties advance arguments on such a scenario and, in these circumstances, we decline to speculate on its effect on the Applicant's profits.

223 On the evidence, and upon consideration of the arguments advanced by the parties, for the above reasons, we are satisfied that the Applicant has met its burden under paragraph 75(1)(*a*) of the Act.

224 We now turn to consideration of the requirement under paragraph 75(1)(*b*).

C. Has the Applicant established that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market pursuant to paragraph 75(1)(b) of the Act?

(1) Parties' Submissions

225 The Applicant contends that it is unable to obtain adequate supplies of live chickens because of insufficient competition among suppliers in the market. It submits that as a result of the supply management scheme, chicken producers are completely insulated from competition. The Applicant states that it is in fact the processors who fight among themselves to offer ever-increasing prices to producers.

226 The Respondent Westco contends that the insufficient competition referred to in paragraph 75(1)(*b*) must be assessed in light of the overall context of the Act and can only refer to situations in which a competitor or competitors have a dominant position or a monopoly, or in which there is a lack of competition as a result of any kind of collusion. It submits that there are a considerable number of suppliers in the relevant market and that there is no evidence of collusion among them, which indicates that there is no issue of insufficient competition. Westco further states that not only are there several competitors, but the evidence also shows that chicken producers are indeed willing to compete and supply the Applicant with their production upon payment of premiums over and above the board price set by regulatory authorities. The Respondents Dynaco and Acadia also submit that there are enough producers in the relevant market to conclude that there is sufficient competition.

227 In the alternative, the Respondents contend that the evidence in the Tribunal's record shows that the cause of any inability on the Applicant's part to obtain replacement birds has nothing to do with a lack of competition among suppliers of live chickens. It is rather because of the following three factors that came to light during the hearing, namely, the Respondents' objectively justifiable business reasons for the refusal, the workings of the supply management system and the level of competition among processors.

(2) Analysis

228 Pursuant to paragraph 75(1)(*b*) of the Act, the refused party must demonstrate that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers in the market. As was set out in *B-Filer*, paragraph 75(1)(*b*) of the Act contains two requirements. First, there must be insufficient competition among suppliers in the relevant market. Second, the inability of the refused party to obtain adequate supplies of the product must be by reason of that insufficient competition. The Tribunal, in *Canada (Director of Investigation & Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Competition Trib.), considered the causal requirement of the provision and concluded as follows, at page 116:

> In addition, the refusal to supply must occur "*because* of insufficient competition among suppliers of the product". That is, <u>the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market</u>.
>
> (emphasis added)

229 The Tribunal must therefore determine whether the Applicant has established that insufficient competition among suppliers in the market is the overriding reason why it is unable to obtain adequate supplies of the product in the market. The product and geographic markets, for the purposes of paragraph 75(1)(*b*), are the same as those which have been

defined pursuant to paragraph 75(1)(*a*). The relevant geographic market therefore consists of New Brunswick, Prince Edward Island, parts of Quebec within a 500 km radius of the St-François Plant, and Nova Scotia.

230 The Tribunal has not yet had an opportunity to determine the meaning of "insufficient competition". In *Xerox* and *Chrysler*, the Tribunal defined the relevant product market in a very narrow manner, and it was therefore not difficult for the Tribunal to conclude that there was insufficient competition among suppliers in the market. The Tribunal noted that the level of competition among suppliers will depend on the facts of the particular case. The Tribunal also stated the following in *Xerox*, at page 116:

> Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the tribunal where so many of a multitude of suppliers would refuse to supply an individual that his business could be "substantially affected". One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

231 We now turn to an assessment of the competitive conditions in the market. The evidence on the record shows that there are many suppliers in the relevant market. Data provided by the Chicken Farmers of New Brunswick indicate that in 2007 there were 38 chicken producers in New Brunswick, 82 producers in Nova Scotia, 7 producers in Prince Edward Island and 760 producers in Quebec. Statistics from Les Éleveurs de volailles du Québec indicate that in 2006 there were 85 producers in the Beauce region, 62 producers in the Québec region and 22 producers in the Côte-du-Sud region, all of which are located in Quebec within 400 km of the St-François Plant. From this data, the Tribunal can conclude that there are, in fact, numerous producers located in the relevant geographic market.

232 The evidence adduced at the hearing shows that over the last few years a number of chicken producers have consolidated their quotas and that some producers have formed alliances to reap financial benefits. Further, the evidence demonstrates that some producers are related, as they are members of the same co-operatives. The evidence does suggest some lack of independence among producers in the New Brunswick market. In fact, Mr. Feenstra has indicated that only eight nominal quota holders in New Brunswick are independent from the Respondents. The Respondents together produce almost 75% of New Brunswick's live chickens. Mr. Feenstra, however, also acknowledged that he is not aware of that degree of concentration in any other Canadian province. In fact, no evidence was adduced regarding such concentrations in Nova Scotia, Prince Edward Island or parts of Quebec. Furthermore, evidence adduced by the Applicant concerning its efforts to seek replacement supply of live chickens in Quebec clearly demonstrates that producers are acting independently. Results from the Applicant's survey show that producers were in fact offering live chickens to the Applicant at different prices above the board price. Under these circumstances, there is insufficient evidence to conclude that there is either collusion or a lack of independence amongst producers in the market as a whole.

233 Normally, the presence of numerous suppliers acting independently is a strong indicator of sufficient competition. However, the parties in this matter are operating within the supply management system, which is governed by a detailed and complex set of regulations. We must therefore consider the impact, if any, of the supply management system on competition among suppliers in the market.

234 As discussed above, under supply management, the minimum price for which chicken may be sold in respective provinces is set by the provincial marketing boards. Production is also restricted to quota holders and limited by a producer's quota allocation.

235 The Applicant asserts that as a result of the supply management system, chicken producers do not compete amongst themselves. Mr. McCullagh indicated that the supply management system has been a "quasi-monopoly for chicken producers" and Dr. Ware indicated that "[w]hatever the merits of such a system, there is no doubt that competition is restricted by it, as entry is precluded completely and the competitive battles for market share which create benefits for consumers and foster incentives for innovation are also completely absent".

236 The purpose or objects of the acts and regulations governing the supply management system are not intended to limit competition. The CFC was created in 1978 by order in council pursuant to section 16 of the *Farm Products Agencies Act* ("FPAA"), R.S.C. 1985, c. F-4. Section 21 of the FPAA identifies the objects of a farm product agency:

> **21.** The objects of an agency are
>
> (a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and
>
> (b) to have due regard to the interests of producers and consumers of the regulated product or products.
>
> (emphasis added)
>
> **21.** Un office a pour mission:
>
> a) de promouvoir la production et la commercialisation du ou des produits réglementés pour lesquels il est compétent, de façon à en accroître l'efficacité et la compétitivité;
>
> b) de veiller aux intérêts tant des producteurs que des consommateurs du ou des produits réglementés.
>
> (nos soulignements)

237 As an agency created under Part II of the FPAA, the CFC has the power to implement a marketing plan for chicken pursuant to the terms of the proclamation establishing it (see s. 22(1) FPAA). Some of the terms of that plan are found in the 2001 Federal Provincial Agreement for Chicken. The purpose and objectives of that agreement are as follows:

> **1.01** This Agreement provides for an orderly marketing system for chicken coordinated in a flexible and market responsive manner having appropriate safeguards so as to provide consistency, predictability and stability in accordance with the following objectives:
>
> (a) to optimize sustainable economic activity in the chicken industry;
>
> (b) to pursue opportunities in both domestic and international markets;
>
> (c) to enhance competitiveness and efficiency in the chicken industry; and
>
> (d) to work in the balanced interest of producers, industry stakeholders and consumers.
>
> (emphasis added)
>
> **1.01** Le présent Accord établit un système de commercialisation ordonnée du poulet coordonné de façon flexible et axée sur le marché, comportant les mesures de protection nécessaires pour assurer l'uniformité, la prévisibilité et la stabilité en conformité avec les objectifs suivants:
>
> (a) optimiser l'activité économique durable dans l'industrie du poulet;
>
> (b) rechercher des débouchés tant sur le marché national que sur le marché international;
>
> (c) améliorer la compétitivité et l'efficacité dans l'industrie du poulet;
>
> (d) travailler dans l'intérêt mutuel des producteurs, des intervenants de l'industrie et des consommateurs.
>
> (nos soulignements)

238 The Applicant's expert, Dr. Barichello, has indicated that competition, within the context of the supply management system, can exist among producers in the provinces in which premiums are paid, albeit not below the minimum price established by the board:

> Ms. Healey: So to the extent — so there's that range, minimum price and up; that's an area in which producers could engage in competition?
>
> Dr. Barichello: That's correct.
>
> Ms. Healey: You want 6 cents for your birds; I'll agree to 4.5?
>
> Dr. Barichello: Right.

239 However, Dr. Barichello also stated that there was a relatively modest scope for competition within the market, as the margin within which producers could compete was limited. He also added that "[n]ormal competitive pressure would be when you would be able to also lower your required price such as below the minimum price".

240 The Tribunal accepts that the margin in excess of the regulated minimum price that Quebec producers receive is relatively small. In our view, however, it is competition among individual producers that keeps this margin relatively small. What matters is that the price received by producers (including the margin in excess of the regulated minimum price) is determined by competition among producers. As for Dr. Barichello's contention that the minimum price set by the provincial board restricts competition, we are of the view that the regulated minimum price does not itself limit a producer's ability to compete effectively unless the aggregate market supply set by the marketing board exceeds demand at the regulated minimum price. In that case, the regulated minimum price would prevent the competitive price adjustment required to clear the market. There is no evidence that competition in the relevant market is currently inhibited in this way.

241 Significant evidence was adduced to the effect that prices received by producers in Quebec exceed the minimum price set by the marketing board. Such evidence was outlined under the paragraph 75(1)(*a*) analysis and will not be repeated here. Suffice it to say that the Tribunal is satisfied that prices received by producers in Quebec generally include a premium above the regulated base. As Dr. Barichello has conceded, this premium and thus the price received by each producer can be determined by competition among individual producers.

242 Furthermore, some Quebec producers canvassed during the Applicant's procurement survey indicated that they were seeking the same price as other producers were getting. This is consistent with price-taking behaviour and supports the finding that an individual producer cannot set the price and that the price ultimately paid is set by the competitive forces in the market.

243 The restrictions on entry and expansion established by the supply management system have an impact on competition, but inelastic market supply does not itself imply that there is insufficient competition among suppliers in the market.

244 In our view, while supply management restricts the available aggregate supply and makes it less price-responsive, it does not give any one producer any price-setting power. The inability of the Applicant to obtain adequate supplies on the usual trade terms is not the result of insufficient competition among individual producers. The existence of inelastic market supply is not incompatible with the market price being set by competition among individual producers in the market.

245 Apart from producers in Quebec, there is very little evidence regarding the prices producers in Nova Scotia and Prince Edward Island are receiving relative to their respective regulated minimum prices. We know that in New Brunswick, there is an Incentive Plan in place. We are unable, therefore, to make a conclusive finding as to whether and how the regulated minimum prices in those provinces might have affected competition among producers.

246 To conclude, we are of the opinion that the Applicant has failed to establish that there is insufficient competition among suppliers in the relevant market for the following reasons: the number of producers in the market; the absence of any evidence that producers, except for the Respondents, are not acting independently; and our conclusion that supply management in and of itself does not establish that there is insufficient competition among individual producers.

247 Even if there were a finding of insufficient competition among suppliers, we would nevertheless still be of the view that the Applicant has not met its burden under paragraph 75(1)*(b)* of the Act. There is inadequate evidence to establish that the competitive conditions of the market are the overriding reason why the Applicant is unable to obtain adequate supplies of the product. The overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the Applicant is unable to obtain adequate supplies of live chickens. As will become evident from our discussion of ample supply for the purposes of paragraph 75(1)*(d)* later in these reasons, the limit on aggregate supply has a very significant impact on the question of whether the Applicant is able to obtain adequate supplies of chickens in the market.

248 Therefore, for the purposes of paragraph 75(1)(*b*), we conclude that the Applicant has not established that it is unable to obtain adequate supplies of chickens because of insufficient competition among suppliers in the market.

D. Has the Applicant established that it is willing and able to meet the usual trade terms pursuant to paragraph 75(1)(c) of the Act?

249 The Applicant contends that it has always met the usual and customary terms of trade. The testimony of the Applicant's representatives, Mr. Feenstra, Mr. Landry, and Mr. Plourde, indicates that the Applicant is willing to meet the usual trade terms with respect to Quebec supply. There appears to be no dispute that the Applicant is willing and able to meet the usual trade terms.

250 On the evidence, we are satisfied that the Applicant is willing and able to meet the usual trade terms of the suppliers of live chickens.

E. Has the Applicant established that the product is in ample supply pursuant to paragraph 75(1)(d) of the Act?

251 The Tribunal has dealt with this element of the provision only once. *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, is the only case in which the Tribunal has made a determination in respect to ample supply. It decided that the product, Harley-Davidson motorcycles, was not in ample supply and consequently declined to grant an interim order. The Tribunal held, at paragraph 19, that "section 75, and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser."

252 In *Quinlan's*, the Tribunal acknowledged that the product was in ample supply some months of the year, but found that it was not appropriate to order interim supply, in the circumstances, because the product was not in ample supply at the time the order to supply was sought.

253 In the circumstances of this case, the supply of the product, live chickens, is regulated under the supply management system. The system strictly controls the supply of live chickens in Canada through a quota system. Under supply management, each producer may only produce live chickens in accordance with its quota in a given period. A producer faces a significant penalty if it exceeds its quota. The system does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment formula designed to strike a balance between chicken production and consumer demand. The issue here is whether, under these circumstances, live chickens can be said to be in ample supply for the purposes of paragraph 75(1)(*d*).

(1) The supply management system

254 Before proceeding further, it is useful to fully understand the complex supply management system in place for the production of live chickens in Canada and to appreciate how that system functions. To that end, we will review below the various statutory and regulatory provisions which underlie the system, applicable federal-provincial agreements and certain orders issued by provincial marketing boards which are material to the issues in this case.

(a) Chicken Farmers of Canada and the 2001 Federal- Provincial Agreement

255 As mentioned above, the Chicken Farmers of Canada was created in 1978 by order in council and implements a marketing plan pursuant to the terms of the 2001 Federal-Provincial Agreement for Chicken (the "FPA"). Schedule A to the FPA is known as the *Chicken Farmers of Canada Proclamation*, SOR/79-158. This document establishes the CFC and the quota system. Under section 6 of the Proclamation, the CFC shall establish a quota system for the signatory provinces by which quotas are allotted to chicken producers in each province to which quotas are allotted by the appropriate board. The CFC Board of Directors is comprised of the following persons:

(i) ten members representing the producers of each provincial marketing board;

(ii) two persons appointed by the Canadian Poultry and Egg Processors Council;

(iii) one person appointed by the Canadian Restaurant and Food Service Association;

(iv) one person appointed by the Further Poultry Processors Association of Canada; and

(v) one national chairperson elected from among the chairs of the provincial marketing boards.

256 Under section 3.01 of the FPA, each Provincial Commodity Board agrees to limit chicken production pursuant to the quotas:

3.01 In the fulfillment of their obligations under section 2.05, the Provincial Commodity Boards each agree:

(a) to limit the total quantity of chicken produced in their respective provinces, and marketed, to the quota allocation as determined from time to time by reference to this Agreement;

(b) to establish the minimum prices at which live chicken may be sold in their respective provinces; and

(c) in conjunction with CFC, to implement and maintain a coordinated system of quota allotment that is auditable by CFC, where the basic effects as between provinces are similar.

(emphasis added)

3.01 Dans le cadre de la réalisation de leurs obligations en vertu de l'article 2.05, chaque office de commercialisation provincial convient:

(a) de limiter la quantité totale de poulet produite et commercialisée dans leur province respective à l'allocation de contingents déterminée, de temps à autre, conformément au présent Accord;

(b) d'établir des prix minimums de vente du poulet vivant dans leur province respective;

(c) de mettre en oeuvre et de maintenir, en collaboration avec les PPC, un système coordonné d'allocation de contingents qui peut être vérifié par les PPC lorsque les effets de base entre les provinces sont similaires.

(nos soulignements)

257 Schedule B to the FPA is known as the Operating Agreement and its purpose is to set out the fundamentals of the operation of the marketing system for chickens.

258 Schedule B distinguishes "federal quota" from "provincial quota". It defines "federal quota" as "the quantity of chicken expressed in live weight that a producer is entitled to market in interprovincial and export trade in a period, and is allotted to the producer by the Provincial Commodity Board on behalf of CFC". This is different from the "provincial quota" defined as "the quantity of chicken expressed in live weight that a producer is entitled to market in intraprovincial trade in a period, and is allotted to the producer by the Provincial Commodity Board."

259 It appears, however, that the provinces adopt as the provincial quota the exact share assigned by the CFC. Justice Abella, in *Fédération des producteurs de volailles du Québec c. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292 (S.C.C.), acknowledged that this is the accepted practice in the industry. She states at paragraph 8 that "[e]ach provincial body ... adopts as its intraprovincial production quota the exact share federally assigned to it."

260 It is also accepted that the system provides for a granting of authority in respect of allotting federal quotas and administering them in accordance with the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36 (see subsection 2(1) of the *Chicken Farmers of Canada Delegation of Authority Order*, SOR/2003-274). This was recognized by Justice Abella in *Pelland*, where she wrote at paragraph 9 of the Court's decision that "[i]n order to facilitate the integration of production and marketing quotas, the federal body delegates its authority to regulate the marketing of chickens in interprovincial and export trade to the provincial body".

261 This regulatory scheme provides strict limitations on quotas. Section 9 of the *Canadian Chicken Marketing Quota Regulations* provides the following limits:

> **9.** The Provincial Commodity Board of a province must allot federal quotas to producers in the province in such manner that the aggregate of the following numbers of kilograms of chicken that is produced in the province, and authorized to be marketed, during the period referred to in the schedule will not exceed the applicable number of kilograms of chicken set out in column 2 of the schedulein respect of the province for that period:
>
> > (a) the number of kilograms of chicken authorized to be marketed by producers in interprovincial or export trade under federal quotas allotted on behalf of CFC by the Provincial Commodity Board;
> >
> > (b) the number of kilograms of chicken authorized to be marketed by producers in intraprovincial trade under provincial quotas allotted by the Provincial Commodity Board; and
> >
> > (c) the number of kilograms of chicken anticipated to be marketed by producers under quota exemptions authorized by the Provincial Commodity Board.
>
> (emphasis added)
>
> **9.** L'Office de commercialisation d'une province doit allouer des contingents fédéraux aux producteurs de cette province de manière que la somme des nombres de kilogrammes de poulet ci-après, exprimés en poids vif, qui sont produits dans une province et dont la commercialisation est autorisée au cours de la période visée à l'annexe, n'excède pas le nombre de kilogrammes de poulet, exprimé en poids vif, visé à l'annexe pour cette province, pour la période en cause:
>
> > a) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché interprovincial ou d'exportation, au titre des contingents fédéraux alloués au nom des PPC par l'Office de commercialisation de la province;
> >
> > b) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché intraprovincial, au titre des contingents alloués par l'Office de commercialisation de la province;
> >
> > c) le nombre de kilogrammes de poulet que les producteurs prévoient de commercialiser en vertu des exemptions de contingents autorisées par l'Office de commercialisation de la province.

(nos soulignements)

262 The schedule referred to in the above provision sets the quota allocation for an eight-week production period. The system provides for periodic adjustments to the schedule. We reproduce in Schedule B to these reasons a recent schedule issued covering the quota period of January 4, 2009, to February 28, 2009.

263 The FPA also provides for a specific quota allocation procedure (see sections 3.01 to 3.10 of the FPA) (the "quota allocation procedure") and for subsequent adjustments to the quotas set in the initial procedure (see sections 4.01 to 4.11 of the FPA) (the "quota adjustment procedure"). We will briefly review these two regulatory procedures.

(b) The quota allocation procedure

264 Section 3.02 of the FPA provides that, for six periods at a time, the CFC will establish the initial base for each province pursuant to a formula which takes into account the previous year's level. Each provincial commodity board may make a request to adjust the initial base allocation for one or more of the six periods provided that the adjustments for any period do not exceed 5% and the total of the bases for the six periods does not change (s. 3.03).

265 Further, prior to each period, each provincial commodity board also makes a written quota allocation request to the CFC in the following manner:

3.05 . . .

(a) in accordance with the procedures, if any, established pursuant to section 5.01 below, the Provincial Commodity Board will consult with its processors using a "bottom up approach and, having regard to the market requirements proposed by those processors will arrive at the estimated provincial market requirements prior to the submission of the quota allocation request for the period to CFC;

(b) in accordance with the procedures, if any, established pursuant to section 5.02 below, Provincial Commodity Boards in each region shall consider discussing market conditions and estimated market requirements in the region prior to the submission of the quota allocation request by each Provincial Commodity Board to CFC; and

(c) in submitting its quota allocation request to CFC for a period, each Provincial Commodity Board will provide to CFC the rationale for the request which will enable CFC to fulfill its obligations under the *Farm Products Agencies Act*, including those in section 23(2).

(emphasis added)

3.05 [...]

(a) l'office de commercialisation provincial consulte ses transformateurs, conformément à la procédure, s'il y en a une, qui est établie en vertu de l'article 5.01, en utilisant une approche « ascendante » et, après avoir examiné les besoins de marché proposés par ces transformateurs, estime les besoins du marché provincial avant de soumettre aux PPC la demande d'allocation de contingents pour la période;

(b) les offices de commercialisation provinciaux de chaque région envisagent de discuter, conformément à la procédure, s'il y en a une, qui est établie en vertu de l'article 5.02 ci-dessous, des conditions de marché et des estimations des besoins du marché dans la région avant de présenter la demande d'allocation de contingents aux PPC;

(c) lorsqu'il présente sa demande d'allocation de contingents aux PPC pour une période, chaque office de commercialisation provincial fournit aux PPC la justification de la demande, ce qui permet aux PPC de s'acquitter de leurs obligations en vertu de la Loi sur les offices des produits agricoles, y compris celles qui sont prévues au paragraphe 23(2).

(nos soulignements)

(c) The quota adjustment procedure

266 The Operating Agreement also sets out certain rules regarding adjustments to the quota allocation. Temporary changes to the regional range are possible in certain circumstances (see s. 4.02). For provinces in a region ("region" is defined in section 2.01 of the Operating Agreement), the regional range shall allow for quota allocation changes of up to 5%. An adjustment to the regional range, which is not temporary and which establishes a new regional range requires a special vote of the CFC (s. 4.01).

267 Further, section 4.07 provides that a provincial board may request a quota allocation that exceeds the provincial range for one or more periods to accommodate exceptional circumstances ("provincial range" means the percentage change from the base for a province for a period). Section 4.06 provides that "[f]or a province, the provincial range shall allow for quota allocation changes of up to eight (8) percent" and "[a]n adjustment to the provincial range, other than pursuant to section 4.07, requires a special vote" of the CFC.

268 What emerges from the above provisions of the FPA is that any adjustments to quotas are made provincially and/or regionally. The system provides for adjustments to be made on a "macro" level, that is, for all producers within a province or a region.

269 The evidence adduced before the Tribunal does not contradict the above summary of the supply management system. We note, in particular, the evidence of Mr. Feenstra in his reply affidavit, wherein he confirms that the "bottom-up" approach was implemented across Canada in or about January 1995. He further attests that during the period leading up to the new approach, processors had experienced shortages of chickens for so long and thought they could sell a lot more chicken. According to Mr. Feenstra, this shortage led to a recommendation to increase volumes and prices substantially. Mr. Feenstra further testified that the market could not handle the increase and that a significant oversupply of chickens resulted across Canada.

(2) Positions of the parties

270 The Applicant argues that the product here is in ample supply. It takes the position that the Respondents can and do raise enough chickens and just want to deprive the Applicant of them. It is argued that the purpose of paragraph 75(1)(*d*) is to ascertain whether the supplier, through no fault of its own, is unable to supply the Applicant with the product. Alternatively, the Applicant argues that the purpose of the supply management system as a whole is to ensure a match between supply and demand or, in other words, to ensure ample supply to meet consumer needs. The Applicant also relies on a statement made by Mr. Brodeur, who stated at the hearing that there is too much supply ("Il y a trop d'approvisionnement").

271 The Respondents argue that the product is not in ample supply. It is argued that ample supply must be assessed not in relation to the Applicant's need, but rather in relation to what is available in the relevant market or from the supplier from whom an obligation to supply is sought. The focus must be on the suppliers' capacity to offer product in the relevant market. The Respondents contend that live chickens are not generally a product in ample supply because the supply management system regulating the chicken industry expressly limits the quantities that may be supplied by producers in a given period. In the Respondents' view, this is the primary reason chickens are not available in ample supply.

272 Further, the Respondents argue that section 75 is not intended to apply to situations where a supplier's particular production capacity is limited, nor is it intended to oblige the Tribunal to arbitrate an agreement between customers who are seeking access to a limited supply of products. It is argued that the section provides for only one remedy, namely acceptance of the customer on usual trade terms. If the product were in ample supply, there would be no need for an order

stipulating a volume or to allocate supply, since the suppliers in the market would have available capacity to meet the needs of the person who has been refused supply. Conversely, the Respondents maintain that if, in order to accomplish its purpose, an order should need to specify a volume to ensure supply to a customer at the expense of another, the product then would not be in ample supply, and the conditions of section 75 would not have been met.

273 Finally, the Respondents maintain that it does not matter whether the product is no longer available because it is reserved for an innocent third party, as in *Quinlan's*; or whether it is no longer available by reason of a business decision by the Respondent Westco to vertically integrate its operations. The supplier simply does not have "ample supply" of the product because there is no excess capacity available to meet the demand.

(3) Analysis

(a) Meaning of "ample supply"

274 Defining "ample supply/quantité amplement suffisante" in the context of paragraph 75(1)(*d*) is essentially a question of legal interpretation. It is now accepted law that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.)).

275 The word "ample" is defined by both the *Canadian Oxford Dictionary* (2004) and *Webster's Encyclopedic Dictionary of the English Language* as plentiful, abundant, extensive and more than enough. *Le Petit Robert de la langue française* (2006) defines "amplement" as "abondamment" and "en allant au-delà du nécessaire". This is to be contrasted with the word "adequate" found in paragraph 75(1)(*a*), which is defined by the *Canadian Oxford Dictionary* as sufficient, satisfactory, and barely sufficient. The *Webster's Encyclopedic Dictionary of the English Language* defines "adequate" as equal to or sufficient for a special requirement.

276 A different meaning of "supply" was therefore intended in each paragraph. In its grammatical and ordinary sense, ample therefore means more than a sufficient or adequate supply. It means supply available in abundance or to the point that it is considered to be excessive. Ample or abundant supply must then be considered in the context of the object and scheme of the Act, the object of the particular provision, and the intention of Parliament.

277 The purpose of the Act is set out in section 1.1. It essentially provides that the purpose of the Act is to maintain and encourage competition in Canada. It includes, among other objectives, doing so in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and in order to provide consumers with competitive prices and product choices.

278 In *Xerox*, the Tribunal had occasion to consider the constitutionality of section 75 of the Act. In finding the provision to be within Parliament's legislative authority and constitutionally valid, it commented on the purpose of the provision. At page 78 of its decision, the Tribunal wrote:

> Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI.

279 We agree with the above characterization of the objective of the provision. The goal of promoting and maintaining competition is also reflected in the scheme of the Act. The scheme under section 75 of the Act provides for certain conditions which, when met, render a refusal to deal, an otherwise legal act, a reviewable practice. Two of these conditions make express reference to competition being affected. In paragraph 75(1)(*b*), it must be established that there is insufficient competition among suppliers in the market, and paragraph 75(1)(*e*) requires that it be shown that the refusal to deal is having or is likely to have an adverse effect on competition in the market. Therefore, a refusal's impact on competition is a central focus of the provision. Once it is established that competitive forces are hindered by the

refusal or the lack of access to supplies, the Tribunal may, pursuant to section 75 of the Act, order that one or more suppliers of a product in a market accept the Applicant as a customer on usual trade terms. As stated by the Tribunal in *Xerox*, the effect of the remedy under section 75 is to open up channels of distribution and free competitive forces hindered by lack of access to supplies.

280 The term "ample supply" must be interpreted harmoniously with the above discussed purpose of the Act and scheme. Supply is not ample when suppliers generally would be inhibited from growing or even changing the nature of their business, or be forced to ration supplies between current and potential future customers because supply is limited. A product is in ample supply when its availability is not in issue when a supplier considers whether to develop its business by seeking new customers and/or new distribution channels, such as involvement in the downstream processing market.

281 A remedy under section 75 would not be available in circumstances where a refusal to supply was caused by reason of a shortage of supply in general as a result of a strike, scarcity of raw materials, or by reason of an upstream supplier going out of business. In such circumstances, supply is constrained by reason of factors beyond anyone's control. As a consequence, a supplier is unable to meet demand in the market, by reason of supply being limited. It follows that the product is therefore not in ample supply. This view finds support in the 1974 transcripts of committee proceedings before the House of Commons when Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl.) was being debated. The issue being debated was a refusal where the product was in short supply. The following question was put to the minister responsible, followed by his response:

> Mr. Frank: Mr. Chairman, Mr. Minister, unfortunately I do not have the legal mind that most members of this committee apparently have and this disturbs me to some degree, to the effect that, when this bill gets passed, if it ever does, just what in actual fact may happen.

> To clarify one particular area, which, no doubt, you can adjust to suit other areas: in the fertilizer business back in the winter, there was some degree of concern at the lack of products for dealers to sell. As a specific example, a company that supplied dealers went out of business and the dealers that were supplied by them naturally could not have the product unless they were able to acquire it from other manufacturers.

> At that particular time, the other manufacturers felt that they wanted to protect their dealers and make sure that they were not shorting them. Consequently, they refused to sell to these dealers that had unfortunately found themselves ex-customers of this other company. Now, would this particular area here change that particular picture? In other words, would it make it necessary for these manufacturers to sell to dealers that they had not supplied before?

> Mr. Gray: No, because in the situation you have outlined it would appear that the product in question was not in ample supply, and in order for the Commission to make an order requiring a supplier to supply somebody, it would have to find that the product was in ample supply.

> (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 29th Parl. 2nd Sess., No. 9 (April 30, 1974) at 9:34)

282 Bill C-7 died on the order paper, but the provision at issue was eventually brought back under a different bill. The above exchange is therefore relevant and would appear to support an intention by the minister to have the provision apply only where there is evidence of ample supply of the product in the market. What is also suggested is that in cases where product is in short supply, a supplier would not be required to ration limited supplies of a product in a manner that prevents existing customers from obtaining the quantities they wish to purchase.

283 The above factors support a definition of "ample supply" consistent with that articulated by the Tribunal in *Quinlan's*. The words "ample supply", read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, are meant to deal with

situations in which the product is in ample supply, in the sense that suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing customers.

(b) Are "live chickens" a product in ample supply in the circumstances of this case?

284 As can be observed from the above review of the supply management system for live chickens in Canada, the system as structured does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment mechanism designed to strike a balance between chicken production and consumer demand. Essentially quotas are adjusted by the CFC when consumer demand for chicken increases or decreases. This is measured by what industry participants refer to as a "bottom-up" process which starts when processors gauge changes in consumer demand for chicken. According to Mr. Brodeur, any increase in demand translates into a corresponding increase in what is known as the "meat margin". The "meat margin" measures the difference between the minimum board prices for live chickens set by the provincial marketing board and the aggregate of the prices paid for processed chickens at both the primary and secondary stages of transformation. These prices are not regulated and are set by market forces. Therefore, when the prices for processed chickens either rise or fall, the "meat margin" increases or decreases. This reflects an increase or decrease in consumer demand. It is when the "meat margin" exceeds historic levels that the CFC is led to conclude that supply and demand for chickens in Canada is not in equilibrium, and as a result there is a need to increase production quotas in order to satisfy increased consumer demand. The evidence indicates that, historically, such an adjustment has served to reduce prices at both the wholesale and retail levels. The converse is also true. When the "meat margin" is below historic levels, quotas may be reduced. As seen above, such adjustments in quotas, if any, can only occur at the end of an eight-week production period.

285 We are satisfied that the above review of the supply management system in Canada as it relates to chickens properly reflects the system under which the parties to this application are operating and were operating at the time of the filing of the application. It is a system that does not allow for an immediate or timely response to changes in market conditions as would be the case in an unregulated market.

286 The system in place provides for supply to be adjusted at the "macro" level. Quotas may be increased nationally and even on a provincial level as a result of increased consumer demand. However, under the system, there is no assurance that a particular supplier who wishes to increase production can obtain the increased quota that it needs to meet its business plan. Indeed the evidence of Mr. Feenstra indicates that adjustments in the system are made across the system and that an increased quota over a previous period is divided up on a pro-rata basis between each existing producer. That is of little assistance to individual producers who wish to accommodate additional customers.

287 Under the system, aggregate supply is maintained at adequate levels to meet consumer demand. The level of supply is essentially fixed for any given period. Increases in quotas are made only after the market data is computed and assessed at various levels of administration in the system for a given period. When quotas are adjusted, they are adjusted on an aggregate basis and distributed on a pro-rata basis among existing producers. This takes time, and in the meantime, a producer is unable to increase production to meet increased demand. A producer can only supply more if it acquires production quotas from another producer, and processors can only increase capacity and grow in the market by obtaining additional supply by accessing supply that is destined for another processor, since total supply is limited by the system.

288 As can be seen from the above review of the supply management system, the main focus has been to ensure stability and a reasonable rate of return for producers and an adequate supply for consumers. Indeed, on the latter point, the Marketing Plan issued under Order I of the Chicken Farmers of New Brunswick (see Schedule C) uses such language. The plan provides that one of its objects is to ensure that there is "adequate supply of New Brunswick grown chicken available to the consumer". Under the supply system as discussed above, the product cannot be said to be in ample supply, in the sense that it is available on a timely basis to individuals wishing to expand or develop their businesses. This is a consequence, in particular, of the time lag required for an adjustment in aggregate supply and of the apportioning of any adjustment among all suppliers.

289 In accordance with the definition of "ample supply" set out earlier in these reasons, and in the circumstances of this case, its follows that the product, live chickens, cannot be said to be in ample supply as that term is understood for the purposes of paragraph 75(1)(*d*) of the Act.

290 The Applicant further argues that "(s)ubsection 75(1)(d) cannot be interpreted so as to permit the malefactors to profit from their own misconduct". The Applicant maintains that the Respondents "embarked on a deliberate and conspiratorial course of conduct, as far back as August 2006, whose sole purpose and object was to attempt to force an improvident sale of the Nadeau Plant". In support of its argument, the Applicant relies on evidence adduced by different witnesses which indicates that the Respondents were strategizing to acquire the St-François Plant at below market value by threatening to cut off supply to the Applicant if it was not prepared to sell. A number of e-mails and other correspondence were adduced in evidence, including exchanges between the Respondents and their respective officials that support elements of the Applicant's allegation.

291 As stated earlier, the Respondents argue that the prime reason that motivated their decision to refuse supply to the Applicant is their decision to have their birds processed by Sunnymel. This would allow for continued vertical integration of Westco's enterprise. In essence, the Respondents say that it was no more than a business decision.

292 We are of the view that we need not decide whether the Respondents' conduct, which led to its decision to terminate supply to the Applicant, is misconduct, as alleged by the Applicant, or tough negotiations motivated by a business decision, as argued by the Respondents. In our view a determination is not necessary in the circumstances because of our above finding that there is not "ample supply" of chickens in the market. In the context of a section 75 application, for a remedy to be available, all the requirements in subsection 75(1) must be met.

293 We now turn to the final requirement under subsection 75(1) and consider whether the refusal is having or is likely to have an adverse effect on competition in a market.

F. Has the Applicant established that the refusal to deal is having or is likely to have an adverse effect on competition in a market pursuant to paragraph 75(1)(e) of the Act?

294 Under paragraph 75(1)(*e*), the market of concern is different from the market defined for the purposes of paragraph 75(1)(*a*). Our analysis will involve the "downstream market". We will begin by defining this market, which includes defining the relevant product market and the relevant geographic market.

(1) Relevant product market

295 Neither party disputes that the product market includes processed chicken. The only question is whether "further processed chicken" and "air-chilled chicken" constitute separate and distinct product markets. The parties adopt different approaches to this question.

296 In its Pleadings, the Applicant states that the refusal to deal is likely to have an adverse effect on competition "at various levels of the market for chicken". The Applicant's final submissions also refer to "sub-markets". Dr. Ware refers to both the market for "processed chicken" and the "market for further processed chicken" in his reports. In his examination in chief, Dr. Ware stated that there can be subcategories within the broad category of processed chicken such as air-chilled chicken, but said that he "didn't have even close to adequate data" that would allow him to make that identification. He also stated, however, that the market for further processing of chicken constituted another product market in this case.

297 The Respondents assert that the relevant product market is processed chicken. Ms. Sanderson's report also refers to "processed chicken". In cross-examination, when asked whether air-chilled products are different from water-chilled products, Ms. Sanderson stated the following:

> They may be different products, but they may be part of the same relevant product market. So for example, because this happens with differentiated products, it may be the case that you're unable to increase the price of an air-chill product by a substantial amount, because if you were to do that, customers will substitute to water-chill products. If there's sufficient substitution possibilities between those products at a market level, then they might be part of the same relevant product market even though they're distinguished from each other.

298 With regards to air-chilled chicken and water-chilled chicken, we acknowledge, as did Dr. Ware, that they may well be "subcategories for processed chicken". However, there is insufficient evidence on the record to support a conclusion that they are separate product markets.

299 We come to the same conclusion with respect to further processed chickens. There is a paucity of evidence on this issue. Counsel for the Applicant acknowledged that stakeholders do not always agree on the definition of "further processing". This disagreement may lie in the fact that there are different types of further processing operations such as boning, cutting, and cooking. Mr. Donahue referred to different "grades of further processing" and responded as follows in cross-examination when asked about the Applicant's processing operations: *[CONFIDENTIAL]*

300 Dr. Ware described the product market for further processed chicken as "basically anything that happens to the chicken after it's been killed and possibly cut up". However, without further evidence, we are unable to conclude on the record before us that further processed chicken constitutes a separate product market.

301 We therefore find that the product market for the purpose of paragraph 75(1)(*e*) is processed chicken. We agree that further processed chicken forms part of the same relevant product market in the circumstances.

(2) Relevant geographic market

302 The parties disagree on the definition of the relevant geographic market. The dispute turns on whether Ontario or parts of Ontario should be included in the geographic market.

(a) Positions of the parties

303 In its Pleadings, the Applicant submits that the relevant geographic market for the purposes of paragraph 75(1)(*e*) is Quebec and the Maritimes. In its submissions, however, the Applicant takes the position that provincial boundaries are artificial boundaries and distances itself from a formal definition of the geographic market. When asked about the Applicant's submissions concerning the relevant geographic market, counsel for the Applicant stated:

> All right. In my argument I don't look at geographic. I think if you remember Dr. Ware said, he said provincial boundaries are somewhat artificial lines that are drawn and they may not be relevant for the purpose of the market analysis. Because the real question is, is what is the market that's affected?
>
> . . .
>
> My point though is that in trying to draw — I submit that it's somewhat artificial to use geography as the defining characteristics of the behaviour of a market where the element that is concern is the impact, wherever it may fall, of the particular behaviour. We have to look at the impact of the behaviour wherever it may fall, and if it falls within three miles of Toronto, fine, but if it falls 1,000 miles away it's still relevant for the purpose of the 75(1)(e) analysis.

304 Dr. Ware did express the view that relevant markets need not necessarily coincide with provincial borders. Using provincial boundaries, however, he found that the "best definition" of the geographic market is one that consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island.

305 The Respondents are of the view that the relevant geographic market is the region comprising Ontario, Quebec and the Maritimes.

(b) Analysis

306 Dr. Ware is of the opinion that the hypothetical monopolist test should be used to define the relevant geographic market, but expresses the view that the data are insufficient to determine the precise boundaries of the market pursuant to such a test:

> My conclusion was, and is, that the geographic market for processed chicken is likely — well, let me put it this way, well described by the boundary of Quebec, New Brunswick and the maritime provinces, not including Newfoundland, but it's certainly smaller than the boundary of those same provinces and the Province of Ontario. That's my conclusion. The reason — so my reasoning that I have used in reaching this conclusion is indirect. It's indirect because, as I said, I don't have the ability — I mean, what I need to do to make a formal precise conclusion of that kind is I need to — I need to actually estimate the ability of a hypothetical monopolist who controlled the supply within Quebec, New Brunswick and the other maritime provinces too if they were to act as one to increase the price. That would give me the answer. That would give me a precise answer, but I don't have the ability to do that. I need a lot of data on demand elasticities and supply, behaviour of all the relevant producers. I don't have that information, but I do have indirect information and there are various indirect indicators that one can use to assess whether or not the geographic market is, in a sense, broad or relatively narrow. And, again, I do stress that because this is both a spatially and a product differentiated market, that geographic market definition is going to be a rather fuzzy sort of concept because if you have — you know, clearly these producers are separated by space. We're talking about a lot of territory here.

307 Instead, Dr. Ware therefore relies on indirect indicators, namely (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of Nadeau's products; (2) concerns expressed by Nadeau's customers regarding its possible exit from the market; (3) the apparent clustering of processors; (4) transportation costs; (5) price relationships between different geographic areas as described in the *Merger Enforcement Guidelines*; and (6) the regulatory limitation of the aggregate supply of chickens available to the market.

308 Ms. Sanderson is not explicit about the test she uses to define the geographic market. The evidence on which she relies includes (1) Nadeau's and Olymel's historic shipping patterns; (2) shipping distances; (3) transportation costs; and (4) price comparisons.

309 While the usual approach to market definition under paragraph 75(1)(*a*) is based on the ability of the applicant to substitute in favour of alternative service or material inputs without being substantially affected, the Tribunal clarified in *B-Filer*, as mentioned earlier in these reasons, that the approach need not be the same under paragraph 75(1)(*e*):

> [78] In our view, while the addition of paragraph 75(l)(*e*) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(l)(*a*). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(l)(*e*) need not be the market of concern in paragraphs 75(l)(*a*) and 75(l)(*b*), the market that best suits the particular context and purpose of 75(l)(*e*) can be separately considered when considering that paragraph of the Act.

310 Therefore, the conventional hypothetical monopolist approach to market definition which, in essence, relies on the practical indicia suggested in the *Merger Enforcement Guidelines*, can be used under paragraph 75(1)(*e*).

311 Both the Applicant and the Respondents ultimately make use of the practical indicia suggested in the *Merger Enforcement Guidelines* and commonly used in connection with geographic market definition in merger cases to support their proposed market definitions. Practical indicia include transportation costs, price relationships, shipping patterns and trade views.

312 Our approach to determining the relevant geographic market will involve considering the above-mentioned practical indicia as well as the following indicators suggested by Dr. Ware: (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of the Applicant's products; (2) concerns expressed by the Applicant's customers regarding the Applicant's possible exit from the market; (3) the apparent clustering of processors; and (4) the regulatory limitation of the aggregate supply of chickens available to the market. We will consider each of these indicators in turn.

(i) The predicted effect of a hypothetical Nadeau/Olymel merger

313 Dr. Ware is of the opinion that an Olymel/Nadeau merger would result in an increase of approximately *[CONFIDENTIAL]*% in the price of processed chicken. *[CONFIDENTIAL].* On the assumption that the geographic market would consist of Ontario, Quebec and the Maritimes, Nadeau would hold a 7% market share in such a market. Dr. Ware reasons that a "7% market share" is not sufficient to produce a price increase of nearly 2% and concludes that these data point to a narrower geographic market.

314 Ms. Sanderson notes that the *[CONFIDENTIAL]*. She adds that Dr. Ware did not question the Nadeau management team's belief or provide any analysis to support the *[CONFIDENTIAL]*% price increase upon which he founded his opinion. She also notes that Olymel's managers, "who are in a more informed position to assess Olymel's ability to raise prices to Olymel customers should the Partnership acquire the St. François facility", did "not identify price increases as part of their internal valuation of the acquisition".

315 We note that the Projet Westco Report indicates that *[CONFIDENTIAL]*. While this may represent Olymel's view, this does not necessarily imply either higher prices in general or a *[CONFIDENTIAL]*% price increase in particular.

316 We are also of the view that Dr. Ware's opinion regarding the effect of a hypothetical merger on the price of processed chicken is of little assistance in determining the geographic market. Dr. Ware's market share analysis is incomplete in its own terms in that it does not appear to take into account the combined market share of the merging parties. Further, apart from the belief of the Applicant's management team reflected in the Robinson Report, there is simply no explanation to support the conclusion that the merger would result in a *[CONFIDENTIAL]*% price increase.

(ii) Concerns expressed by the Applicant's customers

317 As a second indicator, Dr. Ware cites the concerns of some of the Applicant's customers that prices would increase and service would deteriorate if the Applicant were to cease to be a competitor. He points, for example, to a letter written by Ms. Goodz, the president of Riverview, who wrote that "[i]f the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur". Dr. Ware is of the opinion that these customers would not be concerned if the geographic market were broader, that is, if it included Ontario processors; the fact that these customers expect prices to rise and supplies to be restricted indicates that the geographic market is significantly smaller.

318 In her report, Ms. Sanderson closely examines each of the letters cited by Dr. Ware and notes that in many cases, alternative sources of supply exist.

319 Complaints by customers will be dealt with more comprehensively later in these reasons when we consider the adverse effect on competition. In the absence of further corroborating evidence to support complaining customers' concerns about price increases and supply shortages, very little can be concluded in terms of their impact on geographic market definition.

320 First, as pointed out by Ms. Sanderson, many of the complaining customers did not investigate alternative sources of supply in the event the Applicant is unable to continue supplying chickens. This was the case of the general manager of UPGC, also Priszm's chief purchasing officer, who admitted in cross-examination that he had not sought out other sources of supply.

321 Second, there is no evidence to establish the relative importance of these complaints in respect to the geographic definition of the market. For instance, Puddy, one of the largest complaining customers, is located in the Greater Toronto Area and is closer to Ontario processors and Quebec processors than it is to the Applicant. Consequently, Puddy's complaint does not point to a narrower geographic market.

322 On the evidence, it is difficult to assess the relative importance of customers' complaints and concerns. Many of the complaints are not based on the geographic proximity of competing suppliers. For these reasons we find this indicator to be of little utility in determining the geographic market and consequently conclude that no inference can be drawn for defining the geographic market.

(iii) The apparent clustering of processors

323 Also regarded as being instructive by Dr. Ware is a map of Eastern Canada (Figure 1 in his Expert Report) that appears to show that there is a cluster of processors around the Toronto area. Dr. Ware testified that:

> ...there are two distinct clusters of poultry processing plants in Eastern Canada. Given the significance of transportation costs, the cluster of processing plants west of Toronto are unlikely to be part of the same market as those in Quebec, New Brunswick and Nova Scotia (the plant in Newfoundland is supplied by, and supplies to, only Newfoundland).

324 While admitting that this was not a "super scientific approach", he stated that these clusters illustrate "a kind of density of economic activity that they are more likely - the ones close together - are more likely to be in the same geographic area than the ones that are further away".

325 While Dr. Ware's definition of clustering is somewhat vague, we accept the general proposition that plants that are close together are more likely to be in the same geographic market than plants that are further away from each other. There are, however, many factors (such as the availability of the requisite inputs) that bear on the location of plants. Whether plants in different locations are in the same geographic market depends on the characteristics of the product concerned, in particular, the distance over which it can be shipped economically. Looking at plant locations is simply the starting point of the analysis required to determine the boundaries of the geographic market. In the circumstances, this indicator is of little assistance in defining the geographic market.

(iv) Regulatory limitations

326 At paragraph 23 of his first report, Dr. Ware also suggests that another reason why geographic markets for processed chicken are smaller than might be expected from their basic manufacturing characteristics is because the supply elasticities for live chickens are kept low by supply management policies. If the price of processed chicken rises in one area, potential importers will have to bid chicken away from consumers in other areas.

327 Ms. Sanderson responds that the inelasticity of the supply of live chickens is common throughout Canada and that there is no reason to believe that it is possible to distinguish Quebec and the Maritimes from Ontario or the rest of Canada on this basis.

328 It is true that under the marketing board regime, additional chickens can be shipped to one geographic area only by diverting them from another, but this is also true within individual provinces. We therefore agree with Ms. Sanderson that there is no reason to distinguish Quebec and the Maritimes from Ontario on this basis.

(v) Transportation costs

329 In his first report, Dr. Ware relies on the Projet Westco Report to conclude that the Applicant's transportation cost for processed chicken is $*[CONFIDENTIAL]*/kg. In her expert report, Ms. Sanderson states that if the transportation cost is $*[CONFIDENTIAL]*/kg, it is less than *[CONFIDENTIAL]*% of the average price of processed chicken; she

therefore notes that large shipments of processed chicken can be made over substantial distances because of low transportation costs. In this regard, she testified that the analysis should focus on the cost to ship processed chicken relative to the price, rather than the cost of processed chicken.

330 At paragraph 20 of his reply report, Dr. Ware points to data on sales for quota period A-76 to conclude that the average transportation cost as a proportion of the sale price is not *[CONFIDENTIAL]*%, but rather *[CONFIDENTIAL]*%. Prior to the hearing, Westco objected to paragraph 20 and other paragraphs of Dr. Ware's reply report on the basis that it failed to constitute a proper reply to Ms. Sanderson's report. In an order dated November 7, 2008, the Tribunal held that the evidence would be admitted; Westco was granted the latitude to address this issue at the hearing (see *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 31).

331 Dr. Ware testified that transportation costs matter because customers say they matter and because the figure of *[CONFIDENTIAL]*% is significant. He failed, however, to explain the significance of *[CONFIDENTIAL]*% or to point to any customer who stated that transportation costs matter *per se*.

332 In her examination in chief, Ms. Sanderson testified that the figure of *[CONFIDENTIAL]*% is incorrect, as it is the result of an error in the sales data on which Dr. Ware relied. She found that transportation costs for Nadeau averaged *[CONFIDENTIAL]*% of its sales revenue of 2007. Ms. Sanderson testified that it is significant that transportation costs are less than 5% of the price of the product because this would allow competitors to undercut a 5% price increase by a hypothetical monopolist.

333 We agree with Ms. Sanderson that Nadeau's average transportation cost was *[CONFIDENTIAL]*% of the average price of its products in 2007. As an average, however, it does not tell us what the fixed component (loading and unloading) of transportation costs is and how the variable component of transportation costs increases with distance. As a consequence, it does not speak conclusively to the boundaries of the geographic market. Nevertheless, Nadeau's average transportation cost does reflect the cost of relatively large shipments in excess of 1,000 km because we know that one of the Applicant's largest customers, *[CONFIDENTIAL]*, is located in Mississauga, Ontario. The evidence that the Applicant's transportation costs for processed chicken averaged *[CONFIDENTIAL]*% of the price of its products certainly implies that transportation costs are not prohibitive even over significant distances. It could also imply that transportation costs would not prevent an Ontario processor from undercutting a 5% price increase by a New Brunswick or Quebec producer and vice versa. The stated 5% price increase refers to the hypothetical monopolist test as articulated in the *Merger Enforcement Guidelines*[2] .

2 Sections 3.5 and 3.6 of the *Merger Enforcement Guidelines* state as follows:

3.5 The market definition analysis begins by postulating a candidate market for each product of the merging parties. For each candidate market, the analysis proceeds by determining whether a hypothetical monopolist controlling the group of products in that candidate market would be able to impose a five per cent price increase assuming the terms of sale of all other products remained constant. If the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the postulated candidate market is not the relevant market, and the next-best substitute is added to the candidate market. The analysis then repeats by determining whether a hypothetical monopolist controlling the set of products in the expanded candidate market would be able to profitably impose a five per cent price increase. This process continues until the point at which the hypothetical monopolist would impose and sustain the price increase for at least one product of the merging parties in the candidate market. The smallest set of products in which the price increase can be sustained is defined as the relevant product market.

3.6 The same general approach applies to assessing the geographic scope of the market. In this case, an initial candidate market is proposed for each location where the merging parties produce or sell the relevant products. <u>As above, if buyers are likely to switch their purchases to sellers in more distant locations in sufficient quantities to render a five per cent price increase by a hypothetical monopolist unprofitable, the location that is the next-best substitute is added to the candidate market. This process continues until the smallest set of areas over which a hypothetical monopolist would impose and sustain the price increase is identified</u>.

(emphasis added)

(vi) Price comparisons

334 The expert economists make a variety of price comparisons, none of which are entirely satisfactory.

335 At paragraph 21 of his initial report, Dr. Ware refers to paragraph 3.25 of the *Merger Enforcement Guidelines*, which states that "[e]vidence that prices in a distant area have historically either exceeded or have been lower than prices in the candidate geographic market by more than transportation costs may indicate that the two areas are in separate relevant markets, for reasons that go beyond transportation costs". He then compares retail prices for various cuts of processed chicken in Ontario, Quebec and New Brunswick because wholesale price data are sparse. Dr. Ware finds that retail prices of processed chicken are higher in New Brunswick than in Ontario and assumes that this implies that wholesale prices are also higher.

336 In her report, Ms. Sanderson notes that a review of the retail price data for the products set out in Dr. Ware's report shows that the average retail price for those products is $*[CONFIDENTIAL]*in Ontario, $*[CONFIDENTIAL]*in Quebec, and $*[CONFIDENTIAL]*in New Brunswick, making average prices 17% lower in Ontario and 20% lower in Quebec than in New Brunswick. At first glance, this would mean that Quebec is not in the same market as New Brunswick and that therefore Quebec-based Olymel does not compete with the Applicant. Ms. Sanderson finds that such a conclusion is nonsensical and that conclusions of this type cannot be drawn from retail price comparisons. *[CONFIDENTIAL]*.

337 In his reply report, Dr. Ware uses another source of data to construct average wholesale prices for the Applicant's sales by province. Dr. Ware conducts an analysis of Nadeau's 2007 sales and finds that when the analysis is confined to products sold in all three provinces, the weighted average wholesale price was $*[CONFIDENTIAL]*in Ontario, $*[CONFIDENTIAL]*in Quebec and $*[CONFIDENTIAL]*in New Brunswick. *[CONFIDENTIAL]*.

338 At the hearing, Ms. Sanderson produced a price comparison of the average Ontario, Quebec and New Brunswick prices of the Applicant's five biggest-selling products in Ontario. Ms. Sanderson testified that these top five products represent *[CONFIDENTIAL]*% of the Applicant's sales in Ontario. Her bar graph is reproduced as Table 1 below.

Table 1

[CONFIDENTIAL]

339 Ms. Sanderson stated that this comparison shows that the prices are basically the same. *[CONFIDENTIAL]*.

340 During her cross-examination, Ms. Sanderson agreed that *[CONFIDENTIAL]* of the *[CONFIDENTIAL]*products sold in all three provinces were priced higher in New Brunswick than in Ontario. Further, *[CONFIDENTIAL]* of the *[CONFIDENTIAL]* products were priced higher in New Brunswick than in both Quebec and Ontario. Ms. Sanderson stated that this was consistent with the weighted average price being *[CONFIDENTIAL]* in New Brunswick than in Ontario.

341 Both experts agreed that a comparison of the Applicant's weighted average wholesale prices of products sold in all three provinces, Ontario, Quebec and New Brunswick, in 2007 was the most informative. As mentioned above, the comparison was confined to *[CONFIDENTIAL]* products sold in all three provinces. The results were as follows: Ontario, $*[CONFIDENTIAL]*/kg; Quebec, $*[CONFIDENTIAL]*/kg; and New Brunswick, $*[CONFIDENTIAL]*/kg. The Applicant's weighted average price in Ontario was *[CONFIDENTIAL]* and its price in Quebec *[CONFIDENTIAL]* than in New Brunswick during 2007.

342 The extent to which the observed differences in the weighted average prices are due to differences in the mix of products sold in each province and to the average size of the customers in each province is unclear. The same is true of

the extent to which these averages might vary from year to year. The above data support the contention that differences amongst the three provinces are relatively small. There is no expert evidence on price differentials that would allow for any inference to be drawn with respect to the relationship between prices in Prince Edward Island and Nova Scotia and the remainder of the market.

343 With respect to the differences between New Brunswick and Quebec prices, the Applicant has already defined New Brunswick and Quebec as being in the same geographic market. The observation of price differences between New Brunswick and Quebec merely serves to emphasize that there is a certain amount of underlying price variability within a geographic market.

(vii) Shipping Patterns

344 In Ms. Sanderson's view, processed chicken can be shipped economically for considerable distances. She notes that the Applicant's revenues from sales in Ontario account for *[CONFIDENTIAL]*% of the Applicant's sales revenues whereas the Applicant's revenues from sales in New Brunswick and Nova Scotia account for *[CONFIDENTIAL]*% and *[CONFIDENTIAL]*% respectively of the Applicant's sales revenue. She states that the Applicant's furthest Ontario customer is located *[CONFIDENTIAL]*km from the St-François Plant. Relying on the Applicant's customer data for quota period *[CONFIDENTIAL]*, she concluded that the Applicant makes frequent and large shipments of processed chicken every day to very distant customers, including customers based in Ontario. In her opinion, the fact that the Applicant can profitably ship processed chicken to Ontario is clear evidence that Quebec and Ontario processors can profitably ship to customers located in New Brunswick and Nova Scotia.

345 Ms. Sanderson also finds that the Applicant's customers based in Quebec and Ontario have access to alternative nearby processors and that in many instances, the closest processing facility is not the Applicant's plant.

346 She adds that Olymel makes *[CONFIDENTIAL]*% of its sales in Ontario and that over *[CONFIDENTIAL]*% of those sales are made to customers located in the Greater Toronto Area. Ms. Sanderson concludes that, given that Olymel can profitably ship processed chicken 475 km to Toronto, Ontario processors could profitably ship their products the same distance in the other direction:

> ... it is self-evident that Ontario-based processors in the GTA can also profitably ship product to Montreal and throughout Quebec, which they do. Consequently, the prices that Olymel charges to its Quebec customers are influenced by competition from Ontario processors and as a result, Nadeau's prices to its Quebec customers are also influenced by Ontario processors given the competition that exists between Nadeau and Olymel for sales in Quebec.

347 In cross-examination, Ms. Sanderson conceded that she had no direct evidence of Ontario processors' shipping their products to customers in New Brunswick. She also agreed that Olymel does not have significant sales in New Brunswick. In her report, Ms. Sanderson stated that Olymel makes more sales to customers in the western provinces than it does to customers in the Maritimes.

348 We find the fact that Olymel sells only a small amount of processed chicken in New Brunswick does not support the position that Ontario is not part of the relevant market. Dr. Ware has defined the relevant market to include both New Brunswick and Quebec so that the lack of sales by Olymel (a Quebec-based processor) in New Brunswick merely emphasizes that a producer in a relevant geographic market need not have sales in every part of it at all times.

349 It is not disputed that the Applicant ships processed chicken to Quebec and Ontario and that Olymel also does so. There is some evidence that processed chicken is shipped from Ontario to Quebec and the Maritimes. Mr. McHaffie testified that Ontario-based Puddy delivers to *[CONFIDENTIAL]*.

350 The Brodeur affidavit states that Olymel buys 210,000 birds per week from other primary processors but that the great majority of these purchases are from Exceldor. Mr. Brodeur states that Olymel has purchased chicken for

further processing from Ontario processors such as Maple Leaf and from the United States. Ms. Goodz testified that *[CONFIDENTIAL]*.

351 Mr. Brodeur testified that McDonald's chicken nuggets are all made in Ontario and that Costco in Ontario is supplied by Exceldor.

352 Based on the above evidence, we find that processed chicken can be and is shipped profitably for fairly long distances, over 1,000 km in one major instance. A considerable fraction of Nadeau's and Olymel's sales are in Ontario's Toronto area. Olymel ships some processed chicken products further still. While there is no reason to believe that processed chicken could not be shipped equivalent distances to customers east of Ontario, there is less evidence of such shipments.

(viii) Trade views

353 In her expert report, Ms. Sanderson relies on the Serecon Report to the effect that Nova Scotia must compete in a national chicken market despite being located in a high-cost region. The Serecon Report refers to the fact that current production in Nova Scotia exceeds consumption within the province and that this is why "NS chicken has to compete with production from outside the region not only in NS but also in Quebec and Ontario".

354 In cross-examination, Mr. Feenstra agreed that the Applicant competes with Ontario and Quebec processors for its business in the Greater Toronto Area and that it competes with Ontario processors that want to sell into Quebec for the Quebec business. During his examination for discovery, he stated that "[p]rocessed product travels across the country back and forth all the time".

355 A number of witnesses testified that they consider Ontario and Quebec to be in the same market. Mr. McHaffie stated that "Ontario processors can sell into Quebec at their whim and Quebec processors can sell here at their whim". Mr. Brodeur expressed the view that Quebec and Ontario constitute a single market. Mr. Ellis stated that Sunchef competes with processors in Ontario and Quebec.

(ix) Analysis and conclusion

356 It is not disputed that Quebec and Ontario are in the same geographic market. Counsel for the Applicant conceded this:

> We have not suggested that Ontario and Quebec are not in the same market with each other. There's no question that there's competition between Ontario and Quebec. And you heard Mr. Lefebvre talk about a central Canada market. That's right through the evidence, not just of our witnesses but of all of them. Ontario and Quebec compete with each other.
>
> The issue, in my respectful submission, for this Tribunal is not that at all, not this issue, but rather the issue as to whether there is competition between Ontario and New Brunswick, because the question was whether the scope of the geographic market — we, as I told you at the outset, accept that it's New Brunswick and Quebec. The question is does it extend as far as Ontario?

357 As mentioned above, Dr. Ware finds that the relevant geographic market consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Ms. Sanderson is of the opinion that the relevant market consists of Ontario, Quebec and the Maritimes. The experts thus agree that New Brunswick and Quebec are in the same market. Further, the Applicant concedes that Quebec and Ontario are in the same market. If Ontario and the Maritimes are both in the same market as Quebec, it is difficult to escape the conclusion that they are in the same market as each other. The implication is that Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island are part of the same geographic market.

358 Put another way, Quebec processors compete with Ontario-based processors as well as with New Brunswick and Nova Scotia-based processors. Quebec processors discipline and are disciplined by both Ontario and Maritime-based processors.

359 Put yet another way, according to the Applicant's argument, even if Nadeau were to disappear, Olymel would continue to be disciplined by competition from Ontario processors as well as from Exceldor and ACA on the *[CONFIDENTIAL]*% of its sales that are in Quebec and Ontario. There is nothing on the record to indicate that this competitive discipline would not apply to any sales that Olymel or any other competitor might make to customers located in New Brunswick in the event that Nadeau disappears.

360 In our view, the evidence relating to both the practical indicia suggested in the *Merger Enforcement Guidelines*, including transportation costs, price relationships, shipping patterns and trade views, and the indicators relied on by Dr. Ware support the argument that the Ontario processors should be included in the relevant geographic market. The relevant geographic market is therefore defined to include processors in New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Ontario.

361 Having defined the relevant product and geographic market for the purposes of paragraph 75(1)(*e*), we now turn to the requirement that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

(3) Adverse effect on competition in a market

(a) Meaning of adverse effect on competition

362 We first consider what is meant by "an adverse effect on competition in a market". We begin with the position advanced by the parties.

363 The Applicant submits that by deliberately omitting the word "substantial" and using the word "adverse", "Parliament must be taken to have accepted that a remedy should be granted at the suit of a private litigant on a showing of *any* non-trivial adverse effect on *any* market" (emphasis in original).

364 The Respondent Westco submits that adverse effect, while a lower threshold than substantial effect, must still incorporate a notion of market power or dominant market position; it cannot just be a trivial reduction in competition. Westco contends that the test established in *B-Filer* does not admit a finding of adverse effect on competition if only one competitor is affected and notes that protecting competition cannot be reduced to protecting competitors or a select handful of them.

365 In *B-Filer*, beginning at paragraph 195, the Tribunal had occasion to consider the final element of subsection 75(1) of the Act. It conducted a comprehensive review of the case law in interpreting the phrase "competition in a market". It was guided by prior decisions that dealt with how paragraph 79(1)(*c*) of the abuse of dominance provision of the Act had been interpreted. The Tribunal in *B-Filer* agreed that paragraph 75(1)(*e*) demands a relative and comparative assessment of the market in two time frames, namely with the refusal to deal and without the refusal to deal. It concluded as follows at paragraph 200 of its decision:

> Thus, we conclude that paragraph 75(1)(*e*) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal.

366 The Tribunal went on to consider what is meant by "competitiveness". It considered the case law on the issue under the abuse and merger provisions of the Act. The Tribunal noted that adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market or a decrease in the variety of products made available to buyers. The Tribunal noted that these and other competitive factors can only be adversely affected by the exercise of market power. The Tribunal applied this reasoning to the refusal to deal provision and concluded:

Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

367 The Tribunal then distinguished between the term "substantial" found in other provisions of the Act and the term "adverse" used in section 75. It found that the difference lies in the degree of the effect and that "adverse", according to its plain meaning, is a lower threshold than "substantial".

368 Regarding the requirement that the refusal to deal "is likely to have" such adverse effect, based on earlier case law, the Tribunal found the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

369 We agree with and adopt the approach articulated in *B-Filer*, above, regarding the meaning of adverse effect on a market. Consequently, our analysis under paragraph 75(1)(*e*) will require consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.), the Tribunal noted that "[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period". In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers. As indicated above in *B-Filer*, the impact on indicators such as price, quality and variety of the product must also be considered in assessing adverse effect. It is also understood that without market power there can be no adverse effect in a market. Our analysis under paragraph 75(1)(*e*) will therefore lead us to consider the following indicators in the circumstances of this case:

1. Market share and market concentration;

2. Barriers to entry;

3. Impact on prices;

4. The effect of the refusal on rivals' costs;

5. Impact on quality and variety of the product;

6. Possible foreclosure of supply to other processors in the market; and

7. Impact of possible elimination of an efficient processor.

370 Before proceeding to our analysis of the above indicators, it is useful to first set out the respective positions of the parties on adverse effect under paragraph 75(1)(*e*) of the Act.

(b) Positions of the parties on "adverse effect on competition"

371 The Applicant submits that the evidence adduced establishes the likelihood of many scenarios involving adverse effects on competition in various markets and sub-markets. In its written submissions, the Applicant states that these adverse effects include the following:

(a) the adverse effect on competition entailed by the increase in "live price" caused by a "premium war";

(b) the adverse effect on competition resulting from the "raising of a rival's costs", in that it is admitted that Nadeau is a rival of Olymel's (the Partnership) and the refusal to deal will admittedly (at a minimum) raise its costs;

(c) the adverse effect on non-price dimensions of competition, namely product quality, product choice and service;

(d) the adverse effects on the price (money) dimension of competition, given the likelihood that the live cost increases caused by a premium war, if these cannot be passed on by Nadeau and other processors to their customers;

(e) the likelihood that the elimination of Nadeau would create market power for Olymel in the Maritimes, where it previously had none ("un percée sur le marché des Maritimes");

(f) the "raising of rival's costs" among Nadeau's customers who are competitors of Olymel's at the further processing levels of the market;

(g) Olymel's enhanced market power *vis-à-vis* the other players in the market, even assuming that the geographic dimensions of the market encompass Ontario; and

(h) the possible elimination of the most efficient chicken processing plant in Canada.

372 In the Applicant's argument, any of the adverse effects listed above would flow from the Respondents' refusal to supply. We summarize below the Applicant's explanation of the alleged adverse effects.

373 The Applicant contends that the resulting premium war amongst processors will lead to an increase in the cost of price of live chickens which will generate "severe repercussions on the price of chicken at the retail level". The Applicant submits that raising its costs has an anti-competitive effect because it would weaken the Applicant to the benefit of Olymel. It is further argued that the Respondents' refusal to supply will threaten the Applicant's very viability and that its elimination will have an immediate effect on product quality and availability throughout the Maritimes. The Applicant states that many of its customers are also further processors that compete directly with Olymel. It is argued that the weakening or elimination of the Applicant would prohibitively increase its costs, even if it is able to obtain supply, and thus imperil its businesses. Finally, the Applicant contends that it "operates the most modern and efficient processing plant in Canada" and that for this reason alone, its elimination would have an adverse effect on competition in the market.

374 In oral argument, counsel for the Applicant argued that except for (g) listed above, which provides for a market power analysis, none of the alleged adverse effects require an exercise of market power by Olymel. It is argued, for instance, that the disappearance of a processor that is unable to remain viable has nothing to do with Olymel's market power but is nonetheless an adverse effect on competition.

375 In his report, Dr. Ware relies largely on the possible shift in market share from Nadeau to Olymel to support his inference that the alleged refusal to deal would have an adverse effect on competition. He argues that if Olymel were to experience the same increase in market share as a result of a merger or acquisition, the Competition Bureau would deem the merger or acquisition concerned as likely to lessen competition substantially and would challenge it.

376 The Respondent Westco submits that the guidelines on mergers and abuse of dominant position state that there is no market power where market share is below a threshold of 35%. It argues that Westco's refusal will not create, maintain, or enhance the market power of Westco or any other entity in the relevant market because no entity will have a sufficient market share as a result of the refusal to supply, even if Nadeau ceased its operations. Westco further submits that the evidence shows that the other indicia of market power, be they direct or indirect, have not been met in this case.

377 Ms. Sanderson focuses on the question of whether Olymel would gain market power or enhance it as a result of the refusal. To answer this question, Ms. Sanderson suggests the following analytical steps: (1) define the relevant market; (2) examine the position of the firm concerned with that of other firms in the market (using market share and concentration); (3) examine the ability of customers to switch suppliers; and (4) examine the ability of rivals to expand their supply. In her view, the inference of an adverse effect cannot be drawn on the basis of market share and concentration evidence alone.

378 In his reply report, Dr. Ware states that the increase in Olymel's market share coupled with what he calls the degradation in product quality and disruption in supply to certain customers resulting from Nadeau's possible inability to continue to supply them constitutes an adverse effect on competition. Dr. Ware relies on affidavits filed by certain

customers of the Applicant to support his conclusion that the refusal will decrease quality and disrupt supply. In support of his conclusion, Dr. Ware points to the Projet Westco Report wherein it is stated that *[CONFIDENTIAL]*.

(c) Analysis

379 As stated earlier, we adopt the approach set out in *B-Filer*, which provides that for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. As a consequence we necessarily reject the Applicant's submission that the exercise of market power need not be established for there to be an adverse effect on competition in a market.

380 We acknowledge that neither Westco, nor any of the Respondents for that matter, are involved in the slaughter of chickens or the sale of processed chicken. Strictly speaking, the Respondents have no market share in this downstream market. However, the arrangement under which Olymel will process the Respondents' chickens is a *[CONFIDENTIAL]*partnership. While the interests of this Sunnymel partnership are not fully aligned with those of Olymel, it is reasonable to treat the Sunnymel partnership and Olymel as a single entity for purposes of the analysis of the competitiveness of the Ontario-Quebec-Maritimes market for processed chicken. We therefore accept that adverse effect under paragraph 75(1)(*e*) may be analysed by measuring the impact on the market power of the said partnership.

381 We now turn to the above-mentioned indicators which we will consider in our evaluation of market power.

(i) Market share and market concentration

• *Evidence of the parties*

382 Having defined the geographic market for processed chicken as Quebec, New Brunswick, Nova Scotia and Prince Edward Island, Dr. Ware calculates the market shares of the processors in Table 4 of his expert report as follows:

Nadeau	*[CONFIDENTIAL]*%
Olymel	*[CONFIDENTIAL]*%
Exceldor	*[CONFIDENTIAL]*%
ACA Co-op	*[CONFIDENTIAL]*%
Other (Quebec)	*[CONFIDENTIAL]*%

383 The Herfindahl-Hirschman Index ("HHI") is a common measure of industry concentration that takes into account all participants in a relevant market and gives proportionately greater weight to the market shares of larger firms. The HHI is defined as the sum of the squares of the respective market shares of each competitor in the market.

384 Dr. Ware calculates the HHI for this market to be 3062. He also describes Olymel as "the dominant processor" in that market. Ms. Sanderson correctly points out that the market shares Dr. Ware reports do not support the characterization of Olymel as dominant given Exceldor's market share of *[CONFIDENTIAL]*%.

385 We have concluded that the geographic market is broader than the one defined by Dr. Ware and that it should include Ontario-based processors. This has the effect of reducing both the market shares of the processors listed in Dr. Ware's Table 4 and the market concentration.

386 We note, however, that even according to his own definition of the geographic market, Dr. Ware's estimates of market share and market concentration are imperfect. The market shares Dr. Ware reports are based on *slaughter* (number of chickens slaughtered) rather than sales of processed chicken to customers in the relevant market. However, slaughter data were the only data available to the experts and the Tribunal.

387 It is known that *[CONFIDENTIAL]*% of Olymel's total sales are to customers in Ontario. According to Dr. Ware's definition of the relevant geographic market, these would be "exports". Similarly, the Applicant "exports"

[CONFIDENTIAL]% of its sales to Ontario. There is little evidence regarding Exceldor's sales outside the market as defined by Dr. Ware. It is also the case that Olymel, Exceldor, the Applicant and ACA are not the only processors competing in the geographic market as Dr. Ware defines it. There is some evidence that Ontario processors compete in this market. For example, Mr. Feenstra testified that it is safe to assume that the Applicant competes with the Ontario processors that want to sell into Quebec. In addition to excluding the "export" sales of Olymel, Exceldor, the Applicant and ACA, a proper market share calculation would include the share of "imports" from Ontario and elsewhere.

388 Dr. Ware conceded in cross-examination that including only the sales that were made within the relevant market "might be a better way to do it". He stated, however, that he did not have the necessary data to make those calculations:

> Ms. Healey: Right. Okay. So back to the issue of assessing shares of sales in Quebec and the Maritimes: You would only include the sales that were made within those provinces; correct?
>
> Dr. Ware: I would — I think I would like to have done that. Of course, I didn't have those data.
>
> Ms. Healey: Fair enough, Dr. Ware. I'm not — I'm not suggesting that you did.
>
> Dr. Ware: But I — I think I would have preferred that, yes.

389 We have found that the relevant geographic market for the purposes of paragraph 75(1)(*e*) includes Ontario processors. Ms. Sanderson examines the market shares in this broader geographic market, but these shares are also based on slaughter and therefore include sales that are made outside the relevant market and ignore sales of chickens that are slaughtered outside the relevant market (imports). However, we find that the misstatement of market shares is likely to be less serious than was the case with the more narrowly defined market advocated by Dr. Ware because exports from and imports to the broader market are absolutely and proportionately smaller. In particular, Olymel makes *[CONFIDENTIAL]*% of its sales outside of Quebec and the Maritime provinces but only *[CONFIDENTIAL]*% of its sales outside of Ontario, Quebec and the Maritime provinces. Similarly, Nadeau makes *[CONFIDENTIAL]*% of its sales outside Quebec and the Maritime provinces but only *[CONFIDENTIAL]*% of its sales outside of Ontario, Quebec, New Brunswick and Nova Scotia.

390 Maple Lodge Farms is among the Ontario processors in the relevant geographic market. The Applicant and Maple Lodge Farms are wholly-owned subsidiaries of Maple Lodge. It is clear that as a wholly-owned subsidiary, the Applicant's interests are fully aligned with those of Maple Lodge. It is therefore sensible to assume that Maple Lodge Farms and the Applicant conduct themselves with an eye to their joint profitability and to treat them as a single entity (Maple Lodge) for the purpose of analyzing the state of competition in this market.

391 The processors' market shares (based on weekly slaughter) in the relevant geographic market in 2007 are found in Exhibit A to Mr. Soucy's affidavit of May 29, 2008. While they have their defects, we accept these data to be an adequate reflection of the market shares of processors in the market for that period. Based on these data, the shares are as follows [3] :

3 Both Ms. Sanderson and Dr. Ware used market shares based on slaughter; shares of further processors are therefore not included in their calculations.

Maple Lodge Farms/Nadeau	22.6%
Maple Leaf	17.9%
Olymel	17.9%
Exceldor	18.5%
ACA	5.1%
Cargill	5.1%
Port Colborne	3.8%
Grand River	2.6%

Other Ontario	3.8%
Other Quebec	2.6%
	(Total 99.9%)

392 The HHI in the relevant geographic market in 2007 was 1579.[4] Maple Lodge Farms/Nadeau had the largest market share (over 22%) with Maple Leaf, Exceldor and Olymel all grouped at around 18%. For purposes of comparison, taken by itself, the Applicant's share of this market would have been 7.2%.

4 For purposes of calculating the HHI, the "Other Quebec" processors are treated as one. If there is more than one, this results in a slight overstatement of the HHI. "Other Ontario" processors are treated as three equal sized processors. The reason for this is that the smallest Ontario processor that is identified (Grand River) processes 200,000 birds per week. Unidentified Ontario processors slaughter a total of 300,000 birds per week. It is reasonable to assume that the largest unidentified processor is smaller than Grand River. Given this, the total slaughter by unidentified Ontario processors could be allocated in a variety of ways. The assumption made here is that three unidentified Ontario processors are each slaughtering 100,000 birds per week. Given the very small portion of the market involved, the assumption made regarding the composition of the unidentified segment of the market makes very little difference to the value of the HHI.

393 As stated above, the Applicant advances a number of scenarios where there would be an adverse effect on competition. Some of these assume that the Applicant will remain a market participant, although with higher costs as a result of the refusal; in other scenarios it is no longer a participant. Dr. Ware acknowledged these scenarios:

> And as I say, there are sort of a number of possible scenarios here. One, ranging — and we already went through this. I don't want to — perhaps you don't want to spend a lot of time on this, but ranging from Nadeau, ceasing to process — ceasing to replace, not being able to replace the chicken that it's currently getting from New Brunswick. Two, it being able to — possibly being able to replace after a delay perhaps but at a significantly higher price. So both those cases, it seems to me, would amount to an adverse effect on competition.

394 In its analysis, the Tribunal decided that it would be helpful to develop the scenarios described by the Applicant and Dr. Ware to determine the likely impact on market shares and, where possible, on market concentration if the scenarios played out.

• *Possible scenarios and the resulting impact on market share*

395 We agree that a number of scenarios are possible. The Respondents' refusal to supply takes place against an uncertain backdrop. The Sunnymel partnership has stated its intention to build a processing plant in New Brunswick, but it has not commenced construction, and the Applicant argues that it will not do so. According to the evidence adduced, the Sunnymel partnership is proceeding with certain tests, such as testing the groundwater, to determine the best location for a new processing plant. Witnesses have also testified that ACA may expand its Nova Scotia plant and that Maple Lodge may participate in that expansion. There is also considerable disagreement regarding the success that the Applicant is likely to have in replacing the Respondents' birds, both in terms of the price premium to be paid and the number of birds it will succeed in obtaining. Also in dispute is the point (in terms of weekly slaughter) at which the Applicant's St-François Plant would cease to be a viable operation.

396 The suggested implication of the foregoing is that the refusal could impact market shares and market concentration in a variety of ways. We agree that a number of scenarios are possible and some are more likely than others. It is therefore useful to consider a number of these scenarios and the resulting impact on market share for each. In considering these alternatives, an analysis of market share and market concentration (as measured by the HHI) is helpful in assessing the market power implications of each scenario.

Scenario 1

397 One possible scenario is that the Applicant is able to replace all of the Respondents' birds from sources in Quebec. Given the operation of the Quebec supply guarantee (VAG), the net effect of this would be to leave Maple Lodge Farms/ Nadeau's market share unchanged while increasing Olymel's market share at the expense of Exceldor and other Quebec processors. In this scenario, given the increase in exports from Quebec to New Brunswick, the VAG allocated to each Quebec processor, including Olymel's allocated share, would be reduced. In this regard, it is difficult to understand the basis for Dr. Ware's assertion at paragraph 14 of his reply report, that "[t]here is every reason to believe that Olymel's production of processed chicken would increase by the volume of redirected chicken". On cross-examination, Dr. Ware acknowledged that he had not taken the VAG into consideration. He also stated that Olymel's market share would, however, increase in this scenario and added that he was not qualified to predict the effect of the VAG on concentration and market shares. We are unable to compute the HHI for this circumstance because of insufficient data.

Scenario 2

398 Another possibility is that the Applicant is able to replace approximately half of the Respondents' birds from sources in Quebec. *[CONFIDENTIAL]*. Dr. Ware is of the opinion that 136,000 birds per week is the "absolute maximum" Nadeau would be able to obtain in Quebec. The net effect of this would be to reduce Exceldor's and Maple Lodge Farms/Nadeau's respective market shares and increase Olymel's. Here, too, the data available do not make it possible to compute the HHI.

Scenario 3

399 Yet another possibility is that the Applicant is unable to replace any of the Respondents' birds but is able to retain the balance of the New Brunswick birds as well as the Prince Edward Island and Nova Scotia birds it is presently processing. According to Mr. Robinson, the Applicant would remain profitable under these circumstances; in his view, the Applicant's earnings would drop from $*[CONFIDENTIAL]*to $*[CONFIDENTIAL]*. In this case, Olymel would slaughter the Respondents' 271,350 chickens and, as a result, its market share would go up by 3.5 percentage points to 21.4% and Maple Lodge Farms/Nadeau's share would go down to 19.1%. The HHI would decline from 1579 to 1570. That is, by the well-known market concentration measure used by Dr. Ware, the market would become *less* concentrated. The reason for this is that a processor with a smaller market share (Olymel) is increasing its share at the expense of a processor with a larger market share (Maple Lodge Farms/Nadeau). This reduces the share inequality in the market and, in turn, reduces the HHI.

400 In his discussion of this scenario at paragraph 16 of his reply report, Dr. Ware states that an increase of Olymel's market share by 3.5 percentage points, coupled with evidence on quality degradation and supply disruption, would satisfy the threshold requirement for an adverse effect on competition. Keeping aside the issues of supply disruption and quality degradation for the moment, it does not appear analytically sound to infer an adverse effect on competition on the basis of an increase in the market share of *one firm*, when the *overall* measure of market concentration (the HHI) is decreasing, if only by a small amount.

Scenario 4

401 Another possibility is that the Applicant is unable to source any birds from Quebec and that it ultimately loses the Prince Edward Island and Nova Scotia birds to ACA. In this event, the St-François Plant would likely be closed and the remaining New Brunswick birds might go to either ACA or Olymel. In this scenario, we assume that the remaining New Brunswick birds go to ACA. In this event, as explained above, Olymel's market share would go up to 21.4%, Maple Lodge Farms/ Nadeau's share would go down to 15.4% and ACA's share would go up to 8.8%. The HHI would fall to 1494. If ACA gets the Prince Edward Island and Nova Scotia birds, but the remaining New Brunswick birds go to Olymel, ACA's market share would be 7.7% and Olymel's 22.5%, and the HHI would be 1524.

Scenario 5

402 Another possibility is that the Applicant is unable to source any birds from Quebec and ultimately loses its Prince Edward Island and Nova Scotia birds and remaining New Brunswick birds to Olymel. We are of the view that, on a balance of probabilities, this scenario is not likely. The Applicant is more likely to be able to obtain supply to replace at least some of the Respondents' chickens. In this scenario, Olymel's market share would go up to 25.1%, Maple Lodge Farms/Nadeau's share would be 15.4%, and ACA's would remain unchanged. The HHI would be 1615. This could be regarded as the worst-case scenario from a competition perspective. In this scenario, the refusal would result in an increase in the HHI, implying a more concentrated market. The HHI would increase from 1579 to 1615 or 36 points. In their expert reports, both Dr. Ware and Ms. Sanderson referred to thresholds at which mergers can be challenged or blocked. In this case, to provide a frame of reference, a merger of two firms each of which had a market share of 4.25% would increase the HHI by 36 points. A merger of this nature would be within the safe harbours stated in the *Merger Enforcement Guidelines* [5] . We fully appreciate, however, that the experts' reference to safe harbours is in the context of mergers and that a different threshold applies; namely a "substantial" lessening or prevention of competition and not an "adverse effect" pursuant to paragraph 75(1)(*e*).

5 See s. 4.12 of the *Merger Enforcement Guidelines*.

Conclusion

403 Based on the above, we find that the refusal to supply will likely not have a significant impact on market shares of processors or market concentration. Even the worst case scenario, scenario 5, results in only a very small increase in the HHI.

(ii) Barriers to entry

404 The assessment of barriers to entry is usually part of the assessment of market power. None of the experts discussed barriers to entry directly. Neither Dr. Ware nor Ms. Sanderson incorporated considerations on barriers to entry into their market power analyses.

405 There is very little evidence of the kind usually used in the assessment of barriers to entry on the record. We have no systematic information on the historic entry-and-exit pattern, although there are statements to the effect that the chicken processing industry has become more consolidated over time. For instance, in a document prepared by Agriculture and Agri-Food Canada on the Canadian chicken industry, one can read that "the poultry industry has become concentrated over the years" and that "[w]hile the concentration ratio has stabilized in the recent years, concentration in the industry might continue to occur in the future".

406 Concerns about cost-related barriers to entry normally center on diseconomies of small scale and sunk costs (specialized investments required for entry). We have very little information on these factors, although Dr. Barichello does state that "[c]learly, a processing plant represents a considerable capital investment and therefore business risk". With respect to regulatory barriers to entry, we have some information: given that the supply of live chickens is fixed by the marketing boards, a new entrant abattoir would have to bid against incumbents for live birds. Although some chicken producers may have relationships with co-ops, having to bid against incumbents for birds does not necessarily place an entrant at a disadvantage. The problem for new abattoirs comes with the provincial allocation systems in place in Ontario and Quebec, which allocate incumbents their historic share of provincial slaughter. These allocation schemes provide for some exceptions. Dr. Barichello stated that there is an "open sign-up pool" [6] in Ontario. Also, new entrants can bid inter-provincially. The impression remains, however, that the provincial allocation schemes make new entry into processing at the abattoir level difficult. Entry into further processing would not be subject to the same regulatory barrier. While there is evidence that there are barriers to entry in primary processing, there is little to indicate that the refusal would increase them or prevent them from eroding.

6 He explained that the pool "...provides some flexibility for producers to choose the processor with whom they wish to do business as well as allowing some differential growth among processors" and that there "...is no long-term requirement for a producer to continue to sell to the same processor."

407 While it is clear that barriers to entry do exist, they are one of many factors to be considered in assessing market power. In our view, the existence of barriers to entry is not in itself determinative.

(iii) The effect of the refusal on the price of processed chicken

408 With respect to the link between the Respondents' refusal to supply and the price of processed chicken paid by consumers, four issues are raised in argument, namely (1) the price increase that is implied by the change in Olymel's market share and in the HHI; (2) contractual provisions bearing on the ability of processors to pass premiums along to customers; (3) statements by processors regarding their ability to pass price increases along; and (4) the implications of supply management for processors' ability to raise the price of processed chicken. We will deal with each of these in turn.

• *The effect of the change in market shares and the HHI on the price of processed chicken*

409 Dr. Ware testified that he did not model the effect of the change in market concentration on the price of processed chicken. He explained that he had not been asked to undertake such an analysis and that he did not have enough data to do so. He explained that "because...we have a standard of the adverse effect on competition rather than a substantial lessening on competition ... any lessening or any change in market structure in the direction of increasing concentration would constitute an adverse effect on competition" and that "if you add that to the increasing costs arising from an increase in premiums and an increase in live transport costs plus the effect on the further processing market, then that would amount to an adverse effect on competition". The first statement would appear to require some qualification. An increase in concentration could be the result of pro-competitive forces at work. For example, an increase in concentration may occur if a more efficient firm attracts customers from a less efficient rival. In any event, as stated above, the refusal in this case could well decrease concentration. In the worst-case scenario, it would increase concentration by a very small amount.

• *Contractual limitations on the ability of processors to pass on increases in premiums to their customers*

410 Dr. Ware contends that if the Applicant attempted to replace the Respondents' birds by acquiring birds in Quebec, the result would be an increase in premiums paid by the Applicant and other processors, and these premiums would be passed on to consumers. Dr. Ware believes that some of the Applicant's contracts with its customers "are of a cost plus form in which their cost — Nadeau's cost increase would automatically be represented in their prices to the customers". During her cross-examination of Dr. Ware, counsel for the Respondent Westco made reference to several cost-plus contracts. According to Westco, these contracts do not allow the Applicant to pass on its premiums to its customers. Below, we review the provisions in a number of these contracts.

411 Clauses *[CONFIDENTIAL]*of the Applicant's contract with *[CONFIDENTIAL]* stipulate the following:*[CONFIDENTIAL]*.

412 *[CONFIDENTIAL]*.

413 On this evidence, while *[CONFIDENTIAL]* may be able to pass an increase in the NB Board Price on to *[CONFIDENTIAL]*, it is unclear if any other increase can be passed on.

414 The Applicant's contract with *[CONFIDENTIAL]* sets out the following pricing formula: *[CONFIDENTIAL]*.

415 We have limited evidence to explain how the contracts described above work in practice. On the whole, they appear to provide for prices to be fixed at least for a set time period. It is unclear as to how and when cost increases can

be passed on, if at all. There is simply insufficient evidence to determine, based on these contracts, how increases in cost to the Applicant, caused by "premium wars", could be passed on to customers.

• *Processors' statements regarding their ability to pass on cost increases to their customers*

416 At paragraph 101 of her report, Ms. Sanderson stated that "[t]he record is filled with statements from processors indicating that they have no ability to raise prices to customers". In that regard, she referred to the statements made by Mr. Feenstra and two of the Applicant's customers. Cara, a full-service restaurant operator, indicated in a letter that its business is very price-sensitive and that there is "virtually no room to increase prices to our customers". In a letter addressed to the Applicant, the following concerns are expressed on behalf of La Préférence, another customer:

> Eliminating Nadeau from the supply chain, by way of shut down or purchase from a competitor of there's [sic] will only tighten the supply of fresh raw products, and ultimately I foresee an increase in the price of poultry.
>
> An increase in the price of poultry will hurt La Preference's bottom line. Our clients will not pay for the increase in price for simply having fostered a controlled supply.

417 In her testimony, Ms. Sanderson stated that the fact that costs were going up did not necessarily mean that prices of processed chicken would go up. She expressed the opinion that processors were worried about a premium war because they could not pass the higher premiums on to their customers.

418 Mr. Brodeur stated that it would be very difficult for a processor to pass these costs on to customers and consumers. In his evidence, he gave three reasons to explain his view. He said:

> 7.16. À la connaissance du Témoin, advenant une augmentation des coûts d'approvisionnement en poulets vivants causés par une hausse des primes versées aux éleveurs, il serait très difficile pour un transformateur ou un surtransformateur d'exiger un prix plus élevé de la part de ses clients et ultimement, des consommateurs. Cela s'explique par les trois raisons suivantes:
>
> **1ère raison: produits substituts**
>
> 7.16.1. Il existe une « concurrence croisée » entre le poulet et les autres viandes telles que le boeuf et le porc. Le Témoin a pu constater, au fil de ses années d'expérience dans l'industrie, que lorsque les prix des Produits transformés et surtransformés augmentent, les consommateurs se tournent vers le porc ou le boeuf, ce qui a résulté en une baisse de la demande des clients d'Olymel pour ses Produits transformés et surtransformés. Cette réalité a aussi été constatée dans le rapport des PPC, joint à la présente déclaration à la pièce YB-16, à la page 41. En effet, chez les Canadiens, la consommation d'un type de viande se fait naturellement au détriment d'un autre type.
>
> **2e raison: coûts des inventaires**
>
> 7.16.2. Les coûts associés à la conservation en inventaire des Produits transformés et des Produits surtransformés sont élevés et motivent les abatteurs, transformateurs et surtransformateurs à vendre leurs produits rapidement. De plus, une fois congelé, le produit perd de sa valeur en raison des frais qui devront être encourus pour le décongeler et des limitations concernant l'utilisation de cette viande.
>
> **3e raison: augmentation prévisible des contingents**
>
> 7.16.3. Advenant une hausse des prix de vente, les contingents de production des poulets vivants sont rapidement ajustés à la hausse afin de ramener les « marges viande » des transformateurs à leur niveau historique.
>
> 7.16.4. Il faut savoir que les données produites par la firme Express Markets Inc. (EMI), dont les résultats sont utilisés par les organismes de réglementation dans leur évaluation des besoins en poulets de la population canadienne, ne tiennent pas compte des primes payées aux éleveurs dans le calcul de la « marge viande »

des transformateurs. Dans les calculs effectués par ces organismes de réglementation, la « marge viande » des transformateurs correspond à l'écart entre les prix de gros moyens (données EMI) et prix de référence du poulet vivant en Ontario.

7.16.5. Or, lorsque cette marge augmente au-delà d'une moyenne historique, ceci peut laisser présager un manque de viande sur le marché domestique et les contingents de production de poulets vivants seront normalement ajustés à la hausse, ce qui aura pour effet d'augmenter la quantité de produit disponible pour les abatteurs et, par le fait même, de réduire les primes versées aux éleveurs.

7.17. Selon l'expérience du Témoin, il n'y a pas de relation directe entre les primes payées aux éleveurs pour les poulets vivants et les prix de vente en gros et au détail des Produits transformés et surtransformés. En effet, la variation des prix de ces produits est principalement causée par les fluctuations de l'offre et de la demande et par les variations de prix des autres viandes transformées. Quant aux primes payées aux éleveurs, celles-ci dépendent notamment de la concurrence entre les abatteurs et de la rentabilité relative de l'industrie.

419 Some processors stated, however, that they would attempt to pass on the increased costs to their customers. In a letter addressed to the New Brunswick Farm Products Commission, Kevin Thompson, on behalf of the Association of Ontario Chicken Processors, stated that processors would "attempt to [pass] the additional costs on to their customers causing increases in the price of chicken at the retail meat counter and an adverse impact on consumption which will in turn lead to lower production for all chicken farmers". In his view, "...consumers who already pay higher prices in Canada to support supply management will unjustly pay even more".

420 Mr. McCullagh, at paragraph 14 of his affidavit, states that processors will look to and need to pass on the costs to their retail and foodservice customers, who, in turn, will seek to increase prices to consumers.

421 However, Mr. Feenstra testified that it is very difficult for processors to pass on the costs of a "premium war" to the end consumer as consumers are willing to pay only so much for their chicken. In cross-examination, Dr. Ware responded to Mr. Feenstra's testimony as follows:

> Ms. Healey: If Mr. Feenstra were to advise the Tribunal that it is very difficult to pass along the cost of a premium to a consumer or consumers are only willing to pay so much for chicken, would you have any reason to doubt Mr. Feenstra's comments in that regard?
>
> Dr. Ware: Yes, I would because it is possible that economists take a bit more of a detached view of how markets work than people who are embroiled in the everyday decision-making and, as I said, these premiums are not just going up to Nadeau. These premiums are going to go up way across Quebec and if that were to happen, that would be, you know, a market-wide increase in costs and it's hard for me to imagine that a market-wide increase in costs would not be reflected in the price of chicken.

422 Dr. Ware is distinguishing between the ability of the Applicant or that of any other individual competitor to pass on cost increases that they may have incurred and the ability of processors as a group to pass on a market-wide increase in the premiums they pay for live chicken. Competitive pressure normally limits the ability of individual competitors to pass on cost increases that they have incurred. In the absence of supply management, a market-wide increase in costs is more likely to be passed on as Dr. Ware has stated. It is the Tribunal's view, however, that supply management itself limits processors' ability to pass on even a widespread increase in the premiums they pay for live birds. We will now turn to that issue.

• *Limitations posed by supply management on the ability of processors to increase price*

423 Supply management reduces the ability of processors to raise the price of processed chicken and also attenuates any link between price and concentration that might otherwise exist. The supply of live chickens in Canada is determined by

producer-controlled provincial marketing boards coordinated by a national marketing board, the CFC. Dr. Barichello explains the regulatory process by which the supply of live chickens is determined:

1. Processors calculate their requirements for production.

2. Each province's marketing board aggregates processors' requirements within their province.

3. Provincial marketing boards send their aggregates to the CFC.

4. The CFC makes any necessary adjustments and then authorizes a total production for each province.

424 According to Dr. Barichello, national chicken quota is set by the CFC for a six- to seven- week production period, and farmers cannot deviate materially from their quota. Thus, there is a continuous flow of live chickens coming to market. The quantity is determined by regulation, and the birds must be processed and sold to consumers. It is normally not possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the case at hand, it would appear very difficult to raise the price of processed chicken without simultaneously restricting the amount offered on the market. The weekly flow of chicken into the market is not under the control of any one processor.

425 The evidence also points to a recent instance in which processors jointly lobbied the CFC for a reduction in the national quota and were successful; the CFC reduced the allocation for period A-87. Mr. Landry testified as follows with respect to the request made by the processors:

> Mr. Lefebvre: Une des dernières questions que j'ai pour vous. Pourquoi tant vouloir baisser la production de poulets?
>
> Mr. Landry: C'est comme je t'ai expliqué, c'est que le prix de vente, c'est un marché contrôlé, c'est là qu'est la demande. Puis quand le prix vivant du poulet vient trop élevé —
>
> Mr Lefebvre: Oui.
>
> Mr. Landry: — pour le prix de vente que les abattoirs peuvent faire, les retours sont pas bons. Donc, c'est une des raisons pourquoi que le système est révisé à toutes les huit semaines.

426 The limited information provided about this one incident is insufficient to support the inference that processors exercise the kind of control over supply management that would be necessary for them to increase the price of processed chicken as and when they wish. This is particularly so given the complex nature of quota adjustments provided for in the supply management system.

427 As indicated in our earlier review of the supply management system, a "bottom-up approach" is contemplated in order to determine if quota adjustments are required. The mechanism is designed to strike a balance between chicken production and consumer demand. In essence, quotas are adjusted as a result of changes in that demand.

428 We find that it would normally not be possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the absence of an increase in consumer demand or a reduction in supply, there is no reason to believe that prices will rise.

429 The Applicant contends, in essence, that the price increases caused by "premium wars" will be passed on to customers and consumers. In the event that the Applicant is able to obtain all of its replacement birds from Quebec, the concern is that this would result in "premium wars" that would squeeze processor margins. It is argued that processors would then attempt to pass on premium increases to customers. It is our view that other factors, such as consumer preferences, being equal, an increase in the price of processed chicken cannot be sustained in the absence of a further restriction in supply by the marketing boards. Here, any "premium war" would be the result of excess processor demand for live chickens. There is little evidence to suggest that the marketing boards would respond to excess processor

demand for chickens by reducing quotas and thus further restricting supply. This would only make things worse, because processors would then be competing for an even smaller supply of chickens. It is our view that it would be more logical for marketing boards to attempt to mitigate any premium increase by increasing quotas to ensure that there would be sufficient chickens for all processors. In that case, prices would fall.

430 For the above reasons, we find that the price increases to processors caused by "premium wars" are not likely to be passed on to customers or consumers without an accommodating reduction in supply by the marketing boards. We also question whether a further restriction of supply would remedy or even be seen as a remedy for a deterioration of processor margins caused by "premium wars".

(iv) The effect of the refusal on rivals' costs

431 The Applicant further argues that to the extent that processors cannot pass on the increased live costs caused by a "premium war", their viability will be threatened. It also argues that the refusal will substantially raise the Applicant's costs and that the raising of these costs would have an anti-competitive effect because it would weaken the Applicant to the benefit of Olymel. Dr. Ware states as follows in his examination in chief:

> Ms. Price: Can I just stop you there for a minute and ask a question arising from what you said? This concept of raising rivals' costs, I believe that there's been a fair bit of evidence that Nadeau and Olymel do compete in the primary processing market. Does that concept that you've just described apply not only to the further processors whose costs might be raised as you've described but also to Nadeau itself in the event it has to go into Quebec?
>
> Dr. Ware: It could, yes. Yes, it could. We don't know — you're basically saying does it apply to the processing market, the primary processing market?
>
> Ms. Price: As well.
>
> Dr. Ware: Yes. Well, it certainly could. We don't know — and I didn't really directly address this, but we don't know how much premiums will be bid up in Quebec to other processors as a result of them being bid up to Nadeau.
>
> Ms. Price: Right.
>
> Dr. Ware: But they certainly will be bid up to some extent because as I was saying before the break, if Nadeau is going to bid 10 percent of the supply of Quebec chicken out of Quebec, it's going to do that by raising the price, and you raise the price — when you raise the price that they pay, that's going to increase the price to everyone else too.

432 "Raising rivals' costs" is a term described in section 4.2 of the Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* and can be described as a set of anti-competitive strategies that a dominant incumbent firm might use to inhibit the expansion of smaller competitors or the entry of new competitors, thereby entrenching its dominance. The Guidelines note that in order for the raising of rivals' costs to be a profitable strategy for the dominant firm, the burden of the cost increase concerned must fall more heavily on the rivals of the dominant firm than on the dominant firm itself.

433 The Tribunal has found that, for the purposes of paragraph 75(1)(*a*), if the Applicant replaced the Respondents' birds with birds from Quebec, its costs would increase and it would be substantially affected as a consequence. The question here is whether the evidence supports that the raising of rivals' costs would be the result of the refusal and, if it does, whether this implies that competition in the Ontario-Quebec-Maritimes market for processed chicken would be adversely affected. The answer is that it does not. The reasons are as follows.

434 First, the conditions for the successful pursuit of a strategy of raising rivals' costs do not appear to exist in the relevant market. Olymel, the recipient of the Respondents' birds, is not dominant in the relevant market, and the receipt and retention of the Respondents' birds would not come close to making it so. Indeed, there is no dominant firm in the relevant market. There are several other large, if not larger, competitors (Maple Leaf, Maple Lodge, Exceldor) and numerous smaller ones. Second, there is little in the evidence to indicate that a price war for live chickens would be less burdensome to Olymel than to other processors. In his testimony, Dr. Ware refers to a market-wide increase in processors' costs that is the result of their bidding more aggressively for live birds.

435 To the extent that cost increases resulting from the refusal are confined to the Applicant, it is unlikely that any cost increases experienced by the Applicant could be passed on to consumers in the form of higher prices. Indeed, it is central to the Tribunal's determination under paragraph 75(1)(*a*) that the Applicant would be substantially affected by the refusal, that it could not simply pass the higher cost of acquiring replacement birds in Quebec on to its customers. The evidence relating to the possibility that costs increases experienced by the Applicant could be passed on to consumers is summarized above. Further, Mr. Robinson assumed that the price at which the Applicant sells processed chicken would remain unchanged in scenario 2, where the Applicant is able to replace the Respondents' chickens with birds from Quebec. The ultimate limitation on the ability of the Applicant or other processors to increase the price of processed chicken is that they do not control the supply of chickens to the market. Control of supply lies with the marketing boards.

(v) The effect of the refusal on the quality and variety of processed chicken available to consumers

436 Dr. Ware states as follows at paragraph 25 of his reply report:

> There are compelling reasons also to believe that the refusal to deal will lead to severe declines in quality in some cases, which are sufficient in themselves to constitute an adverse effect on competition.

437 Dr. Ware cites an example of what he sees as a decline in quality, the evidence of *[CONFIDENTIAL]*, which is that if the Applicant were to close, *[CONFIDENTIAL]* would lose a source of *[CONFIDENTIAL]*, and replacement sources would be further away and more costly. *[CONFIDENTIAL]*.

438 Ms. Sanderson responds that if the Applicant were able to replace the Respondents' birds, there is no issue. If the Applicant were unable to replace the Respondents' birds, *[CONFIDENTIAL]* would still have a variety of realistic alternatives. One possibility is that Sunnymel builds a plant in New Brunswick. Exceldor and ACA could also supply *[CONFIDENTIAL]* without greatly increasing the shipping distance.

439 Ms. Gazzard stated in her affidavit that UPGC and Olymel have been in negotiations to replace the Applicant as a source of supply. Olymel has apparently stated that it has the capability of filling UPGC's requirements but has not quoted a price. She stated that they had also approached Exceldor about replacing the lost Nadeau volume. Exceldor believed, however, that their price would not be commercially viable to UPGC.

440 There is evidence of complaints by certain customers of the Applicant, in particular Puddy, relating to their inability to obtain chickens of the required quality and variety should they no longer be supplied by the Applicant. Mr. McHaffie stated as follows:

> By contrast, our purchases from Olymel have declined significantly since 2006. This is because of quality and service problems. The quality problems have included bruising, cuts, neck skin left on, missing parts, (such as wings), and the like. Service problems include late delivery and short delivery. Olymel, for reasons unknown, has been unresponsive to our requests for improvement. As we are unable, in our view, to obtain sufficient supplies to meet our needs from elsewhere in Québec, it has been a major advantage for us to have Nadeau as an alternative source of fresh killed chicken.

441 Given the distances processed chicken is routinely shipped, a need to find a new (possibly more distant) source of supply does not necessarily qualify as a decline in quality. There are several post-refusal scenarios under which Priszm and Puddy would not experience any need to change suppliers, for instance, if the Applicant were to replace some or all of its lost supply. In the event that they have to change suppliers, there are several other options open to Priszm and Puddy whereby they need not go much further afield for supply. Nor is it necessarily the case that the need to change suppliers qualifies as an adverse effect on competition. Changing suppliers is part of the normal process of competition. Given the consolidation that has occurred among chicken processors, customers have presumably changed suppliers in the past although there is not much in the way of evidence on this point.

(vi) Possible foreclosure of supply to other processors in the market

442 Dr. Ware also cites a possible lessening of competition in what he calls the "market for further processed chicken" as another manifestation of the adverse effect on competition flowing from the refusal. He cites the affidavit of Ms. Goodz of Riverview and the affidavit of Mr. Ellis of Sunchef. Both Ms. Goodz and Mr. Ellis express the concern that, as a competitor, Olymel would not supply them or would not supply them on reasonable terms. Also, at paragraph 28 of his report, Dr. Ware cites the affidavit of Mr. McHaffie of Puddy. Mr. McHaffie explains that Puddy has had quality and service problems with Olymel and that Olymel has been unresponsive to its request for improvement. We now turn to the evidence of some of the Applicant's customers in that respect.

Riverview

443 Ms. Goodz testified that both Olymel and Exceldor have refused to supply Riverview. She stated as follows at paragraph 17 of her affidavit:

> My ability to continue to supply my specialized product at an acceptable price depends on my ability to obtain supplies from Nadeau. Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off, and we will no longer be able to continue in this business.

444 Ms. Sanderson responds to these concerns at paragraph 77 of her report. She states that Ms. Goodz' concerns would not arise if the Applicant is able to replace the Respondents' birds. She states that alternate suppliers such as Exceldor, Abattoir Agri and Lilydale are closer to Riverview than Nadeau is and that Maple Lodge Farms and Maple Leaf are not much further away. Lilydale is no longer an alternative for Riverview as it is going out of business, and Exceldor is questionable as Ms. Goodz has testified that it has refused to supply her. Ms. Goodz also stated that some suppliers cannot meet her size requirements. Ms. Goodz conceded under cross-examination that *[CONFIDENTIAL]*. Ms. Sanderson further stated that even if Riverview were forced out of business, it is small enough that there would be no adverse effect on the market for processed chicken.

Sunchef

445 Sunchef is a further processor of chicken located in Montreal. *[CONFIDENTIAL]*

446 Mr. Ellis states at paragraph 16 of his affidavit that if the Applicant's supplies are cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated:

> This would have a major adverse effect at our level of the market. It would permit Olymel to increase its dominance and market power, at the expense of other businesses like ours.

447 At paragraph 15 of his affidavit, Mr. Ellis makes the same claim as Ms. Goodz as to the crucial role that continued supply from Nadeau at the same level plays with respect to the future of his business:

> Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off and that we will no longer be able to continue in this business.

Puddy Brothers

448 Puddy is a further processor located in Mississauga, Ontario. According to Mr. McHaffie, it currently purchases whole birds from Exceldor (*[CONFIDENTIAL]*%), Nadeau (*[CONFIDENTIAL]*%) and Olymel (*[CONFIDENTIAL]*%). According to paragraph 9 of Mr. McHaffie's affidavit, Puddy has been in business since 1884 and began purchasing from the Applicant in about 2004 or 2005. Since 2006, it has reduced its purchases from Olymel because it has not been satisfied with its service. Mr. McHaffie states that Puddy cannot buy from Ontario primary processors, which are much closer than Nadeau, because they are also engaged in further processing, and the requirements of Ontario processors exceed the Ontario slaughter.

449 Mr. McHaffie states that if the Applicant were unable to continue as a viable business, Puddy would be forced to buy more from Olymel, and its service might be worse. He concludes that if the Applicant were to close or be taken over by Olymel, competition in the market would definitely be hurt. He admitted under cross-examination, however, that he had not taken his concerns regarding inadequate supply up with the CFC.

Desco

450 Mr. Chevalier testifies that Desco competes directly with Olymel and Exceldor and that they have refused to supply Desco at reasonable prices. At paragraph 7 of his affidavit, he states that if the Applicant's supplies of live chicken were reduced or cut off, Desco's ability to compete effectively against Olymel would be reduced.

451 Ms. Sanderson responds to Mr. Chevalier at paragraph 78 of her report. She states that there would be no issue if the Applicant is able to replace the Respondents' birds. Ms. Sanderson also calculates that Desco's purchases from Nadeau account for *[CONFIDENTIAL]%* of its annual chicken purchases, indicating to her that Desco has many other suppliers available to it. She states that Desco currently obtains fresh-killed chickens within 72 hours from the United States and that the Ontario processors as well as ACA could provide chicken within the same delivery time. Ms. Sanderson also states that if Desco were to go out of business, this does not mean that prices for processed chicken would rise.

452 In cross-examination, Mr. Chevalier conceded that the Applicant's supply accounts for a small percentage of Desco's supply.

Analysis

453 We earlier determined that further processed chicken is not a separate product market. We have little evidence regarding the respective market shares of the stated further processors Riverview, Sunchef, Puddy and Desco. We note that Mr. McHaffie stated in cross-examination that further processors are numerous. When questioned on the matter, he stated that he thought that there are more than 50 further processors in Ontario and 5 to 15 in Quebec.

454 Both Riverview and Sunchef maintain that any diminution of their supply of chicken from the Applicant would be disastrous. Puddy concludes that it would be forced to return to a longstanding supplier, Olymel, with whom it has recently become disenchanted. This assumes, of course, that the Applicant is put out of business. There are many possible scenarios short of the worst-case scenario in which the St-François Plant closes and all the Applicant's birds go to Olymel. In the event of the worst-case scenario where the St-François Plant closes and Riverview and Sunchef are denied chicken from all other sources and are obliged to close, there is insufficient evidence to infer that this would have an adverse effect on competition in the relevant market which is the Ontario, Quebec and Maritimes market for processed chicken. This is essentially because of the size of that market, the apparent number of further processors in the market, the marketing boards' ultimate control of supply in the market and the paucity of evidence to show that complaining further processors cannot obtain supply elsewhere.

455 We further note that there are several reasons why customer complaints might not be given significant weight in the determination of whether the probable effect of the refusal competition in the market is or is likely to be adverse. First, some of the complaints appear to have been orchestrated. For example, as explained above, some of the letters sent to the Applicant by some of its customers regarding the Respondents' refusal contain paragraphs that are virtually identical to those found in a draft letter prepared by the Applicant. This letter, which was apparently provided to Riverview and Cara, includes the following two paragraphs:

> Our business is a "pennies" business. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.
>
> If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices would rise, and supply problems would occur. We are therefore opposed to any reduced competition.

456 The evidence adduced shows that similar paragraphs are found in letters sent to the Applicant by Riverview and Cara:

> [Riveriew]
>
> If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur. We are therefore strongly opposed to any reduced competition in this market.
>
> [Cara]
>
> Our business is very price sensitive. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.
>
> If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices could rise, and supply problems could occur. We are therefore extremely concerned with any reduced competition.

457 Second, notwithstanding the evidence adduced on behalf of certain customers, in particular Sunchef and Riverview, that they would be put out of business should the Applicant cease operations, we are not persuaded that this result is likely. Some complaining customers have not attempted to investigate alternate sources of supply and have simply asserted that it would be either unavailable or too costly. While the complaining customers assert that specific suppliers approached were either unwilling or unable to supply chickens to required specifications, there is insufficient evidence to establish that these further processors were unable to obtain the chickens they require from other suppliers in the market. Further, at this time, no one appears to have complained about the situation to the CFC, the regulatory body responsible for determining the supply of chickens available to processors as well as being the most capable of remedying their perceived supply problems.

458 Third, many customer complaints focus on a limited set of scenarios, to wit, the possibility of the Applicant's closing or being acquired by Olymel. There are many other possible scenarios. A likely scenario is that the Applicant will be able to replace some but not all the Respondents' birds from Quebec sources. It could be business as usual or business on a reduced scale. This reduced scale could be quite consistent with the Applicant's historic supply of chickens, before it added an extra shift to accommodate the Nova Scotia and Prince Edward Island birds. In the event that the Applicant were to operate at a reduced scale, it might well arrange to continue to supply those customers who rely most on it and allow customers that are less concerned about their alternatives to seek supply elsewhere. This could also be true of some complaining customers who have only recently entered into contracts with the Applicant or increased their purchases from the Applicant.

459 The quality degradation issue appears to be overblown to the extent that it is related to incremental shipping distances. In many cases, complaining customers have alternate sources of supply that are closer than the Applicant. The

most common source of concern appears to be the tension between the abattoirs and the further processors rather than distance. This issue is market-wide and cannot turn on the actions of the St-François Plant. The Applicant itself engages in some further processing (Kentucky Fried Chicken birds) and its sister, Maple Lodge Farms, is also integrated into further processing. There are apparently 50 further processors in Ontario, even though the major abattoirs in Ontario (Maple Lodge Farms and Maple Leaf) are integrated into further processing. It appears that there are market opportunities for specialists in further processing and that these opportunities will not depend on the conduct of or the scale of operations at the St-François Plant.

460 A need to change suppliers does not necessarily equate with a supply disruption. The aggregate supply of chickens coming to market remains the same regardless of where the Respondents send their birds. The capacity to process chickens would remain the same unless the St-François Plant actually closes. Even then, the Sunnymel partnership may build a new plant, and/or ACA may expand, perhaps with the participation of Maple Lodge. It appears that some of the customers who have submitted evidence in this proceeding have changed their mix of suppliers in the past, some quite recently. This is a normal part of doing business, and it is not clear that any special significance should be attached to the fact that some of the Applicant's current customers are obliged to make further changes in their mix of suppliers.

461 In the event that the worst-case scenario prevails and some of the Applicant's current customers are adversely affected, the question remaining is whether this can be regarded as an adverse effect on competition in the market. There is no evidence of concern among purchasers of processed chicken who are not current Nadeau customers. Nor is there much in the way of evidence regarding the portion of the market accounted for by Nadeau's complaining customers. Given the limited likelihood of the worst-case scenario prevailing and the lack of evidence regarding the portion of the market that would be affected if it did prevail, the complaints of the Applicant's customers are not sufficient to support an inference that the Respondents' refusal is likely to have an adverse effect on competition in the market.

(vii) Impact of possible elimination of an efficient processor

462 The Applicant argues that it operates the most modern and efficient processing plant in Canada and that for this reason alone, its elimination would have an adverse effect on competition in the market. In this regard, the Applicant relies on the statistics compiled by Mr. Donahue and the affidavit of Mr. Robinson.

463 Mr. Donahue, as explained above, works for Agri Stats, a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America. At the Applicant's request, he prepared a report about the St-François Plant. He testified that the Applicant's wage rates *[CONFIDENTIAL]*and that the Applicant *[CONFIDENTIAL]*.

464 According to Dr. Ware, *[CONFIDENTIAL]*are an example of the greater efficiencies obtained by the Applicant. He is of the opinion that any adverse effect on competition will be quantitatively more severe if processing at the St-François Plant were replaced by the processing of chickens at a less efficient plant.

465 Mr. Robinson, at paragraph 6 of his affidavit, states that *[CONFIDENTIAL]*.

466 The evidence adduced does not establish that the Applicant operates the most efficient processing plant in Canada. When asked about the findings of his report, Mr. Donahue simply stated that *[CONFIDENTIAL]*.

467 Further, given the paucity of evidence regarding the efficiency of other processing plants in the relevant market, we cannot agree with Dr. Ware that any adverse effect would be quantitatively more severe if another processing plant processed the Respondents' chickens. As stated earlier, we find it unlikely that the Applicant would close. However, if it were to close, any new plant built by Sunnymel could benefit from the same sources of efficiency *[CONFIDENTIAL]*.

(d) Conclusions for paragraph 75(1)(e)

468 As stated above, for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. This analysis requires a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal. The level of competitiveness in the presence of the refusal to deal must be compared with the level that would exist in the absence of the refusal. It must then be determined whether the effect on competition, if any, is "adverse". In *B-Filer*, the Tribunal found that "adverse" is a lower threshold than "substantial".

469 Paragraph 75(1)(*e*) refers to two time frames: the present and the future. In the instant case, because of the Interim Supply Order, the refusal to deal is not having an adverse effect on competition at present because the Respondents have not yet ceased supply. Indeed, in their arguments, the parties referred to the likely effects of the refusal to deal.

470 We are satisfied that neither Olymel nor any other processor in the market currently exercises market power. For comparative purposes, the market we consider at the outset, without the refusal, is a market consisting of numerous processors; many small processors and a number of larger ones including Maple Lodge, Maple Leaf, Exceldor and Olymel. We will now summarize the results of our above analysis of the effect of the refusal to deal.

471 We have considered a number of different scenarios of the Applicant's circumstances resulting from the refusal. We have compared the effect of the refusal on market shares under five different scenarios and found that the results of this comparison are normally not associated with any concern about enhanced market power. We recognize, however, that the market shares upon which these calculations or other estimates of market concentration are based are not entirely accurate because they are based on slaughter rather than sales of processed chicken to customers in the relevant market. The parties failed to adduce any other evidence regarding market shares.

472 In assessing market power, we have also considered a number of other factors. The first factor considered is barriers to entry. We find that while barriers to entry into processing at the abattoir level exist, there is little to indicate that the refusal increases them or keeps them from decreasing. The next factor considered is the likelihood of an increase in the price of processed chicken. We find that there are good reasons to doubt that any increase in costs incurred by processors as a result of increased competition for birds can be readily passed on to consumers. Given the level of demand, it is impossible to sustain an increase in the price of a product without decreasing the quantity of the product offered in the market. Processors can only indirectly influence the supply of chickens through the regulatory process in which they constitute only one group of stakeholders.

473 With respect to the effect of the refusal to deal on further processors, we find that this does not constitute an adverse effect on competition. If the Applicant is able to replace the Respondents' birds, these processors will not be affected by the refusal. If the Applicant is obliged to reduce the amount it supplies to some further processors, alternative sources of supply exist. In this regard, it is important to re-emphasize that the refusal does not restrict the supply of chickens coming to market. Only the marketing boards can do that. In the event that some of the complaining further processors were to suffer some form of competitive disadvantage, there remains the question of the significance of this to the market as a whole. The Applicant failed to adduce evidence regarding the competitive significance of the complaining further processors. Given the absence of evidence regarding the significance of these market participants from the perspective of competition in the market, we cannot draw the inference that harm suffered by them constitutes an adverse effect on competition in the market.

474 The Applicant has failed to establish that it is likely that its customers will experience a disruption in supply and a reduction in quality. There are several plausible scenarios in which there are no adverse effects on complaining customers as a result of the refusal. In the event that some of the Applicant's customers actually do experience a decline in the quality of service or a disruption of service that is beyond the adaptation that is part of the normal competitive process, this effect would be confined to a very small fraction of the market and, because of the paucity of evidence in this regard, would not mean that the effect on competition could be qualified as "adverse" from the perspective of the market as a whole.

475 Based on the above comparative assessment of the market with the refusal to deal and that same market without the refusal to deal, we find that the Applicant has failed to establish that the refusal to deal is having or is likely to have an adverse effect on competition in the market. None of the factors discussed above, taken individually, support a conclusion that the Respondents' refusal is having or is likely to have an adverse effect on competition in the market. We are also of the view that, taken together, these factors lead to the same result. We find that, as a result of the refusal to deal, Olymel would not be placed in a position of created, enhanced or preserved market power. Instead the post-refusal market situation would be fluid, with the potential for a range of possible shifts in market share and changes in market concentration that are ambiguous in their implied effect on competition and, in any case, so small that they would normally pass without notice.

476 We note that earlier in these reasons, we developed a number of different scenarios to assist us in our analysis under paragraph 75(1)(*e*). We have found that, in all cases, there would be no adverse effect on competition. It is therefore unnecessary to determine which of the scenarios is most likely. The evidence on many material factors is not conclusive. For instance, we do not know if the ACA plant in Nova Scotia will expand and if it does, whether Maple Lodge will be involved. Nor do we know whether or when the Sunnymel partnership will build its proposed New Brunswick plant. We would be speculating on such matters. We are, however, as stated earlier, satisfied on the whole of the evidence that the Applicant will likely succeed in obtaining supply to replace at least some of the Respondents' chickens. Therefore to the extent that a finding of a likely scenario is required, we are of the view that the scenarios which provide for the Applicant's being able to replace some of the Respondents' chickens are, on a balance of probabilities, more likely.

477 Finally, we agree with the Respondents' contention and with the evidence of Ms. Sanderson who is of the opinion that, while the refusal does not have or is not likely to have an adverse effect on competition in the relevant market, a remedial order might have such an effect. The processor allocation systems maintained by provincial marketing boards limit intra-provincial competition for live birds. The allocation systems have the effect of fixing the share of the provincial slaughter accounted for by each abattoir in the province. This reduces the ability of one abattoir to attract business from another. A way around this is for an abattoir to purchase live birds from another province, but processors have generally been reluctant to do this on a significant scale. The tacit arrangement to avoid interprovincial competition for live birds has been justified, as arrangements of this nature so often are, by the argument that interprovincial competition for live birds would raise their price and this would be ruinous to processors. In our view, an attempt by the Applicant to acquire live birds in Quebec can be viewed as a departure from the tacit arrangement not to compete interprovincially for live birds. From this perspective, a remedial order that ties the Respondents' birds to the Applicant and to New Brunswick would be anti-competitive in all of the circumstances.

VII. Conclusions

478 For the above reasons, we find that:

(a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;

(d) The Applicant has not established that the product is in ample supply; and

(e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

479 As a consequence, the application will be dismissed.

480 These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, July 10, 2009 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

481 The issue of costs is reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Monday, July 20, 2009, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs. If there is no agreement, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

For These Reasons, the Tribunal Orders That:

482 The application is dismissed.

483 The issue of costs is reserved. On or before Monday, July 20, 2009, the parties shall communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs.

484 On or before Friday, July 10, 2009, the parties are to jointly correspond with the Tribunal setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

Schedule A

The Applicant's Experts

Dr. Richard Barichello

Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. He was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. Dr. Barichello testified about the origins and purpose of supply management in the poultry industry and gave his view that the underlying motivation of the supply management system was the protection of the producer. He described the regulations governing the supply management system and described the workings of that system including quota setting and allocation, import control, and price control. He spoke about the barriers to entry in chicken production and he provided his view that competition among producers was limited. He also testified with respect to premiums and the importance of assured continued supply for chicken processors.

Dr. Roger Ware

Dr. Roger Ware is a professor of economics at Queen's University. He was qualified as an expert in the areas of economics, competition policy and industrial organization, including market definition and competitive behaviour of firms. Dr. Ware opined on the product market and geographic market for both the 75(1)(*a*) analysis and the 75(1)(*e*) analysis. In respect of paragraph 75(1)(*a*) of the Act, he referred to the product as being live chickens. Dr. Ware acknowledged the difficulty in obtaining birds that would meet the size and quality requirements of the Applicant's customers. As for the geographic market under paragraph 75(1)(*a*), Dr. Ware gave his opinion that because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it was neither economic nor efficient for the Applicant to replace the Respondents' supply with supply from greater distances in Quebec.

In respect of paragraph 75(1)(*e*), Dr. Ware was of the opinion that the product market was processed chickens and that the geographic market consisted of the Maritimes and Quebec. Dr. Ware also testified with respect to the magnitude and dimensions of adverse effects on competition as a result of the refusal to deal. Dr. Ware opined that the increase in market power of Olymel in the processed chicken market would inevitably lead to higher prices and worsening conditions in other dimensions for customers.

Grant Robinson

Mr. Grant Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. He was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry. Mr. Robinson developed the following four scenarios to assist the Tribunal in understanding the impact of the removal of the Respondents' birds on the Applicant's operations:

i. loss of the Respondents' chickens;

ii. replacement of the Respondents' birds with birds from Quebec;

iii. loss of the Respondents' birds and Nova Scotia birds; and

iv. replacement of the Respondents' birds and loss of Nova Scotia birds.

He provided his view that the Applicant would be substantially affected in its business in all of the abovementioned scenarios. In order to develop his scenarios, Mr. Robinson made assumptions regarding transportation costs, shrink, DOAs and premiums which would have to be paid by the Applicant to source replacement supply in Quebec.

The Applicant's Lay Witnesses

Yves Landry

Yves Landry is the general manager of the St-François Plant. He testified about the plant's operations, the requirements of Nadeau's customers and Nadeau's arrangements with its customers. He talked about the range of birds supplied by the Respondents to Nadeau and their refusal to deal. He stated that Nadeau began to receive 25,000 additional birds per week from Nova Scotia in early June 2008 and that on September 15, 2008, Nadeau began to receive 6,250 additional chickens per week from Nova Scotia. He testified that one of the reasons why Nadeau had not made extensive efforts to procure supply in Quebec was the concern that those efforts would lead to a premium war. He also testified about Nadeau's efforts to procure chickens from Quebec. He spoke about Nadeau's transportation costs and DOAs.

Denise Boucher

Denise Boucher is the office manager at the St-François Plant. She is responsible for assembling financial data and is familiar with the records and the operations of the St-François Plant. Ms. Boucher's evidence consisted of adducing a number of financial documents into the record.

Anthony Tavares

Anthony Tavares is the former chief executive officer of Maple Lodge and former president of Nadeau. Mr. Tavares described the supply management system and Nadeau's operations in New Brunswick. He spoke about New Brunswick producers and chicken production in New Brunswick. Mr. Tavares also testified with respect to the Respondents' threat of the removal of their birds from the Applicant and of the Respondents' termination of supply. Mr. Tavares referred to the substantial detrimental effect the refusal to deal would have on the Applicant and to the difficulty the Applicant would have in replacing the Respondents' chickens. Mr. Tavares spoke about the current situation and indicated that the

Applicant was willing to continue to meet all of the usual trade terms and to pay fair market price to the Respondents for the continuation of supply of live chickens.

John Feenstra

John Feenstra was the general manager of Nadeau from 1989 to 2006. He talked about Nadeau's initial attempts to obtain supply from New Brunswick producers in the early 1990s, the chicken industry including the legislative scheme in place in New Brunswick and the operations of the St-François Plant. He testified about Nadeau's negotiations with Westco regarding the purchase of the St-François Plant and the effect on Nadeau's business of the Respondents' refusal to supply. Mr. Feenstra explained that an "all-out premium war" would be created if Nadeau were required to purchase chickens from Quebec.

Tina Ouellette

Tina Ouellette is part of the procurement team at the St-François Plant. She testified about her role in the procurement effort to source live chickens from Quebec. She indicated that she was charged with making the initial telephone calls to Quebec producers for the purpose of inquiring as to whether or not they would be interested in meeting with a representative from Nadeau to discuss the possibility of supplying the St-François Plant with live chickens. Ms. Ouellette described the procedure she followed when making the calls to producers. She stated that she contacted 454 producers and that 67 producers were interested in meeting with a Nadeau procurement representative. Ms. Ouellette also indicated that a number of producers could not be reached for a variety of reasons and that others could not supply the Applicant because they produced other types of poultry or had sold their quota.

Léonard Viel

Léonard Viel is the manager of sales, transportation and the garage at the St-François Plant. He stated that he was asked to assist the procurement team to attempt to source chickens from Quebec when another member of the procurement team was on vacation. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying Nadeau with live chickens. He also outlined the pricing arrangements sought by potential Quebec producers before they would consider moving their production to the St-François Plant and the volume of live chickens they were willing to supply the Applicant.

Réjean Plourde

Réjean Plourde is part of the procurement team at Nadeau. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying the Applicant with live chickens. He also testified with respect to the instructions he received from Mr. Landry regarding his task to seek replacement supply in Quebec and stated that he did not have the authority to sign contracts. He indicated that he had met with 39 producers and that he had made detailed notes of these meetings. He testified about the pricing arrangements sought by Quebec producers before they would consider moving their production to the St-François Plant. He also testified with respect to the procedure he followed when meeting with Quebec producers.

Guy Chevalier

Guy Chevalier is the president of Desco, a further processor and distributor of chickens. He stated that Desco competes directly with Olymel and Exceldor in the Quebec market and that as a result it cannot purchase fresh-killed chickens from them at reasonable prices. He further stated that Desco has no difficulty obtaining supply at reasonable prices from Nadeau. Mr. Chevalier indicated that he purchased processed chickens from the United States by purchasing importation quotas from processors that did not utilize them. He further testified about the procedure applicable to processors seeking to obtain supplementary importation quotas from the CFC.

Terry Ellis

Terry Ellis is the president and a major shareholder of Sunchef, a further processor located in Quebec. He described the nature of Sunchef's business and the contractual relationship between Sunchef and Nadeau. He stated that Sunchef entered into a contractual relationship with Nadeau in 2007 in order to ensure sufficient supply for its biggest customer. He further stated that, since their arrangement came into effect, the birds supplied by Nadeau had been of high quality and of the type and size requested. Mr. Ellis also indicated that Olymel was unwilling to supply fresh-killed chickens to Sunchef at a reasonable price and that although he currently purchased processed chickens from Exceldor, it could not meet all of its needs. Mr. Ellis stated that Nadeau had always been an effective competitor to Exceldor and Olymel and said that if Nadeau's supplies of live chickens were cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated. According to Mr. Ellis, this would have a major adverse effect at Sunchef's level of the market. He further stated that should Nadeau go out of business or be acquired by Olymel, he foresaw that Sunchef's supplies would be reduced or cut off and that he would no longer be able to continue in that business.

Lyndsay Gazzard

Lyndsay Gazzard is the senior purchasing manager of UPGC. She testified about UPGC's long and mutually beneficial relationship with Nadeau. She stated that Nadeau had for a long time supplied all of the fresh chickens used in KFC restaurants in New Brunswick, and, in the last two years, supplied 98% of KFC restaurants in Nova Scotia and Prince Edward Island. She further stated that UPGC had no difficulty obtaining all of its requirements for Atlantic Canada from Nadeau at a reasonable price. She testified about UPGC's purchasing requirements and trends, including procurement from Olymel and Exceldor. She also testified about the problems arising from Westco's change in production size. Lastly, she indicated that she remained concerned about UPGC's ability to obtain birds of the required size and specifications in the event that live chicken supply to Nadeau was disrupted.

Corey Goodman

Corey Goodman is the chief purchasing officer for Priszm LP and the general manager of UPGC. Priszm operates about 45 KFC restaurants in New Brunswick and Nova Scotia, and UPGC is a non-profit association that operates as the purchasing agent for all KFC restaurants in Canada. Mr. Goodman stated that he was concerned about the impact of any reduction in the supply of live chickens to Nadeau, as it would result in increased costs, reduced freshness and operational complexities with respect to obtaining replacement supply. He further stated that Olymel and Exceldor were already very powerful players in the market and that with Nadeau weakened or gone, there would be even less competition.

Debbie Goodz

Debbie Goodz is the president and CEO of Riverview which is a further processor located in Ste-Sophie, Quebec. Ms. Goodz described Riverview's business and its supply requirements and specifications. She indicated that Riverview purchased the vast majority of its supplies from the Applicant and that it had always been content with the Applicant's service, quality and price. Ms. Goodz stated that her ability to continue to supply her specialized product at an acceptable price depended on her ability to continue to obtain supplies from the Applicant. She indicated that she was unable to obtain chickens from Olymel and that she could not obtain alternative supplies from elsewhere because of transportation issues, price concerns and size requirements. Ms. Goodz also indicated that she had never complained to the CFC regarding the unavailability of supplies. Ms. Goodz expressed her view regarding the current state of competition and stated that if the Applicant's supplies of live chickens were cut off or curtailed, its ability to compete with Olymel would be reduced or eliminated, thus causing a major adverse effect at Riverview's level of the market.

Jeffrey Lloyd McHaffie

Jeffrey Lloyd McHaffie is a consultant to Puddy and its *de facto* vice president, in charge of sales and purchases of poultry products. He has over 20 years' experience in the poultry industry. Puddy is a further processor of fresh-killed chickens, specializing in "case-ready" chicken for the retail supermarket. Mr. McHaffie testified about Puddy's strict specifications for its incoming supplies of chickens and stated that Nadeau has consistently been able to meet its exacting quality and freshness requirements. He also testified about Puddy's difficulties in obtaining supply from Ontario and western Canada and he discussed the service and quality problems associated with Olymel's products.

Kevin Thompson

Kevin Thompson is the executive director of the Association of Ontario Chicken Processors ("AOCP"). He has been involved with the Ontario chicken industry since 1978. He stated that maintaining a supply of live chicken was essential for a processor as without supply, processors become less competitive and less able to meet the needs of their customers. He described the plant supply allocation systems in place in Ontario and Quebec and the supply management system in place in Canada. He stated that it was disconcerting to the AOCP that Nadeau's only alternative may be to enter into an interprovincial premium war to try to replace 50% of its live supply if the Respondents were able to unilaterally withdraw their live chicken production from Nadeau. He testified on the detrimental effects of interprovincial trade via premium wars and concluded that the consequences of a premium war for the processor community as a whole, its customers and for consumers were all negative. He indicated that the interprovincial movement of live chickens is really a weakness in the regulated supply system and one that must ultimately be addressed if supply management is to be sustained. He further stated that if Nadeau elected not to source chickens from Quebec or if it decided to close or to sell to one of the other processors in the region, there would be a substantial adverse effect on competition in the marketplace in Quebec and eastern Canada.

Bruce McCullagh

Bruce McCullagh is the senior vice president and general manager of poultry operations at Maple Leaf. He has over 12 years' experience in the poultry industry. He described the nature of the supply management system including the manner in which the system shields chicken producers from competition. He also testified about the plant supply allocation systems in place in Ontario and Quebec. Mr. McCullagh discussed the detrimental effects of interprovincial trade including the creation of unsustainable premium wars. He stated that interprovincial trade is a systemic problem in the poultry industry and that the government needs to look at possible amendments to the current regulatory regime to address this issue. Mr. McCullagh also testified about Maple Leaf's involvement in the interprovincial procurement of live chickens.

Andre Merks

Andre Merks is a Nova Scotia producer. He has been farming broiler chicken, turkeys and layer eggs for over thirty years. Mr. Merks spoke of the "handshake deal" he entered into with the Applicant following the closure of the Maple Leaf plant in Nova Scotia. He discussed the reasons why he had decided to send his production to the Applicant instead of ACA. Mr. Merks spoke of the concerns expressed by Nova Scotia producers with respect to the chicken industry in Nova Scotia. He also testified with respect to a meeting that took place in October of 2008 between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

Michael Donahue

Michael Donahue is the vice-president of Agri Stats, a company that offers benchmarking services for the poultry industry across North America. He described the procedure used by Agri Stats to collect and analyze data. Mr. Donahue explained the report that he had generated for the St-François Plant and indicated that, in the areas he had examined the St-François Plant would be competitive with the Canadian industry.

Westco's Expert

Dr. Margaret Sanderson

Margaret Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. Ms.

Sanderson was qualified as an expert in the area of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms. Ms. Sanderson testified with respect to paragraphs 75(1)(*a*) and 75(1)(*e*) of the Act. With respect to paragraph 75(1)(*a*), Ms. Sanderson expressed the opinion that the issue was not in dispute and that the product market was live chickens. To determine whether or not the Applicant would be substantially affected in its business, Ms. Sanderson looked at the cost of replacing the Respondents' birds with birds from Quebec. She was of the opinion that the Applicant could source live chickens from producers in Quebec without being substantially affected and thus concluded that Quebec-based chickens were substitutes for the live chickens supplied by the Respondents.

In respect of paragraph 75(1)(*e*), Ms. Sanderson was of the opinion that the relevant geographic market for determining whether there was an adverse effect on competition was at least as large as Ontario, Quebec and the Maritimes. She examined Nadeau's and Olymel's historic shipping patterns, shipping distances, transportation costs and prices to make this determination. In Ms. Sanderson's view, the refusal would not provide Olymel with market power and would not cause an adverse effect on competition.

Westco's Lay Witnesses

Thomas Soucy

Thomas Soucy is the president and chief executive officer of Westco. He testified about Westco's activities and operations. He discussed the consolidation of production quota in New Brunswick and Westco's plans for complete vertical integration. He testified about Westco's business relationship with the Applicant and provided his view that the Applicant had abused its monopoly power in New Brunswick. Mr. Soucy described the conception of Sunnymel and discussed Sunnymel's plan to acquire or construct a new processing plant in New Brunswick. He also testified about Westco's negotiations with the Applicant regarding the purchase of the St-François Plant and with respect to the Applicant's ability to obtain replacement supply of live chickens in Quebec.

Bertin Cyr

Bertin Cyr is a Westco shareholder and has been chairman of Westco's Board of Directors since 2003. He testified about the history of the corporation as well as its plans for complete vertical integration. Mr. Cyr described the steps toward vertical integration that had been taken by Westco in the past and he provided his view that complete vertical integration, by acquiring an existing processing plant or by building a new one, was Westco's only way to ensure its long term survival in the poultry industry. Mr. Cyr testified about Westco's business relationship with the Applicant and indicated that Westco's desire to vertically integrate was also motivated by the fact that the Applicant had abused its position. Mr. Cyr also spoke of Westco's past attempts to enter into a partnership with the Applicant.

Yvan Brodeur

Yvan Brodeur is vice-president of procurement at Olymel. He described the nature of Olymel's business including its processing and procurement activities. He described the supply allocation system in place in Quebec and he discussed interprovincial trade of live chickens. Mr. Brodeur also spoke about the conditions of purchase of both live and processed chickens. He discussed transportation costs associated with transporting live chickens as well as transportation costs associated with transporting processed chickens. Mr. Brodeur also testified about Olymel's clients and their location from Olymel's processing plants.

Julie Desroches

Julie Desroches is an environmental project officer at Olymel. She testified about her involvement in Sunnymel's project to build a new slaughterhouse in New Brunswick and the steps that had been taken to date in the construction project. She also spoke of the circumstances which had led to the project being delayed and she discussed Sunnymel's future construction plans for the new slaughterhouse in New Brunswick.

Richard Wittenberg

Richard Wittenberg is a chicken producer in Nova Scotia. He testified on the closure of the Maple Leaf plant in Nova Scotia and spoke of the "handshake" agreement he entered into with the Applicant following the closure of that plant. He also testified with respect to a meeting that took place on October 15, 2008, between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

Dynaco's Lay Witnesses

Gilles Lapointe

Gilles Lapointe is the director of finance for Dynaco. He testified with respect to Dynaco's corporate structure and the nature of its business. He described Dynaco's production quota and indicated that it consisted of 6.22% of New Brunswick's total production quota. Mr. Lapointe testified about Dynaco's decision to cease supplying the Applicant with live chickens. He also described how co-operatives operate and why it was beneficial for Dynaco to send its production to Sunnymel.

Rémi Faucher

Rémi Faucher is the general manager of Dynaco. He testified about Dynaco's corporate structure and the nature of its business and chicken production. He spoke of the reason why Dynaco decided to cease supplying the Applicant with live chickens and stated that it was essentially based on the deterioration of its business relationship with the Applicant and on the business opportunities offered by Sunnymel.

Acadia's Lay Witnesses

Rémi Faucher

Rémi Faucher is the former president and director of Acadia. He testified about Acadia's corporate structure and the nature of Acadia's business. Mr. Faucher spoke of Acadia's quota and indicated that it consisted of 16% of New Brunswick's total production quota. He also testified about Acadia's decision to cease supplying the Applicant with live chickens and indicated that it was a business decision. He also spoke about the financial advantages involved in sending Acadia's production to a processing facility owned by Olymel.

Schedule B

Schedule to the *Regulations Amending the Canadian Chicken Marketing Quota Regulations*, SOR/2009-4

SCHEDULE *(Sections 1, 5 and 7 to 10)*
LIMITS FOR PRODUCTION AND MARKETING OF CHICKEN FOR THE PERIOD
BEGINNING ON JANUARY 4, 2009 AND ENDING ON FEBRUARY 28, 2009

Item.	**Column 1 Province**	**Column 2 Production Subject to Federal and Provincial Quotas (in live weight) (kg)**	**Column 3 Production Subject to Federal and Provincial Market Development Quotas (in live weight) (kg)**
1.	Ont.	65,725,554	2,920,000
2.	Que.	53,105,045	5,400,000
3.	N.S.	7,014,256	0
4.	N.B	5,716,109	0
5.	Man.	8,390,996	394,950
6.	B.C	29,212,807	4,089,793
7.	P.E.I	754,057	0

8.	Sask.	7,015,829	982,216
9.	Alta.	18,430,359	400,00
10.	Nfld. and Lab.	2,825,158	0
Total		198,190,170	14,186,959

ANNEXE *(articles 1, 5 et 7 à 10)*
LIMITES DE PRODUCTION ET DE COMMERCIALISATION DU POULET POUR LA PÉRIODE COMMENÇANT LE 4 JANVIER 2009 ET SE TERMINANT LE 28 FÉVRIER 2009

Article	**Colonne 1** **Province**	**Colonne 2** **Production assujettie aux contingents fédéraux et provinciaux (en poids vif) (kg)**	**Colonne 3** **Production assujettie aux contingents fédéraux et provinciaux d'expansion du marché (en poids vif) (kg)**
1.	Ont.	65 725 554	2 920 000
2.	Qc	53 105 045	5 400 000
3.	N.-É.	7 014 256	0
4.	N.-B	5 716 109	0
5.	Man.	8 390 996	394 950
6.	C.-B	29 212 807	4 089 793
7.	Î.-P.-É	754 057	0
8.	Sask.	7 015 829	982 216
9.	Alb.	18 430 359	400 00
10.	T.-N.-L.	2 825 158	0
Total		198,190,170	14 186 959
1.			

Schedule C

Sections 1 and 2 of Order I - Chicken Farmers of New Brunswick Marketing Plan

1. The object of the marketing plan is to control the number of chickens raised for marketing within the province, in such a manner:

(a) As to ensure there is an adequate supply of New Brunswick grown chicken available to the consumer.

(b) To provide an opportunity for the maximum number of residents in New Brunswick to earn a living in the marketing of chicken.

(c) To ensure a reasonable rate of return from the sale of chicken and to ensure a continuity of supply.

(d) To avoid the development of monopolies which could result in excessive cost to the consumers of chicken.

(e) To avoid a curtailment of the overall supply in the event one or more producers cease to market chicken.

2. There shall be established a periodic marketing limit being the number of kilograms of chicken live weight which can be raised for marketing within the Province in conformity with the objectives of the plan.

1. Le but du plan de commercialisation est de réglementer l'élevage du poulet destiné à la commercialisation dans la province, de façon à:

a) assurer au consommateur un approvisionnement adéquat de poulets produits au Nouveau-Brunswick,

b) offrir à un nombre maximum de résidents du Nouveau-Brunswick l'occasion de gagner leur vie dans la commercialisation du poulet,

c) assurer un profit raisonnable de la vente de poulets et assurer un approvisionnement continuel.

d) éviter la réalisation de monopoles qui pourraient entraîner un coût excessif au consommateur, et

e) éviter une réduction de l'approvisionnement global advenant le retrait d'un ou de plusieurs producteurs de la commercialisation du poulet.

2. Une limite de commercialisation périodique est établie, correspondant au nombre de kilogrammes (poids vif) de poulets pouvant être élevés à des fins de commercialisation dans la province, conformément aux objectifs du plan.

APPEARANCES:

For the applicant

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited

Leah Price

Ron Folkes

Andrea McCrae

Joshua Freeman

For the respondents

Groupe Westco Inc.

Eric C. Lefebvre

Martha Healey

Denis Gascon

Alexandre Bourbonnais

Geoffrey Conrad

Groupe Dynaco, Coopérative Agroalimentaire

Olivier Tousignant

Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.

Valérie Belle-Isle

Footnotes

15

2011 CAF 188, 2011 FCA 188
Federal Court of Appeal

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.

2011 CarswellNat 2032, 2011 CarswellNat 2033, 2011 CAF 188, 2011 FCA 188, [2011] S.C.C.A. No. 365, 204 A.C.W.S. (3d) 57, 419 N.R. 333

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited, Appellant and Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc., Respondents

Johanne Trudel J.A., M. Nadon J.A., Pelletier J.A.

Heard: January 18, 2011
Judgment: June 2, 2011
Docket: A-342-09

Proceedings: affirmed *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.* (2009), 2009 CarswellNat 5934, 2009 Comp. Trib. 6 ((Competition Trib.))

Counsel: Leah Price, Andrea M. Marsland, Ron E. Folkes, for Appellant
Denis Gascon, Eric Lefebvre, Martha A. Healey, Alexandre Bourbonnais, for Respondent, Groupe Westco Inc.
Olivier Tousignant, for Respondent, Groupe Dynaco, Co-Operative Agroalimentaire

Subject: Criminal; Corporate and Commercial; Property; Torts

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — General principles

Suppliers informed chicken processor N that they would cease supplying it with live chickens within matter of months, depriving N of 50 percent of its supply of live chicken — N alleged that suppliers conspired to reduce competition by putting competitors of suppliers' related company out of business — Competition Tribunal dismissed N's complaint that suppliers' refusal to deal was breach of s. 75 of Competition Act — Tribunal found that N did not establish that it was unable to obtain adequate supplies of live chickens or that suppliers' refusal to deal was likely to have adverse effect on competition in market — Tribunal decided that it did not have to determine nature of suppliers' conduct because such characterization would not change legal result — N appealed — Appeal dismissed — Tribunal's conclusion that suppliers' refusal to supply would not have adverse effect on market was reasonable.

Table of Authorities

Cases considered by *Pelletier J.A.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 203 N.R. 36, [1996] 3 S.C.R. 458, 31 C.C.L.T. (2d) 113, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — referred to

B-Filer Inc. v. Bank of Nova Scotia (2006), 2006 Comp. Trib. 42, 2006 CarswellNat 6422 (Competition Trib.) — considered

Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 2001 FCA 104, 2001 CarswellNat 702, 269 N.R. 109, 199 D.L.R. (4th) 130, [2001] 3 F.C. 185, 2001 CarswellNat 2092, 11 C.P.R. (4th) 289 (Fed. C.A.) — referred to

Canada (Director of Investigation & Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1, 1990 CarswellNat 1368 (Competition Trib.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1995), 21 B.L.R. (2d) 1, 63 C.P.R. (3d) 1, [1995] 3 F.C. 557, *(*sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 1))* 185 N.R. 321, 1995 CarswellNat 708, 1995 CarswellNat 1312, 127 D.L.R. (4th) 263 (Fed. C.A.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83, 1990 CarswellNat 1372 (Competition Trib.) — considered

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — considered

Cusson v. Robidoux (1975), [1977] 1 S.C.R. 650, 1975 CarswellQue 56, 10 N.R. 592, 1975 CarswellQue 56F (S.C.C.) — considered

Devine c. Québec (Procureur général) (1988), 10 C.H.R.R. D/5610, 90 N.R. 48, [1988] 2 S.C.R. 790, 55 D.L.R. (4th) 641, 19 Q.A.C. 33, 36 C.R.R. 64, 1988 CarswellQue 156, 1988 CarswellQue 156F (S.C.C.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

J. & A. McMillan Ltd. v. McMillan Press Ltd. (1989), 50 C.C.L.T. 141, 27 C.P.R. (3d) 390, 45 B.L.R. 149, 99 N.B.R. (2d) 181, 250 A.P.R. 181, 1989 CarswellNB 10, 99 N.B.R. 181 (N.B. C.A.) — considered

Nadeau Ferme Avicole Ltée v. Groupe Westco Inc. (2009), 2009 CarswellNat 5934, 2009 Comp. Trib. 6 (Competition Trib.) — referred to

Operation Dismantle Inc. v. R. (1985), [1985] 1 S.C.R. 441, 59 N.R. 1, 18 D.L.R. (4th) 481, 12 Admin. L.R. 16, 13 C.R.R. 287, 1985 CarswellNat 151, 1985 CarswellNat 664 (S.C.C.) — considered

Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd. (2004), 35 C.P.R. (4th) 517, 2004 Comp. Trib. 15, 2004 CarswellNat 5577 (Competition Trib.) — considered

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

s. 75 — considered

s. 75(1) — considered

s. 75(1)(a) — considered

s. 75(1)(b) — considered

s. 75(1)(c) — considered

s. 75(1)(d) — considered

s. 75(1)(e) — considered

s. 75(3) "trade terms" — considered

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I
s. 13 — considered

APPEAL by company from Competition Tribunal's decision.

***Pelletier J.A.*:**

1) Introduction

1 Between January and September 2008, each of the respondents advised the appellant, whose business consists of slaughtering chickens, that they would cease supplying it with live chickens within a matter of months. The respondents' collective action, if carried into effect, would deprive the appellant of approximately 50% of its supply of live chickens. The appellant commenced a private prosecution under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 [the Act], which makes a refusal to deal a reviewable practice under certain conditions. The Competition Tribunal (the Tribunal) issued an interim supply order to preserve the status quo while it considered the appellant's complaint.

2 On June 8, 2009, in a decision reported as *Nadeau Ferme Avicole Ltée v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 (Competition Trib.) [Reasons or Tribunal's Reasons], the Tribunal dismissed the appellant's complaint that the respondents' refusal to deal was a breach of section 75 of the Act. The Tribunal found that the appellant had failed to establish that:

a. it was unable to obtain adequate supplies of live chickens because of insufficient competition among the suppliers of the product in the market;

b. the product was in ample supply; and

c. the respondents' refusal to deal was likely to have an adverse effect on competition in the market.

3 The appellant appeals from the Tribunal's decision. Because all of the conditions set out in section 75 must be present before the appellant can succeed, the appellant must persuade the Court that the Tribunal erred with respect to each of these conclusions. For the reasons which follow, I am of the view that it has not done so and I would, therefore, dismiss the appeal with costs.

2) The Parties

4 The appellant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (Nadeau) is a wholly owned subsidiary of Maple Lodge Holding Corporation (Maple Lodge), one of Canada's largest chicken processors. Nadeau operates a

large, modern chicken processing plant located at St. François de Madawaska in northern New Brunswick. Nadeau's plant has been the only chicken processing plant in New Brunswick since 1992.

5 The respondent Groupe Westco Inc. (Westco) is a highly integrated chicken producer. It owns or controls egg hatching production quota, farms, chicken production quota, and chicken production farms. Directly or indirectly, Westco owns or controls approximately 50% of New Brunswick's chicken production quota.

6 The respondent Groupe Dynaco, Coopérative Agroalimentaire (Dynaco) is a Quebec co-operative with interests in chicken production facilities in New Brunswick. Dynaco owns 6.22% of New Brunswick's chicken production quota. The respondents Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc. (collectively Acadia) are extra-provincial entities registered to do business in New Brunswick. Acadia owns or controls 16% of the New Brunswick's chicken production quota.

7 The respondents are interrelated. For present purposes, it is sufficient to know that Westco is a member of the Dynaco cooperative. Dynaco owns 30% of the shares in Acadia while Westco owns 25%.

8 Another important participant in the poultry production system is Co-op Fédérée, the largest firm in the chicken sector in Canada. Dynaco is a member of Co-op Fédérée which owns 60% of Olymel, a Quebec based processor and Nadeau's primary competitor in Quebec and the eastern provinces. Co-op Fédérée also owns 30% of Acadia.

3) The Poultry Supply Management System

9 The production of poultry in New Brunswick, as in the rest of Canada, is subject to an elaborate supply management scheme established by the Government of Canada and administered in each province by a provincial marketing board in so far as it concerns producers within the province. The scheme is complex and all encompassing. A full description of the operation of this system is found at paragraphs 9 to 18 and 254 to 269 of the Tribunal's Reasons. For the purposes of this decision, the relevant features of the scheme are as follows.

10 The amount of poultry which a producer may produce and bring to market is determined by a quota set by the provincial marketing board. A producer may not exceed its production quota. The quota is fixed every eight weeks or so through a process tied to consumer demand for poultry. In most provinces, increases in the total quota are allocated proportionately between existing producers.

11 The minimum price for which producers may sell their live chickens is also set by the provincial marketing board (the board price). The Ontario board price serves as bench mark for several other provinces, including Quebec and New Brunswick. The New Brunswick board price is $.065 per kilogram live weight higher than the Ontario board price while the Quebec board price is the same as the Ontario board price.

12 Although the poultry marketing scheme allows for imports of poultry from outside Canada, imports are tightly controlled and, as a result, they play no role in the present dispute.

13 While the production of poultry and the price to be paid for it is highly regulated, the slaughter and processing of the poultry thus produced is not subject to the same degree of regulation. With some exceptions, producers may sell their production to the processor of their choice, even if that processor is located in another province. Processors, such as Nadeau, may pay producers a premium in order to obtain their product. Nadeau has done so on a number of occasions (Reasons at paras. 37-40). Quebec processors regularly pay their suppliers a premium over the Quebec board price (Reasons at para. 153).

14 While the poultry supply management system attempts to maintain equilibrium between poultry production and consumer demand, it does not seek to regulate the activities of the processors. Thus processors' decisions to add or reduce processing capacity have no impact on poultry producers' quotas. As a result, the equilibrium between consumer demand and production quotas is not necessarily reflected in the relationship between production quotas and the processing

industry's capacity. There is no shortage of processing capacity in the sense that all producers' quotas are taken up by processors. But it is open to individual processors to increase their processing capacity faster than production quotas are increased, or for new processors to enter a market in which supply and demand are already closely matched.

4) The Dispute Between the Parties

15 Westco is a highly integrated player in the poultry industry. It lacks only a processing plant in order to be a fully vertically integrated operation. In January 2007, Westco advised Nadeau of its interest in acquiring an interest in its plant, or in buying it outright. Maple Lodge, Nadeau's parent company, advised Westco that it was not interested in selling the St. François plant. Maple Lodge was of the view that an arrangement by which Westco owned a portion of Nadeau while retaining 100% of its production assets would lead to an undesirable non-alignment of shareholder interests.

16 After consideration of the situation by its board of directors, Maple Lodge indicated its interest in an arrangement in which Maple Lodge and Westco would each own a portion of the combined operations of Westco and Nadeau. Westco did not respond to this proposal.

17 In the meantime, Westco was engaged in discussions with Olymel with a view to forming a partnership to implement its vertical integration strategy. The course of events is set out in the Reasons at paragraphs 46-47 and 49-50:

> The purpose of the partnership was to acquire the assets or shares of [Nadeau] or to acquire property and construct, start up, own and operate a new chicken processing plant. Westco and Olymel thus worked out a business plan envisaging the acquisition of the St-François Plant or, in the event that negotiations failed with [Nadeau], the construction of a new processing plant in New Brunswick. The partnership between Olymel and Westco is the Sunnymel Limited Partnership ("Sunnymel")...
>
> Thomas Soucy, Chief Executive Officer of Westco, contacted Mr. Tavares [President and Chief Executive Officer of Maple Lodge] in mid-August 2007 and said that he wanted Mr. Tavares to meet with him and Réjean Nadeau, President and Chief Executive Officer of Olymel. At the meeting, Mr. Tavares was advised that Westco and Olymel wanted to buy the St-François Plant. He was told that if [Nadeau] was not willing to sell the St-François Plant, all of the chickens produced by Westco would be diverted to Quebec and Sunnymel would then build its own plant in New Brunswick.
>
> . . .
>
> Following [a subsequent meeting], Mr. Tavares advised Mr. Soucy that although its first choice was to maintain the status quo, Maple Lodge's Board of Directors had, given the circumstances, instructed him to assemble a negotiating team.
>
> On November 6, 2007, the parties started negotiations for the sale of the St-François Plant. The purchase price offered by Sunnymel was less than 25% of the value attributed to the St-François Plant by [Nadeau]. The negotiations therefore broke down and, on January 17, 2008, Westco gave written notice that it would cease supplying its live chickens to [Nadeau], effective July 20, 2008, and that its chickens would be diverted to Olymel in Quebec pending Sunnymel's construction of a new slaughterhouse in New Brunswick.

18 Following the breakdown of negotiations between Westco and Nadeau, Dynaco gave Nadeau notice on March 6, 2008, that it would cease supplying it effective September 15, 2008. Acadia gave notice of its intention to cease supplying Nadeau, effective September 15, 2008, by means of a letter dated February 28, 2008.

19 Nadeau puts a different cast on the facts. It argues that Olymel and Westco conspired to reduce competition by putting one of Olymel's biggest competitors out of business. It points to evidence which shows that Olymel and Westco were in touch long before any approach was made to Nadeau or Maple Lodge. The Tribunal decided that it did not have to determine the nature of Westco's conduct because, on the view which it took of the relevant principles, such a

characterization would not change the legal result (Reasons at para. 292). I agree with the Tribunal and do not propose to cast my analysis more broadly than required by the terms of subsection 75(1) of the Act.

5) Section 75 of the Act

20 At this point, it may be useful to reproduce section 75 of the Act:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
>
> (b) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
>
> (c) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
>
> (d) the product is in ample supply, and
>
> (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.
>
> 75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:
>
> a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
>
> b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
>
> c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
>
> d) que le produit est disponible en quantité amplement suffisante;
>
> e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
>
> le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

6) The Decision Under Appeal

21 The Tribunal's decision is very long, 484 paragraphs, and extremely detailed. For the purposes of this part of my reasons, it is only necessary to summarize the substance of the Tribunal's decision on the elements of section 75, subject to a more detailed review when dealing with the grounds of appeal raised by the appellant.

22 In order to deal with paragraph 75(1)(*a*), the Tribunal was required to define a number of terms used by economists in their analysis of competition issues. The first was the relevant product market, which it defined as the market for live chickens, without reference to any weight restrictions. The Tribunal found that Nadeau had failed to show that live chickens within the weight range it had specified (1.71 to 2.4 kilograms) could not be replaced by chickens outside that range.

23 The Tribunal defined the relevant geographic market as New Brunswick, Prince Edward Island, those parts of Quebec within a 500 kilometre radius of Nadeau's plant, and Nova Scotia.

24 The Tribunal dealt at some length with the definition of "usual trade terms", inquiring whether price was included among the "usual trade terms". It noted that "usual trade terms" is defined at subsection 75(3) of the Act as referring to "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". The Tribunal found that usual trade terms are not the specific terms in effect between the parties prior to the refusal to deal, but rather those terms which are considered usual from the perspective of all processors competing for the product in the relevant market.

25 The Tribunal went on to find that "terms in respect of payment" include price, expressed as a range of prices.

26 Having defined the relevant terms, the Tribunal then considered whether Nadeau had established that its business would be substantially affected because it could not obtain adequate supplies of live chickens on the usual trade terms in the relevant geographic market. For the purposes of this analysis, the Tribunal considered whether Nadeau could replace the live chickens it receives from the respondents by live chickens from Quebec on the usual trade terms. The Tribunal concluded that Nadeau would be required to pay Quebec producers a premium in order to induce them to deal with it and, further, that the premiums it would have to pay would be outside the range of prices which constitute the usual trade terms.

27 The Tribunal then considered whether this inability to obtain live chickens on the usual trade terms would substantially affect Nadeau's business. It used earnings as the relevant indicator of a business' performance. The Tribunal found that replacing the live chickens that Nadeau receives from the respondents with live chickens from Quebec would result in a significant reduction of earnings relative to earnings in the appropriate reference period. In the Tribunal's view, this meant that Nadeau would be substantially affected in its business if it had to replace the respondents' supply of live chickens with live chickens from Quebec.

28 As a result, the Tribunal concluded that Nadeau had satisfied the conditions set out in paragraph 75(1)(*a*) of the Act.

29 The Tribunal then addressed paragraph 75(1)(*b)* of the Act, specifically whether Nadeau's inability to obtain adequate supplies of live chickens from Quebec on the usual trade terms was the result of insufficient competition among suppliers of live chickens in the relevant geographic market.

30 The Tribunal accepted that, for the purposes of this analysis, the relevant product and geographic markets were the same as those considered in the analysis with respect to paragraph 75(1)(*a*).

31 In addressing the question of "insufficient competition", the Tribunal referred to a previous Competition Tribunal decision with respect to refusal to deal, *Canada (Director of Investigation & Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, [1990] C.L.D. 1146 (Competition Trib.) [*Xerox*], in which the Tribunal commented that a market composed of numerous suppliers acting independently would not be considered a market in which there was insufficient competition. The Tribunal also reviewed the effect of the poultry supply management system on competition between

suppliers of live chickens. It concluded that Nadeau had failed to establish that there was insufficient competition among suppliers in the relevant market because of the number of suppliers and the absence of any evidence that they were not acting independently.

32 The Tribunal went on to say that, even if it had found that there was insufficient competition among suppliers, it would nonetheless have concluded that Nadeau had not discharged its burden under paragraph 75(1)(*b*). The Tribunal expressed its reasoning on this point as follows at paragraph 247 of its Reasons:

> There is inadequate evidence to establish that the competitive conditions of the market are the overriding reason why the Applicant is unable to obtain adequate supplies of the product. The overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the Applicant is unable to obtain adequate supplies of live chickens.

33 The Tribunal then turned its attention to whether Nadeau met the conditions set out at paragraph 75(1)(*c*) of the Act; it had no difficulty in coming to the conclusion that Nadeau was indeed willing and able to meet the usual trade terms of suppliers of live chickens.

34 The next issue which the Tribunal considered was whether the product, live chickens, was in ample supply in the relevant geographic market, as required by paragraph 75(1)(*d*) of the Act. The Tribunal began by asking itself what was meant by "ample supply". It concluded that "ample supply" means a situation in which suppliers are not obliged to choose between serving new customers and continuing to supply existing customers at historic rates. Next, the Tribunal examined the operation of the poultry supply management system and found that the production quotas and the pro-rata distribution of increases in the overall quota for live poultry meant that producers were not able to increase their production to supply new or growing markets. Producers were thus constrained in their ability to serve new customers while continuing to serve existing customers at historic levels. The product, therefore, was not in ample supply.

35 The last element in the analysis, paragraph 75(1)(*e*), is whether the refusal to deal is likely to have an adverse effect on competition in a market. The Tribunal began by recognizing that the market in issue under paragraph 75(1)(*e*) is not the market considered under paragraphs 75(1)(*a*) and (*b*), it is the "downstream" market.

36 The Tribunal was required to define the relevant product and geographic markets, this time in relation to the downstream market. It found that the relevant product market was processed chicken, including further processed chicken. Processed chicken is chicken which has been boned, cut up or cooked while further processed chicken was defined by one witness as "basically anything that happens to the chicken after it's been killed and possibly cut up" (Reasons at para. 300).

37 After reviewing a number of factors, the Tribunal defined the relevant geographic market as New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Ontario.

38 As to the meaning of "adverse effect on competition in a market", the Tribunal accepted, at paragraph 366 of its Reasons, the finding in a prior decision of the Tribunal, *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 (Competition Trib.) at para. 208, that:

> [F]or a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power.

39 The Tribunal noted that neither Westco, nor any of the other respondents, had any share in the downstream market and therefore could not have market power in that market. Market power "is generally accepted to mean an ability to set prices above competitive price levels for a considerable period", *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Trib.), at 28, [1990] C.L.D. 1078 (Competition Trib.). However, the Sunnymel partnership formed between Olymel and Westco would participate in the downstream market. For that

reason, the Tribunal found that the adverse effects of the refusal to deal could be analysed by measuring its impact on the market power of the partnership.

40 After examining a number of indicators of market power, the Tribunal concluded that no one participant in the relevant market currently has market power. Its examination of the same factors led the Tribunal to conclude that the respondents' refusal to deal with Nadeau would not create, enhance or preserve the market power of any of the current participants in the relevant market. The Tribunal noted that the refusal to deal would not change the total volume of chicken available to the downstream market so there should be little effect on consumers. To the extent that further processors might experience some form of competitive disadvantage as a result of Nadeau's inability to supply them, the Tribunal was unable to conclude that this would constitute an adverse effect on competition in the relevant market as a whole.

41 Since Nadeau failed to establish three of the five conditions required by subsection 75(1), the Tribunal dismissed its application for an order requiring the respondents to continue providing it with a supply of live chickens.

7) Issues in the Appeal

42 In order to succeed, Nadeau must persuade this Court that all of the conditions set out in subsection 75(1) have been satisfied. Since the Tribunal found that Nadeau had established that it met the requirements of paragraphs 75(1)(*a*) and (*c*), this appeal turns on the Tribunal's decision with respect to paragraphs 75(1)(*b*), (*d*), and (*e*) of the Act.

43 There are two limits to this Court's ability to review the Tribunal's conclusions: the restricted right of appeal from the Tribunal's findings of fact, and the standard of review.

44 Section 13 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), imposes a limitation on Nadeau's right of appeal:

> 13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.
>
> (2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.
>
> 13. (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.
>
> (2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale

45 A party may only appeal the Tribunal's conclusion on a question of fact with leave of this Court. As no such application for leave has been made, Nadeau is precluded from attacking the Tribunal's conclusions of fact. While Nadeau has an unfettered right of appeal on questions of law, subject only to the question of the appropriate standard of review, it has no right of appeal with respect to questions of fact.

46 This leaves the issue of appeals on questions of mixed fact and law. The distinction between questions of fact, questions of law, and questions of mixed fact and law, was laid out in the Supreme Court of Canada's decision in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para. 35, (1997), 71 C.P.R. (3d) 417 (S.C.C.):

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

47 For purposes of appealing a question of mixed fact and law, Nadeau must take the facts as the Tribunal found them. It cannot, under cover of challenging a question of mixed fact and law, revisit the Tribunal's factual conclusions.

48 It follows from this that the question of the standard of review on a question of fact does not arise in this case, since leave has not been granted to appeal a question of fact. The parties are agreed that the standard of review for questions of law is correctness and the jurisprudence of this Court is also to that effect (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 (Fed. C.A.) at paras. 39-72, [2001] 3 F.C. 185 (Fed. C.A.) at paras. 59-92). The parties are also agreed that the standard of review of questions of mixed fact and law is reasonableness.

8) Analysis

a) Did the Tribunal err in finding that Nadeau failed to establish that it was unable to obtain adequate supplies of live chickens because of insufficient competition among the suppliers of the product in the market?

49 Nadeau raises four issues, which it describes as errors of law, with respect to the Tribunal's findings in relation to paragraph 75(1)(*b*). I will deal with these four issues but not in the same order as they were raised by Nadeau:

> i. The Tribunal erred in concluding that the Quebec Chicken Marketing Board would not intervene to limit inter-provincial trade in chickens if Nadeau's replacement efforts resulted in a significant increase in the volume of chickens being exported from Quebec;
>
> ii. The Tribunal erred in concluding that the limit on aggregate supply, resulting from the supply management system, was the overriding reason why Nadeau could not obtain adequate supplies of live chicken following a refusal to deal by the respondents;
>
> iii. The Tribunal erred in finding that Nadeau failed to establish that there was insufficient competition between suppliers of live chicken when it accepted that the poultry supply management system created a statemandated cartel among chicken producers; and
>
> iv. The Tribunal erred in applying the wrong legal test to determine if there was insufficient competition among suppliers.

50 I turn now to consider each of these issues.

i) The Tribunal erred in concluding that the Quebec Chicken Marketing Board would not intervene to limit inter-provincial trade in chickens if Nadeau's replacement efforts resulted in a significant increase in the volume of chickens being exported from Quebec.

51 The Tribunal heard evidence from Dr. Ware, an economist retained by Nadeau, that the Quebec Chicken Marketing Board would intervene to limit inter-provincial trade in chicken if Nadeau succeeded in persuading a substantial number of Quebec producers to divert their product to its plant. The Tribunal set out the substance of Dr. Ware's evidence on this point as follows (Reasons at para. 115):

> Dr. Ware, however, expressed the opinion that, if the Applicant were to replace the Respondents' supply with Quebec-grown chickens, an intervention by Quebec governmental agencies would be likely. In his view, the resulting increase in interprovincial trade will have a direct impact on Quebec's VAG ("volume d'approvisionnement garanti"). The Quebec Chicken Marketing Board, under the VAG, fills interprovincial demands of processors located outside the province, before allocating live chicken supply to Quebec processors under the Quebec processor allocation system. Therefore, the greater the volume of supply sold to processors located outside Quebec is, the smaller the volume available to Quebecbased processors will be. In Dr. Ware's view, it is unlikely that a high level of interprovincial trade, around 14%, would be permitted by the Quebec governmental agencies in the long run.

52 The Tribunal then considered the evidence in support of Dr. Ware's hypothesis and rejected it (Reasons at para. 118):

> We find that there are no regulatory impediments to interprovincial trade and that while processing associations have expressed concerns about interprovincial trade, the evidence is insufficient to conclude, on the balance of probabilities, that an increase in interprovincial trade between Quebec and New Brunswick would induce a drastic intervention by Quebec governmental agencies.

53 Having found that there was no barrier to interprovincial trade in live chickens, and that this was not likely to change, the Tribunal went on to find that Quebec was part of the relevant geographic market.

54 On appeal, Nadeau argues that the Tribunal erred in law in concluding as it did. Nadeau argued that this Court must take judicial notice of a regulation adopted by the Régie des marchés agricoles et alimentaires du Québec, after the Tribunal's decision was issued, which imposed a moratorium on sales of live chickens to out-of-province buyers. According to Nadeau, this demonstrates that the Tribunal erred in law in including Quebec in the geographic market for the purposes of paragraphs 75(1)(*a*) and (*b*).

55 The difficulty with this argument is that it turns on the effect to be given to the evidence of Dr. Ware who was testifying as to regulatory context. He was offering an opinion as to a possible regulatory response in the event that certain events occurred. In effect, he was offering an opinion as to the probable course of events in the future. In her reasons in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at 478, (1985), 18 D.L.R. (4th) 481 (S.C.C.) [*Operation Dismantle*], Wilson J. described such evidence as evidence of "intangible facts":

> What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand.

56 Dr. Ware's evidence did not raise a question of law, even though the change in the regulatory context would take the form of a change in the regulation or other instrument having legal effect. Nadeau's attempt to undermine the Tribunal's conclusions with respect to Quebec's response to increased exports of live chickens is an attack on a finding of fact, a course which is not open to it in this appeal. While this Court may take judicial notice of changes in the law of a province, and while a Court should not shut its eyes to the real world in which its decision will be implemented, it would be unfair to the respondents for this Court to simply take judicial notice of one or more regulatory changes without giving the respondents the opportunity to put those changes in context by leading evidence of their own. This is particularly so since the regulations which Nadeau put to us appeared to have their origins in a dispute between the Quebec and Ontario marketing boards, which was not at all the basis upon which Dr. Ware offered his opinion. In short, I decline to take judicial notice of the changes in the Quebec regulatory scheme because they amount to a challenge to one of the Tribunal's findings of fact and to do so would be unfair to the respondents.

57 Nadeau cited, in support of its position, jurisprudence from the Supreme Court of Canada. In *Cusson v. Robidoux* (1975), [1977] 1 S.C.R. 650 (S.C.C.), at 656, (1975), 10 N.R. 592 (S.C.C.) [*Cusson*], the Supreme Court held:

> As Duff J. accepted in [*Boulevard Heights v. Veilleux* (1915), 52 S.C.R. 185] (at p.192), a court of appeal must decide on the basis of the situation existing when it renders its judgment, and not necessarily on the basis of the situation that existed when the trial judge ruled.

58 The decision in *Cusson* was reaffirmed in the Supreme Court of Canada's decision in *Devine c. Québec (Procureur général)*, [1988] 2 S.C.R. 790 (S.C.C.), at 805, (*subnom Allan Singer Ltd. v. Quebec (Attorney General)* (1988), 90 N.R. 48 (S.C.C.) [*Devine*]. Nadeau provided the Court with a number of other authorities to the same effect.

59 The jurisprudence relied upon by Nadeau deals with a different question than that raised by the evidence of subsequent changes to the Quebec regulatory context. The cases relied on by Nadeau deal with the effect of a change in the law to be applied to a case where that law has changed between the time of trial and the hearing of the appeal. In *Cusson*, the issue was the retroactive application of a change in limitation periods. In *Devine*, the issue was the effect to be given to a constitutional override. In both cases, and the many others to the same effect cited by Nadeau, the issue was the law to be applied by the Court to the facts of the case before it. That is not the case here.

60 As a result, this argument fails.

ii) The Tribunal erred in concluding that the limit on aggregate supply, resulting from the supply management system, was the overriding reason why Nadeau could not obtain adequate supplies of live chickens following a refusal to deal by the respondents.

61 At the start of its analysis with respect to paragraph 75(1)(*b*), the Tribunal noted that the disposition had two branches. An applicant must show, first, that there is insufficient competition in a market and, second, that its inability to obtain adequate supplies is due to that insufficient competition. The second branch involves a conclusion as to causation, a question of fact: see *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 70 and 159, [2002] 2 S.C.R. 235 (S.C.C.); *Operation Dismantle*, *supra* at para. 79; *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.) at para. 16, (1996), 140 D.L.R. (4th) 235 (S.C.C.).

62 In this case, the Tribunal found that Nadeau failed to show that there was insufficient competition but went on to say that even if it had, the Tribunal was persuaded that "the overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the applicant is unable to obtain adequate supplies of live chickens" (Reasons at para. 247). In other words, the Tribunal's conclusion on insufficient competition was overtaken by its findings as to the cause of Nadeau's inability to obtain adequate supplies.

63 Nadeau seeks to challenge the Tribunal's determination of the cause of its inability to obtain adequate supplies by arguing the facts: see Appellant's Memorandum of Fact and Law at paras. 55-57. However, since the appellant did not obtain leave to appeal any question of fact, it is bound by the Tribunal's conclusion as to the cause of its inability to obtain adequate supplies of chicken. This ground of appeal fails.

iii) The Tribunal erred in finding that Nadeau failed to establish that there was insufficient competition between suppliers of live chicken when it accepted that the poultry supply management system created a state-mandated cartel among chicken producers.

64 Nadeau also argues that the Tribunal erred in not giving effect to its own statement that the poultry supply management program amounted to a state-mandated cartel among chicken producers. According to Nadeau, cartels, by their nature, are anti-competitive, whether they are large or small. The Tribunal ought to have followed its statement on the nature of the poultry supply management system to its logical conclusion and found that there was insufficient competition among poultry producers.

65 This ground of appeal has no merit. The reference to a cartel in the Tribunal's Reasons was simply a report of a statement made by others which the Tribunal did not endorse. Specifically, the Tribunal wrote, at paragraph 10 of its Reasons:

> It [the poultry supply management system] has been described as being, in effect, a statemandated cartel arrangement.

66 There is no basis for the assertion that the Tribunal adopted this statement as its own.

iv) The Tribunal erred in applying the wrong legal test to determine if there was insufficient competition among suppliers.

67 Nadeau argues that the Tribunal erred in law holding that the number of producers in the market, and the absence of any evidence that they were not acting independently, was the appropriate test for insufficient competition under paragraph 75(1)(*b*) of the Act. The correct test, according to Nadeau, is to compare the terms upon which live chickens are available from alternative sources to the terms upon which they were available from the parties who are refusing to deal. Nadeau bases this argument upon the dictionary definition of competition adopted by the New Brunswick Court of Appeal in *J. & A. McMillan Ltd. v. McMillan Press Ltd.* (1989), 99 N.B.R. (2d) 181 (N.B. C.A.) at para. 16, (1989), 27 C.P.R. (3d) 390 (N.B. C.A.), as "...the effort of two or more parties acting independently to secure the business of their party by offering the most favourable terms."

68 Nadeau cites, in support of its argument, passages from the Tribunal's decisions in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1, [1989] C.C.T.D. No. 49 (Competition Trib.) [*Chrysler Canada*], and *Xerox*, *supra*. In *Chrysler Canada*, Nadeau says, the Tribunal found that there was insufficient competition because the alternative sources of supply were inferior sources, essentially because their price was substantially higher than the price previously charged by Chrysler Canada. Similarly, Nadeau argues that in *Xerox*, the Tribunal decided that there was insufficient competition because the alternative sources of supply were neither adequate nor economically viable.

69 Whatever the merits of Nadeau's argument on this point, it too has been overtaken by the Tribunal's conclusion that the supply management system was the cause of Nadeau's inability to obtain adequate supplies of live chicken. Insufficient competition in a market is relevant only to the extent that it can be shown to be the cause of Nadeau's inability to obtain adequate supplies. Here, the Tribunal found that insufficient competition among producers was not the cause of Nadeau's supply difficulties.

70 As a result, I conclude that Nadeau's appeal from the Tribunal's decision with respect to the application of paragraph 75(1)(*b*) to the facts of its case fails.

b) Did the Tribunal err in finding that live chickens were not in ample supply?

71 The Tribunal began its analysis of the requirements of paragraph 75(1)(*d*) by distinguishing between "adequate supply", the term used in paragraphs 75(1)(*a*) and (*b*), and "ample supply", the term used in paragraph 75(1)(*d*). It referred to various dictionaries, both French and English, and concluded that while an "adequate supply" was essentially a sufficient supply, no more than enough, an "ample supply" was a "supply available in abundance or to the point that it is considered to be excessive" (Reasons at para. 276).

72 The Tribunal then considered this definition in light of the objects and purposes of the Act, which are to promote and to maintain competition. It concluded that supply was not ample "when suppliers generally would be inhibited from growing or even changing the nature of their business or be forced to ration supplies between current and potential future customers because supply is limited". It went on to find that a product was in ample supply when "its availability is not in issue when a supplier considers whether to develop its business by seeking new customers and/or new distribution channels..." (Reasons at para. 280).

73 The Tribunal referred to the transcripts of parliamentary committee hearings in support of its position that the product was not in ample supply when there was a shortage of supply for reasons such as strikes, scarcity of raw materials, or the failure of upstream suppliers. The Tribunal relied on the following exchange from the Parliamentary committee hearings (Reasons at para. 281):

> **Mr. Frank**: Mr. Chairman, Mr. Minister, unfortunately I do not have the legal mind that most members of this committee apparently have and this disturbs me to some degree, to the effect that, when this bill gets passed, if it ever does, just what in actual fact may happen.
>
> To clarify one particular area, which, no doubt, you can adjust to suit other areas: in the fertilizer business back in the winter, there was some degree of concern at the lack of products for dealers to sell. As a specific example, a

> company that supplied dealers went out of business and the dealers that were supplied by them naturally could not have the product unless they were able to acquire it from other manufacturers.
>
> At that particular time, the other manufacturers felt that they wanted to protect their dealers and make sure they were not shorting them. Consequently, they refused to sell to those dealers that had unfortunately found themselves customers of this other company. Now, would this particular area here change that particular picture? In other words, would it make it necessary for these manufacturers to sell to dealers that they not supplied before?
>
> **Mr. Gray**: No, because in the situation you have outlined it would appear that the product in question was not in ample supply, and in order for the Commission to make an order requiring a supplier to supply somebody, it would have to find that the product was in ample supply.

74 Commenting on this exchange, the Tribunal made two observations: first, that this exchange supported the view that the provision was intended to apply only when there was evidence of ample supply of the product in the market; and, second, that a supplier would not be required to ration limited supplies of a product and so prevent existing customers from obtaining the same quantity of the product they had received in the past.

75 In coming to its final conclusion on the meaning of ample supply, the Tribunal referred to a prior Tribunal decision dealing with ample supply, *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15 (Competition Trib.) [*Quinlan's*]. In that case, Quinlan's, a long standing vendor of Harley Davidson Motorcycles, was advised that its dealership agreement would not be renewed. Quinlan's invoked the private prosecution provisions of the Act and applied for an interim supply order against Fred Deeley Imports Ltd., (Deeley) the Canadian distributor of Harley Davidson motorcycles.

76 The evidence before the Tribunal was that Deeley obtained its supply of Harley Davidson motorcycles from the U.S. factory, the sole supplier of Harley Davidson motorcycles in the world. At the time of the application, Deeley had a confirmed number of units available to it, which it had fully allocated to members of its dealer network. Consequently, motorcycles which it might be ordered to supply to Quinlan's would have to be taken from the units previously allocated to other dealers. The Tribunal framed the issue before it as follows (*Quinlan's*, *supra* at para. 17):

> The question raised by these facts is whether, in the present situation, in which all of the 2005 H-D motorcycles have been allocated to dealers and in which dealers have been advised of their allocations and have picked the specific motorcycles they want, it is possible to conclude that the 2005 year H-D motorcycles are in ample supply.

77 The Tribunal was of the view that section 75 of the Act was intended to deal with situations "in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser" (*Quinlan's*, *supra* at para. 19). On the evidence before it, the Tribunal concluded that the only time Harley Davidson motorcycles were in ample supply was before Deeley placed its order with the factory. The Tribunal went on to find that, while it had been shown that Harley Davidson motorcycles were in ample supply at some times of the year, they were not in ample supply at the time the application was made.

78 In the present case, the Tribunal held that it should define "ample supply" in a manner consistent with the Tribunal's decision in *Quinlan's*. It concluded that the words "ample supply" were meant to deal with "situations in which the product is in ample supply, in the sense that suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing customers" (Reasons at para. 283).

79 The Tribunal then applied that definition to the facts of the market for live chickens. The Tribunal noted that the poultry supply management system is designed to meet consumer demand for poultry products. There are mechanisms for adjusting the level of supply to respond to changes in consumer demand but those mechanisms do not allow for a timely response to changes in market conditions. In addition, these mechanisms operate at the "macro" level with increases in quota being allocated provincially and then, pro-rata, to existing producers. This leaves no room for individual producers to increase production to meet increased demand from processors. In light of all these factors, the

Tribunal decided that the product, live chickens, could not be said to be in ample supply in the sense that it was "available on a timely basis to individuals wishing to expand or develop their businesses" (Reasons at para. 288).

80 Finally, the Tribunal addressed Nadeau's argument that the respondents should not be permitted to take advantage of their conduct, intended to force the sale of the Nadeau plant at an improvident price. The Tribunal found that it did not have to deal with the respondents' motives because of its conclusion that live chickens were not in ample supply.

81 Nadeau argues that the Tribunal misinterpreted the Act. It says that "ample supply" deals only with the situation in which there is a shortage of supply as a result of factors beyond the supplier's control. This must be the case, it says, because a supplier who refuses to deal with a particular customer must have another market for the product it refuses to sell to the complainant.

82 Nadeau makes the point that the respondents should not be allowed to divert their product from one processor to another and, by so doing, create a lack of ample supply with respect to the first processor which shelters them from prosecution under section 75 of the Act. Nadeau argues that the scheme between the respondents and Olymel to drive it out of business is profoundly anticompetitive and should be treated as such.

83 Nadeau further argues that the facts of this case are not comparable to the facts in *Quinlan's*. In this case, the respondents had no other pre-existing customer in the sense that they had historically sold all of their New Brunswick production to Nadeau. No one else had a prior claim on the product which they sold to Nadeau. As a result, the product was readily available and in ample supply.

84 In summary, Nadeau's argument is predicated on the fact that, as between itself and the respondents, there is an ample supply of chicken. The fact that the respondents have chosen to divert that supply does not reduce the amount of the supply. The number of chickens being produced has not changed. There are still enough chickens being produced to meet consumer demand. The product is therefore in ample supply.

85 The question whether or not a product is in ample supply is a question of mixed fact and law. The definition of ample supply is a question of law; it consists of interpreting the words "in ample supply" in paragraph 75(1)(*d*) of the Act.

86 The jurisprudence on the meaning of "ample supply" is sparse. The subject was considered explicitly in *Quinlan's* and was mentioned in *Chrysler Canada* and *Xerox*, cited above. Both of the latter cases deal with sole suppliers. In each case it was assumed, without more, that the product was in ample supply. Presumably, this flows from the fact that in each case, there was no suggestion that the supplier lacked the means to supply both the complainant and the balance of the market for the products in issue. *Quinlan's* was another sole supplier case in that Deeley was the exclusive Canadian distributor of Harley Davidson motorcycles.

87 This case differs from the jurisprudence in that it deals with a refusal to supply in the context of a multi-supplier market for a commodity product, in that any live chicken can be substituted for any other live chicken (subject to certain weight parameters which are not relevant here). Where there are multiple sources of supply, one would expect that a customer who is refused supply by one supplier could obtain replacement supplies from other suppliers at competitive prices because other suppliers either have the product in inventory or can increase production to meet increased demand. This capacity to increase production to meet increased demand appears to me to be an indicator of a market in which a product is in ample supply.

88 I agree with the Tribunal's conclusion on the issue of ample supply but I would formulate the test in terms of what constitutes ample supply rather than what constitutes a lack of ample supply. I would say that a product is in ample supply when producers of that product have the capacity to increase production in a timely way to meet increases in demand for the product. Where there is a lack of capacity to increase production to meet increases in demand, the result is product shortage, which requires suppliers to choose between supplying existing customers at historic levels and supplying new customers. Product shortage also results in price increases which, as the Tribunal found, was likely to occur (at least in the market for live chickens) if the respondents' refusal to deal were allowed.

89 In my view, the Tribunal did not err in law in defining ample supply as it did, though I would reformulate the test in positive terms.

90 When it came to apply the definition of ample supply to the facts of the present case, the Tribunal found that, in the context of the poultry supply management system, producers cannot increase their production to meet new demand from processors. Quotas are fixed by reference to consumer demand, not processor demand, so that the quota system is essentially unresponsive to changes in demand by processors.

91 Producers can only respond to increases in processor demand by diverting their production from one processor to another in exchange for a premium. A market in which increased demand for a product can only be accommodated by diverting supplies from one customer to another is not a market in which the relevant product is in ample supply. The Tribunal's conclusion on this point is reasonable.

92 As a result, I would not give effect to this ground of appeal.

c) Did the Tribunal err in finding that Nadeau had failed to establish that the respondents' refusal to deal was likely to have an adverse effect on competition in the market?

93 In the course of dealing with this element of subsection 75(1), the Tribunal considered a number of issues, only some of which were challenged by Nadeau before us. The issues raised by Nadeau are the following:

(i) The Tribunal erred in limiting the relevant market, for purposes of paragraph 75(1)(*e*), to the "downstream" market;

(ii) The Tribunal erred in not identifying the market for air-chilled chicken as a separate product market;

(iii) The Tribunal erred in failing to properly appreciate the adverse effect of the respondents' refusal to deal on the quality or availability of products; and

(iv) The Tribunal erred in failing to properly consider the effect of the elimination of an efficient competitor.

94 I will now consider each of these issues in turn.

i) The Tribunal erred in limiting the relevant market, for purposes of paragraph 75(1)(e), to the "downstream" market.

95 The Tribunal began by defining the market in issue in paragraph 75(1)(*e*) as the "downstream" market, that is, the market into which Nadeau sells. Nadeau challenges this definition and argues that the Act permits the Tribunal to consider adverse effects in "a" market which, it says, means any market, including the market in which Nadeau buys live chickens. It argues that the evidence shows that the respondents' refusal to sell will result in an increase in the premiums paid to Quebec producers in order to persuade them to sell to Nadeau, resulting in an increase in prices in the "upstream" market. This, it says, is evidence of an adverse effect on competition in "a" market.

96 In my view, this analysis is flawed. Paragraph 75(1)(*e*) is one of a number of elements which must be satisfied before a supply order will be made. Paragraph 75(1)(*a*) requires the complainant to show that it is unable to obtain adequate supplies of a product on usual trade terms due to insufficient competition. Paragraph 75(1)(*b*) requires the complainant to establish that insufficient competition is the reason for its inability to obtain adequate supplies. Since paragraphs 75(1)(*a*) and (*b*) deal with the complainant's supply problems, both must refer to the upstream market - the market in which the complainant is a buyer.

97 It would be redundant for the legislation to require, as a condition for the granting of a supply order, that the complainant show a further distortion of the upstream market for live chickens - a market which is, hypothetically, already marked by insufficient competition. In my view, the statutory reference to "a" market is a reference to any relevant

product or geographical market into which the complainant sells. As a result, I am of the view that the Tribunal did not err in law in considering only the "downstream" market in this portion of its analysis.

98 This is consistent with the fact that paragraph 75(1)(*e*) was introduced into subsection 75(1) at the same time as the right to pursue a private prosecution. In my view, the requirement that the complainant show an adverse effect in a market was designed to avoid private prosecutions based on injury to an individual market participant without any impact on the relevant markets themselves. B.A. Facey and D.H. Assaf, the authors of *Competition & Antitrust Law*, 3rd ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 336, expressed a similar view, based on materials issued by the Competition Bureau:

> Originally, section 75 did not contain a competition test requirement that the refusal to deal "is having or is likely to have an adverse effect on competition in a market." This element was added in connection with the amendment to permit private actions in order to filter out specious claims and address legitimate stakeholder concerns over the risks of strategic litigation by private parties.

99 The object of competition legislation is to protect consumers, and to protect market participants only to the extent that doing so can be shown to protect consumers.

ii) The Tribunal erred in not identifying the market for air-chilled chicken as a separate product market.

100 In its submissions to the Tribunal, Nadeau identified the relevant product market for the purposes of subsection 75(1) as follows (Affidavit of Roger Ware, sworn September 22, 2008, at para. 10, Confidential Appeal Book, vol. 4, p. 1437 [emphasis added]):

> There are potentially three product markets at issue in this case. <u>If we start at the level of the purchasers of processed chicken</u> and move back down the chain of production, they are:
>
> > i. the market for processed chicken;
> >
> > ii. the market for purchasing live chicken; and
> >
> > iii. the market for selling chicken.

101 Nadeau's expert, Dr. Ware, qualified this assertion somewhat with his subsequent statement that "the technique of air-chilling, practiced by Nadeau and Olymel in producing their processed chicken may have created a distinct product market for higher quality, higher priced product" (Affidavit of Dr. Ware, *supra* at para. 11).

102 In his evidence in chief, Dr. Ware referred to the fact that anti-trust economists have a precise definition of product markets and that some sub-products in the processed chicken market could satisfy those definitions. Dr. Ware gave two examples of such sub-products, air-chilled chicken and chicken below a certain weight. He concluded, however, "...we didn't have even close enough to adequate data that would allow us to make that identification" (Confidential Transcript vol. 2, p. 672).

103 The Tribunal accepted Dr. Ware's evidence at face value and concluded that there was insufficient evidence on the record to support the conclusion that air-chilled chicken constituted a separate product market (Reasons at para. 298).

104 In this Court, Nadeau argued that the Tribunal erred in failing to find that air-chilled chicken constituted a separate product market for purposes of paragraph 75(1*)(e)* of the Act. It says the Tribunal erred in law in not considering other evidence of a separate product market in air-chilled chicken.

105 Nadeau then cites the decision of this Court in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557, 185 N.R. 321 (Fed. C.A.) rev'd [1997] 1 S.C.R. 748, 209 N.R. 20 (S.C.C.), as authority for the proposition that certain factors ought to be considered in determining whether products are in separate markets. Nadeau

then examines the facts in the light of these factors and concludes that the Tribunal ought to have concluded that air-chilled chicken constituted a separate product market.

106 The approach adopted by Nadeau is curious to say the least. Its own expert was of the view that the data was insufficient to allow an anti-trust economist to determine whether air-chilled chicken constituted a separate product market. Dr. Ware was no doubt aware of evidence upon which Nadeau bases its argument on this point. Nadeau asks this Court to come to a different conclusion than did its own expert.

107 The Tribunal heard Dr. Ware and it heard all of the evidence to which Nadeau now makes reference. It concluded that Dr. Ware was correct and that there was insufficient evidence to support the conclusion that air-chilled chicken was a separate product market. Given that this is a question of mixed fact and law, I am unable to see how the Tribunal's decision on this issue could be said to be unreasonable. This ground of appeal fails.

iii) The Tribunal erred in failing to properly appreciate the adverse effect of the respondents' refusal to deal on the quality or availability of products.

108 Nadeau argues that the Tribunal erred in failing to give effect to the evidence of a number of its customers that the disappearance of Nadeau from the market would result in a decrease in the quality and availability of products in the market. Nadeau then reviews excerpts of the evidence of these customers in an attempt to illustrate its point.

109 This line of argument is, it seems to me, an attack upon the Tribunal's findings of fact, territory upon which this Court cannot tread. The Tribunal carefully set out the testimony of the various witnesses called by Nadeau and noted their comments with respect to quality and availability of products. In the end, the Tribunal did not give this evidence the effect which Nadeau wished, for the reasons which it set out at paragraphs 455 to 461 of its Reasons. Nadeau seeks to have this Court reweigh this evidence in the hope we will come to a different conclusion than did the Tribunal. This is simply an appeal on a question of fact for which leave was not granted.

110 In any event, the premise of this argument is that, absent a supply order, Nadeau will cease to exist. The Tribunal came to no such conclusion. It found that Nadeau would be unable to obtain adequate supplies of live chickens *on the usual trade terms*, meaning that it would have to pay a premium in excess of that which it was currently paying in order to source live chickens from Quebec producers. This would likely result in a significant loss of earnings but it does not mean that Nadeau would not be profitable or that it would necessarily operate at a loss. As a result, the premise underlying this line of argument is unproven.

111 The Tribunal did not accept the hypothesis that Nadeau would disappear from the market if no supply order was made, as it pointed out at paragraph 458 of its Reasons:

> [M]any customer complaints focus on a limited set of scenarios, to wit, the possibility of the [Nadeau's] closing or being acquired by Olymel. There are many other possible scenarios. A likely scenario is that [Nadeau] will be able to replace some but not all the Respondents' birds from Quebec sources. It could be business as usual on a reduced scale....

112 For both of these reasons, this ground of appeal cannot succeed.

iv) The Tribunal erred in failing to properly consider the effect of the elimination of an efficient competitor.

113 This argument has already been addressed in the preceding section. The Tribunal did not accept that the respondents' refusal to sell would necessarily result in a closure of Nadeau's plant. As the Tribunal stated "... we find it unlikely that [Nadeau] would close" (Reasons at para. 467).

114 That said, this line of argument is another attempt to have this Court reconsider and reweigh the evidence in the hope that it will come to a different conclusion than did the Tribunal. The effect of the closure of Nadeau's plant is a pure question of fact, perhaps an "intangible fact". There is no legal component to this question. Nadeau cannot finesse

this problem by saying that the Tribunal committed an error of law in failing to consider all relevant facts. The issue is not whether the Tribunal considered all the evidence, but rather the conclusions the Tribunal drew from that evidence. The Tribunal's findings of fact cannot be challenged in this appeal.

115 It is worth repeating, however, that the premise underlying this line of argument is one which the Tribunal did not accept.

116 In the result, I am of the view that the Tribunal's conclusion that the respondents' refusal to supply would not have an adverse effect on a market is reasonable. Nadeau has not persuaded me that there is a basis on which this Court could interfere with the Tribunal's decision.

d) Did the Tribunal err in finding that Nadeau was substantially affected in its business due to its inability to obtain adequate supplies anywhere in a market on usual trade terms?

117 This issue was raised by the respondents in their memorandum of fact and law. The respondents did not cross-appeal since they do not seek any change in the Tribunal's disposition of Nadeau's application. However, they take the position that if Nadeau is able to persuade us to set aside the Tribunal's conclusions with respect to paragraphs 75(1)(*b*), (*d*) and (*e*), then they seek to persuade us that the Tribunal erred in its conclusions with respect to paragraph 75(1)(*a*). Since all five elements of subsection 75(1) must be satisfied before a supply order will be made, the respondents' success on this issue would require us to dismiss the appeal even though Nadeau had succeeded with respect to the grounds of appeal which it had raised.

118 In light of the conclusion to which I have come with respect to paragraphs 75(1)(*b*), (*d*) and (*e*), it is not necessary for me to address this issue.

9) Conclusion

119 In order to succeed on this appeal, Nadeau must persuade us that the Tribunal committed a reviewable error in its treatment of each of paragraphs 75(1)(*b*), (*d*) and (*e*) of the Act. Subsection 75(1) requires that each of its elements be satisfied before the Tribunal may issue a supply order. I have not been persuaded that the Tribunal erred in law or came to an unreasonable conclusion with respect to any of the elements which it considered in deciding that Nadeau had not established that:

a) its inability to obtain adequate supplies of live chicken on usual trade terms was due to insufficient competition;

b) live chicken was in ample supply at the relevant times; and

c) the respondents' refusal to supply had an adverse effect on competition in a market.

120 As a result, I would dismiss the appeal with costs.

***M. Nadon J.A.*:**

I agree

***Johanne Trudel J.A.*:**

I agree

Appeal dismissed.

16

2007 Comp. Trib. 6
Competition Tribunal

Sears Canada Inc. v. Parfums Christian Dior Canada Inc.

2007 CarswellNat 1610, 2007 CarswellNat 7100, 2007 Comp. Trib. 6

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an application under section 103.1 of the Competition Act by Sears Canada Inc. for leave to make an application under section 75 of the Competition Act

Sears Canada Inc., (applicant) and Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd., (respondents)

S.J. Simpson Chair

Heard: March 14, 2007
Judgment: March 23, 2007
Docket: CT-2007-001

Counsel: John F. Rook, Q.C., Derek J. Bell, Linda Visser, for Applicant, Sears Canada Inc.
James Orr, Jennifer Cantwell, for Respondents, Parfums Christian Dior Canada Inc., Parfums Givenchy Canada Ltd.

Subject: Corporate and Commercial

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Practice and procedure — Miscellaneous issues

Table of Authorities

Cases considered by *S.J. Simpson Chair*:

Barcode Systems Inc. v. Symbol Technologies Canada ULC (2004), *(*sub nom. *Symbol Technologies Canada ULC v. Barcode Systems Inc.)* 327 N.R. 296, 2004 CarswellNat 3582, 2004 FCA 339, 2004 CAF 339, 34 C.P.R. (4th) 481, 2004 CarswellNat 4789, [2005] 2 F.C.R. 254, 4 B.L.R. (4th) 58 (F.C.A.) — followed

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1, 1989 CarswellNat 720 (Competition Trib.) — considered

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1991), *(*sub nom. *Canada (Director of Investigation & Research) v. Chrysler Canada Ltd.)* 38 C.P.R. (3d) 25, *(*sub nom. *Chrysler Canada Ltd. v. Director of Investigation & Research)* 129 N.R. 77, 1991 CarswellNat 1118 (Fed. C.A.) — referred to

Construx Engineering Corp. v. General Motors of Canada (2005), 2005 Comp. Trib. 21 (Competition Trib.) — considered

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

s. 2(1) "business" — considered

s. 75 — referred to

s. 75(1) — referred to

s. 75(1)(a) — considered

s. 75(1)(a)-75(1)(e) — referred to

s. 75(2) — considered

s. 103.1(7) [en. 2002, c. 16, s. 12] — considered

***S.J. Simpson Chair*:**

Introduction

1 Sears Canada Inc. has applied under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act) for leave to commence an application for a supply order based on the Respondents' refusal to supply the Prestige Fragrances and Cosmetics described in paragraph 5 below.

The Parties

2 Sears Canada Inc. (Sears) is incorporated pursuant to the laws of Canada and is a multichannel, multi-product retailer with a network that includes 196 company-owned stores, 178 dealer stores, more than 1850 catalogue merchandise pick-up locations and internet shopping.

3 Parfums Christian Dior Canada Inc. (Dior) is a Quebec corporation and Parfums Givenchy Canada Ltd. (Givenchy) is incorporated pursuant to the laws of Ontario. Both Dior and Givenchy are wholly-owned subsidiaries of LVMH Louis Vuitton Möet Hennessy.

The Evidence

4 Sears' evidence is provided in an affidavit sworn by Carol Wheatley on February 22, 2007 (the Wheatley Affidavit). She describes her present position and experience as follows:

> I am the General Merchandise Manager, Cosmetics and Accessories, of the Applicant, Sears Canada Inc. ("Sears"). I have held this position since August 1, 2004. In my position, I am responsible for developing and managing Sears' Cosmetics and Accessories categories. Prior to this, I held the position of Shop Co-ordinator, Cosmetics at Sears from June 1999 to August 2004. Prior to this, I was a Buyer, Fragrances, at T. Eaton & Co. Ltd. from May 1998 to June 1999, and for the thirteen years prior to that, I held various positions at Quadrant Cosmetics, Sanofi Beaute / Parfums Stern, and Germaine Monteil / Revlon, all of which are cosmetics manufacturers or distributors.

The Supply

5 For at least fourteen years, Dior has supplied Sears with Dior fragrances, make-up and skin care products (collectively the Dior Products). They are currently sold in 104 of Sears' 196 company-owed department stores. In the same period, Givenchy supplied Sears with Givenchy fragrances (the Givenchy Products) which are sold in 121 of Sears' 196 company stores.

6 The Dior and Givenchy Products are included in an industry product category known as Prestige Fragrances and Cosmetics. Counsel for Sears indicated that Dior make-up and skin care products are one of the fifteen to twenty brands of Prestige Cosmetics sold in Sears stores. He derived this information from an analysis of the exhibits to the Wheatley Affidavit.

7 The sale of the Dior and Givenchy Products generates revenues for Sears of approximately sixteen million dollars per annum. Sears' annual revenue from the sale of all its products exceeds six billion dollars.

The Refusal to Supply

8 In December 2006, Givenchy advised Sears that it could not supply the Givenchy Products because of "shipping" issues. Then on January 18, 2007, both Dior and Givenchy indicated that they would no longer be doing business with Sears. In a letter of January 24, 2007, counsel for the Respondents terminated the supply of the Dior and Givenchy Products to Sears effective March 24, 2007. However, by agreement during this proceeding, that date was extended to May 4, 2007.

9 Sears speculates that the refusal to supply was prompted by the discounts it offered in December 2006 on all cosmetics products. The Dior and Givenchy Products were included.

Facts Not in Dispute

10 Revenues from the sale of the Dior and Givenchy Products represent an insignificant percentage *[CONFIDENTIAL]* % of Sears' overall sales and a modest percentage *[CONFIDENTIAL]* % of Sears total cosmetics business. The Dior and Givenchy Products with sales of $ *[CONFIDENTIAL]* and $ *[CONFIDENTIAL]* in 2006 ranked *[CONFIDENTIAL]* and *[CONFIDENTIAL]* respectively among cosmetic lines sold in Sears stores. The five top selling cosmetic lines had sales of *[CONFIDENTIAL]* in 2006.

11 Sears has been losing market share to The Bay in Prestige Fragrances and Cosmetics over the past three years.

12 In addition to Sears, London Drugs has also been refused supply of the Dior and Givenchy Products. This means that only The Bay, Holt Renfrew and Shoppers Drug Mart will continue to distribute the Dior and Givenchy Products in Canada. The status of Jean Coutu as a distributor is uncertain but it is probable that it has also been refused supply.

13 The Dior and Givenchy Products have not traditionally competed on the basis of price with other brands of Prestige Fragrances and Cosmetics.

The Issues

14 The following are the issues:

1. What is Sears' business for the purpose of this application?

2. Is there reason to believe that Sears is directly and substantially affected in its business?

3. Is there reason to believe that an order could be made under subsection 75(1) of the Act?

Issue 1 — Sears' Business

15 The relevant language in subsection 103.1(7) and paragraph 75(1)(*a*) and subsection 75(2) of the Act is highlighted below:

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

. . .

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

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

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

. . .

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

[my emphasis]

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

. . .

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut:

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

. . .

75. (2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

[je souligne]

The cases

16 Sears says that this application for leave is significant because it raises for the first time the question of how the Tribunal will approach the issue of a substantial effect on a multi-product business when the refused items impact only one sector or segment of the overall business. However, this issue is not new. It has already been considered in five cases: Chrysler, three Pharmacy cases and Construx Engineering.

17 In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.), aff'd (1991), 38 C.P.R. (3d) 25 (Fed. C.A.), the Director of Investigation and Research applied for an order under section 75 of the Act. The Tribunal was required to consider the language of paragraph 75(1)(*a*) of the Act and determine whether Mr. Brunet had been substantially affected in his business by Chrysler's (the Respondent's) refusal to supply Chrysler auto parts. The Director argued that the business at issue was the sale of Chrysler auto parts. Chrysler said that Mr. Brunet's overall auto parts export business was the business at issue and not just the segment involving Chrysler parts and that this broader interpretation was mandated by the definition of "business" in subsection 2(1) of the Act.

18 The Tribunal found that Chrysler's refusal to supply had caused losses of approximately $200,000 in sales and $30,000 in gross profits and that those losses were substantial for Mr. Brunet's small business. The Tribunal concluded as follows "A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used." The Tribunal then said that the question of whether the refused product accounted for a large percentage of the overall business was the first issue to be addressed. The Tribunal concluded that Mr. Brunet's overall business had been substantially affected by Chrysler's refusal to supply its auto parts.

19 The three Pharmacy cases are *1177057 Ontario Inc. (c.o.b. as Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22, *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 and *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23. These cases involved applications for leave under subsection 103.1(7) of the Act. In each case, the Tribunal considered whether the withdrawal of certain brands of prescription drugs had had a direct and substantial effect on the applicants' businesses. In each case, the pharmacy sold products other than prescription drugs and, in each case, Blais J. considered the loss of the prescription drug sales in the context of the pharmacy's overall business.

20 Finally, in *Construx Engineering Corp. v. General Motors of Canada*, 2005 Comp. Trib. 21 (Competition Trib.), the applicant for leave was a wholesale dealer and broker of transportation products including automobiles. GM had refused supply. The only evidence before the Tribunal was that in 2003, the sale of GM vehicles represented 67% of Construx' sales of new motor vehicles. Leave under subsection 103.1(7) of the Act was refused because there was no evidence to show the impact of GM's refusal to supply cars on the whole enterprise.

21 Based on this review, I have concluded that the Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the entire business.

The parties' submissions

22 Sears' written representations do not include a description of Sears' business for the purpose of this application for leave. However, in his oral submissions, counsel for Sears said that, for the purpose of this application, Sears' business is the sale of the Dior and Givenchy Products.

23 The Respondents say that Sears' business is the operation of department stores.

24 The Wheatley Affidavit provides the evidence which was referred to in support of Sears' position. Carol Wheatley says that:

- Consumers of Prestige Fragrances and Cosmetics are intensely brand loyal and, if their preferred product is not available at Sears, they will seek it elsewhere.

• The Dior and Givenchy Products are unique and are "not" or "often not" interchangeable with other brands of Prestige Fragrances and Cosmetics.

• The Dior and Givenchy Products are the subject of heavy investment in research and development which results in innovative and unique products.

• Dior Givenchy Products are advertised as status symbols in association with their brand names.

• Along with other brands of Prestige Fragrances and Cosmetics, the Dior and Givenchy Products are distributed on a selective basis.

• The Dior and Givenchy Products compete with other brands of Prestige Fragrances and Cosmetics on the basis of service and advertising with celebrity endorsements rather than on price.

25 In my view, this evidence is not helpful. It might be apt if used to argue that the Dior and Givenchy Products are "products" as that term is used in paragraph 75(1)(*a*) of the Act but it does not assist in reaching a conclusion about the breadth of Sears' business for the purpose of subsection 103.1(7) of the Act.

The Language of the Act

26 As shown in paragraph 15 above, subsection 75(2) of the Act refers to a person carrying on business in a class of articles. It is therefore my view that, if Parliament had intended the substantial effect in subsection 103.1(7) and paragraph 75(1)(*a*) of the Act to be on a business in a class of articles such as the Dior and Givenchy Products, it would have said so.

Conclusion - *Issue 1*

27 In my view, both the Tribunal's earlier decisions and the plain language used in the subsection lead to the conclusion that Sears' entire business as a department store retailer is the business under consideration for the purposes of subsection 103.1(7) of the Act.

Issue 2 — Substantial Effect

28 Sears suggested that the French version of paragraph 75(1)(*a*) which uses the phrase "sensiblement gênée dans son entreprise" indicates that a substantial effect need not be a very significant or important effect.

29 In this regard, Sears relied on a Larousse French English Dictionary at page 834 to show that "sensiblement" means "appreciably", "noticeably" and "markedly" (*Grand Dictionnaire Larousse Chambers, Anglais-Français Français-Anglais*, s.v. "sensiblement"). Further, it noted that according to Collins Robert French-English Dictionary at page 328, "gêner" as a verb means to "bother", "disturb" or "be in the way" (*Collins Robert French-English English French Dictionary*, 2nd ed., s.v. "gêner").

30 It is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of the provision. The Harrap French-English Dictionary defines "sensiblement" as "appreciable; perceptible; obviously; to a considerable extent" and the word is defined in Le Petit Robert as "d'une manière appreciable" (see *Grand Harrap Dictionnaire français-anglais et anglais-français*, s.v. "sensiblement" and *Le Petit Robert*, s.v. "sensiblement").

31 In my view, there is nothing in the French language version of paragraph 75(1)(*a*) that detracts from the notion that substantial in the English carries meanings such as important and significant. This is the meaning shared by the two versions and is the one which has already been confirmed by this Tribunal in *Chrysler* where it said that "important" was an acceptable synonym for substantial.

32 Sears says that the substantial effect on its business is the combined impact of the following:

(i) $16,000,000 in lost sales

(ii) Loss of cross-segment sales

(iii) A negative impact on Sears' ability to negotiate with and attract other brands of Prestige Fragrances and Cosmetics

(iv) A negative impact on Sears' ability to compete with The Bay

(v) A negative impact on Sears' marketing strategy and reputation in the marketplace

I will deal with each in turn.

(i) Lost Sales

33 As described above, the Dior and Givenchy Products generate revenues of $16 million. However, some of the lost sales will be recouped when customers switch to other brands of Prestige Fragrances and Cosmetics at Sears, so the $16 million figure is slightly high. The Wheatley Affidavit acknowledges this in paragraph 61(a) which says:

> First, Sears will lose a significant portion of the $16 million in annual sales revenue from these products, because only a fraction of the customers will select an alternate brand. The remaining sales revenue will simply be lost as customers look for that product elsewhere.

In my view, whether the figure is $16 million or something less, it is insignificant when considered in the context of Sears' $6 billion overall business.

(ii) Cross-Segment Sales

34 Sears says that the Dior and Givenchy Products generate $14 million in sales of other products at Sears. However, this figure is difficult to assess because it is not clear what portion of the sales were made to customers who were motivated to go to Sears to purchase a Dior or Givenchy Product and then purchased something else. Sales of that kind would be relevant as the Wheatley Affidavit acknowledges. However, sales to customers who went to Sears for other products and happened to purchase a Dior or Givenchy Product would not count as relevant cross-segment sales. Since the value of such sales is not in the evidence, the cross-segment sales figure of $14 million must be discounted by an unknown amount. Whatever that amount may be it will not, even when combined with lost sales, be substantial in the context of Sears' entire business.

(iii) Dealings with other Brands

35 Sears says that it will suffer harm because the bargaining position and negotiating power of other brands of Prestige Fragrances and Cosmetics will be improved if Sears no longer carries the Dior and Givenchy Products. The Wheatley Affidavit states this as a fact but in my view it is mere speculation because there is no discussion that shows that it is based on the deponent's experience or on comments made by personnel who work for other brands. For this reason, I have given this assertion of alleged harm little weight.

(iv) Competition with The Bay

36 The Wheatley Affidavit shows that Sears has lost market share in Prestige Fragrances and Cosmetics in the last three years. It decreased from 26.3% in 2004 to 23.5% in 2005 and to 23.0% in 2006. The concern is that the loss of the Dior and Givenchy Products will contribute to a continuation of the trend. As the loyal Dior and Givenchy customers

are lost, Sears says they will be lost principally to The Bay and, while there is no evidence quantifying this effect, I accept Sears' submission.

(v) Sears Marketing

37 Sears treats Prestige Fragrances and Cosmetics and Accessories as one of six destination categories in its department stores. The Wheatley Affidavit indicates that Sears must have the Dior and Givenchy Products to convey the message to the market that this destination is credible. Sears says that its reputation and market image will suffer if it does not carry a full range of Prestige Fragrances and Cosmetics. I accept that this could be true to some degree.

38 Sears also uses Dior as the "central magnet" in its Toronto Eaton Centre and Vancouver Pacific Centre flagship stores. The evidence shows that Dior's display is one of the first things customers see when they use one of the ground floor entrances to the stores. As well, in the Calgary store and Rideau Centre store in Ottawa, Dior has branded displays in key locations. Sears estimates that it will cost $600,000 to remove and replace the Dior displays. However, the Respondents have said in paragraph 11 of their written representations that they are willing to cover reasonable costs associated with the removal or renovation of any related displays or shelving units.

Conclusion — Issue 2

39 I have concluded that, when taken together, these submissions show that Sears will be directly affected by the Respondents' refusal to supply the Dior and Givenchy Products, but that the effect on Sears' department store business will not be substantial.

40 Accordingly, applying the test for leave approved by the Federal Court of Appeal in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 FCA 339 (F.C.A.) at paragraph 16, I am not satisfied that Sears has provided sufficient credible evidence to give rise to a *bona fide* belief that it may have been directly and substantially affected in its business by the Respondents' refusal to supply the Dior and Givenchy Products.

Issue 3 — A section 75 order

41 In view of the previous conclusion, it is not necessary to consider whether the Tribunal could make an order under paragraphs 75(1)(*a*-*e*) of the Act.

For These Reasons, The Tribunal Orders That:

42 The application for leave is hereby dismissed with costs.

End of Document

17

2015 Comp. Trib. 26
Competition Tribunal

Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada

2015 CarswellNat 6857, 2015 Comp. Trib. 26

In the Matter of an application by Stargrove Entertainment Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Competition Act, RSC, 1985, c C-34 as amended

In the Matter of an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act

In the Matter of an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act

Stargrove Entertainment Inc., (applicant) and Universal Music Publishing Group Canada, Universal Music Canada Inc., Sony/ATV Music Publishing Canada Co., Sony Music Entertainment Canada Inc., ABKCO Music & Records, Inc., Casablanca Media Publishing, and Canadian Musical Reproduction Rights Agency Ltd., (respondents)

R.L. Barnes Presiding Member

Judgment: December 14, 2015
Docket: CT-2015-009

Counsel: Nikiforos Iatrou, Scott McGrath, Bronwyn Roe, Sangeetha Punniyamoorthy, Thomas Kurys, for Applicant, Stargrove Entertainment Inc.
Donald B. Houston, for Respondents, Universal Music Publishing Group Canada, Universal Music Canada Inc.
Mahmud Jamal, Peter Franklyn, for Respondents, Sony/ATV Music Publishing Canada Co., Sony Music Entertainment Canada Inc.
Michael Osborne, for Respondents, ABKCO Music & Records, Inc., Casablanca Media Publishing
Christopher M. Hersh, Casey M. Chisick, Eric Mayzel, for Respondent, Canadian Musical Reproduction Rights Agency Ltd.

Subject: Corporate and Commercial; Intellectual Property; Property

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Investigation and prosecution — Conduct of investigation — General principles

Table of Authorities

Cases considered by *R.L. Barnes Presiding Member*:

Barcode Systems Inc. v. Symbol Technologies Canada ULC (2004), 2004 FCA 339, 2004 CarswellNat 3582, 2004 CAF 339, 34 C.P.R. (4th) 481, 2004 CarswellNat 4789, (sub nom. *Symbol Technologies Canada ULC v. Barcode Systems Inc.*) 327 N.R. 296, 4 B.L.R. (4th) 58, [2005] 2 F.C.R. 254 (F.C.A.) — followed

Canada (Director of Investigation & Research) v. Warner Music Canada Ltd. (1997), 78 C.P.R. (3d) 321, 1997 CarswellNat 2811, 43 B.L.R. (2d) 93 (Competition Trib.) — considered

Cinémas Guzzo Inc. c. Canada (Procureur général) (2005), 2005 CF 691, 2005 CarswellNat 1349, 2005 FC 691, 2005 CarswellNat 5321, (sub nom. *Cinémas Guzzo Inc. v. Canada (Attorney General)*) 47 C.P.R. (4th) 250, (sub nom. *Cinémas Guzzo Inc. v. Canada (Attorney General)*) 277 F.T.R. 39 (Eng.) (F.C.) — referred to

Cinémas Guzzo Inc. c. Canada (Procureur général) (2006), 2006 CAF 160, 2006 CarswellNat 1294, 2006 FCA 160, 2006 CarswellNat 3592 (F.C.A.) — referred to

Eli Lilly & Co. v. Apotex Inc. (2005), 2005 FCA 361, 2005 CarswellNat 3562, 2005 CAF 361, 2005 CarswellNat 4430, 44 C.P.R. (4th) 1, 260 D.L.R. (4th) 202, 341 N.R. 114, [2006] 2 F.C.R. 477, 44 C.P.R. (4th) 23 (F.C.A.) — considered

Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2009), 2009 Comp. Trib. 6, 2009 CarswellNat 5934 (Competition Trib.) — referred to

R. v. Royal LePage Real Estate Services Ltd. (1994), 1994 CarswellAlta 1098 (Alta. Q.B.) — considered

Safa Enterprises Inc. v. Imperial Tobacco Co. (2013), 2013 Comp. Trib. 19, 2013 CarswellNat 5767, 2013 Trib. conc. 19, 2013 CarswellNat 11421 (Competition Trib.) — referred to

Van Damme v. Gelber (2013), 2013 ONCA 388, 2013 CarswellOnt 7839, 115 O.R. (3d) 470, 307 O.A.C. 81, 42 C.P.C. (7th) 100, 363 D.L.R. (4th) 250 (Ont. C.A.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34

s. 32 — considered

s. 75 — considered

s. 75(1) — considered

s. 76 — considered

s. 76(1)(a)(ii) — considered

s. 76(2) — considered

s. 76(3) — considered

s. 76(3)(c) — considered

s. 76(8) — considered

s. 77 — considered

s. 77(2) — considered

s. 103.1 [en. 2002, c. 16, s. 12] — pursuant to

s. 103.1(1) [en. 2002, c. 16, s. 12] — considered

s. 103.1(7) [en. 2002, c. 16, s. 12] — considered

s. 103.1(7.1) [en. 2009, c. 2, s. 431(4)] — considered

Rules considered:

Competition Tribunal Rules, SOR/2008-141
Generally — referred to

R. 119(3) — considered

***R.L. Barnes Presiding Member*:**

I. Overview

1 The Applicant, Stargrove Entertainment Inc. ("Stargrove"), seeks leave under section 103.1 of the *Competition Act*, RSC, 1985, c C-34 as amended, to bring an application against the Respondents for the following substantive relief:

(a) an Order pursuant to subsection 75(1) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to the Canadian Musical Reproduction Rights Agency Ltd.;

(b) an Order pursuant to subsection 76(2) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;

(c) an Order pursuant to subsection 76(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to CMRRA;

(d) an Order pursuant to subsection 76(8) of the Act prohibiting the Respondents from continuing to engage in the practices that form the basis of this Application;

(e) an Order pursuant to subsection 76(8) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to CMRRA;

(f) an Order pursuant to subsection 77(2) of the Act prohibiting the Respondents from continuing to engage in exclusive dealing;

(g) an Order pursuant to subsection 77(2) of the Act requiring the Respondents to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other applicants to CMRRA.

2 In support of the application for leave Stargrove filed an Application Record and a Supplementary Application Record. The Respondents replied with Written Representations. Included with the responding material was an affidavit sworn on behalf of Sony Music Entertainment Canada Inc. ("Sony Canada") stating that it "does not own or control any copyright rights in musical works". This was filed in support of Sony Canada's argument that it is not a proper party to this proceeding. A similar affidavit was filed on behalf of Casablanca Media Publishing ("Casablanca"). Casablanca sought leave to file under Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141, but Sony Canada neglected to do so. When Stargrove filed its Reply, it, too, included an affidavit without seeking permission. That affidavit attached a relevant email that was deliberately withheld from the Application Record ostensibly for privacy concerns.

3 Subsequently the Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA"), asked for leave to file a 10-paragraph sur-reply that, for the most part, repeated arguments it had made in its Written Representations. That submission drew an objection from Stargrove. It, too, took the opportunity to repeat some of its earlier arguments. The CMRRA then filed a sur-sur-sur-reply, this time without the courtesy of seeking leave.

4 While the *Competition Tribunal Rules* contemplate a degree of informality, they do not countenance unlimited, unrestrained and unauthorized filings. Where leave is required to file affidavit evidence or to make a further submission, it must be sought.

5 There is similarly no authority in the Rules to file Reply *evidence* as of right and the only basis to do so is under Rule 2 with leave. This also applies to the filing of arguments in sur-reply, sur-sur-reply and sur-sur-sur-reply.

6 Notwithstanding the above-noted irregularities, I have considered the additional evidentiary materials received. I have done so on the basis that those affidavits would have been admitted had leave been properly sought.

7 Leave is denied for the CMRRA's sur-reply and sur-sur-sur-reply and for Stargrove's response in sur-sur-reply. Nothing in those submissions adds anything of significance to the issues before me and, on that basis, I have ignored them.

II. Background

8 Stargrove says that, since 2014, it has carried on business as a record label manufacturing and selling competitively-priced musical compact discs ("CDs"). It characterizes the Respondent, CMRRA, as a music licensing collective representing the interests of music publishers on whose behalf it issues licenses for the reproduction of musical works on payment of appropriate fees. The remaining corporate Respondents are said to be record labels and/or music publishers who, in this case, allegedly hold or control copyright in certain musical works for which the issuance of a mechanical license is required before reproduction can take place. Stargrove is aggrieved by the refusal of the Respondents to issue mechanical licenses authorizing the reproduction by Stargrove of five recordings, namely: the Beatles "*Love Me Do*", the Beatles "C*an't Buy Me Love*", the Rolling Stones "*Little Red Rooster*", Bob Dylan "*It Ain't Me Babe*" and The Beach Boys "*Fun, Fun, Fun*". In each case, copyright in the sound recording has expired but copyright in the musical work still exists in favour of at least some of the Respondents.

9 According to the affidavit of the sole Director and Officer of Stargrove, Mr. Terry Perusini, its business model is based on the production and sale of low-cost CDs for musical works of three types:

(a) sound recordings for which Stargrove owns the sound recording copyright;

(b) sound recordings licensed to Stargrove from various independent labels; and

(c) sound recordings that are now in the public domain and for which master recording licenses are no longer legally required but where mechanical licenses are still required from the publishers.

10 In early 2015, Stargrove applied to the CMRRA seeking mechanical licenses to reproduce the five titles noted above. It submitted a royalty payment of $13,799.10 based on a "standard" mechanical royalty rate of $0.083 per song. The CMRRA cashed Stargrove's cheque and Stargrove proceeded to produce CDs (12,400 units) for sale through a distributor to Walmart at a retail price of $5. Sales of some of these CDs were strong.

11 According to Mr. Perusini, from January 22, 2015 each of the Respondents took steps to refuse or to block the issuance of mechanical licenses to Stargrove or to otherwise discourage the sale of its CDs. On February 25, 2015, the CMRRA returned Stargrove's royalty payment. At the same time negative reviews began to appear on the Walmart website criticizing the quality of Stargrove's CDs. According to evidence filed on behalf of Stargrove, these supposed customer reviews were the product of an in-house campaign initiated by the Respondent, Universal Music Canada

Inc. ("Universal Canada"), to convince Walmart to remove the Stargrove CDs from its shelves and to thereby protect Universal's market share.

12 Stargrove then made efforts to negotiate with CMRRA and with some of the Respondents, (Sony/ATV Music Publishing Canada Co., Sony Canada, ABKCO Music & Records, Inc. ("ABKCO"), Casablanca), to obtain the required mechanical licenses. The CMRRA did obtain authorizations for a few of the songs in issue but not for most of them. Stargrove has been unable to pursue its intended line of business in connection with the protected song titles and Mr. Perusini estimates an immediate loss of $150,000 in wholesale sales through Walmart.

13 Mr. Perusini characterizes the overall impact of the Respondents' conduct in the following way:

> Stargrove's business model relies heavily on producing CD compilations of sound recordings that are in the public domain. The Respondents' refusal to license Stargrove under usual licensing terms has caused losses to Stargrove and has cut off any future growth of the business.
>
> I estimate that, if Stargrove's business is able to continue and we are able to sell a mix of licensed sound recordings, our own sound recordings, and public domain sound recordings, we will achieve sales of $3 to $5 million per year in Canada.
>
> Under our current business model, without being able to obtain mechanical licences on ordinary terms through CMRRA, Stargrove will go out of business.

14 The affidavit of Mario Bouchard filed on behalf of Stargrove describes the typical business arrangements that apply to the issuance of mechanical licenses in Canada. Mr. Bouchard is a former general counsel to the Copyright Board. He acknowledges that compulsory licensing to record a musical work ended in 1988 and "in law, a record label [eg. Stargrove] should obtain the necessary mechanical licenses before pressing a CD, let alone releasing it" (see para 29). Nevertheless, according to Mr. Bouchard — and verified by David Basskin in a 2009 affidavit sworn in an unrelated Ontario legal proceeding — in practice record producers routinely release new recordings without first obtaining the requisite mechanical licenses from copyright holders or the CMRRA. When a mechanical license is issued by the CMRRA on behalf of the holder of the copyright, the necessary royalties are paid by the licensee on generally applicable business terms. It is of some additional note that Mr. Basskin's affidavit also stated that "a given copyright owner is entitled to refuse a license request and might well do so..." (see Application Record at p 381, para 51). On the other hand, music publishers will often be motivated to obtain appropriate royalties for the reproduction of their songs.

15 The general background to Stargrove's claim to relief is captured in the first four paragraphs of its Proposed Notice of Application:

> 1. Stargrove is a record label that manufactures CD compilations of sound recordings of The Beatles, The Rolling Stones, and other artists for sale at low prices ($5.00) at Walmart stores. It can offer such low prices because the sound recordings it uses are no longer protected by copyright; they are in the public domain. As such, Stargrove does not require a "master sound recording licence" to use the recordings.
>
> 2. Although the sound recordings are in the public domain, the musical works (songs) on the recordings continue to be copyright protected. Stargrove requires what are known as "mechanical licences" for each song it seeks to use. In Canada, there are standard industry practices and terms that govern the issuance of mechanical licences; for the songs relevant to this application, these are administered by the Canadian Musical Reproduction Rights Agency. Stargrove is willing to abide by those terms and practices. The Respondents, however, have banded together to shut Stargrove out, having CMRRA deny Stargrove *any* mechanical licences (not just for the titles in question).
>
> 3. Stargrove is being targeted for its low pricing model, but the real victims are consumers; instead of being able to buy popular titles for just $5.00 per CD, they pay much more.

4. The Respondents have campaigned to block Stargrove by pressuring Stargrove's distributor, concocting false negative reviews of Stargrove's CDs, and having CMRRA refuse to deal with Stargrove on standard terms. They have violated sections 75, 76, and 77 of the Competition Act, depriving consumers of competitive prices and artificially extending copyright over public domain recordings. This has negatively affected competition. Stargrove seeks to be treated fairly, in accordance with standard industry terms. Since the Respondents are unwilling to engage with Stargrove, Stargrove asks this Tribunal to order them to do so.

16 The Respondents oppose the granting of leave on various grounds discussed below.

The Test for Leave

17 Subsection 103.1(1) of the *Competition Act*, RSC, 1985, c C-34 as amended (the "Act") gives any person the right to apply to the Tribunal for leave to make an application under sections 75, 76 or 77 — the three provisions under which Stargrove seeks relief.

18 Subsection 103.1(7) provides that leave may be granted under section 75 or section 77 if the Tribunal "has reason to believe that the applicant is directly *and* substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section".

19 Subsection 103.1(7.1) authorizes the Tribunal to grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order. For this provision, the words "substantially affected" are not present.

20 The general approach to the granting of leave for relief under section 75 was set out by Justice Marshall Rothstein in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 FCA 339, [2005] 2 F.C.R. 254 (F.C.A.):

> [16] In *National Capital News Canada v. Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:
>
> > Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.
>
> I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).
>
> [17] The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.
>
> [18] However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set

out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

[19] The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

[20] The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

21 The above discussion also informs the granting of leave under sections 76 and 77 (see also: *Safa Enterprises Inc. v. Imperial Tobacco Co.*, 2013 Comp. Trib. 19 (Competition Trib.), at para 15).

III. Analysis

22 I am not satisfied that Stargrove has met its burden for leave to apply for relief under either section 75 or section 77. I am, however, satisfied that it has made a case for leave to seek relief under section 76.

23 There are two fundamental weaknesses to Stargrove's claim to pursue relief under sections 75 and 77. Standing squarely in the way of a claim to section 75 relief is a decision of the Tribunal in *Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.*, [1997] C.C.T.D. No. 53, 78 C.P.R. (3d) 321 (Competition Trib.) ("*Warner Music*)". I do not agree with Stargrove's assertion that this decision can be distinguished or, alternatively, that it should be ignored.

24 In *Warner Music*, the Commissioner brought an application alleging that the Respondents' (collectively "Warner Music") refusal to grant copyright licenses to a competitor on usual trade terms allowing it to make sound recordings from master recordings contravened section 75 of the Act.

25 Warner Music successfully moved to strike the application. In striking out the Commissioner's application, the Tribunal said the following:

30 Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" — there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.

31 As well, the Tribunal has accepted the respondents' submissions that, when considered in the context of sections 32 and 79(5) of the Act, the term "product" in section 75 cannot be read to include these copyright licences. These submissions are discussed above and need not be repeated here.

32 Although the Tribunal was commenting on section 79 and intellectual property (trade-marks) in *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, we are of the view that its statement is very compelling in the circumstances of the motion before us:

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

The *Copyright Act* is similar to the *Trade-marks Act*, in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license. [Footnotes omitted]

26 This analysis fully applies to the section 75 relief sought by Stargrove. Relief is simply not available under this provision where the impugned conduct involves the refusal to grant a license over copyrighted material. The ratio in *Warner Music* is further strengthened by the exception found in subsection 76(3) making price maintenance relief available notwithstanding the existence of exclusive intellectual property rights. If Parliament intended that relief under sections 75 or 77 could be had in the face of such an exclusive right, presumably it would have said so just as it did in section 76.

27 The general concerns expressed by the Tribunal in *Warner Music* also apply to the availability of relief under section 77. There is simply no reasonable interpretation of section 77 that would make it applicable to the factual allegations advanced by Stargrove. Put simply, the conduct Stargrove complains about is not a form of exclusive dealing or tied selling as those terms are defined in the Act.

28 The second fundamental deficiency in Stargrove's application for leave under sections 75 and 77 arises from its evidence concerning the impact of the alleged conduct on its business. Subsection 103.1(7) requires evidence of a direct and substantial affect. The evidence presented by Stargrove is manifestly insufficient to meet the burden it carries to show a "substantial" affect. Despite Mr. Perusini's acknowledgement that Stargrove's business model includes the sale of musical works it controls or which are now fully within the public domain, he has provided no evidence about the size of that part of its overall business relative to the market for the disputed musical works.

29 I have no doubt that the copyrighted CDs Stargrove seeks to produce and sell represent a potentially lucrative market but I cannot tell on this record whether access to those products is possibly existential or simply profitable in some largely unsubstantiated measure. To be substantial there must be an effect that is "important or significant"; it need not be such that the affected party will be unable to carry on: see *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 (Competition Trib.). Mr. Perusini offers the bare conclusion that Stargrove will fail without access to these products but he provides no credible data in support of that opinion or to support his estimates of potential sales going forward. On the whole, this evidence is insufficient to give rise to a *bona fide* belief by the Tribunal that the denial of access to the musical works in issue could substantially affect Stargrove's business and the application under sections 75 and 77 fails on that basis as well.

30 I am satisfied that Stargrove has, however, met the threshold for leave under section 76 of the Act. As noted above, subsection 103.1(7.1) only requires that a party has been "directly affected" by the alleged reviewable conduct. For purposes of leave, that requirement is clearly met.

31 In light of the limited scope of *Warner Music* it remains an open question whether a copyright is, for some statutory purposes, a "product". In *Warner Music* at para 30 the Tribunal recognized that possibility: also see *Cinémas Guzzo Inc. c. Canada (Procureur général)*, 2005 FC 691 (F.C.) at para 56 aff'd, 2006 FCA 160 (F.C.A.).

32 Perhaps of more significance is the recognition in subparagraph 76(1)(*a*)(ii) that reviewable price maintenance includes direct or indirect discriminatory conduct motivated by the low-pricing policy of another person.

33 If Stargrove is able to establish that some or all of the Respondents, singularly or in concert, discriminated against it by refusing to issue mechanical licenses motivated by Stargrove's low-pricing practices, an argument for section 76 relief could be available. The case for relief could be enhanced by credible evidence that mechanical licenses are routinely granted by music publishers to record labels on standard business terms and that Stargrove was treated differently.

34 In *R. v. Royal LePage Real Estate Services Ltd.*, [1994] A.J. No. 823, 27 W.C.B. (2d) 428 (Alta. Q.B.), the Alberta Court of Queen's Bench held that discrimination under the earlier equivalent criminal provision meant "treating a person differently than another without proper justification" (see para 25). Similarly, in the text *Competition Law of Canada* (Huntington, New York: Juris Publishing, 2003) (loose-leaf revision 22-2009) (Davies, Ward and Beck), the authors state:

> The Background Papers also note with regard to the prohibition on refusing to supply "or otherwise discriminating" in now repealed paragraph 61(1)(b) (currently paragraph 76(1)(a)(ii)) that discrimination may "encompass certain unfair pressures that do not amount to a direct refusal to supply but that have the effect of disturbing the retailer's suppliers, e.g., line breaking, lost or delayed orders." [Footnotes omitted]

35 By virtue of paragraph 76(3)(*c*), the fact that the impugned conduct is carried out by a party with an exclusive intellectual property right is not a bar to relief. Presumably, by enacting this provision, Parliament recognized that some forms of anti-competitive conduct should be the subject of relief notwithstanding the existence of intellectual property rights. In the face of this provision, I do not agree that it is clear the authority to order a compulsory license resides only in section 32 of the Act. It also strikes me that discriminatory conduct falling under section 76 may not be "the mere exercise of an intellectual property right" as described in *Eli Lilly & Co. v. Apotex Inc.*, 2005 FCA 361 (F.C.A.) at paras 28 and 34.

36 I also agree with Stargrove that it is still an open question whether, in every instance, section 76 requires product resale or that a product input could never be the subject of relief. These are issues worthy of further consideration.

37 There is also an argument to be made that relief for reviewable conduct under section 76 is not effectively the equivalent of a compulsory licensing regime. If, in a particular case, a breach of section 76 is proven, it is arguably open to the Tribunal to order an appropriate remedy under that provision. This presumably would not open the door to anyone to obtain a copyright license regardless of the basis for its refusal. Where the owner of an exclusive intellectual property right lawfully refuses a license, no compulsory remedy would be available to the party affected.

38 I am also satisfied that sufficient credible evidence has been produced to support a *bona fide* belief that holding Stargrove out of the market could have an adverse effect on competition in a market. In an email exhibited to the affidavit of Ms. Anna Kusmider, a representative from Universal Canada noted one-week CD sales of Universal content through Walmart of 4,172 units. The author expressed concern about maintaining market share. Other evidence presented by Mr. Perusini speaks to Stargrove's initial success in the retail market and to Walmart's continuing interest in Stargrove's CDs. The Respondents' alleged denials of meaningful access to the market could also be an indication of their concern about damage to the existing higher-priced market for this music.

39 I acknowledge that the evidence bearing on each Respondent's motives is not particularly strong. This is, however, evidence that lies exclusively within the knowledge of the Respondents and they have not produced any evidence in rebuttal. In the face of the unanswered evidence submitted by Stargrove, I am satisfied that it has met the relatively low evidentiary threshold on this point.

40 Sony Canada argues that Stargrove's application for leave should be dismissed against it because it is not a music publisher and holds no copyright interests in any of the musical works in issue. Casablanca makes a similar argument. It says that Stargrove has mistakenly attributed to Casablanca copyright over three songs that, until September 30, 2015, was owned or controlled by a third party (Red Brick songs).

41 In an affidavit sworn by Ms. Jennifer Mitchell — who is the President of both Red Brick Songs and Casablanca — it is asserted that "the Three Songs were never administered by Casablanca". She also stated that Casablanca "does not have the ability to grant licenses to Red Brick songs".

42 This evidence is seemingly contradicted by an email from the CMRRA to Stargrove stating that Casablanca represents the three songs in issue and had instructed CMRRA not to issue any licenses to Stargrove. This apparent contradiction cannot be resolved on the record before me and, until it is, there is no basis for dismissing this application against Casablanca.

43 I am similarly not persuaded that it is appropriate at this early stage to dismiss the application for leave against Sony Canada. It may well be correct that Sony Canada does not own or control copyright in any musical works. But that fact may not be sufficient on its own to exempt it from any form of section 76 relief. There is evidence in the record that some of the Respondents *may* have acted in concert to exclude Stargrove. That is an issue deserving of further evidentiary exploration. The same concern arises in connection with the involvement of the CMRRA. It was presumably acting throughout as an agent but its joinder as a Respondent may be necessary to give practical effect to any order that might ultimately be made in favour of Stargrove.

44 ABKCO argues that this application should be dismissed against it because the Tribunal lacks jurisdiction where service was carried out *ex juris*. Most of ABKCO's arguments, however, go directly to the merits of the application. I agree with Stargrove that the appropriate approach to this issue required a separate motion challenging the Tribunal's jurisdiction. By challenging this application on the merits, ABKCO has consented to the Tribunal's jurisdiction; see *Van Damme v. Gelber*, 2013 ONCA 388 (Ont. C.A.) at para 22, (2013), 363 D.L.R. (4th) 250 (Ont. C.A.).

45 For the foregoing reasons, this application is allowed in part with costs payable to Stargrove at the mid-point of Column IV.

NOW THEREFORE THE TRIBUNAL ORDERS THAT:

46 The application for leave seeking relief under section 76 of the Act is allowed;

47 The application for leave seeking leave for relief under sections 75 and 77 of the Act is dismissed; and

48 The Applicant is awarded costs against the Respondents, jointly and severally, at the mid-point of Column IV.

End of Document

18

2011 Comp. Trib. 10
Competition Tribunal

Used Car Dealers Assn. of Ontario v. Insurance Bureau of Canada

2011 CarswellNat 5274, 2011 CarswellNat 7318, 2011 Comp. Trib. 10

In the Matter of the Competition Act, R.S.C. 1985, c. C-34, as amended

In the Matter of an Application by the Used Car Dealers Association of Ontario for an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76 of the Competition Act.

Used Car Dealers Association of Ontario, (applicant) and Insurance Bureau of Canada, (respondent)

Sandra J. Simpson J.

Judgment: September 9, 2011
Docket: CT-2011-06

Counsel: A. Neil Campbell, Casey W. Halladay, for Applicant, Used Car Dealers Association of Ontario
Peter Glossop, Graham Reynolds, Geoffrey Grove, for Respondent, Insurance Bureau of Canada

Subject: Corporate and Commercial; Public; Criminal

Headnote

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — General principles

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Price maintenance — Refusal to supply

Commercial law --- Trade and commerce — Competition and combines legislation — Practice and procedure — Miscellaneous issues

Table of Authorities

Cases considered by *Sandra J. Simpson J.*:

Barcode Systems Inc. v. Symbol Technologies Canada ULC (2004), *(*sub nom. *Symbol Technologies Canada ULC v. Barcode Systems Inc.)* 327 N.R. 296, 2004 CarswellNat 3582, 2004 FCA 339, 2004 CAF 339, 34 C.P.R. (4th) 481, 2004 CarswellNat 4789, [2005] 2 F.C.R. 254, 4 B.L.R. (4th) 58 (F.C.A.) — considered

Canada (Director of Investigation & Research) v. Warner Music Canada Ltd. (1997), 78 C.P.R. (3d) 321, 43 B.L.R. (2d) 93, 1997 CarswellNat 2811 (Competition Trib.) — considered

Nadeau Ferme Avicole Ltée/Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2009), 2009 CarswellNat 5934, 2009 Comp. Trib. 6 (Competition Trib.) — considered

Nadeau Ferme Avicole Ltée/Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. (2011), 2011 FCA 188, 2011 CarswellNat 2032, 2011 CarswellNat 2033, 419 N.R. 333 (F.C.A.) — considered

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77, *(*sub nom. *National Capital News Canada v. Milliken)* 2002 Comp. Trib. 41, 2002 CarswellNat 4487 (Competition Trib.) — considered

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
s. 75 — pursuant to

s. 75(1)(a) — referred to

s. 75(1)(a)-75(1)(e) — referred to

s. 75(1)(b) — referred to

s. 75(1)(c) — referred to

s. 75(1)(d) — referred to

s. 75(1)(e) — referred to

s. 76 — referred to

s. 76(1)(a)(ii) — pursuant to

s. 103.1(7) [en. 2002, c. 16, s. 12] — referred to

s. 103.1(7.1) [en. 2009, c. 2, s. 431(4)] — referred to

Motor Vehicle Dealers Act, 2002, S.O. 2002, c. 30, Sch. B
Generally — referred to

Tariffs considered:

Federal Courts Rules, SOR/98-106
Tariff B, Table, column III — referred to

***Sandra J. Simpson J.*:**

The Application

1 The Used Car Dealers Association of Ontario (the "UCDA") seeks leave from the Competition Tribunal (the "Tribunal") to commence an application pursuant to section 75 and subparagraph 76(1)(a)(ii) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). The proposed application names the Insurance Bureau of Canada as the respondent.

The Decision

2 For the following reasons leave has been granted to commence an application under section 75 of the Act. However, leave to proceed under section 76 has been denied.

The Applicant

3 The UCDA was founded in 1984. It is a not-for-profit trade association which represents more than 4500 motor vehicle dealers in Ontario. The UCDA provides a variety of services to its members including one called Auto Check[TM] ("Auto Check"). It provides dealers who are selling used cars with infomlation about the accident history of the vehicles they intend to sell. Using a vehicle's VIN number, a dealer who is a member of the UCDA pays a fee of$7.00 (before taxes) to conduct an Auto Check vehicle accident history search.

4 The UCDA's evidence for this application is found in an affidavit sworn by Robert G. Beattie on June 29, 2011 (the "Beattie Affidavit"). Mr. Beattie is the UCDA's Executive Director.

The Respondent and ITs Databases

5 The Insurance Bureau of Canada (the "IDC") is a national not-for-profit industry association which represents home, vehicle and business insurers. The IDC is, according to the UCDA, the only source of integrated industry wide data collected from all insurers who sell auto insurance as well as from independent adjusters and investigators. The data are located on a database which IDC describes as its Web Claims Search Application. However, that database does not include information about the dollar value of claims made when vehicles are in accidents. Those values are found in information provided to IDC by its members and collected in a second IDC database called the Automotive Statistical Plan ("ASP Database").

The Background

6 In 1998, the UCDA became an Associate Member of the IDC primarily to gain access to the infommtion in IDC's Web Clainls Search Application. That infomlation is a critical input into UCDA's Auto Check business.

Other Providers of Vehicle Accident Searches

7 3823202 Canada Inc., carrying on business as CarProof ("CarProof"), began to provide vehicle accident searches in 2005. It is now the market leader and its searches cost $34.95 (Cdn) before taxes.

8 In 2008, CARFAX, Inc. ("Carfax"), an American based provider of vehicle accident histories, began to sell them in Ontario. It charges $34.99 (U.S.) before taxes.

9 Both CarProof and Carfax purchase IBC's data for their accident history searches and, according to the Beattie Affidavit, they are both able to provide the dollar value of claims as part of their search results.

10 The relationship between Auto Check and CarProof has, from the UCDA's perspective, been troubled. The UCDA took CarProof to court to prevent it from misrepresenting the services offered by Auto Check. In the end, a settlement achieved Auto Check's objective. CarProof has also twice (in 2009 & 2010) tried to persuade the UCDA to enter into a partnership in which the Auto Check service would be terminated and CarProof would supply vehicle accident histories to UCDA's members. The UCDA refused to entertain these proposals because it believes that its members place a high value on their ability to purchase inexpensive vehicle accident histories through Auto Check.

Regulatory Changes

11 On January 1, 2010, changes to the regulations under the Ontario *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Schedule B, required motor vehicle dealers to disclose to potential purchasers whether a used vehicle had ever suffered damage which cost more than $3000.00 to repaIr.

12 To assist its members to meet this new obligation, the UCDA decided to try to obtain additional infonnation from IBC about the dollar value of insurance claims. IBC has that information on its ASP Database. The Beattie Affidavit describes the UCDA's early efforts to secure this infonnation in paragraphs 21 and 25-28:

In early June 2009, in anticipation of these [Regulatory] changes, Robert Pierce, the UCDA's Director of Member Services, contacted Marti Pehar, Manager, Business Partnerships, of IBC by telephone and requested that IBC expand the scope of the information it provided to Auto Check[TM] to include dollar value claims information.

I understand from Mr. Pierce that he met with Ms. Pehar on June 16, 2009 to discuss Auto Check[TM]'s request for dollar value claims information. Although UCDA had indicated its willingness to compensate IBC for the provision of this additional infomlation, on June 24, 2009, Ms. Pehar infomled Mr. Pierce that IBC had refused UCDA's request. I understand and believe that at that time IBC provided, and presently continues to provide, similar information directly or indirectly to CarProof.

On May 17, 2010 Warren Barnard, UCDA's Legal Services Director, and I met with Ralph Palwnbo, IBC Vice-President - Ontario, and Randall Bundus, IBC Vice-President - Operations and General Counsel, and renewed Auto Check[TM]'s request for dollar value claims information. Mr. Palumbo stated that he did not see any reason why IBC would not provide this information to UCDA. Mr. Bundus indicated that IBC would need to obtain authorization from its member insurers in order to provide the ASP infornlation to UCDA.

The requirement to obtain insurer consents in respect of dollar claims data came as a surprise to UCDA because this has never been an issue with the Web Claims Search application. Nevertheless, on May 20, 2010, I wrote to Mr. Palumbo and formally requested that IBC seek the requisite authorization from its member insurers to provide the ASP dollar value claims information to Auto Check[TM].

In a letter dated May 26, 2010, Mr. Bundus wrote to me to state that IBC would not seek the authorization UCDA had requested to supply dollar claims data from its insurer members. Instead, Mr. Bundus indicated that UCDA should contact each insurer member of IBC in order to obtain individual consents for provision of dollar claims information.

[The emphasis is mine]

The Termination of the UCDA'S Access to IBC's Web Claims Search Application

13 The Beattie Affidavit deals with this subject and the UDCA's ongoing efforts to secure consents in paragraphs 28-37. There he says:

[In a letter dated May 26, 2010] ..., without any prior warning, Mr. Bundus informed me that IBC was terminating UCDA's Associate Membership, thereby ending the 12-year relationship between the parties and Auto CheckTws ability to continue to obtain the claims data from the Web Claims Search application.

On June 2, 2010, my colleague Warren Barnard wrote to Mr. Bundus expressing the UCDA's shock over the unexplained and unforeseen termination of its Associate Membership, and requesting that the IBC reconsider its decision. In the alternative, Mr. Barnard requested an extension of the termination notice period to six months (i.e., to November 26,2010) in order to (i) allow the UCDA a reasonable opportunity to contact the individual insurers whose authorization would be required for UCDA to obtain ASP infornlation from IBC, and (ii) continue using the Web Claims Search application.

In the absence of a reply to Mr. Barnard's letter, on June 9, 2010, McMillan LLP, external counsel to UCDA, wrote to Mr. Bundus expressing UCDA's concerns that mC's conduct raised issues under the *Competition Act* and reiterating UCDA's request that IBC reconsider the termination of UCDA's membership and its ability to source vehicle claims data (or, alternatively, extend the notice period to six months).

On June 23, 2010, McMillan LLP again wrote to Mr. Bundus, requesting that IBC grant the six-month extension and, in the meantime, provide UCDA with further particulars as to the form and content of the insurer authorizations required by IBC in order to supply the ASP information to Auto Check[TM] Mr. Bundus replied on June 28, 2010 providing information about the form of authorization required, but refusing to reconsider mC's termination of UCDA's membership and provision of the Web Claims Search application, or UCDA's request for an extension of the notice period.

After further discussions and emails, IBC reinstated UCDA's Associate Membership and ability to use the Web Claims Search application until November 26, 2010. UCDA also began a process of contacting numerous insurers to obtain consent for IBC to provide ASP infornlation to UCDA, something that has never been required to use the Web Claims Search application.

Between July 2010 and May 2011, UCDA obtained consents from insurers in respect of ASP information, and was also dealing wilh IBC on a range of contractual, technical and logistical issues related to ASP information. UCDA's Associate Membership has continued on a month to month basis as did its ability to use the Web Claims Search application.

On April 18, 2011, UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. UCDA was then in a position to seek consent from three insurers who had apparently withdrawn their earlier consents. However, UCDA was not made aware until May 30, in an email from James Fordham, Director of Customer Service at IBC, to Neil Elgar, UCDA's Manager of Administrative Services, that several other insurers had withdrawn their consents in the period from January to March, 2011. Mr. Fordham did not explain how the withdrawals occurred or why UCDA was not informed about them many months earlier when the withdrawals took place.

On June 7, 2011, Mr. Fordham informed Mr. Elgar by email that IBC would be terminating use of the Web Claims Search application. IBC gave notice that termination would take place on June 10, 2011, although after subsequent correspondence between Messrs. Elgar and Fordham, the date was extended to June 17, 2011. Mr. Fordham did not give a reason for the termination or for the briefness of the notice period.

On June 9, 2011, Mr. Barnard communicated with Mr. Bundus and requested continuing provision of the Web Claims Search application, for which insurer consents had never been required, while UCDA pursued consents from insurers for supply of the ASP information. On June 16, 2011, McMillan LLP reiterated Mr. Barnard's request in voicemail and email messages to Mr. Bundus.

On June 16,2011, UCDA advised its members that the Auto Check[TM] searches would be suspended effective June 17,2011 until further notice due to the inability to obtain supply of sufficient data to provide vehicle accident history searches. On June 17, 2011 at 5:00 pm IDC terminated supply of the Web Claims Search application to UCDA.

[The emphasis is mine]

The Effect of the Termination

14 The termination on June 17, 2011 (the "Termination") ended a 13 year arrangement which had cost the UCDA $65,000.00 in annual dues plus $16,000.00 which the UCDA provided to IDC in June of 2007 to help finance upgrades to IDC's database. As well, in 2010, IDC added a fee for the information supplied to the UCDA from the Web Claims Search Application. The UCDA has always paid IDC as required.

15 The Termination also caused the UCDA to suspend its Auto Check business.

The Future of Auto Check

16 The UCDA takes the position that its Auto Check service would again be viable ifit had the data from the Web Claims Search Application. In other words, although it would have been helpful, the UCDA's members do not need the dollar value claims information from the ASP Database becanse, according to the Beattie Affidavit, approximately 2/3 of the searches show that vehicles have not been in accidents. Further, where accidents have occurred, the UCDA's

member dealers are free to exercise judgment about whether the damage would have cost below or above $3000.00 to repair. In other words, dealers don't usually need the dollar value of the claims. However, the Beattie Affidavit concedes that, in the small number of situations in which a precise dollar value is needed, dealers can purchase the more costly searches from CarProof or Carfax which include the dollar amounts.

Part I — Section 75 — Refusal to Supply

17 Subsection 103.1(7) sets out the test for granting leave under section 75 of the Act. It reads:

> 103.1 (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that tlle applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

> 103.1 (7) Le Tribunal peut faire droit à une demande de pernlission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que I'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire I'objet d'une ordonnance en vertu de ces articles.

18 The law is clear that there must be sufficient credible evidence to give rise to a *bona fide* belief (i) that an applicant is directly and substantially affected by the refusal to supply and (ii) that an order could be made under subsection 7S(1)(a-e) of the Act (*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 FCA 339 (F.C.A.), at paragraph 16, and *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41 (Competition Trib.), at paragraphs 14-15).

The Product

19 The UCDA says that the product is IBC's Web Claims Search Application and notes that it has the following distinguishing features:

- The data are available to the UCDA without the need to secure consents from the parties who provide the data.
- It includes integrated industry wide claims data.
- It is offered through IBC's web portal.
- It does not include information about the dollar value of claims.

20 The UCDA says that the Web Claims Search Application is the product that has been refused, and that, for the reasons described above in paragraph 16, it is a viable product which meets the needs of the UCDA's members in almost all situations.

21 The IBC takes a different view and says that the product at issue is the right to access IBC's Web Claims Search Application and that the product is therefore properly characterized as a license. IBC says that, because the Tribunal held in *Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321 (Competition Trib.), that licenses are not products for the purpose of section 75 of the Act, an order could not be made.

22 However, I have not been persuaded by this submission. There is no evidence to suggest that IBC ever characterized its arrangements with the UCDA as a license. The evidence is that access to the Web Claims Search Application data was incidental to the UCDA's Associate Membership in IBC.

23 In the alternative, IBC submits that the proper product market is "vehicle insurance claims data" and that data of that kind is available in both IBC's Web Claims Search Application and in its ASP Database.

24 Evidence about the contents and attributes of the ASP Database is sparse but it does appear that the UCDA could use the ASP data to operate Auto Check ifit were available. In this regard, the Beattie Affidavit says at paragraph 40:

> The Web Claims Search application will remain critical to the Auto Check[TM] business unless and until UCDA is able to obtain consents from individual insurers to access sufficient ASP infomlation to offer a viable vehicle accident history search service.

25 As noted above, the Beattie Affidavit shows that the UCDA initially approached IBC asking only for the dollar values of claims on the ASP Database and IBC refused. However, UCDA's request appears to have changed over time into one for access to all the ASP data. This change may have been motivated by IBC's first decision to temlinate UCDA's access to the Web Claims Search Application in May 2010. In any event, IBC subsequently agreed to give the UDCA access to the ASP Database but said that consents were required from the insurance companies whose data are found therein (the "Consent(s)"). IBC initially offered to secure the Consents from its members.

26 However, IBC changed its mind and, instead of providing the Consents itself, required the UCDA to approach each insurance company for its Consent. The UCDA undertook thi s exercise and, over a period of almost one year, from July 2010 to May 2011 it secured many Consents. On April 18, 2011, the UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. When the agreement was signed, the UCDA knew that three insurers who had consented had withdrawn their earlier Consents. However, it was not until the end of May 2011 that IBC told the UCDA that several other Consents had also been withdrawn earlier in the year. No reasons were provided. Without those Consents, the UCDA does not have access to sufficient ASP data to make the ASP Database a viable alternative for the data on IBC's Web Claims Search Application.

27 Given these facts, I find that the Tribunal could conclude that the fact that access to the ASP Database requires Consents, which are not readily avai lable, means that it is not in the same product market as the Web Claims Search Application data for which no Consents are required.

28 For this reason, I have decided that the Tribunal could conclude that the vehicle insurance claims data from IBC's Web Claims Search Application is the product at issue in this application.

29 IBC also says that, even if the data on the Web Claims Search Application is the product, leave should be denied because the UCDA fails to consistently describe the product it says is at issue. IBC notes that the data the UCDA received before the Termination is variously described as:

- Web Search claims data.
- Vehicle Insurance claims data
- Supply from the IBC Web Claims Search Application
- Vehicle Insurance Claims data

30 In my view, there is no lack of clarity. In spite of the various descriptions provided, it is clear that the UCDA is speaking of the data it has received since 1998 using IBC's Web Claims Search Application.

Directly and Substantially Affected — Subsection 103.1(7)

31 The Beattie Affidavit shows that Auto Check's business accounted for more than 50% of the UCDA's net income in the year ended December 31,2010. As well, Mr. Beattie says that Auto Check is a service which the UCDA's members consider to be "critical" and that it has been suspended as a consequence of the Termination. In my view, this evidence is sufficient to show that, as a result of the Termination, the UCDA is directly and substantially affected in its business. While it may be useful to consider earnings over time as the Tribunal suggested in *Nadeau Ferme Avicole Ltée/Nadeau*

Poultry Farm Ltd. v. Groupe Westco Inc., 2009 Comp. Trib. 6 (Competition Trib.), affd 2011 FCA 188 (F.C.A.), I do not accept IBC's submission that such data is required. Further, it is noteworthy that subsection 103.1(7) reads in the present tense and that the UCDA has provided current information.

The Meaning of "Could"

32 I now tum to the question of whether an order could be made under section 75 and I think it useful at this juncture to reflect on the meaning of the word "could". The context is important. The question of whether an order "could" be made is being considered in an application for leave which is not supported by a full evidentiary record. Parliament decreed that an applicant would file an affidavit and a respondent would file representations. This means that there will inevitably be incomplete information on some topics. As well, the process is to be expeditious and the burden of proof is lower than the ordinary civil burden which is "a balance of probabilities".

33 In my view, the lower threshold means that the question is whether an order is "possible" and "could" is used in that sense.

34 In deciding whether an order is possible the Tribunal must assess whether there is sufficient credible evidence to give rise to a *bona fide* beliefthat an order is possible. However, given the context described above, it is not reasonable to conclude that hard and fast evidence is required on every point. In my view, reasonable inferences may be drawn where the supporting grounds are given and circumstantial evidence may be considered.

The UCDA'S Inability to Obtain Adequate Supplies of a Product Anywhere in a Market on Usual Trade Terms 75(1)(a)

35 The UCDA says that IBC is the only supplier of integrated insurance claims data. IBC disputes this saying that the UCDA could acquire the information it needs for its Auto Check business from CarProof and Carfax. However, in my view, the Tribunal could not conclude that the phrase "anywhere in a market" is intended to require the UCDA to purchase the data it needs from Auto Check's competitors.

36 IBC also says that the UCDA has failed to define the geographic market. However, since the UCDA's members are in Ontario and, since the used vehicle accident histories are sought for their use, it is reasonable to conclude Ontario is the geographic market and that an order could therefore be made.

37 Finally, with respect to usual trade terms, the evidence shows that the UCDA is willing to continue to pay IBC and since the Web Claims Search Application data is only available from IBC, this aspect of the test is met and an order could be made.

Insufficient Competition Among Suppliers — 75(1)(b)

38 In my view, because IBC is the sole supplier, the Tribunal could conclude that the UCDA's inability to secure the data on IBC's Web Claims Search Application is due to insufficient competition.

The Person Referred to in Paragraph (a) Is Willing and Able to Meet the Usual Trade Terms of the Supplier or Suppliers of the Product — 75(1)(c)

39 There is no question that the UCDA is prepared to continue to pay for the Web Claims Search Application data. In these circumstances, I find that the Tribunal could conclude that this test has been met.

The Product is in Ample Supply — 75(1)(d)

40 The Beattie Affidavit shows that IBC was able to reinstate the UCDA's associate membership and its access to the Web Claims Search Application after the initial termination of the UCDA's membership on May 26, 2010. Thereafter, it continued supplying the data on a month to month basis until the Termination. Based on this evidence, the Tribunal could conclude that the product is in ample supply.

The Refusal to Deal is Having or is Like to Have an Adverse Effect on Competition in a Market — 75(1)(e)

41 In my view, the Tribunal could find that IBC's refusal to supply the Web Claims Search Application has caused Auto Check's exit from the market. Since Auto Check was the low cost provider of accident claims searches to approximately 4500 used car dealers and, since it is reasonable to conclude that these dealers will now be forced to purchase more expensive searches from CarProof or Carfax, the Tribunal could find that the test is met.

Part II — Price Maintenance — 76(1)(a)(ii)

42 The test for leave to bring applications under section 76 of the Act is found in subsection 103.1 (7.1). It says that the Tribunal must have reason to believe that an applicant is directly affected by any conduct that could be the subject of an order.

43 For the reasons given in paragraph 31 above, I have concluded that the UCDA is directly affected by the closure of its Anto Check business.

44 The more difficult question is whether I can conclude that an order "could" be made under subparagraph 76(l)(a)(ii) in the absence of any direct evidence in the Beattie Affidavit showing that IBC's refusal to supply its Web Claims Search Application data to the UCDA is a result of Auto Check's low pricing. The only evidence before the Tribunal is circumstantial.

45 Some of the circumstantial evidence described below relates to the actions and affiliations of two companies called CGI Group Inc. ("CGI") and i2iQ Inc. ("i2iQ")

46 In its submissions the UCDA says at paragraph 25:

> UCDA is unable to establish defiriltively, without discovery pursuant to the Tribunal's rules, whether IBC's refusal to supply occurred because of concerns about Auto Check[TM]'s low pricing policy. However, there is significant circumstantial evidence related to the large difference between Auto Check[TM] and CarProof prices, the actions of CarProof, connections between CarP roof and i2iQ and communications between i2iQ and IBC, that provides reason to believe that IBC's refusal to supply occurred because of Auto Check[TM]'s low pricing policy.

47 Further in its reply submissions the UCDA said at paragraph 39:

> In this situation, the circumstantial evidence that IBC was acting to benefit CGI, with whom it has a preferred business relationship, and which in tum has a close business relationship with i2iQ and CarProof, is the only evidence on the record related to the reasons for IBC's refusal to supply. It is noteworthy that, as Mr. Beattie indicated in his affidavit, m c did not provide reasons when it terminated supply to UCDA, and again in its Representations IBC has remained silent about any other reasons for the temlination. UCDA submits that in such a situation an adverse inference should be drawn from IBC's silence and/or the "sufficient credible evidence" test should be applied in a manner which allows potentially viable claims to proceed and be tested on the merits rather than be frustrated by the Applicant's inability to access relevant evidence in the possession of the Respondent during the leave stage.

48 While I accept that circumstantial evidence and reasonable inferences may be relied on, the question is whether the circumstantial evidence in this case meets the requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order.

49 The UCDA relies on four pieces of circumstantial evidence to show that the Termination was because of UCDA's $7.00 price contrasted with CarProof's price of$34.95. I will deal with each in tum.

(i) The Price Difference

50 The evidence shows that CarProof has twice approached the UCDA with a view to acquiring its dealers as its customers. These approaches failed because the UCDA believes that its members prefer Auto Check's low priced searches. Accordingly, CarProof's searches will only be attractive to the UCDA's members if Auto Check's low cost searches are no longer available.

51 The evidence, which is said to suggest that the Termination was due to Auto Check's low price, is as follows:

• CarProof doesn't deal directly with IBC to obtain its ASP data. It deals through an intermediate company. Mr. Beattie speculates that that company is either i2iQ or CGI or perhaps both. CGI is contractually linked to IBC because CGI operates the ASP Database for IBC and provides other data services to IBC members. One service is called Auto Plus and it provides information to assist insurers when making decisions about coverages and premiums. Another service is Enhanced Auto Plus. It includes vehicle claim histories from CarProof.

• 12iQ's website also offers CarProof's vehicle claim history searches and says that i2iQ has a partnership or strategic alliances with CarProof and with a division of CGI called CGI Insurance Information Services. However, there is no evidence about whether i2iQ has a contractual relationship with IBC.

52 If CGI is the intermediary between CarProof and IBC, the Tribunal is asked to speculate that, because CGI provides important data services to IBC, IBC will be inclined to do a favour for CGI by helping its customer, CarProof. This would be accomplished by refusing to supply data to its low cost competitor Auto Check.

53 Regarding i2iQ, the evidence shows (i) that i2iQ's CEO is able to say to IBC that UCDA's dealers could purchase data from CarProof, (ii) that i2iQ and IBC were in prompt telephone contact about the UCDA's request for dollar claims information and (iii) that i2iQ has a partnership or strategic alliance with a division of CGI. This information suggests to me that i2iQ has a degree of control over CarProof and that i2iQ has a close relationship with IBC and may be the intemlediary selling IBC's data to CarProof. If those facts were true, I must infer that IBC would be inclined to do a favour for i2iQ by, in tum, helping its customer CarProof. Again, this would involve refusing to supply the Web Claims Application Search data to Auto Check.

(ii) CarProof's Actions

54 These are described in the following paragraphs taken from paragraphs 13-15 of the Beattie Affidavit:

CarProof has grown substantially and is the market leader in the supply of vehicle accident history searches in Ontario. In 2004, CarProof began distributing false and misleading promotional materials to motor vehicle dealers in Canada, which misrepresented the nature and scope of UCDA's lien search and other services. Following written warnings from UCDA's legal counsel, CarProof abandoned this negative campaign. It again began distributing false and misleading promotional material in 2007 in connection with UCDA's services including its Auto Check[TM] service. I believe that this may have been motivated in whole or in part by UCDA's position as the low-price supplier in the market. UCDA's efforts to resolve the situation out of court were unsuccessful, leading it to commence litigation against CarProof. That litigation was ultimately settled in 2009, with CarProof and UCDA issuing ajoint statement in which CarProof acknowledged that UCDA provides accident claim information through its Auto Check[TM] service and undertook not to make misleading statements in the future.

In early 2009, representatives of CarProof approached UCDA and proposed that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members rather than doing so directly through the Auto Check[TM] business. Such a proposal, if adopted, would have meant the end of the Auto Check[TM] business. Bearing in mind CarProof's aggressive business tactics and the significantly higher prices at which it provides vehicle accident history searches, UCDA concluded that a relationship with CarProof was not in the best interests of its members and declined the CarProof proposal.

> In early 2010, representatives of CarProof again approached UCDA and requested that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members, rather than doing so directly through the Auto Check[TM] business. UCDA's views on such a relationship had not changed, and we again rejected CarProof's overtures.

55 In sum, the evidence indicates that CarProof appears to have misrepresented Auto Check's business and has suggcstcd closing it down. However, these effOits have failed because of Auto Check's low price.

(iii) Connections Between CarProof and i2iQ

56 This topic is dealt with above in paragraphs 51 and 53.

(iv) Communications Between i2iQ and IBC

57 In June 2009, the UCDA contacted Ms. Pehar of IBC to ask for access to the dollar value claims information in the ASP Database. Shortly thereafter, the CEO of i2iQ spoke to Ms. Pehar and advised her that UCDA could purchase CarProof vehicle history reports and confirmed that he could be contacted ifthe UCDA wanted to pursue the idea. In the alternative, he suggested that the UCDA could speak directly to CarProof.

58 The Beattie Affidavit speculates that IBC must have told i2iQ or CarProof of UCDA's request and that the only reason IBC, CarProof and i2iQ were in contact, after the UCDA asked for access to the dollar value claims information, was because they were concerned that, with this information, Auto Check would be a more effective low cost competitor.

Conclusions

59 Against this background, it is clear that IBC has a close direct relationship with CGI (through its provision of services and maintenance of the ASP Database) and with i2iQ (it spoke to it about the UCDA's request for dollar value claims data). It is also clear that CGI and i2iQ have close ties to CarProof. Its searches are provided to IBC's members through CGI, and i2iQ appears to have some control over CarProof's operations and sells its searches through its website.

60 Finally, it is reasonable to conclude based on its past conduct, that CarProof would like to see Auto Check's low cost business closed so that the UCDA's dealers could become potential customers for CarProof's searches.

61 However, while I can conclude that it is possible that the Termination occurred as a result of mC's wish to support CarProof's business objectives as a favour to either CGI or i2iQ, I cannot conclude that there is sufficient credible evidence to show the possibility that the Termination by IBC was due to Auto Check's low pricing policy. In these circumstances, an order could not be made.

Order

62 The UCDA is hereby granted leave, pursuant to subsection 103.1(7) of the Act, to commence an application under section 75 of the Act. However, leave to apply under section 76 of the Act is denied.

63 The UeDA is to have its costs fixed as a lump sum amount payable forthwith based on Column III of TariffB of the *Federal Courts Rules*, SOR/98-106. The UCDA is to prepare a bill of costs for review by IBC and, if an amount cannot be agreed, the Registry may be contacted and I will fix the amount once a procedure has been agreed.

Direction

64 The parties are to consult to see if they can agree about whether an interim supply order can be made and, if so, on what terms. Failing agreement, the Registry may be contacted to discuss arrangements for the hearing of the UCDA's application for interim relief.

End of Document

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Canada Federal Statutes
Competition Act
Part VIII — Matters Reviewable By Tribunal
General

R.S.C. 1985, c. C-34, s. 103.1

s 103.1

Currency

103.1
103.1(1)Leave to make application under section 75, 76 or 77
Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

103.1(2)Notice
The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76 or 77, as the case may be, is sought.

103.1(3)Certification by Commissioner
The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

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

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76 or 77, as the case may be, is sought.

103.1(4)Application discontinued
The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77.

103.1(5)Notice by Tribunal
The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

103.1(6)Representations
A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

103.1(7)Granting leave to make application under section 75 or 77
The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

103.1(7.1)Granting leave to make application under section 76

The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

103.1(8)Time and conditions for making application

The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76 or 77 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

103.1(9)Decision

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

103.1(10)Limitation

The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76 or 77.

103.1(11)Inferences

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

103.1(12)Inquiry by Commissioner

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

Amendment History

2002, c. 16, s. 12; 2009, c. 2, s. 431

Currency

Federal English Statutes reflect amendments current to June 1, 2016

Federal English Regulations are current to Gazette Vol. 150:11 (June 1, 2016)

End of Document

Canada Federal Statutes
Competition Act
Part VIII — Matters Reviewable By Tribunal
Restrictive Trade Practices
Refusal to Deal

R.S.C. 1985, c. C-34, s. 75

s 75.

Currency

75.

75(1)Jurisdiction of Tribunal where refusal to deal

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

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

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

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

(d) the product is in ample supply, and

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

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

75(2)When article is a separate product

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

75(3)Definition of "trade terms"

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

75(4)Inferences

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

Amendment History

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

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Canada Federal Statutes
Competition Act
Part VIII — Matters Reviewable By Tribunal
Restrictive Trade Practices
Price Maintenance [Heading amended 2009, c. 2, s. 426.]

R.S.C. 1985, c. C-34, s. 76

s 76.

Currency

76.

76(1)Price maintenance

On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

76(2)Order

The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

76(3)Persons subject to order

An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

(b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

76(4)Where no order may be made

No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph (1)(a)(i) or (ii) are principal and agent or mandator and mandatary, or are affiliated corporations or directors, agents, mandataries, officers or employees of

(a) the same corporation, partnership or sole proprietorship; or

(b) corporations, partnerships or sole proprietorships that are affiliated.

76(5)Suggested retail price

For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price for the product, however arrived at, is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

76(6)Advertised price

For the purposes of this section, the publication by a producer or supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is proof that the producer or supplier is influencing upward the selling price of any person to whom the product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

76(7)Exception

Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

76(8)Refusal to supply

If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

76(9)Where no order may be made

No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(a)(ii) if the Tribunal is satisfied that the person or class of persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

(a) was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;

(b) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(c) was making a practice of engaging in misleading advertising; or

(d) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

76(10)Inferences

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

76(11)Where proceedings commenced under section 45, 49, 79 or 90.1

No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

76(12)Definition of "trade terms"

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

Amendment History
R.S.C. 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37(x); 2009, c. 2, s. 426

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End of Document

Canada Federal Statutes
Competition Act
Part VIII — Matters Reviewable By Tribunal
Restrictive Trade Practices
Exclusive Dealing, Tied Selling and Market Restriction

R.S.C. 1985, c. C-34, s. 77

s 77.

Currency

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

"exclusive dealing" means

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

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

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

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

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

"tied selling" means

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

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

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

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

77(2)Exclusive dealing and tied selling

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

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

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

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

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

77(3)Market restriction

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

77(3.1)Damage awards

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

77(4)Where no order to be made and limitation on application of order

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

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

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

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

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

77(5)Where company, partnership or sole proprietorship affiliated

For the purposes of subsection (4),

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

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

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

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

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

(ii) no one product dominates the business.

77(6)When persons deemed to be affiliated

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

77(7)Inferences

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

Amendment History

R.S.C. 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37(y); 2002, c. 16, ss. 11.2, 11.3

Currency

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End of Document

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Canada Federal Statutes
Copyright Act
Interpretation

R.S.C. 1985, c. C-42, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act,

"architectural work" means any building or structure or any model of a building or structure;

"architectural work of art" [Repealed 1993, c. 44, s. 53(1).]

"artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works;

"Berne Convention country" means a country that is a party to the Convention for the Protection of Literary and Artistic Works concluded at Berne on September 9, 1886, or any one of its revisions, including the *Paris Act* of 1971;

"Board" means the Copyright Board established by subsection 66(1);

"book" means a volume or a part or division of a volume, in printed form, but does not include

(a) a pamphlet,

(b) a newspaper, review, magazine or other periodical,

(c) a map, chart, plan or sheet music where the map, chart, plan or sheet music is separately published, and

(d) an instruction or repair manual that accompanies a product or that is supplied as an accessory to a service;

"broadcaster" means a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission;

"choreographic work" includes any work of choreography, whether or not it has any story line;

"cinematograph" [Repealed 1997, c. 24, s. 1(2).]

"cinematographic work" includes any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack;

"collective society" means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act;

"collective work" means

(a) an encyclopaedia, dictionary, year book or similar work,

(b) a newspaper, review, magazine or similar periodical, and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

"commercially available" means, in relation to a work or other subject-matter,

(a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or

(b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort;

"communication signal" means radio waves transmitted through space without any artificial guide, for reception by the public;

"compilation" means

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

(b) a work resulting from the selection or arrangement of data;

"computer program" means a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result;

"copyright" means the rights described in

(a) section 3, in the case of work,

(b) sections 15 and 26, in the case of a performer's performance,

(c) section 18, in the case of a sound recording, or

(d) section 21, in the case of a communication signal;

"country" includes any territory;

"defendant" includes a respondent to an application;

"delivery" [Repealed 1997, c. 24, s. 1(1).]

"dramatic work" includes

(a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise,

(b) any cinematographic work, and

(c) any compilation of dramatic works;

"educational institution" means

(a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,

(b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational education or training,

(c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b), or

(d) any other non-profit institution prescribed by regulation;

"engravings" includes etchings, lithographs, woodcuts, prints and other similar works, not being photographs;

"every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

"exclusive distributor" means, in relation to a book, a person who

(a) has, before or after the coming into force of this definition, been appointed in writing, by the owner or exclusive licensee of the copyright in the book in Canada, as

(i) the only distributor of the book in Canada or any part of Canada, or

(ii) the only distributor of the book in Canada or any part of Canada in respect of a particular sector of the market, and

(b) meets the criteria established by regulations made under section 2.6,

and, for greater certainty, if there are no regulations made under section 2.6, then no person qualifies under this definition as an **"exclusive distributor"**;

"Her Majesty's Realms and Territories" [Repealed 1997, c. 24, s. 1(1).]

"infringing" means

(a) in relation to a work in which copyright subsists, any copy, including any colourable imitation, made or dealt with in contravention of this Act,

(b) in relation to a performer's performance in respect of which copyright subsists, any fixation or copy of a fixation of it made or dealt with in contravention of this Act,

(c) in relation to a sound recording in respect of which copyright subsists, any copy of it made or dealt with in contravention of this Act, or

(d) in relation to a communication signal in respect of which copyright subsists, any fixation or copy of a fixation of it made or dealt with in contravention of this Act.

The definition includes a copy that is imported in the circumstances set out in paragraph 27(2)(e) and section 27.1 but does not otherwise include a copy made with the consent of the owner of the copyright in the country where the copy was made;

"lecture" includes address, speech and sermon;

"legal representatives" includes heirs, executors, administrators, successors and assigns, or agents or attorneys who are thereunto duly authorized in writing;

"library, archive or museum" means

(a) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

(b) any other non-profit institution prescribed by regulation;

"literary work" includes tables, computer programs, and compilations of literary works;

"maker" means

(a) in relation to a cinematographic work, the person by whom the arrangements necessary for the making of the work are undertaken, or

(b) in relation to a sound recording, the person by whom the arrangements necessary for the first fixation of the sounds are undertaken;

"Minister", except in sections 44 to 44.12, means the Minister of Industry;

"moral rights" means the rights described in subsections 14.1(1) and 17.1(1);

"musical work" means any work of music or musical composition, with or without words, and includes any compilation thereof;

"perceptual disability" means a disability that prevents or inhibits a person from reading or hearing a literary, musical, dramatic or artistic work in its original format, and includes such a disability resulting from

(a) severe or total impairment of sight or hearing or the inability to focus or move one's eyes,

(b) the inability to hold or manipulate a book, or

(c) an impairment relating to comprehension;

"performance" means any acoustic or visual representation of a work, performer's performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set;

"performer's performance" means any of the following when done by a performer:

(a) a performance of an artistic work, dramatic work or musical work, whether or not the work was previously fixed in any material form, and whether or not the work's term of copyright protection under this Act has expired,

(b) a recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired, or

(c) an improvisation of a dramatic work, musical work or literary work, whether or not the improvised work is based on a pre-existing work;

"photograph" includes photo-lithograph and any work expressed by any process analogous to photography;

"plaintiff" includes an applicant;

"plate" includes

(a) any stereotype or other plate, stone, block, mould, matrix, transfer or negative used or intended to be used for printing or reproducing copies of any work, and

(b) any matrix or other appliance used or intended to be used for making or reproducing sound recordings, performer's performances or communication signals;

"premises" means, in relation to an educational institution, a place where education or training referred to in the definition **"educational institution"** is provided, controlled or supervised by the educational institution;

"receiving device" [Repealed 1993, c. 44, s. 79(1).]

"Rome Convention country" means a country that is a party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on October 26, 1961;

"sculpture" includes a cast or model;

"sound recording" means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work;

"telecommunication" means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system;

"treaty country" means a Berne Convention country, UCC country, WCT country or WTO Member;

"UCC country" means a country that is a party to the Universal Copyright Convention, adopted on September 6, 1952 in Geneva, Switzerland, or to that Convention as revised in Paris, France on July 24, 1971;

"WCT country" means a country that is a party to the WIPO Copyright Treaty, adopted in Geneva on December 20, 1996;

"work" includes the title thereof when such title is original and distinctive;

"work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

"work of sculpture" [Repealed 1997, c. 24, s. 1(1).]

"WPPT country" means a country that is a party to the WIPO Performances and Phonograms Treaty, adopted in Geneva on December 20, 1996;

"WTO Member" means a Member of the World Trade Organization as defined in subsection 2(1) of the *World Trade Organization Agreement Implementation Act*.

Amendment History

R.S.C. 1985, c. 10 (4th Supp.), s. 1; 1988, c. 65, s. 61; 1993, c. 23, s. 1; 1993, c. 44, ss. 53, 79(1); 1994, c. 47, s. 56; 1995, c. 1, s. 62(1)(g); 1997, c. 24, s. 1; 2012, c. 20, s. 2; 2014, c. 32, s. 2

Currency

Federal English Statutes reflect amendments current to June 1, 2016
Federal English Regulations are current to Gazette Vol. 150:11 (June 1, 2016)

End of Document

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Competition Bureau Canada

Bureau de la concurrence Canada

Enforcement Guidelines

Intellectual Property

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

This publication replaces the following Competition Bureau publications:
Draft Enforcement Guidelines — *Draft update of Intellectual Property Enforcement Guidelines* – April 2, 2014

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4. APPLYING THE *ACT* TO CONDUCT INVOLVING IP

4.1 Overview

In general, the Bureau's analysis for determining whether competitive harm would result[14] from a particular type of business conduct comprises five steps:

- identifying the conduct;[15]
- defining the relevant market(s);
- determining if the firm(s) under scrutiny possess market power[16] by examining the level of concentration and entry conditions in the relevant market(s), as well as other factors;
- determining if the conduct would substantially lessen or prevent competition in the relevant market(s); and
- considering, when appropriate, any relevant efficiency rationales.

This analysis applies to all industries and all types of business conduct, and is sufficiently flexible to accommodate differences among the many forms of IP protection, as well as between IP and other types of property. For example, the Bureau takes differences among the various forms of IP protection into account when defining the relevant market and determining whether a firm has market power. In addition, although IP rights to a particular product or process are often created and protected by statute and are thus different from other forms of property rights, the right to exclude others from using the product or process does not necessarily grant the owner market power. It is only after it has defined the relevant market and examined factors, such as concentration, entry barriers and technological change, that the Bureau can conclude whether an owner of a valid IP right possesses market power. The existence of a variety of effective substitutes for the IP and/or a high probability of entry by other players into the market (by "innovating around" or "leap-frogging over" any apparently entrenched position) would likely cause the Bureau to conclude that the IP has not conferred market power on its owner.

While the criminal offence provisions of the Act do not require a finding of market power, under many civil provisions, an order can only be made if a firm has engaged in anti-competitive conduct that creates, enhances or maintains market power. Again, consistent with its approach with respect to all forms of property, the Bureau does not consider an owner of IP to have contravened the Act if it attained market power solely by possessing

14 For ease of discussion, and unless otherwise indicated, competitive harm is prospective. Note, however, that in many cases, competitive harm may be occurring at the time the Bureau is conducting an investigation or may have occurred sometime in the past.

15 Some examples of conduct that could involve IP include mergers, pooling of licences, setting standards for products, tied selling and exclusive dealing.

16 Matters pursued under the criminal provisions or the provisions concerning deceptive marketing practices do not require a finding of market power or an identification of competitive effects.

a superior quality product or process, introducing an innovative business practice or other reasons for exceptional performance.

Licensing is the usual method by which the owner of IP authorizes others to use it. In the vast majority of cases, licensing is pro-competitive because it facilitates the broader use of a valuable IP right by additional parties.[17] In assessing whether a particular licensing arrangement raises a competition issue, the Bureau examines whether the terms of the licence serve to create, enhance or maintain the market power of either the licensor or the licensee. The Bureau will not consider licensing agreements involving IP to be anti-competitive unless they reduce competition substantially relative to that which would have likely existed in the absence of the licence's potentially anti-competitive terms.

4.2 Enforcement Principles

Specific reference is made to IP rights in a number of provisions of the Act.[18] The circumstances in which the Bureau may apply the Act to anti-competitive conduct involving IP or IP rights fall into two broad categories: those involving anti-competitive conduct that is something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The general provisions of the Act address the former, while section 32 (special remedies) addresses the latter. The Bureau's approach is consistent with subsection 79(5), which acknowledges that the mere exercise of an IP right is not an anti-competitive act,[19] while acknowledging the possibility that under the very rare circumstances set out in section 32, the mere exercise of an IP right might raise a competition issue.[20]

4.2.1 General Provisions

The mere exercise of an IP right is not cause for concern under the general provisions of the Act. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use of the IP also as being the mere exercise of an IP right.

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.

17 Licensing is a means by which owners trade IP, and it signals the willingness of IP holders to participate in the marketplace. This ability of owners to exchange and transfer IP can enhance the IP's value and increase the incentive for its creation and use. Licensing arrangements also promote the efficient use of IP by facilitating its integration with other components of production, such as manufacturing and distribution.

18 Refer to sections 32, 76, 77, 79 and 86.

19 Subsection 79(5) reads: "For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

20 The remedies in section 32 are more extensive than those under the general provisions.

The Bureau applies the general provisions of the Act when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights, and when the alleged competitive harm stems from such an arrangement and not just from the mere exercise of the IP right and nothing else.

Applying the Act in this way may limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. If an IP owner licenses, transfers or sells the IP to a firm or a group of firms that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the Bureau may seek to challenge the arrangement under the appropriate section of the Act.[21] Part 7 of this document provides a series of hypothetical examples to illustrate how the Bureau would examine the licensing, transfer or sale of IP under the Act.

This approach is consistent with the Tribunal's decisions in both Tele-Direct[22] and Warner[23] in which the Tribunal held that the mere exercise of the IP right to refuse to license a complainant was not an anti-competitive act. In its decision in Tele-Direct, the Tribunal indicated that competitive harm must stem from something more than just the mere refusal to license.[24]

Underlying this enforcement approach is the view that market conditions and the differential advantages IP provides should largely determine commercial rewards flowing from the exploitation of an IP right in the market to which it relates. If a company uses IP protection to engage in conduct that creates, enhances or maintains market power as proscribed by the Act, then the Bureau may intervene.

When joint conduct of two or more firms lessens or prevents competition, the competitive harm clearly flows from something more than the mere exercise of the IP right to refuse. To the extent that conduct, such as joint abuse of dominance, market allocation agreements and mergers, restricts competition among firms actually or potentially producing substitute products or services, the presence of IP should not be a mitigating factor. Similarly, IP should not be an exception or immunity mitigating factor in matters involving criminal conduct, such as conspiracy[25] or bid-rigging. All these types of conduct would be subject to review under the appropriate general provision of the Act.

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21 This analysis would use the concept of a relevant market as discussed in section 5.1. For an example where an assignment of patent rights may create market power see *Apotex Inc. v. Eli Lilly and Co.*, *supra* note 13.

22 DIR v. Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (1997), 73 C.P.R. (3d) (hereafter *Tele-Direct*).

23 DIR v. Warner Music Canada Ltd. (1997), 78 C.P.R. (3d) 321.

24 In *Tele-Direct* the Competition Tribunal stated that, "The Tribunal is in agreement with the Director that there may be instances where a trademark may be misused. However in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trademark."

25 The *Copyright Act* provides that section 45 of the Act does not apply to any royalties or related terms and conditions arising under certain collective society agreements filed with the Copyright Board.

A transfer of IP rights that lessens or prevents competition is a further example of a situation in which competitive harm results from something more than the mere exercise of the IP right to refuse. Two examples of this are when a licensor ties a non-proprietary product to a product covered by its IP right, and when a firm effectively extends its market power beyond the term of its patent through an exclusive contract. In either case, if the conduct leads to the creation, enhancement or maintenance of market power so as to substantially lessen or prevent competition, the Bureau may intervene.

Sometimes upon examination, what appears to be just a refusal to license or to grant others access to a firm's IP rights turns out to have included conduct that goes beyond such a refusal. The conduct that goes beyond the unilateral refusal to grant access to the IP could warrant enforcement action under the general provisions of the Act. For instance, if a firm acquires market power by systematically purchasing a controlling collection of IP rights and then refuses to license the rights to others, thereby substantially lessening or preventing competition in markets associated with the IP rights, the Bureau could view the acquisition of such rights as anti-competitive. If the conduct met the definition of a merger as specified in section 91 of the Act, the Bureau would review the acquisitions under the merger provisions. If the conduct did not meet the definition of a merger, the Bureau would review the matter under either section 79 (abuse of dominance) or section 90.1 (civil agreements between competitors) of the Act.[26] Without the acquisitions, the owner's mere refusal to license the IP rights would have been unlikely to cause concern (see example 7).

4.2.2 Matters Outside the General Provisions – Section 32[27]

Only section 32, in the special remedies part of the Act, contemplates the possibility that the mere exercise of an IP right may cause concern and result in the Bureau seeking to have the Attorney General bring an application for a special remedy to the Federal Court.

The Bureau will seek a remedy for the unilateral exercise of the IP right to exclude under section 32 only if the circumstances specified in that section are met and the alleged competitive harm stems directly from the refusal and nothing else. Such circumstances require the Federal Court to balance the interests of the system of protection for IP (and the incentives created by it) against the public interest in greater competition in the particular market under consideration. Generally, the Bureau would recommend to the Attorney General that an application be made to the Federal Court under section 32 when, in the Bureau's view, no appropriate remedy is available under the relevant IP statute.

Enforcement under section 32 requires proof of undue restraint of trade or lessened competition. The Bureau expects such enforcement action would be required only in certain

26 The Competition Tribunal in DIR. v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) (hereafter *Laidlaw*), recognized that the abuse of dominance provision could apply to situations involving a series of acquisitions.

27 The special remedies provided for under section 32 include declaring any agreement or licence relating to the challenged right void, ordering licensing of the right (except in the case of trademarks), revoking a patent, expunging or amending a trademark, or directing that other such acts be done or omitted as deemed necessary to prevent the challenged use.

narrowly defined circumstances. The Bureau determines whether the exercise of an IP right meets this threshold by analyzing the situation in two steps.

In the first step, the Bureau establishes that the mere refusal (typically the refusal to license IP) has adversely affected competition to a degree that would be considered substantial in a relevant market that is different or significantly larger than the subject matter of the IP or the products or services that result directly from the exercise of the IP. This step is satisfied only by the combination of the following factors:

i) the holder of the IP is dominant in the relevant market; and

ii) the IP is an essential input or resource for firms participating in the relevant market — that is, the refusal to allow others to use the IP prevents other firms from effectively competing in the relevant market.

In the second step, the Bureau establishes that invoking a special remedy against the IP right holder would not adversely alter the incentives to invest in research and development in the economy. This step is satisfied if the refusal to license the IP is stifling further innovation.

If factors i) and ii) are present and if the refusal is stifling further innovation, then the Bureau would conclude that incentives to invest in research and development have been harmed by the refusal and a special remedy would help realign these incentives with the public interest in greater competition.

The Bureau recognizes that only in very rare circumstances would all three factors be satisfied. A case in which they could arise is in a network industry,[28] when the combination of IP protection and substantial positive effects associated with the size of the network could create or entrench substantial market dominance. In such a situation, IP rights and network externalities can interact to create de facto industry standards. Standardization means that the protected technology is necessary for a competitor's products to be viable alternatives. IP protection can effectively exclude others from entering and producing in the market.[29] However, the Bureau still would have to be satisfied that a refusal is stifling further innovation and not simply preventing the replication of existing products before seeking to recommend that the Attorney General bring an application for a special remedy to the Federal Court (see example 8).

28 A network industry is an industry that exhibits network effects. These effects exist when the value or benefit derived from using a product increases with the number of other users. For example, particular types of software can exhibit network effects because the value of exchanging computer files with other individuals clearly depends on whether these individuals use compatible software.

29 This does not suggest that markets subject to network effects will inevitably be monopolized. Often, firms form alliances and make a new technology "open" to gain acceptance and build an installed base. These activities tend to be pro-competitive if firms that participate in the standard-setting process freely compete with each other in the market.

4.2.3 Matters Possibly Resolved Outside the Act

An illegitimate extension of an IP right could include anti-competitive behaviour. This might involve a patent holder asserting its patent over products that are not within the scope of its patent or a distributor making false claims that it is an official licensee of a trademarked good. Alternatively, the Bureau may receive complaints that infringement of a legitimate IP right should be justified on competition grounds. In such disputes, the Bureau will use its enforcement discretion and may choose to leave the matter to be resolved by the appropriate IP authority under the appropriate IP statute (see example 1).

As outlined in section 4.1 above, the Bureau's analytical approach is sufficiently flexible to accommodate the specific characteristics of IP and the differences in the scope and length of protection extended to different IP rights. The following information highlights how the Bureau takes these factors into account when analyzing business conduct involving IP.

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Competition Bureau Canada
Bureau de la concurrence Canada

Guide

A Guide to Amendments to the *Competition Act*

April 22, 2009

Canada

Important amendments to the *Competition Act* became law on March 12, 2009.

The changes will modernize the *Competition Act* and bring it more closely in line with the competition laws of our country's major trading partners.

The amendments will increase the predictability, efficiency and effectiveness of the enforcement and administration of the *Competition Act* for both business and the Competition Bureau, and better protect Canadians from the harm caused by anti-competitive conduct.

It is important to ensure that consumers and legitimate businesses do not fall prey to illegal activity, and that if they do, they have confidence the law will be enforced effectively and the penalties are tough enough to deter future illegal activity.

This document explains the most important changes to the *Competition Act*, in the areas of deceptive marketing, restitution for victims of false and misleading representations, pricing provisions, collaboration among competitors, merger review, and others.

DECEPTIVE MARKETING

The Competition Bureau promotes truth in advertising in the marketplace by discouraging deceptive business practices and by encouraging the provision of information to allow consumers to make informed choices.

- Administrative monetary penalties have been increased for non-criminal offences.
    - Individuals: maximum $750,000 for first-time offence and $1 million for subsequent offences (formerly $50,000 and $100,000, respectively).
    - Corporations: maximum $10 million for first-time offence and $15 million for subsequent offence (formerly $100,000 and $200,000, respectively).
- For criminal offences, the maximum term of imprisonment has been increased to 14 years from 5 years.
- A false or misleading representation is now clearly subject to action under the *Competition Act* even when made to the public outside Canada, or in a non-public setting.

RESTITUTION

This is a new provision in the *Competition Act*.

- The court or Tribunal may now order the person in violation to make restitution to purchasers.
    - The amount of restitution may not exceed the total paid by purchasers.
- The court or Tribunal may issue an injunction to prevent the disposal of property to ensure that there are funds available for restitution to victims.

- Restitution is already available for criminal offences, including criminal false or misleading representations, under the *Criminal Code*.

ABUSE OF DOMINANCE

Abuse of dominance continues to be dealt with under the non-criminal provisions of the *Competition Act*.

- Administrative monetary penalties (AMPs) have been introduced for abuse of dominance: maximum $10 million for first offence; maximum $15 million for subsequent offences.
- The airline-specific provisions have been repealed so that all industries are treated equally.

PRICING PROVISIONS

- The former criminal pricing provisions have been repealed; such activities will be addressed under the civil abuse of dominance provisions.
  - The criminal pricing provisions concerning price discrimination, predatory pricing, geographic price discrimination and promotional allowances have been repealed.
  - Pricing practices are now subject to review under a civil provision, but a remedy is only available where evidence of likely substantial anti-competitive effect.
  - The removal of these offences promotes innovative pricing programs and increases certainty for Canadian businesses.

PRICE MAINTENANCE

The price maintenance provisions are designed to provide resellers of products with the freedom to set their own prices and to provide suppliers with the ability to compete through low-pricing policies.

- The former criminal provision has been repealed and replaced with a new non-criminal provision.
  - Similar to the refusal to deal provision, it must be shown that there is an "adverse effect" on competition before the Tribunal can issue an order under the civil price maintenance provision (to prohibit conduct or accept a customer).
  - There is a right of access for private litigants to bring cases for price maintenance to the Competition Tribunal.
  - The decriminalization of the price maintenance provision promotes aggressive pricing with no threat of criminal sanctions.

COMPETITOR COLLABORATION

The amendments create a more effective criminal enforcement regime for the most egregious forms of cartel agreements, while allowing other forms of potentially anti-competitive competitor collaborations to be reviewed under a civil provision.

- True cartel-like behaviour (price-fixing, market allocation, output restriction) is subject to criminal prosecution and is prohibited outright.
  - The maximum fine for conviction is increased to $25 million from $10 million, and the maximum term of imprisonment to 14 years from 5 years.
- Other forms of potentially anti-competitive agreements between or among competitors are subject to civil review and assessed to determine if they result in a substantial lessening or prevention of competition.
- These provisions are not in force until March 2010. Until then, parties may apply to the Commissioner for an opinion on the legality of existing or proposed agreements.
- The Bureau will issue draft Guidelines describing the Bureau's proposed approach to assessing agreements among competitors. Following consultation with interested parties, the Guidelines will be issued in final form to provide predictability to business.

MERGER REVIEW

New merger review procedures will allow for a more efficient and effective review of mergers.

- The Bureau may now only challenge a completed merger before the Competition Tribunal up until one year (previously three years) after the transaction has been substantially completed.
- There is a new merger review and information-gathering process:
  - The initial waiting period during which parties may not implement a notifiable merger is 30 days after notification by parties (subject to early termination of the waiting period by the Bureau).
  - If more information is needed, the Commissioner can issue a Supplementary Information Request any time during the initial waiting period.
  - A Supplementary Information Request triggers a second 30-day waiting period, which commences when all information required to be provided in the Supplementary Information Request has been received.
- The "size of transaction" asset/revenue threshold for mandatory merger notification is raised to $70 million (from $50 million for most kinds of transaction), and indexed based on changes to Canada's GDP, subject to a different amount to be prescribed by regulations.
- *Draft Revised Merger Review Process Guidelines* describing the Bureau's proposed approach were released for consultation on March 24, 2009. Interested parties are invited to provide comments by May 29, 2009.

BID-RIGGING

- Definition of bid-rigging is amended to explicitly prohibit the withdrawal of bids by agreement, and the maximum term of imprisonment has been increased to 14 years (from 5 years).

OBSTRUCTION AND NON-COMPLIANCE

Certain penalties were increased to promote compliance with the *Competition Act* and to deter conduct that would compromise the effective enforcement of the Act, such as destruction of evidence.

23

THE 2016 ANNOTATED

COMPETITION ACT

Omar Wakil, BA LLB LLM

OF THE ONTARIO BAR
SOLICITOR, ENGLAND & WALES

STATUTES OF CANADA ANNOTATED

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petition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

(9) Where no order may be made — No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(a)(ii) if the Tribunal is satisfied that the person or class of persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

(a) was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;

(b) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(c) was making a practice of engaging in misleading advertising; or

(d) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

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

(11) Where proceedings commenced under section 45, 49, 79 or 90.1 — No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

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

R.S.C. 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37(x); 2009, c. 2, s. 426

Commentary

Subsection 76(1) creates the reviewable practice of "resale price maintenance". It is intended to minimize restrictions on the ability of resellers to compete on price where restrictions would have an "adverse impact on competition." Section 76 was added to the Act in 2009 to replace the criminal price maintenance offence previously found in s. 61 and now repealed. The former criminal offence and current reviewable practice are largely the same, the only significant substantive difference being that the former criminal offence made price maintenance *per se* illegal, regardless of its impact on competition, whereas subs. 76(1) requires that the price maintenance had an adverse effect on competition.

CARGURUS INC. - and - TRADER CORPORATION
Applicant Respondent

File No. CT-2016-003

CANADA COMPETITION TRIBUNAL

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RESPONDENT, TRADER CORPORATION

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