File No. CT-2015-009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34 (the "Act");

AND 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 Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

B E T W E E N:

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

WRITTEN REPRESENTATIONS of ABKCO Music & Records Inc. and Casablanca Media Publishing

November 20, 2015

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INDEX

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- and -

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CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.

Respondents

MEMORANDUM OF FACT AND LAW of ABKCO Music & Records Inc. and Casablanca Media Publishing

November 20, 2015

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TABLE OF CONTENTS

MEMORANDUM OF FACT AND LAW
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I OVERVIEW

1. This case is déjà vu all over again. It is indistinguishable from *Warner Music*.[1] In that case, as here, the applicant attempted to use section 75 to force a copyright owner to license that copyright. In that case, this Tribunal held that copyright licences are not "products" within the meaning of section 75, and that this provision cannot be used to create a compulsory licensing provision.

2. Stargrove has added sections 76 and 77 to its case, presumably in order to avoid the result that *Warner Music* must dictate in its section 75 case. But the fundamental thrust of Stargrove's case is the same as *Warner Music*: Stargrove wants the Tribunal to turn the *Competition Act* into a compulsory licensing regime for copyrights. Sections 76 and 77 were no more intended for this purpose than was section 75.

3. Parliament has already decided against compulsory licensing of copyrights by repealing compulsory licensing provisions in 1988. It is not open to the Tribunal to restore compulsory licences using the *Competition Act*. To do so would nullify rights granted by federal intellectual property statutes, including the *Copyright Act*. On the contrary, it has been consistently recognized that the mere exercise of intellectual property rights, including the right to exclude others by refusing a licence, is immune from scrutiny under the *Competition Act's* provisions, apart from the special remedy in section 32.

4. Stargrove has failed to lead evidence to establish a *bona fide* belief that an order could be granted under section 76 or 77. There is no basis for an order under section 76 because there is no resale of the licences Stargrove is seeking, that is, mechanical licences. Similarly, Stargrove has failed to plead facts or lead evidence to bring this case within the ambit of section 77.

5. Stargrove's application must also fail because it has not presented sufficient evidence to give rise to a reasonable belief that it is directly and substantially affected in its business by the conduct of which it complains. Stargrove has failed to lead evidence

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[1] *Canada (Director of Investigation and Research) v Warner Music Canada Ltd*, [1997] CCTD No 53 (Comp Trib) [*Warner Music*].

about two of its three lines of business; it has failed to lead evidence about efforts to obtain licences from other publishers; it has failed to lead evidence about what licences might or might not be available from other publishers.

6. Finally, in relation to Casablanca, Stargrove has brought this application against the wrong party. Casablanca does not own, control, or administer the copyrights for any of the musical works referred to in Stargrove's application. There is thus no basis for an order against Casablanca; and Casablanca would be unable to comply with an order to grant licences over copyrights it does not own, control, or administer.

7. Casablanca and ABKCO therefore submit that Stargrove's application for leave should be denied, with costs.

II CASABLANCA IS NOT A PROPER PARTY

8. The respondent 2204253 Ontario Inc., which carries on business as Casablanca Media Publishing ("Casablanca") seeks leave under rule 119(3) of the *Competition Tribunal Rules*[2] to introduce the affidavit of Jennifer Mitchell and make the following submissions thereon.

9. Casablanca does not own, administer, have, or grant any rights or licences whatsoever to any of the musical works referred to Stargrove's application materials.[3]

10. Until September 30, 2015, 1652181 Ontario Inc., which carries on business as Red Brick Songs ("Red Brick"), administered the three musical works that Stargrove mistakenly attributed to Casablanca (the "Three Songs"), namely:

a) "I Saw Her Standing There"

b) "From Me To You"

c) "I Wanna Be Your Man"[4]

11. The refusal to grant mechanical licences for the Three Songs that is attributed to Casablanca came from Red Brick, not Casablanca.[5]

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[2] SOR/2008-141.
[3] Affidavit of Jennifer Mitchell sworn 19 November 2015 at ¶6, Written Representations of ABKCO Music & Records Inc. and Casablanca Media Publishing ("ABKCO & Casablanca Response") at tab 2.
[4] Mitchell Affidavit at ¶8-14, ABKCO & Casablanca Response at tab 2.
[5] Mitchell Affidavit at ¶24, 27, ABKCO & Casablanca Response at tab 2.

12. Although Jennifer Mitchell is president of both companies, Casablanca and Red Brick are not affiliates within the meaning of subsection 2(2) of the *Competition Act*, as there is no common share ownership of the companies, apart from Ms Mitchell's 15% stake in Casablanca. The two companies' businesses are separate.[6]

13. None of the acts complained of in Stargrove's application were committed by Casablanca. As well, it would be impossible for Casablanca to comply with any order the Tribunal may make in relation to the Three Songs, as it does not own the copyright over those songs. Casablanca is not a proper party to this application.

14. Casablanca advised Stargrove of these facts. Stargrove refused to consent to dismissing its application as against Casablanca. Casablanca submits that this refusal should entitled Casablanca to costs on a higher scale.

15. This evidence meets the test recently set out in *Audatex Canada, ULC v. CarProof Corporation*.[7] It is focussed "on the issues to be determined by the Tribunal, namely whether sufficient credible evidence exists to give rise to a bona fide belief that the applicant is directly and substantially affected in its business by an alleged conduct that could be the subject of an order" under section 75, 76, or 77. In particular, it fits one of the categories identified by Justice Gascon in *Audatex*, namely, that "that the supplier [here, Casablanca] does not sell the product sought to be supplied".[8]

16. This evidence is, moreover, determinative of the application against Casablanca, and thus assists the Tribunal in its screening function.

III SERVICE EX JURIS ON ABKCO

17. ABKCO Music & Records, Inc. ("ABKCO") was served with Stargrove's application materials in the United States.

18. There is no provision in the *Competition Tribunal Rules* for service of Competition Bureau process outside of Canada. Rule 8 deals with service of an originating document, including a notice of application for leave, including on a corporation. Rule 8(1)(c) specifies that service on a corporation must be in Canada:

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[6] Mitchell Affidavit at ¶2-5, ABKCO & Casablanca Response at tab 2.
[7] *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 13 [*Audatex*].
[8] *Audatex*, *supra* note 7 at ¶15.

> (c) in the case of a corporation, by leaving a certified copy of the originating document with an officer of the corporation or with a person apparently in charge of the head office or of a branch of the corporation in Canada during business hours [Emphasis added].[9]

19. The Tribunal's rules on service generally mirror the analogous *Federal Courts Rules* (rules 127-137),[10] however, unlike the Federal Court rules, the Tribunal's rules on service do not provide for service ex juris.

20. ABKCO therefore submits that service ex juris of an originating document for an application in the Competition Tribunal is not permissible.

21. The submissions on the merits, below, are therefore made by ABKCO in the alternative.

IV STARGROVE SHOULD NOT GET LEAVE

A. The *Competition Act* is not intended to create a compulsory IP licensing regime

22. Stargrove is asking the Tribunal to use various provisions of the *Competition Act* to create a compulsory licensing regime for intellectual property. It does so in the face of a decision by Parliament to remove compulsory licensing from the *Copyright Act*,[11] and also in the face of the principle that the mere exercise of an intellectual property right, including the right to exclude others, is immune from scrutiny under general provisions of the *Competition Act*, including sections 75, 76, and 77.

23. In 2015, Parliament re-affirmed the importance of protecting copyright by lengthening the protection afforded to sound recordings by 20 years.[12] Using the *Competition Act* to defeat rights created by the *Copyright Act* would be inconsistent with Parliament's most recent expression of its intention in relation to copyright, which was to increase, not decrease, those rights.

24. Casablanca and ABKCO adopt the submissions of CMRRA and Universal about the relationship between intellectual property and the *Competition Act*.

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[9] SOR/2008-141.
[10] SOR/98-106.
[11] In 1988, the compulsory licensing regime set out at sections 29 through 33 of the *Copyright Act* were repealed; *An Act to amend the Copyright Act and to amend other Acts in consequence thereof*, RSC 1985, c 10 (4th Supp), s 7, amending RSC 1985, c C-42.
[12] *Copyright Act*, RSC 1985 c C-42, s 23(1)(b), as amended by SC 2015, c 36, s 81.

B. Stargrove's "business" is not "directly and substantially affected"

1. Stargrove must show a reasonable possibility that its business is directly and substantially affected

25. In order to obtain leave under subsection 103.1(7) to make an application under section 75 or 77, Stargrove must lead "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".[13] Put another way, Stargrove must satisfy the Tribunal that there is a "reasonable possibility that its business has been directly and substantially affected" by the practice in question.[14]

26. While this is less than proof on a balance of probabilities, a "mere possibility" that Stargrove's business has been directly and substantially affected is not enough.[15]

27. The term "direct" means that there must be a causal relationship between the action of the respondent and the business consequences for the applicant. Mere speculation as to causality is not enough.[16]

28. The term "substantial" has been equated by the Tribunal with "important" and "significant".[17] The substantiality of the impact is measured in the context of the entire business, not just one line of business.[18]

29. The test under subsection 103.1(7.1), which applies to an application for leave to make an application under section 76, is similar, except that the "substantially" requirement is omitted.

2. Stargrove has failed to establish a bona fide belief that its business is substantially affected

30. Stargrove has failed to lead sufficient evidence to give rise to a *bona fide* belief that it may have been *substantially* affected in its business. There are two principal deficiencies in Stargrove's evidence:

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[13] *Competition Act*, RSC 1985, c C-34, s 103.1(7); *National Capital News Canada v Milliken*, 2002 Comp Trib 41 at ¶9-14, aff'd 2004 FCA 339.
[14] *Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 Comp Trib 1 at ¶11-12 [*Barcode*].
[15] *Barcode*, *supra* note 14 at ¶13.
[16] *Mrs. O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24 at ¶25.
[17] *Sears Canada Inc v Parfums Christian Dior Canada Inc*, 2007 Comp Trib 6 at ¶31 [*Sears*].
[18] *Sears*, *supra* note 17 at ¶19-21; *Broadview Pharmacy v Wyeth Canada Inc*, 2004 Comp Trib 22; *Paradise Pharmacy Inc v Novartis Pharmaceuticals Canada Inc*, 2004 Comp Trib 21; *Broadview Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 23; *Construx Engineering Corporation v General Motors of Canada*, 2005 Comp Trib 21.

a) Stargrove has not led evidence showing the impact in the context of its *entire* business, but has led evidence about one line of business only.

b) Stargrove has not led evidence about its ability (or inability) to obtain licences from publishers other than the respondent "Title Holders".[19]

a) Stargrove has not led evidence about its entire business

31. According to Mr. Perusini, Stargrove's business model consists of the distribution of three different lines of CDs:

> Stargrove's business model relies on distributing low-cost compact discs. These discs consist of: (i) sound recordings of which Stargrove owns the sound recording copyright; (ii) sound recordings licensed to Stargrove from various independent labels (e.g., K-Tel International); or (iii) sound recordings that have fallen into the public domain and for which master recording licences are not required.[20]

32. Stargrove has only led evidence in relation to the third line, CDs from "sound recordings that have fallen into the public domain and for which master recording licences are not required".

33. Stargrove has not led any evidence at all about the first two lines of its business, nor has it led any evidence as to the importance of the third line of business relative to its business as a whole. Nor has Stargrove filed any financial statements or other financial information to assist the Tribunal in determining whether the respondent Title Holders' refusal to license is substantial in relation to its business as a whole.[21]

34. This case is thus similar to *Construx Engineering Corporation v General Motors of Canada*,[22] where Construx failed to lead evidence as to the nature and volume of other products it sold, among other "serious deficiencies". As a result, there was no reasonable

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[19] This term is used as defined in the application materials as including ABKCO, Casablanca and Sony Publishing, for convenience. As discussed above, Casablanca is not, in fact, a title holder, as it does not own or control the rights to any of the songs at issue in this application.
[20] Affidavit of Terry Perusini sworn 26 August 2015 at ¶20, Stargrove's Application Record at 86.
[21] Applicants who have obtained leave have typically filed extensive financial evidence. See for example *Allan Morgan and Sons Ltd v La-Z-Boy Canada Ltd*, 2004 Comp Trib 4 [*Allan Morgan*]. In *B-Filer Inc v The Bank of Nova Scotia*, 2005 Comp Trib 38 at ¶54, B-Filer led evidence that 50% of its revenue depended on banking services provided by Scotiabank.
[22] 2005 Comp Trib 21 [*Construx*].

basis for the Tribunal to believe that Construx had been substantially affected by a refusal to deal.[23]

b) Stargrove has failed to lead evidence about the availability of licences from other publishers

35. Stargrove's evidence shows that it is unable to include a limited subset of sound recordings on its CDs, namely recordings that were produced and published before December 31, 1964[24] that feature musical works (that is, songs) in which copyright is owned or controlled by one of the respondent "Title Holders".

36. Stargrove's evidence does not address two groups of sound recordings that it may be able to include on its CDs, namely:

a) Sound recordings that feature songs that are entirely in the public domain; and

b) Sound recordings that feature songs owned or controlled by publishers other than the Title Holders.

37. Stargrove can deal freely with songs that are entirely in the public domain without the need to obtain a mechanical licence. This includes any song, the author(s) of which died on or before December 31, 1964, provided that the sound recording that Stargrove wishes to use was recorded and published on or before that date.

38. Stargrove may also be able to include on its CDs songs whose copyright is owned or controlled by other publishers. There are "tens of thousands of music publishers, ranging from multi-national organizations to individual songwriters with very small catalogues".[25] Not all publishers are represented by CMRRA.[26] Moreover, CMRRA invited Stargrove on three separate occasions to contact publishers directly – whether or not CMRRA represented those publishers – and offered to facilitate licences for publishers that agreed to grant mechanical licences to Stargrove.[27]

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[23] *Construx*, *supra* note 22 at ¶8.
[24] This is because the new 70-year term in s. 23(1)(b) of the *Copyright Act* came into force on the day the amending legislation received Royal Assent, that is, June 23, 2015: *Copyright Act*, RSC 1985 c C-42, s 23(1)(b), as amended by SC 2015, c 36, s 81.
[25] Perusini Exhibit 2, "Mechanical Licensing FAQ", CMRRA website, Stargrove's Application Record at 127.
[26] *Ibid.*
[27] Perusini Exhibit 11, Stargrove's Application Record at 167; Perusini Exhibit 18, Stargrove's Application Record at 197; Perusini Exhibit 25, Stargrove's Application Record at 217.

39. It was incumbent on Stargrove to lead evidence to show that it could not obtain suitable replacement songs to use on CDs in order to raise a *bona fide* belief that its business was substantially affected by the Title Holders' refusal to license. In *Allan Morgan*, for example, Mr. Morgan filed an affidavit detailing his efforts to obtain replacement brands following La-Z-Boy's termination of his distributorship.[28]

40. Stargrove has failed to lead any such evidence. Stargrove has not led any evidence about any efforts to use songs that are in the public domain or that other publishers are willing to license, much less, evidence about the likely commercial success, or lack thereof, of recordings that feature those songs. Stargrove has led no evidence that it asked any other publishers to grant mechanical licences, nor any evidence about why it did not do this. There is not even any evidence that the Tribunal could use to derive useful information, as Stargrove has failed to provide any market share information for the market of mechanical licences.

41. What little evidence there is suggests that there are many other songs that Stargrove could use, since there are "tens of thousands of music publishers".[29] From the chart prepared by Mr Perusini, it appears that Stargrove sought mechanical licences for only 44 songs, and was granted licences for seven of them (the songs listed in green type).[30] An additional four are from publishers that are not parties to this application (two from Peermusic Canada, one from Drop Top Music, and one with no publisher shown). There is no evidence about Stargrove's dealings with these other publishers.

42. Stargrove is thus asking the Tribunal to speculate that a refusal by four music publishers, out of tens of thousands, to license 33 songs, out of, presumably, millions, will substantially affect its business. This does not meet the test under section 103.1(7).

3. Stargrove's third line of business is not a "business"

43. The "business" that Stargrove is asserting in this application consists of selling four CDs with 44 songs, 33 of which it needs to license from one of the respondent Title Holders. As noted above, the entire business must be considered, not just the affected line of business. But even if the Tribunal were to accept that Stargrove's "business" for

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[28] *Allan Morgan*, *supra* note 21 at ¶15.
[29] Perusini Exhibit 2, "Mechanical Licensing FAQ", CMRRA website, Stargrove's Application Record at 127.
[30] Perusini Exhibit 26, Stargrove's Application Record at 221. See also letter from CMRRA to Dimock Stratton, 25 March 2015, Perusini Exhibit 25, Stargrove's Application Record at 217.

business of this application consists only of these four CDs, this "business" cannot be described as a viable or valid business.

44. Stargrove has set up a tautology. It wants to start a business selling recordings of 33 songs whose copyright is owned by the respondent "Title Holders". Since that line of business is entirely dependent upon the willingness of the Title Holders to grant mechanical licences, that line of business will by definition be affected if they refuse.

45. This cannot be what the *Competition Act* was intended to deal with. The *Competition Act* was not intended as a vehicle to allow someone to start a "business" of exploiting someone else's intellectual property, and then complain to the Tribunal when the owner of the intellectual property refuses to go along. Stargrove is attempting to use the *Competition Act* to undo the 1988 amendments to the *Copyright Act* that removed the compulsory licensing regime.

46. What is more, by Stargrove's own admission, it pressed and distributed CDs containing songs without first obtaining the necessary mechanical licences from the holders of the copyright in the songs.[31] In short, Stargrove's "business" to date has consisted of infringing copyrights that are owned or controlled by others, including but not limited to the respondent Title Holders.

47. Stargrove has also failed to account for how it proposes to develop its business in the face of Parliament's decision in 2015 to increase the copyright protection for sound recordings from 50 to 70 years.[32] This statutory amendment means that no new recordings will become available to Stargrove for the next 20 years.

C. No basis for an order under section 75

48. This case is indistinguishable from *Warner Music*. In *Warner Music*, the Commissioner of Competition (then known as the Director of Investigation and Research) sought to use section 75 to force Warner Music to grant copyright licences to make sound recordings from their master recordings to BMG Direct Ltd., a mail-order record club business.

49. The Tribunal held that copyright licences are not a product as that term is used in section 75.[33]

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[31] Perusini Affidavit at ¶32-34, 36-45, Stargrove's Application Record at 86.
[32] *Copyright Act*, RSC 1985 c C-42, s 23(1)(b), as amended SC 2015, c 36, s 81.
[33] *Warner Music*, *supra* note 1 at ¶30-31.

50. The Tribunal added:

> 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.[34]

51. The *Warner Music* case is dispositive of Stargrove's application under section 75.

52. ABKCO and Casablanca adopt the submissions of CMRRA and Sony in relation to section 75.

D. No basis for an order under section 76

53. Stargrove has not led sufficient credible evidence to give rise to a *bona fide* belief that the respondents' conduct could be the subject of an order under section 76, for the following reasons:

a) Section 76 applies to *resale* price maintenance. There is no resale of mechanical licences here.

b) A mechanical licence is not a product for the purposes of section 76(2).

c) There is no basis for a separate finding of any discrimination against Stargrove.

d) There is no evidence of any inducing of refusal to supply (s. 76(8)).

e) There is no evidence that the refusal to licence was due to Stargrove's low pricing policy.

f) There is no evidence of an adverse impact on competition.

54. Each of these reasons is discussed below.

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[34] *Warner Music*, *supra* note 1 at ¶30.

1. No resale of mechanical licences, therefore section 76 cannot apply

55. In the recent *Visa/MasterCard* case, the Tribunal held that "a resale is required under section 76 of the *Competition Act*".[35]

56. There is no resale in this case. Stargrove is not reselling mechanical licences. Stargrove needs mechanical licences as an input in order to produce CDs which are ultimately sold to consumers, through distributors and retailers. The consumer who ultimately buys the CD buys the right to listen to the music, but does not obtain a mechanical licence to make and sell copies of the CD.

a) Neither branch of price maintenance extends to inputs

57. Price maintenance is divided into two branches in the *Competition Act*. The first branch, paragraph 76(1)(a)(i) deals with resale price maintenance ("RPM") restraints imposed by suppliers on their customers by way of agreement, threat, promise, or like means. The second branch, paragraph 76(1)(a)(ii), addresses the situation where a supplier refuses to supply or discriminates against a customer that has a low pricing policy, in other words, a customer that will not agree to accept an RPM restraint. Put another way, the first branch captures the RPM policy; the second captures the tool that the supplier uses to enforce the RPM policy.

58. The two branches of price maintenance are complementary provisions that together control the same behaviour, namely, attempts by suppliers to control the price at which the products they supply are resold. The second branch, paragraph (ii), complements the first branch, paragraph (i), by acting as an anti-avoidance mechanism. Because of the second branch, a supplier cannot avoid the application of the provision by cutting off customers who object to an RPM restraint.

59. Paragraph (ii) refers to "a product" rather than "the product". This means that it might capture a case where a supplier refuses to supply products A and B to enforce an RPM policy that applies to product A only. It does not mean, however, that paragraph (ii) is intended to apply to a refusal to supply of inputs, as opposed to products for resale. Read as a whole, section 76 is intended to control *resale* price maintenance.

60. If paragraph (ii) were interpreted as covering a refusal to supply an input, then its ambit would exceed that of paragraph (i). A refusal to supply an input on account of a

[35] *Canada (Commissioner of Competition) v Visa Canada Corp*, 2013 Comp Trib 10 at ¶115 [*Visa/Mastercard*].

low pricing policy would be price maintenance, but an attempt to influence upward the price of a downstream product that incorporated the input would not be captured by paragraph (i). This would be an absurd result. If Parliament had intended the price maintenance provision to apply to inputs, in addition to products for resale, then Parliament would have drafted both branches of the price maintenance to capture this conduct. It must have been Parliament's intention that both branches of the price maintenance provision would have a similar ambit.

61. In any event, three of the four defences to the second branch, outlined in subsection 76(9), apply to resale situations, as they apply to "the product" which is supplied, which excludes their application to an input that becomes part of some other downstream product. Had Parliament intended the second branch to cover inputs, then it would have drafted these defences more broadly.

62. Other parts of section 76 are also expressly limited to resale. Subsection 76(5) deals with suggested *resale* prices. Subsection 76(6) deals with advertising of *resale* prices.

b) The legislative history of the price maintenance provision

63. The legislative history of the price maintenance provision also shows Parliament's intention to limit the current provision to resale situations. The Tribunal surveyed this history in *Visa/MasterCard*.[36] In a nutshell, price maintenance was a criminal offence from 1951 until 2009, when it joined other reviewable matters in Part VIII of the Act. From 1951 to 1976, the provision applied to resale price maintenance only.[37] In 1976, a new price maintenance provision was enacted.[38] This provision was drafted broadly, to capture horizontal as well as vertical (resale) price maintenance. Finally, in 2009, the provision was de-criminalized and narrowed to cover resale price maintenance only, resulting in the current section 76.[39]

64. A number of reports led up to the 2009 amendments. In particular, in 2002, the House of Commons Standing Committee on Industry, Science and Technology recommended that the provision be split into two, with resale price maintenance being

[36] *Visa/MasterCard*, *supra* note 35 at ¶118*ff*.
[37] See *Combines Investigation Act*, RSC 1970 c C-23, s 38.
[38] *Combines Investigation Act*, SC 1974-75-76, c 76, s 18.
[39] *Competition Act*, RSC 1985, c C-34, s 76, as amended by SC 2009, c 2, s 426.

absorbed into the civil provisions in the Act (as part of section 79), and horizontal price maintenance being dealt with in the conspiracy provision.[40]

65. Another seminal report, the 2008 report of the Competition Policy Review Panel, *Compete to Win*, noted that "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", and recommended that resale price maintenance should be treated as a civil matter.[41]

66. In *Visa/MasterCard*, the Tribunal concluded from its review of the legislative history that Parliament's intention in the 2009 amendments was to return to *resale* price maintenance:

> [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)).

67. The Tribunal rejected the Commissioner's contention that the provision was intended to cover inputs as well as products sold for resale:

> [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.

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[40] House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (April 2002) at xviii, 73-76 (Chair: Walt Lastewka).

[41] Canada, Competition Policy Review Panel, *Compete to Win: Final Report* (Ottawa: Industry Canada, June 2008) at 58.

68. Applying the price maintenance provisions to conduct affecting inputs that has the effect of increasing downstream prices would require clear language, the Tribunal held:

> [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.

69. Similarly, interpreting the second branch, paragraph 76(1)(a)(ii), as applying to a refusal to supply an input, would result in the creation of a new free-standing refusal to supply provision. Nothing in the legislative history of the provision suggests such an intention.

70. Indeed, interpreting the second branch in this way would do violence to the structure of the *Competition Act*. Section 75 is expressly designed to capture refusals to deal. Section 79, abuse of dominance, may also be available for a refusal to supply an essential facility.[42] Section 75 requires the applicant to meet an onerous test (s. 75(1)(a) through (e)). Similarly, section 79 is limited to applications by the Commissioner of Competition, and requires a showing that the respondent is dominant, and that the alleged anti-competitive behaviour be likely to cause a substantial lessening or prevention of competition. These limitations help avoid competition-chilling over-enforcement, and are consistent with the permissive structure of Part VIII. Interpreting paragraph 76(1)(a)(ii) as a free-standing refusal to supply provision would allow applicants to by-pass the limitations that Parliament included in section 75 and 79. Such a provision would, in the words of the Tribunal in *Visa/Mastercard*, go "far beyond what had been the traditional area of competition policy and law".[43]

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[42] Margin squeezing, for example, is one of the enumerated anti-competitive acts in s. 78(1)(a). Refusal to supply an essential facility is likely an anti-competitive act for purposes of s. 79, because this conduct is indistinguishable from margin squeezing.

[43] *Visa/MasterCard*, *supra* note 35 at ¶136.

c) Price maintenance involving intellectual property

71. The potential over-reach of including inputs within the ambit of paragraph 76(1)(a)(ii) may be most acute in cases involving intellectual property. Paragraph 76(3)(c) expressly includes owners of intellectual property among the category of potential targets of an order. Thus section 76 has the potential to catch resale price maintenance in relation to intellectual property, or in relation to products with an IP component. For example, *resale* price maintenance involving CDs might well be challenged under section 76. But the inclusion of owners of intellectual property in paragraph 76(3)(c) cannot have been intended to give rise to a compulsory licensing scheme for IP.

72. The overall scheme of the *Competition Act* is to reserve remedies against the exercise of intellectual property rights to the special remedies provided for in section 32. Section 32 provides a special regime for dealing with abuses of intellectual property. That provision applies where it is alleged that the exclusive rights and privileges conferred by intellectual property, including copyright, have been used so as to lessen competition in a number of defined ways, including to, "prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity".

73. Apart from the special remedy provided for in section 32, the mere exercise of an IP right, including "the exercise of the owner's right to unilaterally exclude others from using the IP", is immune from scrutiny under the *Competition Act*.[44] In its *Intellectual Property Enforcement Guidelines*, the Competition Bureau explains:

> 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.[45]

74. In *Molnlycke v. Kimberly-Clark of Canada Ltd.*, the Federal Court of Appeal observed:

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[44] Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: CB, 18 September 2014) at §4.2.1 [*Intellectual Property Guidelines*].
[45] *Ibid*.

> Certainly the existence of a patent is apt to limit, lessen, restrain or injure competition - monopolies do - but its issuance and the inherent impairment of competition has been expressly provided for by an Act of Parliament, which has made provision for compulsory licensing in circumstances where it has considered the ordinary incidence of the statutory monopoly to be contrary to public policy. It is the existence of the patent, not the manner in which issue was obtained or how and by whom its monopoly is agreed to be enforced and defended, that impairs competition.[46]

75. Similarly, the existence of a copyright is apt to restrain competition, but the protection of copyright and the inherent impairment of competition has been expressly provided for by an Act of Parliament.

76. If paragraph 76(1)(a)(ii) is interpreted as applying to licensing IP as an input, this provision becomes a mechanism for a would-be competitor to force the owner of intellectual property to license that intellectual property so that the competitor can undercut the intellectual property owner in selling that very intellectual property. It would turn the provision into a compulsory licensing provision for IP and entirely defeat rights granted by Parliament in the *Copyright Act* and other IP statutes to the owners of copyright and IP.

77. Stargrove is, explicitly, asking the Tribunal to use the *Competition Act* to create a compulsory licensing regime for IP. As with section 75, nothing in the legislative history of section 76 reveals an intention to have section 76 operate in this way, that is, to defeat the operation of another Act of Parliament.[47]

2. A mechanical licence is not a "product" for purposes of section 76

78. In *Warner Music*, the Tribunal held that copyright licences are not products for purposes of section 75. One of the reasons cited by the Tribunal was that there cannot be "usual trade terms" for copyright licences, when licences may be withheld.[48] The same reasoning applies to the "usual trade terms" provision in subsection 76(2). Consequently, a mechanical licence is not a "product" for purposes of section 76.

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[46] *Molnlycke AB v Kimberly-Clark of Canada Ltd*, [1991] FCJ No 532 at 6 (CA) (cited to QL).
[47] *Warner Music*, *supra* note 1 at ¶16.
[48] *Ibid*.

3. No evidence of discrimination against Stargrove

79. In addition to alleging a refusal to grant mechanical licences, Stargrove has also alleged that the respondents have discriminated against it. The Competition Bureau's *Price Maintenance Guidelines* explains that discrimination "will typically occur when a supplier provides a product to a customer at a price that is less favourable than the price at which the supplier provides the same product to a similar customer that does not engage in low pricing policy".[49]

80. The Title Holders have refused to licence copyrighted musical works to Stargrove. They have not "otherwise discriminated" against Stargrove, by, for example, charging Stargrove higher prices. There is thus no basis for a separate finding of discrimination by the Title Holder respondents.

4. No evidence of inducing refusal to supply (s. 76(8))

81. The Title Holder Respondents did not induce CMRRA to refuse to supply a product to Stargrove within the meaning of subsection 76(8). CMRRA acts as an agent of the publishers in granting licences. It is not a separate supplier.

5. No evidence that the refusal to license was due to low pricing policy

82. To succeed under paragraph 76(1)(a)(ii), an applicant must show a causal connection between its low pricing policy and the refusal to supply or the discrimination. To obtain leave, Stargrove must therefore adduce some evidence of this causal connection.

83. It has failed to do so. The *only* evidence of a causal connection provided by Stargrove is one email from an employee of Universal Music Canada that Mr. Perusini claims to have been shown, but which is not reproduced in the materials.[50]

84. There is no evidence whatsoever that the refusal to licence by the other respondents was motivated by Stargrove's low pricing policy, nor any further evidence against Universal.

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[49] Canada, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act) Enforcement Guidelines* (Ottawa: CB, 15 September 2014) at §3.1.1 [*Price Maintenance Guidelines*].
[50] Perusini Affidavit at ¶51-52, Stargrove's Application Record at 86.

6. No evidence of adverse impact on competition

85. Stargrove has failed to lead evidence sufficient to give rise to a belief that the Title Holder respondents' refusal to licence the songs they control could cause an adverse impact on competition.

86. Whether conduct is likely to cause an adverse effect involves a but-for comparison of the market to determine whether the conduct creates, enhances, or preserves market power.[51] Adverse effects may manifest themselves through price increases, preservation of prices that would otherwise be lower, decreases in product quality, or decreases in product variety.[52]

87. It is, moreover, axiomatic that competition law is to protect competition, not competitors. In *B-Filer Inc. v. The Bank of Nova Scotia*, the Tribunal observed that

> 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.[53]

88. Stargrove has not led any evidence to support a finding that the refusal by the respondents to grant mechanical licences creates, enhances, or preserves market power. Stargrove has led no evidence to suggest that any of the manifestations of an adverse effect on competition listed by the Tribunal in *B-Filer* are likely here. Stargrove has led no evidence as to the competitiveness, or lack of competitiveness, in the market for music CDs. Stargrove has offered no evidence about other participants in the market for discount CDs, or the lack thereof.

89. Stargrove's theory is premised entirely on the notion that a refusal by four publishers out of the thousands of music publishers to grant mechanical licences over 33 songs will prevent it from entering the market and cause an adverse impact on competition.

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[51] *B-Filer Inc v The Bank of Nova Scotia*, 2006 Comp Trib 42 at ¶200-201 [*B-Filer*]; the approach in *B-Filer* was endorsed by the Tribunal in *Visa/MasterCard*, *supra* note 35 at ¶350.
[52] *B-Filer*, *supra* note 51 at ¶206.
[53] *B-Filer*, *supra* note 51 at ¶207.

90. Stargrove has not discharged its burden. There is simply not enough evidence in the application to support the conclusion that the refusal by the respondents to grant mechanical licences could cause an adverse impact on competition. Indeed, the *Price Maintenance Guidelines* warn that "where the supplier's conduct is isolated in time or in scope, it may be difficult to establish that the price maintenance conduct is likely to result in an adverse effect on competition in a market".[54]

E. No basis for an order under section 77

91. Stargrove has not led sufficient credible evidence to give rise to a *bona fide* belief that ABKCO and Casablanca's conduct could be the subject of an order under section 77, for the following reasons:

a) There is no evidence at all for a section 77 case against ABKCO or Casablanca.

b) The facts pleaded do not fit within the definition of "exclusive" dealing in section 77.

c) The requirements of subsection 77(2) are not met.

1. No evidence against ABKCO, Casablanca, Sony, or CMRRA

92. It is unclear whether Stargrove is accusing all of the respondents of exclusive dealing, or just Universal. In its proposed Notice of Application, Stargrove includes all of the respondents in its section 77 case.[55]

93. However, the only respondent that Stargrove has led any evidence against in relation to section 77 is Universal. There is no evidence to support the possibility of a finding of exclusive dealing against any of the other respondents, including ABKCO or Casablanca.

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[54] *Price Maintenance Guidelines*, *supra* note 49 at §3.1.1.
[55] Proposed Notice of Application at ¶1(f) and (g), Stargrove's Application Record at 8; Statement of Grounds and Material Facts at ¶46, 51, 53, Stargrove's Application Record at 13.

2. The definition of exclusive dealing is not met

94. The facts alleged by Stargrove do not meet the definition of exclusive dealing under subsection 77(1) of the *Competition Act*. For this reason alone, Stargrove's request for leave to make an application under section 77 should be denied.

95. Exclusive dealing is, in its essence, a *restraint* (exclusivity) imposed by a *supplier* on its *customer* as a condition of supplying a product, or by way of inducement. Without this supplier-customer relationship and an exclusivity restraint, there is no exclusive dealing. Here, there is neither.

96. There is no evidence that ABKCO or Casablanca are *suppliers* to Anderson Merchandisers Canada ("Anderson").

97. There is no evidence that ABKCO or Casablanca, or any respondent, imposed an exclusivity restraint as a *condition* of supplying a product. The highest that Stargrove was able to put it was that Universal "pressured" Anderson not to distribute Stargrove CDs, and that it offered "veiled incentives" and "veiled threats". There is no evidence of any pressure or incentives, veiled or not, from ABKCO, Casablanca or any other respondent.

98. In any event, the pressure allegedly applied by the respondents did not work. Mr Perusini himself observes that "Luckily for Stargrove, Anderson did not bow to the pressure from Universal and the other Respondents. Anderson is still willing to distribute Stargrove's CDs today."[56] Clearly, the respondents did not impose a condition on Anderson, and if any inducement or threats were offered as alleged, they were ineffectual.

99. Stargrove alleges a number of irrelevant facts in connection with section 77. First, it claims that Universal placed negative reviews of Stargrove's CDs on Walmart's website. This is not conduct that is captured by section 77, and it is irrelevant to the case against ABKCO and Casablanca.

100. Next, Stargrove claims that "Universal appears to have been complicit in ABKCO and CMRRA's activities with respect to the Rolling Stones title in issue". As there is no evidence of exclusive dealing by either ABKCO or CMRRA, Universal's apparent complicity is irrelevant to the case against ABKCO and Casablanca.

101. Finally, Stargrove accuses the respondents of "banding together with CMRRA to shut Stargrove out". Even if true, this allegation does not establish exclusive dealing, or

[56] Perusini Affidavit at ¶55, Stargrove's Application Record at 86.

for that matter any of the other reviewable practices that Stargrove is relying on. Rather, this alleged banding together would fall under provisions that only the Commissioner of Competition can prosecute (for example, sections 79 or 90.1).

3. The requirements of subsection 77(2) are not met

102. In order for the Tribunal to make an order against exclusive dealing under subsection 77(2), the Tribunal must make three key findings:

a) Exclusive dealing is engaged in by a major supplier of a product in a market, or is widespread in a market;

b) The exclusive dealing is likely to have one of the enumerated effects (paragraphs 77(2)(a) through (c)); and

c) Competition is likely to be lessened substantially.

103. Stargrove has not led evidence that would permit the Tribunal to make *any* of these required findings.

104. First, it is not clear what the product at issue for purposes of exclusive dealing is. It appears to be CDs. Stargrove has not led evidence as to who the major suppliers of CDs are and whether the respondents are major suppliers. Nor has Stargrove led evidence to show that exclusive dealing is widespread in the market for CDs.

105. Second, none of the enumerated effects is likely, because there is no causal link between the alleged exclusive dealing and Stargrove's inability to enter the market. Anderson did not bow to Universal's alleged inducements. Rather, Stargrove's inability to sell the four CDs it pressed is caused by the refusal of the respondent Title Holders to grant mechanical licences, with the result that the CDs infringed copyright contrary to the *Copyright Act*.

106. Third, competition is not likely to be lessened substantially. As noted above, Anderson did not bow to Universal's alleged inducements. More fundamentally, Stargrove's case is that it is a "maverick" that will disrupt the market and bring lower prices to consumers. Stargrove claims that the respondents are suppressing competition and artificially inflating prices charged for CDs.[57] This is fundamentally a prevention of competition theory, not a lessening of competition theory, as Stargrove is saying that

[57] Stargrove's Memorandum of Fact and Law at ¶55(e), Stargrove's Application Record at 49; Concise Statement of the Economic Theory of the Case at ¶5, Stargrove's Application Record at 26.

prices would fall in the future but for the alleged conduct of the respondents. However, subsection 77(2) does not include the "substantial prevention of competition" element; it only recognizes "substantial lessening".

V ORDER REQUESTED

107. ABKCO and Casablanca request that Stargrove's application for leave be denied, with costs on a solicitor-client basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 20, 2015

W. Michael G. Osborne

Wendy Sun

Counsel to the respondents ABKCO Music & Records, Inc. and Casablanca Media Publishing

LIST OF AUTHORITIES

A. Statutes and Regulations

B. Cases

12. *B-Filer Inc v The Bank of Nova Scotia*, 2005 Comp Trib 38.

13. *B-Filer Inc v The Bank of Nova Scotia*, 2006 Comp Trib 42.

14. *Broadview Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 23.

15. *Broadview Pharmacy v Wyeth Canada Inc*, 2004 Comp Trib 22.

16. *Canada (Commissioner of Competition) v Visa Canada Corp*, 2013 Comp Trib 10.

17. *Canada (Director of Investigation and Research) v Warner Music Canada Ltd*, 1997 CCTD No 53 (Comp Trib).

18. *Construx Engineering Corporation v General Motors of Canada*, 2005 Comp Trib 21.

19. *Molnlycke AB v. Kimberly-Clark of Canada Ltd*, 1991 FCJ No 532 (CA).

20. *Mrs. O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24.

21. *National Capital News Canada v Milliken*, 2002 Comp Trib 41, aff'd 2004 FCA 339.

22. *Paradise Pharmacy Inc v Novartis Pharmaceuticals Canada Inc*, 2004 Comp Trib 21.

23. *Sears Canada Inc v Parfums Christian Dior Canada Inc*, 2007 Comp Trib 6.

C. Secondary Sources

24. Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: CB, 18 September 2014).

25. Canada, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act) Enforcement Guidelines* (Ottawa: CB, 15 September 2014).

26. Canada, Competition Policy Review Panel, *Compete to Win: Final Report* (Ottawa: Industry Canada, June 2008).

27. House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (April 2002) (Chair: Walt Lastewka).

File No. CT-2015-009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act");

AND 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 Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

B E T W E E N:

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

AFFIDAVIT OF JENNIFER MITCHELL

Sworn November 19, 2015

I, **JENNIFER MITCHELL**, of the City of Toronto, in the Province of Ontario, President of the respondent 2204253 Ontario Inc., MAKE OATH AND SAY:

1. I am the President and owner of 15% of the common shares of 2204253 Ontario Inc., which carries on business Casablanca Media Publishing ("Casablanca").

2. I am also the President and owner of 100% of the common shares of 1652181 Ontario Inc., which carries on business as Red Brick Songs ("Red Brick").

3. The remaining 85% of Casablanca's common shares are owned by the estate of my late business partner as well as a few private minority shareholders. I do not stand to inherit any of those shares.

4. Apart from my ownership of shares in both companies, there is no common share ownership between the two companies. Neither company owns or controls the other company.

5. The business of Casablanca is separate from the business of Red Brick.

A. Casablanca

6. Casablanca does not own, administer, have, or grant any rights or licences whatsoever to any of the musical works referred to in the Application for Leave and supporting materials ("Application Materials") submitted by Stargrove Entertainment Inc. ("Stargrove").

7. Accordingly, it would be impossible for Casablanca to comply with any order the Tribunal may make in relation to these musical works.

B. Red Brick and Round Hill Music

8. Round Hill Music ("Round Hill"), a private equity firm located in New York, NY, is the holder of the copyrights of several musical works performed by the Beatles, including three of the songs referred to in the Application Materials (the "Three Songs"), namely:

a) "I Saw Her Standing There"

b) "From Me To You"

c) "I Wanna Be Your Man"

9. In 2012, Round Hill retained Red Brick as its music publishing administrator and agent in Canada for the purpose of, among other things, granting licences to certain copyrighted musical works owned by Round Hill.

10. Red Brick, in turn, entered into an agreement with the Canadian Musical Reproduction Rights Agency ("CMRRA"), a musical licensing collective, providing CMRRA with non-exclusive rights to issue mechanical licences as agent for Red Brick.

11. Red Brick does not have a record label division, nor is it affiliated with any record labels. Red Brick does not produce or sell any CDs on its own (with one exception, namely a CD of songs recorded at a songwriter retreat).

C. Termination of Red Brick's agreement with Round Hill

12. For almost a year, I have been aware that Round Hill has been considering terminating its agreement with Red Brick, in order to assume directly the responsibility for administering licences in Canada for the musical works it owns or controls.

13. On September 14, 2015, Neil Gillis, the President of Round Hill, wrote to give notice that Round Hill wished to manage its Canadian business from the US, and thus was terminating Red Brick's ability to grant mechanical licences as of the end of September, 2015, and performances, as of the end of December, 2015. I attach a copy of Mr Gillis' email as Exhibit 1.

14. As a result, as of September 30, 2015, Red Brick lost the ability to grant mechanical licences for any of the musical works owned by Round Hill, including the Three Songs.

D. Stargrove refuses to let Casablanca out of this proceeding

15. On September 18, 2015, our counsel, Michael Osborne, wrote to counsel for Stargrove, Nikiforous Iatrou, to advise him of the facts set out above and to ask for Stargrove's consent to dismiss the application as against Casablanca. I attach a copy of his letter as Exhibit 2.

16. Stargrove refused, by way of letter from Mr. Iatrou on September 24. I attach a copy of this letter as Exhibit 3. In his letter, Mr. Iatrou makes a number of allegations, to which I will respond.

1. The Three Songs are on Casablanca's website but were administered by Red Brick

17. Mr. Iatrou claims that: "Casablanca holds itself out as representing at least some of the titles Stargrove seeks to license (see www.casablancamediapublishing.com)."

18. It is true that the three songs are listed on Casablanca's website. The search function on the Casablanca website pulls data from our Counterpoint royalty software which includes copyright and royalty data for songs for owned or controlled by Casablanca, Red Brick, and other music publishing companies related to Casablanca. I am not aware of any inexpensive way to segregate songs represented by Casablanca from songs represented by Red Brick on the website. We do show for each song the publisher that we represent. I attach screenshots for the three songs as Exhibit 4.

19. One of them “From Me to You” is currently highlighted on our home page. The home page indicates that the song is represented by Red Brick Music Publishing. However if you click on the listing for the song, it gives the publisher, “Gil Music Corp.” (Round Hill co-owns and administers the rights to GIL music catalog).

20. Even though Red Brick’s songs are listed on the Casablanca website, any licences to Red Brick songs are entered into with Red Brick, not Casablanca. Casablanca does not have the ability to grant licenses to Red Brick songs.

21. The Three Songs were never administered by Casablanca. They were administered by Red Brick in Canada until September 30, 2015. They are now administered directly by Round Hill.

22. Stargrove was fully aware that neither Casablanca nor Red Brick had the final say over licensing of the Thee Songs, and that they were administered by Round Hill. On February 6, 2015, Jennifer Holt, of Stargrove, wrote to Round Hill asking for information about why the licence was refused. I attach a copy of this email as Exhibit 5.

2. CMRRA’s letter of March 12, 2015

23. Mr Iatrou’s second claim is that “CMRRA confirmed in correspondence (March 12, 2015) that Casablanca instructed it to refuse the licenses in question.”

24. I instructed CMRRA not to issue the licences in question. Since Red Brick administered the rights at the time, the refusal came from me in my capacity as President of Red Brick, not Casablanca. However, I did not the need to clarify that Red Brick was the entity refusing the licence in my email to CMRRA since CMRRA had that information on file.

3. My letter of March 24, 2015

25. Mr Iatrou’s third claim is that

> In her reply, Ms. Mitchell did not advise that Red Brick Songs, and not Casablanca, has the rights.

26. I presume that Mr. Iatrou is referring to my letter of March 24, 2015, responding to the March 17 letter from Sangeetha Punniyamoorthy of Dimock Stratton, Stargrove’s IP lawyers.

27. My letter of March 24, 2015, was on Red Brick letterhead. I signed it as President of Red Brick. A copy of this letter is attached to Mr. Perusini’s affidavit as Exhibit 24. Mr. Perusini himself adverts to this at paragraph 65 of his affidavit.

4. The termination by Round Hill

28. Finally, Mr Iatrou claims:

> As for the purported termination of any agreement with Round Hill Music, it is clear that this action has been taken with a view to trying to circumvent the Competition Tribunal's process.

29. This is not the case. Round Hill has been considering for quite some time terminating its arrangement with Red Brick, for its own business reasons, namely, that it wishes to take over the administration of these rights in Canada directly.

30. Having advised Mr. Iatrou that Casablanca did not administer the rights to any of the Three Songs, we considered that we should advise him who would be administering those rights.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on November 19, 2015

Commissioner for Taking Affidavits
(or as may be)

Jennifer Mitchell

Daphne Hewson Edmonds, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires August 21, 2018.

From: Gillis, Neil
To: Jennifer Mitchell
Subject: Round Hill Music w Red brick/Casablanca
Date: September-14-15 3:41:18 PM

Jennifer,

As discussed, we are terminating our deal as it is management's desire to go direct and manage the Canadian business from the US.

With that in mind, our term end date for mechanicals will be 9/31/15 and for performances it will be 12/31/15.

We thank you for all of your efforts during the term of our deal and we wish you much success in the future.

Regards,

ROUND HILL MUSIC

NEIL GILLIS PRESIDENT

400 MADISON AVE, 18TH FLOOR. NEW YORK, N.Y. 10017

OFFICE + 1 212.380.0073 MOBILE +1 516.946.5745

NG@ROUNDHILLMUSIC.COM

IM: SONGSFORFOOD SKYPE: SONGSFORFOOD

WWW.ROUNDHILLMUSIC.COM

This is Exhibit "1" referred to in the Affidavit of Jennifer Mitchell sworn before me, this 19th day of November, 2015

A COMMISSIONER FOR TAKING AFFIDAVITS

Affleck Greene McMurtry LLP

Barristers and Solicitors

Michael Osborne
Email: mosborne@agmlawyers.com
Direct Line: (416) 360-5919

This is Exhibit "2" referred to in the Affidavit of Jennifer Mitchell sworn before me, this 19th day of November, 2015

A COMMISSIONER FOR TAKING AFFIDAVITS

September 18, 2015

File: 3090-001

By Email: niatrou@weirfoulds.com

Mr. Nikiforos Iatrou
WeirFoulds LLP
4100 - 66 Wellington Street West
P.O. Box 35, Toronto-Dominion Centre
Toronto ON M5K 1B7

Dear Mr. Iatrou:

Re: Stargrove Entertainment Inc. v. Universal Music Publishing Group Canada (CT-2015-009)

We are counsel for 2204253 Ontario Inc., which carries on business as Casablanca Media Publishing ("Casablanca"), in relation the above-mentioned Application for Leave by your client Stargrove Entertainment Inc.

I am writing to advise you of the following facts:

1. Casablanca does not own, administer, have, or grant any rights or licences whatsoever to any of the musical works referred to in your Application.

2. 1652181 Ontario Inc., which carries on business as Red Brick Songs ("Red Brick"), administers rights to three of the Beatles songs referred to in your Application pursuant to an agreement with Round Hill Music ("Round Hill"), a U.S. private equity firm. The three songs are: "I Saw Her Standing There", "From Me To You", and "I Wanna Be Your Man".

3. Round Hill has provided Red Brick with notice that it intends to terminate its agreement. In the case of mechanical licences, this termination is effective as of September 30, 2015.

It follows that:

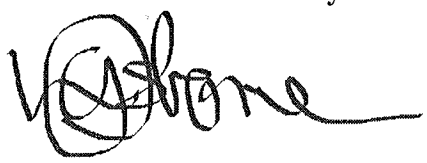
1. Casablanca is not a proper party to this Application.

2. Red Brick will not be a proper party to this Application after September 30, 2015, and in any event, could not comply with any order of the Tribunal in relation to the Beatles songs mentioned above after that date.

3. Unless Round Hill enters into an agreement with CMRRA, CMRRA will also lose the ability to issue mechanical licences for those songs as of September 30, 2015.

Please let me know whether Stargrove will consent to an order dismissing the Application as against Casablanca.

Yours sincerely,
Affleck Greene McMurtry LLP



W. Michael G. Osborne
WMGO / ws

cc. Donald B. Houston and Barry B. Sookman (McCarthy Tétrault)
Casey Chisick and Chris Hersh (Cassels Brock)
Peter Franlyn and Mahmud Jamal (Osler)

This is Exhibit "3" referred to in the Affidavit of Jennifer Mitchell sworn before me, this 19th day of November, 2015

A COMMISSIONER FOR TAKING AFFIDAVITS

Barristers & Solicitors

WeirFoulds LLP

September 24, 2015

Nikiforos Iatrou
T: 416-947-5072
niatrou@weirfoulds.com

File 17083.00001

VIA E-MAIL

Mr. Michael Osborne
Affleck Greene McMurtry LLP
365 Bay Street, Suite 200
Toronto, ON M5H 2V1

Dear Sir:

Re: Stargrove Entertainment Inc. v Universal Music Publishing Group Canada et al (CT-2015-009)

We write further to your letter of September 18, 2015.

Stargrove will not consent to an order dismissing the application against Casablanca.

Casablanca holds itself out as representing at least some of the titles Stargrove seeks to license (see www.casablancamediapublishing.com).

CMRRA confirmed in correspondence (March 12, 2015) that Casablanca instructed it to refuse the licenses in question.

Stargrove wrote to Jennifer Mitchell, President of Casablanca (March 17, 2015) regarding Casablanca's refusal to grant Stargrove mechanical licenses.

In her reply, Ms. Mitchell did not advise that Red Brick Songs, and not Casablanca, has the rights. That letter was copied to her external lawyers, then Cassels Brock (who also represents CMRRA), who also did not provide any such explanation either at that time or in discussions with the undersigned thereafter. Nor did Cassels Brock correct its client's—CMRRA's—statement that Casablanca instructed it to refuse Stargrove's request.

Given the information Stargrove had at the time it filed its application, it proceeded against Casablanca. If in the course of the proceedings it appears necessary to add Red Brick to the proceedings, we will do so. We note that Ms. Mitchell is President of both Red Brick and Casablanca, and so we see no prejudice to Red Brick.

As for the purported termination of any agreement with Round Hill Music, it is clear that this action has been taken with a view to trying to circumvent the Competition Tribunal's process. Until we have further details as to the circumstances leading to this purported termination, and the status of the relationship between Round Hill and CMRRA, our position with respect to the songs in issue remains as described in our material.

Of course, if any of the foregoing parties are prepared to have CMRRA issue Stargrove the necessary licenses on non-discriminatory terms, we would be happy to see if an amicable resolution can be reached. To that end, given that I have not been in contact with Round Hill, I would be obliged if you brought this correspondence to its attention.

Please also advise if, in addition to acting for Casablanca and ABKCO, you also act for Red Brick and Round Hill in this matter.

Yours truly,

WeirFoulds LLP

Nikiforos Iatrou

NI

cc: Sangeetha Punniyamoorthy, Thomas Kurys, Don Houston, Chris Hersh, Casey Chisick, Mahmud Jamal, Peter Franklyn

8526120.3

This is Exhibit "4" referred to in the Affidavit of Jennifer Mitchell sworn before me, this 19th day of November, 2015

A COMMISSIONER FOR TAKING AFFIDAVITS


Casablanca Media Publishing -...
www.casablancamediapublishin
casablanca music pu
CASABLANCA
Media Publishing
Home
Catalogue Search
My Mix
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Home
Everything Under the Sun!
From Me To You
Add to My Mix
Request License
Writers
Publisher
Audio Clip
PAUSED
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We are not a music download store. We are a music publisher and may only represent these songs in specific territories.


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Media Publishing
Home
Catalogue Search
My Mix
Log In
Home
Everything Under the Sun!
I Saw Her Standing There
Add to My Mix
Request License
Writers
Publisher
We are not a music download store. We are a music publisher and may only represent these songs in specific territories.
wanna
Highlight All
Match Case
2 of 2 matches


Casablanca Media Publishing -...
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CASABLANCA
Media Publishing
Home
Catalogue Search
My Mix
Log In
Home
Everything Under the Sun!
I Wanna Be Your Man
Add to My Mix
Request License
Writers
Publisher
We are not a music download store. We are a music publisher and may only represent these songs in specific territories.
wanna
Highlight All
Match Case
2 of 2 matches

From: Steve Payne
To: "Jennifer Mitchell"
Subject: FW: LIC REQUEST - GIL - BEATLES Works - Stargrove Enter.
Date: February-06-15 3:32:43 PM
Importance: High

Hi Jen,

I just received this email from John at Round Hill.

This is Exhibit "5" referred to in the Affidavit of Jennifer Mitchell sworn before me, this 19th day of November, 2015

A COMMISSIONER FOR TAKING AFFIDAVITS

steve payne | manager, copyright & licensing
casablanca media publishing | red brick songs
e. spayne@casaent.com
t. 416.921.9214 ex.235
a. 249 lawrence ave. e., toronto, on, m4n 1t5
www.casablancamediapublishing.com
www.redbricksongs.com

From: John Sadocha [mailto:js@roundhillmusic.com]
Sent: February-06-15 3:17 PM
To: Steve Payne
Subject: Fwd: LIC REQUEST - GIL - BEATLES Works - Stargrove Enter.
Importance: High

Hi Steve - we received the below note from Jennifer Holt at Stargrove Entertainment regarding a denied license request for the BEATLES works. Can you advise why this use was not approved?

Thanks.
John

JOHN SADOCHA SR DIR,.HEAD OF ADMINISTRATION
400 MADISON AVE, 18TH FLOOR. NEW YORK, N.Y. 10017
OFFICE + 1 212.380.0077 MOBILE +1 516.384.9871
JS@ROUNDHILLMUSIC.COM
WWW.ROUNDHILLMUSIC.COM

Begin forwarded message:

From: Michael Lau <ml@roundhillmusic.com>
To: John Sadocha <js@roundhillmusic.com>
Cc: Info <info@roundhillmusic.com>, Licensing <licensing@roundhillmusic.com>

Subject: Re: Round Hill Music
Date: February 6, 2015 at 2:11:55 PM EST

On Feb 6, 2015, at 2:08 PM, Jennifer Holt <jennifer@stargrove.ca> wrote:

To Whom This May Concern:

Re: I Saw Her Standing There, From Me To You, I Wanna Be Your Man

We are Stargrove Entertainment in Canada.
We recently applied for mechanical licences for the above tracks via CMRRA.
We have been refused licences and informed that 'Casablanca Media' have declined to grant us licences.
Our limited research suggests you are the owners of the above tracks and have a stated goal of generating income from what we understand was a significant recent investment.
We would very much like to have a mutually beneficial relationship in generating income for you on these tracks. Could you please let us understand the relationship with Casablanca and shed any light on the licence refusal?

Kind Regards,

Jennifer Holt
Stargrove Entertainment

File No. CT-2015-009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**");

AND 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 Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

B E T W E E N:

STARGROVE ENTERTAINMENT INC.

Applicant

- and -

UNIVERSAL MUSIC PUBLISHING GROUP BBB 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

AFFIDAVIT OF JENNIFER MITCHELL

Sworn on November 19, 2015

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Barristers & Solicitors
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Lawyers for the respondents ABKCO Music & Records, Inc., and 2204253 Ontario Inc cob Casablanca Media Publishing

File No. CT-2015-009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34 (the "Act");

AND 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 Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

B E T W E E N:

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

BOOK OF AUTHORITIES
of ABKCO Music & Records Inc. and Casablanca Media Publishing

November 20, 2015

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Counsel to the respondents ABKCO Music & Records, Inc. and Casablanca Media Publishing

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Fax: (613) 952-1123

AND TO: **John Pecman**
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Competition Bureau
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Gatineau, QC K1A 0C9
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Fax: (819) 997-0324

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Canadian Musical Reproduction Rights Agency Ltd.

INDEX

A. Statutes and Regulations

B. Cases

12. *B-Filer Inc v The Bank of Nova Scotia*, 2005 Comp Trib 38.

13. *B-Filer Inc v The Bank of Nova Scotia*, 2006 Comp Trib 42.

14. *Broadview Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 23.

15. *Broadview Pharmacy v Wyeth Canada Inc*, 2004 Comp Trib 22.

16. *Canada (Commissioner of Competition) v Visa Canada Corp*, 2013 Comp Trib 10.

17. *Canada (Director of Investigation and Research) v Warner Music Canada Ltd*, 1997 CCTD No 53 (Comp Trib).

18. *Construx Engineering Corporation v General Motors of Canada*, 2005 Comp Trib 21.

19. *Molnlycke AB v. Kimberly-Clark of Canada Ltd*, 1991 FCJ No 532 (CA).

20. *Mrs. O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24.

21. *National Capital News Canada v Milliken*, 2002 Comp Trib 41, aff'd 2004 FCA 339.

22. *Paradise Pharmacy Inc v Novartis Pharmaceuticals Canada Inc*, 2004 Comp Trib 21.

23. *Sears Canada Inc v Parfums Christian Dior Canada Inc*, 2007 Comp Trib 6.

C. Secondary Sources

24. Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: CB, 18 September 2014).

25. Canada, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act) Enforcement Guidelines* (Ottawa: CB, 15 September 2014).

26. Canada, Competition Policy Review Panel, *Compete to Win: Final Report* (Ottawa: Industry Canada, June 2008).

27. House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (April 2002) (Chair: Walt Lastewka).

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to December 15, 2014

À jour au 15 décembre 2014

Last amended on November 1, 2014

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http://lois-laws.justice.gc.ca

(*c*) deeds and instruments giving a right to recover or receive property,

(*d*) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(*e*) energy, however generated;

"business" «*entreprise*»

"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.

It also includes the raising of funds for charitable or other non-profit purposes.

"Commission" [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

"Commissioner" «*commissaire*»

"Commissioner" means the Commissioner of Competition appointed under subsection 7(1);

"computer system" «*ordinateur*»

"computer system" has the same meaning as in subsection 342.1(2) of the *Criminal Code*;

"data" «*données*»

"data", other than in Part III, means signs, signals, symbols or concepts that are being prepared or have been prepared in a form suitable for use in a computer system;

"Director" [Repealed, 1999, c. 2, s. 1]

"electronic message" «*message électronique*»

"electronic message" means a message sent by any means of telecommunication, including a text, sound, voice or image message;

"information" «*renseignement*»

"information" includes data;

"locator" «*localisateur*»

"locator" means a name or information used to identify a source of data on a computer system, and includes a URL;

"merger" [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

"Minister" «*ministre*»

"Minister" means the Minister of Industry;

"monopoly" [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

"product" «*produit*»

"product" includes an article and a service;

"record" «*document*»

"record" means any information that is recorded on any medium and that is capable of being understood by a person or read by a computer system or other device;

des éléments de l'actif d'une personne morale;

c) des titres et actes donnant le droit de recouvrer ou de recevoir des biens;

d) des billets ou pièces de même genre attestant le droit d'être présent en un lieu donné à un ou certains moments donnés ou des titres de transport;

e) de l'énergie, quelle que soit la façon dont elle est produite.

«commerce, industrie ou profession» Y est assimilée toute catégorie, division ou branche d'un commerce, d'une industrie ou d'une profession.

«commerce, industrie ou profession» "*trade, industry or profession*"

«commissaire» Le commissaire de la concurrence nommé en vertu du paragraphe 7(1).

«commissaire» "*Commissioner*"

«Commission» [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 20]

«directeur» [Abrogée, 1999, ch. 2, art. 1]

«document» Renseignements enregistrés sur quelque support que ce soit qui peuvent être compris par une personne ou lus par un ordinateur ou un autre dispositif.

«document» "*record*"

«données» Sauf à la partie III, signes, signaux, symboles ou représentations de concepts qui sont préparés ou l'ont été de façon à pouvoir être utilisés dans un ordinateur.

«données» "*data*"

«entreprise» Sont comprises parmi les entreprises les entreprises :

a) de fabrication, de production, de transport, d'acquisition, de fourniture, d'emmagasinage et de tout autre commerce portant sur des articles;

b) d'acquisition, de prestation de services et de tout autre commerce portant sur des services.

«entreprise» "*business*"

Est également comprise parmi les entreprises la collecte de fonds à des fins de charité ou à d'autres fins non lucratives.

«fournir» ou «approvisionner»

a) Relativement à un article, vendre, louer ou donner à bail l'article, ou un intérêt ou droit y afférent, ou en disposer d'une autre façon ou offrir d'en disposer ainsi;

«fournir» ou «approvisionner» "*supply*"

"sender information" «*renseignements sur l'expéditeur*»

"sender information" means the part of an electronic message — including the data relating to source, routing, addressing or signalling — that identifies or purports to identify the sender or the origin of the message;

"service" «*service*»

"service" means a service of any description whether industrial, trade, professional or otherwise;

"subject matter information" «*objet*»

"subject matter information" means the part of an electronic message that purports to summarize the contents of the message or to give an indication of them;

"supply" «*fournir*» *ou* «*approvisionner*»

"supply" means,

(*a*) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and

(*b*) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

"trade, industry or profession" «*commerce, industrie ou profession*»

"trade, industry or profession" includes any class, division or branch of a trade, industry or profession;

"Tribunal" «*Tribunal*»

"Tribunal" means the Competition Tribunal established by subsection 3(1) of the *Competition Tribunal Act*.

b) relativement à un service, vendre, louer ou autrement fournir un service ou offrir de le faire.

«fusion» [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 20]

«localisateur» Toute chaîne de caractères normalisés ou tout renseignement servant à identifier une source de données dans un ordinateur, notamment l'adresse URL. «localisateur» "*locator*"

«message électronique» Message envoyé par tout moyen de télécommunication, notamment un message alphabétique, sonore, vocal ou image. «message électronique» "*electronic message*"

«ministre» Le ministre de l'Industrie. «ministre» "*Minister*"

«monopole» [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 20]

«objet» Partie du message électronique qui contient des renseignements censés résumer le contenu du message ou donner une indication à l'égard de ce contenu. «objet» "*subject matter information*"

«ordinateur» S'entend au sens du paragraphe 342.1(2) du *Code criminel*. «ordinateur» "*computer system*"

«produit» Sont assimilés à un produit un article et un service. «produit» "*product*"

«renseignement» S'entend notamment de données. «renseignement» "*information*"

«renseignements sur l'expéditeur» Partie du message électronique, notamment les données liées à la source, au routage, à l'adressage ou à la signalisation, qui contient ou qui est censée contenir l'identité de l'expéditeur ou l'origine du message. «renseignements sur l'expéditeur» "*sender information*"

«service» Service industriel, commercial, professionnel ou autre. «service» "*service*"

«Tribunal» Le Tribunal de la concurrence, constitué en application du paragraphe 3(1) de la *Loi sur le Tribunal de la concurrence*. «Tribunal» "*Tribunal*"

Affiliated corporation, partnership or sole proprietorship

(2) For the purposes of this Act,

(*a*) one corporation is affiliated with another corporation if one of them is the subsidiary of the other or both are subsidiaries of the same corporation or each of them is controlled by the same person;

(*b*) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other; and

(2) Pour l'application de la présente loi :

a) une personne morale est affiliée à une autre personne morale si l'une d'elles est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou encore si chacune d'elles est contrôlée par la même personne; Filiale, société de personnes ou entreprise unipersonnelle

b) si deux personnes morales sont affiliées à la même personne morale au même moment,

(*c*) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.

c) une société de personnes ou une entreprise individuelle est affiliée à une autre société de personnes, à une autre entreprise individuelle ou à une personne morale si toutes deux sont contrôlées par la même personne.

elles sont réputées être affiliées l'une à l'autre;

Subsidiary corporation

(3) For the purposes of this Act, a corporation is a subsidiary of another corporation if it is controlled by that other corporation.

(3) Pour l'application de la présente loi, une personne morale est une filiale d'une autre personne morale si elle est contrôlée par cette autre personne morale.

Filiale

Control

(4) For the purposes of this Act,

(*a*) a corporation is controlled by a person other than Her Majesty if

(i) securities of the corporation to which are attached more than fifty per cent of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;

(*b*) a corporation is controlled by Her Majesty in right of Canada or a province if

(i) the corporation is controlled by Her Majesty in the manner described in paragraph (*a*), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

(B) a Minister of the government of Canada or the province, as the case may be; and

(*c*) a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than fifty per cent of the profits of the partnership

(4) Pour l'application de la présente loi :

a) une personne morale est contrôlée par une personne autre que Sa Majesté si :

(i) des valeurs mobilières de cette personne morale comportant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, directement ou indirectement, notamment par l'intermédiaire d'une ou de plusieurs filiales, autrement qu'à titre de garantie uniquement, par cette personne ou pour son bénéfice,

(ii) les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale;

b) une personne morale est contrôlée par Sa Majesté du chef du Canada ou d'une province si :

(i) la personne morale est contrôlée par Sa Majesté de la manière décrite à l'alinéa *a*),

(ii) dans le cas d'une personne morale sans capital-actions, une majorité des administrateurs de la personne morale, autres que les administrateurs d'office, sont nommés par :

(A) soit le gouverneur en conseil ou le lieutenant-gouverneur en conseil de la province, selon le cas,

(B) soit un ministre du gouvernement du Canada ou de la province, selon le cas;

c) contrôle une société de personnes la personne qui détient dans cette société des titres de participation lui donnant droit de recevoir plus de cinquante pour cent des bénéfices de

Contrôle

Exception

(3) This section does not apply in respect of any information that has been made public.

2002, c. 16, s. 3.

Records or other things already in Commissioner's possession

30.291 (1) For greater certainty, any evidence requested by a foreign state under an agreement may be obtained for the purposes of giving effect to the request only in accordance with the agreement and the procedure set out in this Part, even in the case of records or other things already in the possession of the Commissioner.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

2002, c. 16, s. 3.

Preservation of informal arrangements

30.3 Nothing in this Part shall be construed so as to abrogate or derogate from any arrangement or agreement, other than an agreement under this Part, in respect of cooperation between the Commissioner and a foreign authority.

2002, c. 16, s. 3.

Exception

(3) Le présent article ne s'applique pas aux renseignements qui sont devenus publics.

2002, ch. 16, art. 3.

Documents ou autres choses déjà en la possession du commissaire

30.291 (1) Il est entendu que les éléments de preuve faisant l'objet d'une demande faite sous le régime d'un accord ne peuvent être obtenus pour donner suite à la demande qu'en conformité avec l'accord et les modalités prévues à la présente partie même s'il s'agit de documents ou d'autres choses déjà en la possession du commissaire.

Exception

(2) Le présent article ne s'applique ni à l'égard de renseignements qui sont devenus publics ni à l'égard de renseignements dont la communication a été autorisée par la personne les ayant fournis.

2002, ch. 16, art. 3.

Maintien des autres arrangements de coopération

30.3 La présente partie n'a pas pour effet de porter atteinte aux accords autres que ceux visés par la présente partie, ou aux ententes, visant la coopération entre le commissaire et une autorité étrangère.

2002, ch. 16, art. 3.

PART IV

SPECIAL REMEDIES

Reduction or removal of customs duties

31. Whenever, as a result of an inquiry under this Act, a judgment of a court or a decision of the Tribunal, it appears to the satisfaction of the Governor in Council that

(*a*) competition in respect of any article has been prevented or lessened substantially, and

(*b*) the prevention or lessening of competition is facilitated by customs duties imposed on the article, or on any like article, or can be reduced by a removal or reduction of customs duties so imposed,

the Governor in Council may, by order, remove or reduce any such customs duties.

R.S., 1985, c. C-34, s. 31; R.S., 1985, c. 19 (2nd Supp.), s. 27; 1999, c. 31, s. 48(F).

Powers of Federal Court where certain rights used to restrain trade

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

PARTIE IV

RECOURS SPÉCIAUX

Réduction ou suppression de droits de douane

31. Chaque fois que, par suite d'une enquête tenue sous le régime de la présente loi, d'un jugement d'une cour ou d'une décision du Tribunal, le gouverneur en conseil est convaincu :

a) que la concurrence relativement à un article a été sensiblement empêchée ou diminuée;

b) que cet empêchement ou cette diminution de la concurrence est favorisé par les droits de douane imposés sur cet article ou sur tout article semblable ou pourrait être atténué par la suppression ou la réduction de ces droits,

le gouverneur en conseil peut, par décret, supprimer ou réduire ces droits.

L.R. (1985), ch. C-34, art. 31; L.R. (1985), ch. 19 (2e suppl.), art. 27; 1999, ch. 31, art. 48(F).

Pouvoirs de la Cour fédérale dans le cas d'usage de certains droits pour restreindre le commerce

32. (1) Chaque fois qu'il a été fait usage des droits et privilèges exclusifs conférés par un ou plusieurs brevets d'invention, par une ou plusieurs marques de commerce, par un droit d'auteur ou par une topographie de circuit intégré enregistrée pour :

(*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.

a) soit limiter indûment les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un article ou d'une denrée pouvant faire l'objet d'un échange ou d'un commerce,

b) soit restreindre indûment l'échange ou le commerce à l'égard d'un tel article ou d'une telle denrée ou lui causer un préjudice indu,

c) soit empêcher, limiter ou réduire indûment la fabrication ou la production d'un tel article ou d'une telle denrée, ou en augmenter déraisonnablement le prix,

d) soit empêcher ou réduire indûment la concurrence dans la production, la fabrication, l'achat, l'échange, la vente, le transport ou la fourniture d'un tel article ou d'une telle denrée,

la Cour fédérale peut rendre une ou plusieurs des ordonnances visées au paragraphe (2) dans les circonstances qui y sont décrites.

Orders

(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 topogra-

Ordonnances

(2) La Cour fédérale, sur une plainte exhibée par le procureur général du Canada, peut, en vue d'empêcher tout usage, de la manière définie au paragraphe (1), des droits et privilèges exclusifs conférés par des brevets d'invention, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés enregistrées touchant ou visant la fabrication, l'emploi ou la vente de tout article ou denrée pouvant faire l'objet d'un échange ou d'un commerce, rendre une ou plusieurs des ordonnances suivantes :

a) déclarer nul, en totalité ou en partie, tout accord, arrangement ou permis relatif à un tel usage;

b) empêcher toute personne d'exécuter ou d'exercer l'ensemble ou l'une des conditions ou stipulations de l'accord, de l'arrangement ou du permis en question;

c) prescrire l'octroi de licences d'exploitation du brevet, de la topographie de circuit intégré enregistrée ou de licences en vertu d'un droit d'auteur aux personnes et aux conditions que le tribunal juge appropriées, ou, si cet octroi et les autres recours prévus par le présent article semblent insuffisants pour empêcher cet usage, révoquer le brevet;

d) prescrire la radiation ou la modification de l'enregistrement d'une marque de com-

phy 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.

Treaties, etc.

(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.

R.S., 1985, c. C-34, s. 32; R.S., 1985, c. 10 (4th Supp.), s. 18; 1990, c. 37, s. 29; 2002, c. 16, s. 4(F).

Interim injunction

33. (1) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a court may issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court could constitute or be directed toward the commission of an offence under Part VI — other than an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53 — or under section 66, pending the commencement or completion of a proceeding under subsection 34(2) or a prosecution against the person, if it appears to the court that

(*a*) the person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence; and

(*b*) if the offence is committed or continued,

(i) injury to competition that cannot adequately be remedied under any other provision of this Act will result, or

(ii) serious harm is likely to ensue unless the injunction is issued and the balance of convenience favours issuing the injunction.

merce dans le registre des marques de commerce ou d'une topographie de circuit intégré dans le registre des topographies;

e) prescrire que d'autres actes soient faits ou omis selon que le tribunal l'estime nécessaire pour empêcher un tel usage.

Traités

(3) Ces ordonnances ne peuvent être rendues que si elles sont compatibles avec les traités, conventions, arrangements ou engagements concernant des brevets d'invention, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés conclus avec tout pays étranger et auxquels le Canada est partie.

L.R. (1985), ch. C-34, art. 32; L.R. (1985), ch. 10 (4e suppl.), art. 18; 1990, ch. 37, art. 29; 2002, ch. 16, art. 4(F).

Injonction provisoire

33. (1) Le tribunal peut par ordonnance, sur demande présentée par le procureur général du Canada ou le procureur général d'une province ou pour leur compte, prononcer une injonction provisoire interdisant à toute personne nommément désignée dans la demande de faire quoi que ce soit qui, d'après lui, pourrait constituer une infraction visée à la partie VI — à l'exception d'une infraction à l'article 52 comportant l'utilisation d'un moyen de télécommunication ou d'une infraction aux articles 52.01, 52.1 ou 53 — ou à l'article 66, ou tendre à la perpétration d'une telle infraction, en attendant que les procédures prévues au paragraphe 34(2) ou des poursuites soient engagées ou achevées contre la personne en question, s'il constate que, à la fois :

a) la personne a accompli, est sur le point d'accomplir ou accomplira vraisemblablement un acte constituant l'infraction, ou tendant à sa perpétration;

b) si l'infraction est commise ou se poursuit :

(i) ou bien il en résultera, pour la concurrence, un préjudice auquel il ne peut être adéquatement remédié en vertu d'une autre disposition de la présente loi,

(ii) ou bien un dommage grave sera vraisemblablement causé en l'absence de l'ordonnance et, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Disposition of appeal

(3) Where the Federal Court of Appeal or the court of appeal of the province allows an appeal under this section, it may quash the decision or order appealed from, refer the matter back to the court appealed from or make any decision or order that, in its opinion, that court should have made.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Appeal on question of fact

74.19 An appeal on a question of fact from a decision or order made under this Part may be brought only with the leave of the Federal Court of Appeal or the court of appeal of the province, as the case may be.

1999, c. 2, s. 22.

Sort de l'appel

(3) La Cour d'appel fédérale ou la cour d'appel d'une province qui accueille l'appel peut annuler la décision ou l'ordonnance portée en appel, renvoyer l'affaire devant le tribunal qui a rendu la décision ou l'ordonnance ou rendre toute ordonnance qui, à son avis, aurait dû être rendue par celui-ci.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Questions de fait

74.19 L'appel d'une décision ou d'une ordonnance rendue par le tribunal en vertu de la présente partie et portant sur une question de fait est subordonné à l'autorisation de la Cour d'appel fédérale ou de la cour d'appel de la province, selon le cas.

1999, ch. 2, art. 22.

PART VIII

MATTERS REVIEWABLE BY TRIBUNAL

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

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 re-

PARTIE VIII

AFFAIRES QUE LE TRIBUNAL PEUT EXAMINER

Pratiques restrictives du commerce

Refus de vendre

Compétence du Tribunal dans les cas de refus de vendre

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 com-

mitted 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.

merce 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.

When article is a separate product

(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.

Cas où l'article est un produit distinct

(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.

Definition of "trade terms"

(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.

Définition de « conditions de commerce »

(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.

Inferences

(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.

Application

(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.

R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1.

L.R. (1985), ch. C-34, art. 75; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.1.

Price Maintenance

Maintien des prix

Price maintenance

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 busi-

Maintien des prix

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

ness 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.

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.

Order

(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.

(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.

Ordonnance

Persons subject to order

(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.

(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.

Personne visée par l'ordonnance

Where no order may be made

(4) 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.

(4) L'ordonnance prévue au paragraphe (2) ne peut être rendue lorsque la personne visée au paragraphe (3) et le client ou la personne visés aux sous-alinéas (1)*a*)(i) ou (ii) ont entre eux des relations de mandant à mandataire ou sont des personnes morales affiliées ou des administrateurs, mandataires, dirigeants ou employés :

a) soit de la même personne morale, société de personnes ou entreprise individuelle;

b) soit de personnes morales, sociétés de personnes ou entreprises individuelles qui sont affiliées.

Cas où il ne peut être rendu d'ordonnance

Suggested retail price

(5) 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

(5) Pour l'application du présent article, le fait, pour le producteur ou fournisseur d'un produit, de proposer pour ce produit un prix de revente ou un prix de revente minimal, quelle que soit la façon de déterminer ce prix, lorsqu'il n'est pas prouvé que le producteur ou fournisseur, en faisant la proposition, a aussi précisé à la personne à laquelle il l'a faite que cette dernière n'était nullement obligée de l'accepter et que, si elle ne l'acceptait pas, elle n'en souffrirait en aucune façon dans ses relations

Prix de détail proposé

supplier or with any other person if they failed to accept the suggestion.

commerciales avec ce producteur ou fournisseur ou avec toute autre personne, constitue la preuve qu'il a influencé, dans le sens de la proposition, la personne à laquelle il l'a faite.

Advertised price

(6) 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.

Prix annoncé

(6) Pour l'application du présent article, la publication, par le producteur ou le fournisseur d'un produit qui n'est pas détaillant, d'une réclame mentionnant un prix de revente pour ce produit constitue la preuve qu'il a fait monter le prix de vente demandé par toute personne qui le reçoit pour le revendre, à moins que ce prix ne soit exprimé de façon à préciser à quiconque prend connaissance de la publicité que le produit peut être vendu à un prix inférieur.

Exception

(7) Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

Exception

(7) Les paragraphes (5) et (6) ne s'appliquent pas au prix apposé ou inscrit sur un produit ou sur son emballage.

Refusal to supply

(8) 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.

Refus de fournir

(8) S'il conclut, à la suite d'une 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, qu'une personne, par entente, menace, promesse ou quelque autre moyen semblable, a persuadé un fournisseur, au Canada ou à l'étranger, en en faisant la condition de leurs relations commerciales, de refuser de fournir un produit à une personne donnée ou à une catégorie donnée de personnes en raison du régime de bas prix de cette personne ou catégorie et que la persuasion a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché, le Tribunal peut, par ordonnance, interdire à la personne de continuer à se comporter ainsi ou exiger qu'elle entretienne des relations commerciales avec le fournisseur en question aux conditions de commerce normales.

Where no order may be made

(9) 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 cus-

Cas où il ne peut être rendu d'ordonnance

(9) L'ordonnance prévue au paragraphe (2) à l'égard du comportement visé au sous-alinéa (1)*a*)(ii) ne peut être rendue si le Tribunal est convaincu que la personne ou catégorie de personnes visée au sous-alinéa avait l'habitude, quant aux produits fournis par la personne visée au paragraphe (3) :

a) de les sacrifier à des fins de publicité et non d'en tirer profit;

b) de les vendre sans profit afin d'attirer les clients dans l'espoir de leur vendre d'autres produits;

c) de faire de la publicité trompeuse;

tomers 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.

d) de ne pas assurer la qualité de service à laquelle leurs acheteurs pouvaient raisonnablement s'attendre.

Inferences

(10) 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.

Application

(10) Le Tribunal, lorsqu'il est saisi d'une demande présentée par une personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, ne peut tirer quelque conclusion que ce soit du fait que le commissaire a pris des mesures ou non à l'égard de l'objet de la demande.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) 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.

Procédures en vertu des articles 45, 49, 79 et 90.1

(11) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits allégués au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée à l'endroit de cette personne en vertu des articles 79 ou 90.1.

Definition of "trade terms"

(12) 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., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426.

Définition de « conditions de commerce »

(12) 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.

L.R. (1985), ch. C-34, art. 76; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2009, ch. 2, art. 426.

Exclusive Dealing, Tied Selling and Market Restriction

Exclusivité, ventes liées et limitation du marché

Definitions

77. (1) For the purposes of this section,

"exclusive dealing" « *exclusivité* »

"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

Définitions

77. (1) Les définitions qui suivent s'appliquent au présent article.

« exclusivité » "*exclusive dealing*"

« 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 pro-

(*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;

"market restriction" «*limitation du marché*»

"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" «*ventes liées*»

"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.

Exclusive dealing and tied selling

(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,

duits, 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.

«limitation du marché» La pratique qui consiste, pour le fournisseur d'un produit, à exiger d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client fournisse lui-même un produit quelconque uniquement sur un marché déterminé ou encore à exiger une pénalité de quelque sorte de ce client si ce dernier fournit un produit quelconque hors d'un marché déterminé.

«limitation du marché» "*market restriction*"

«ventes liées»

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit (le produit « clef »), que ce client :

(i) soit acquière du fournisseur ou de la personne que ce dernier désigne un quelconque autre produit,

(ii) soit s'abstienne d'utiliser ou de distribuer, avec le produit clef, un autre produit qui n'est pas d'une marque ou fabrication indiquée 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 clef 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.

«ventes liées» "*tied selling*"

Exclusivité ou ventes liées

(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 :

(*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.

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.

Market restriction

(3) 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.

Limitation du marché

(3) 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 la limitation du marché, en étant pratiquée par un important fournisseur d'un produit ou très répandue à l'égard d'un produit, réduira vraisemblablement et sensiblement la concurrence à l'égard de ce produit, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de se livrer désormais à la limitation du marché et prescrire toute autre mesure nécessaire, à son avis, pour rétablir ou favoriser la concurrence à l'égard de ce produit.

Damage awards

(3.1) 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).

Dommages-intérêts

(3.1) Il demeure entendu que le présent article n'autorise pas le Tribunal à accorder des dommages-intérêts à la personne à laquelle une permission est accordée en vertu du paragraphe 103.1(7).

Where no order to be made and limitation on application of order

(4) 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

Cas où il ne doit pas être rendu d'ordonnance; restriction quant à l'application de l'ordonnance

(4) Le Tribunal ne rend pas l'ordonnance prévue par le présent article, lorsque, à son avis :

a) l'exclusivité ou la limitation du marché est ou sera pratiquée uniquement pendant une période raisonnable pour faciliter l'entrée sur un marché soit d'un nouveau fournisseur d'un produit soit d'un nouveau produit;

b) les ventes liées qui sont pratiquées sont raisonnables compte tenu de la connexité

(*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.

technologique existant entre les produits qu'elles visent;

c) les ventes liées que pratique une personne exploitant une entreprise de prêt d'argent ont pour objet de mieux garantir le remboursement des prêts qu'elle consent et sont raisonnablement nécessaires à cette fin,

et, aucune ordonnance rendue en vertu du présent article ne s'applique en ce qui concerne l'exclusivité, la limitation du marché ou les ventes liées entre des personnes morales, des sociétés de personnes et des entreprises individuelles qui sont affiliées.

Where company, partnership or sole proprietorship affiliated

(5) 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.

Cas où la personne morale, la société de personnes ou l'entreprise unipersonnelle est affiliée

(5) Pour l'application du paragraphe (4) :

a) une personne morale est affiliée à une autre personne morale si l'une d'elle est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou encore si chacune d'elles est contrôlée par la même personne;

b) si deux personnes morales sont affiliées à la même personne morale au même moment, elles sont réputées être affiliées l'une à l'autre;

c) une société de personnes ou une entreprise individuelle est affiliée à une autre société de personnes, à une autre entreprise individuelle ou à une personne morale si l'une et l'autre sont contrôlées par la même personne;

d) une personne morale, société de personnes ou entreprise individuelle est affiliée à une autre personne morale, société de personnes ou entreprise individuelle en ce qui concerne tout accord entre elles par lequel l'une concède à l'autre le droit d'utiliser une marque ou un nom de commerce pour identifier les affaires du concessionnaire, à la condition :

(i) que ces affaires soient liées à la vente ou la distribution, conformément à un programme ou système de commercialisation prescrit en substance par le concédant, d'une multiplicité de produits obtenus de sources d'approvisionnement qui sont en concurrence et d'une multiplicité de fournisseurs,

(ii) qu'aucun produit ne soit primordial dans ces affaires.

When persons deemed to be affiliated

(6) 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.

Cas où les personnes sont réputées être affiliées

(6) Pour l'application du paragraphe (4) en ce qui concerne la limitation du marché, dans le cadre de tout accord par lequel une personne (la « première » personne) fournit ou fait fournir à une autre personne (la « seconde » personne) un ou des ingrédients que cette dernière transforme, après apport de travail et de matériaux, en aliments ou boissons qu'elle vend sous une marque de commerce appartenant à la première personne ou dont cette dernière est l'usager inscrit, ces deux personnes sont, à l'égard de cet accord, réputées être affiliées.

Inferences

(7) 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.

Application

(7) 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.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3.

L.R. (1985), ch. C-34, art. 77; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 23 et 37, ch. 31, art. 52(F); 2002, ch. 16, art. 11.2 et 11.3.

Abuse of Dominant Position

Abus de position dominante

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;

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;

(*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.

(*j*) and (*k*) [Repealed, 2009, c. 2, s. 427]

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) et *k*) [Abrogés, 2009, ch. 2, art. 427]

(2) [Repealed, 2009, c. 2, s. 427]

(2) [Abrogé, 2009, ch. 2, art. 427]

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13; 2009, c. 2, s. 427.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2000, ch. 15, art. 13; 2009, ch. 2, art. 427.

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.

Additional or alternative order

(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.

Ordonnance supplémentaire ou substitutive

(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.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Restriction

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

Administrative monetary penalty

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

Sanction administrative pécuniaire

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

Aggravating or mitigating factors

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(*a*) the effect on competition in the relevant market;

(*b*) the gross revenue from sales affected by the practice;

(*c*) any actual or anticipated profits affected by the practice;

(*d*) the financial position of the person against whom the order is made;

(*e*) the history of compliance with this Act by the person against whom the order is made; and

(*f*) any other relevant factor.

Facteurs à prendre en compte

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) l'effet sur la concurrence dans le marché pertinent;

b) le revenu brut provenant des ventes sur lesquelles la pratique a eu une incidence;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

d) la situation financière de la personne visée par l'ordonnance;

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

f) tout autre élément pertinent.

Purpose of order

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

But de la sanction

(3.3) La sanction prévue au paragraphe (3.1) vise à encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

Superior competitive performance

(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

(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.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *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.

Exception

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

Limitation period

(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.

Prescription

(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.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(7) 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 by the Commissioner under section 76, 90.1 or 92.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4; 2009, c. 2, s. 428.

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4; 2009, ch. 2, art. 428.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

2002, c. 16, s. 11.5.

Sanctions administratives pécuniaires impayées

79.1 Les sanctions administratives pécuniaires imposées au titre du paragraphe 79(3.1) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

2002, ch. 16, art. 11.5.

Public register

(2) The register shall be accessible to the public.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2014, c. 20, s. 389.

Registre public

(2) Le registre est accessible au public.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2014, ch. 20, art. 389.

Non-application of sections 45, 77 and 90.1

90. Section 45, section 77 as it applies to exclusive dealing, and section 90.1 do not apply in respect of a specialization agreement, or any modification of such an agreement, that is registered.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 429.

Non-application des articles 45, 77 et 90.1

90. Ni l'article 45, ni l'article 77, dans la mesure où il porte sur l'exclusivité, ni l'article 90.1 ne s'appliquent aux accords de spécialisation ou à leurs modifications lorsque ceux-ci sont inscrits.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 429.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Accords ou arrangements empêchant ou diminuant sensiblement la concurrence

Order

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(*a*) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

(*b*) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Ordonnance

90.1 (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

Factors to be considered

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

(*a*) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the agreement or arrangement;

(*b*) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(*c*) any barriers to entry into the market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

Facteurs à considérer

(2) Pour décider s'il arrive à la conclusion visée au paragraphe (1), le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties à l'accord ou à l'arrangement;

b) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties à l'accord ou à l'arrangement;

c) les entraves à l'accès à ce marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès;

(*d*) any effect of the agreement or arrangement on the barriers referred to in paragraph (*c*);

(*e*) the extent to which effective competition remains or would remain in the market;

(*f*) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;

(*g*) the nature and extent of change and innovation in any relevant market; and

(*h*) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

d) les effets de l'accord ou de l'arrangement sur les entraves visées à l'alinéa *c*);

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans ce marché;

f) le fait que l'accord ou l'arrangement a entraîné la disparition d'un concurrent dynamique et efficace ou qu'il entraînera ou pourrait entraîner une telle disparition;

g) la nature et la portée des changements et des innovations dans tout marché pertinent;

h) tout autre facteur pertinent à l'égard de la concurrence dans le marché qui est ou serait touché par l'accord ou l'arrangement.

Evidence

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

Preuve

(3) Pour l'application des paragraphes (1) et (2), le Tribunal ne peut fonder sa conclusion uniquement sur des constatations relatives à la concentration ou à la part de marché.

Exception where gains in efficiency

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

Exception dans les cas de gains en efficience

(4) Le Tribunal ne rend pas l'ordonnance prévue au paragraphe (1) dans les cas où il conclut que l'accord ou l'arrangement a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement de l'accord ou de l'arrangement et que ces gains n'auraient pas été réalisés si l'ordonnance avait été rendue ou ne le seraient vraisemblablement pas si l'ordonnance était rendue.

Restriction

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Restriction

(5) Pour l'application du paragraphe (4), le Tribunal ne peut fonder uniquement sur une redistribution de revenu entre plusieurs personnes sa conclusion que l'accord ou l'arrangement a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience.

Factors to be considered

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

Facteurs pris en considération

(6) Pour décider si l'accord ou l'arrangement aura vraisemblablement pour effet d'entraîner les gains en efficience visés au paragraphe (4), le Tribunal examine si ces gains se traduiront, selon le cas :

a) par une augmentation relativement importante de la valeur réelle des exportations;

b) par une substitution relativement importante de produits nationaux à des produits étrangers.

Exception

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by companies each of which is, in respect of every one of the others, an affiliate.

Exception

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

(*a*) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(*b*) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(*c*) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

Exception

(9) The Tribunal shall not make an order under subsection (1) in respect of

(*a*) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

(*b*) an agreement or arrangement that constitutes a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking

Exception

(7) Le paragraphe (1) ne s'applique pas à l'accord ou à l'arrangement qui est intervenu ou interviendrait exclusivement entre des personnes morales qui sont chacune des affiliées de toutes les autres.

Exception

(8) Le paragraphe (1) ne s'applique pas à l'accord ou à l'arrangement qui se rattache exclusivement à l'exportation de produits du Canada, sauf dans les cas suivants :

a) il a eu pour résultat ou aura vraisemblablement pour résultat une réduction ou une limitation de la valeur réelle des exportations d'un produit;

b) il a restreint ou restreindra vraisemblablement les possibilités pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

c) il a sensiblement empêché ou diminué la concurrence dans la fourniture de services visant à favoriser l'exportation de produits du Canada, ou aura vraisemblablement un tel effet.

Exception

(9) Le Tribunal ne rend pas l'ordonnance prévue au paragraphe (1) en ce qui touche :

a) un accord ou un arrangement intervenu entre des institutions financières fédérales, au sens du paragraphe 49(3), à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et le fait qu'il a été conclu à sa demande ou avec son autorisation pour les besoins de la politique financière;

b) un accord ou un arrangement constituant une fusion — réalisée ou proposée — aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt*, et à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et le fait que cette fusion est dans l'intérêt public, ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) un accord ou un arrangement constituant une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard duquel

into account any terms and conditions that may be imposed under those Acts; or

(*c*) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement.

le ministre des Transports certifie au commissaire le nom des parties.

Where proceedings commenced under section 45, 49, 76, 79 or 92

(10) 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 by the Commissioner under section 76, 79 or 92.

(10) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 79 ou 92.

Procédures en vertu des articles 45, 49, 76, 79 et 92

Definition of "competitor"

(11) In subsection (1), "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

2009, c. 2, s. 429.

(11) Au paragraphe (1), «concurrent» s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence de l'accord ou de l'arrangement.

2009, ch. 2, art. 429.

Définition de «concurrent»

Mergers

Fusionnements

Definition of "merger"

91. In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

91. Pour l'application des articles 92 à 100, «fusionnement» désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Définition de «fusionnement»

Order

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(*a*) in a trade, industry or profession,

(*b*) among the sources from which a trade, industry or profession obtains a product,

92. (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

a) dans un commerce, une industrie ou une profession;

Ordonnance en cas de diminution de la concurrence

l'article 92 afin d'y faire des représentations pour le compte de la province.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Advance ruling certificates

102. (1) Where the Commissioner is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 92, the Commissioner may issue a certificate to the effect that he is so satisfied.

Certificats de décision préalable

102. (1) Lorsqu'une ou plusieurs parties à une transaction proposée convainquent le commissaire qu'il n'aura pas de motifs suffisants pour faire une demande au Tribunal en vertu de l'article 92, le commissaire peut délivrer un certificat attestant cette conviction.

Duty of Commissioner

(2) The Commissioner shall consider any request for a certificate under this section as expeditiously as possible.

Obligation du commissaire

(2) Le commissaire examine les demandes de certificats en application du présent article avec toute la diligence possible.

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

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

No application under section 92

103. Where the Commissioner issues a certificate under section 102, the Commissioner shall not, if the transaction to which the certificate relates is substantially completed within one year after the certificate is issued, apply to the Tribunal under section 92 in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

Nulle présentation de demande en vertu de l'article 92

103. Après la délivrance du certificat visé à l'article 102, le commissaire ne peut, si la transaction à laquelle se rapporte le certificat est en substance complétée dans l'année suivant la délivrance du certificat, faire une demande au Tribunal en application de l'article 92 à l'égard de la transaction lorsque la demande est exclusivement fondée sur les mêmes ou en substance les mêmes renseignements que ceux qui ont justifié la délivrance du certificat.

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

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

General

Dispositions générales

Leave to make application under section 75, 76 or 77

103.1 (1) 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.

Permission de présenter une demande en vertu des articles 75, 76 ou 77

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75, 76 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Notice

(2) 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.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76 ou 77, selon le cas.

Certification by Commissioner

(3) 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.

Certificat du commissaire

(3) Quarante-huit heures après avoir reçu une copie de la demande, le commissaire remet au Tribunal un certificat établissant si les questions visées par la demande :

a) soit font l'objet d'une enquête du commissaire;

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente intervenue entre le commissaire et la personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76 ou 77, selon le cas.

Application discontinued

(4) 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.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)*a*) ou *b*) ou portant sur une question qui fait l'objet d'une demande que lui a présentée le commissaire en vertu des articles 75, 76 ou 77.

Notice by Tribunal

(5) 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.

Avis du Tribunal

(5) Le plus rapidement possible après avoir reçu le certificat du commissaire, le Tribunal avise l'auteur de la demande, ainsi que toute personne à l'égard de laquelle une ordonnance pourrait être rendue, du fait qu'il pourra ou non entendre la demande.

Representations

(6) 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).

Observations

(6) Les personnes à qui une copie de la demande est signifiée peuvent, dans les quinze jours suivant la réception de l'avis du Tribunal, présenter par écrit leurs observations au Tribunal. Elles sont tenues de faire signifier une copie de leurs observations aux autres personnes mentionnées au paragraphe (2).

Granting leave to make 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.

Octroi de la demande

(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.

Granting leave to make application under section 76

(7.1) 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.

Octroi de la demande

(7.1) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article.

Time and conditions for making application

(8) 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.

Durée et conditions

(8) Le Tribunal peut fixer la durée de validité de la permission qu'il accorde et l'assortir de conditions. La demande doit être présentée au plus tard un an après que la pratique ou le comportement visé dans la demande a cessé.

Decision

(9) 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).

Décision

(9) Le Tribunal rend une décision motivée par écrit et en fait parvenir une copie à l'auteur de la demande, au commissaire et à toutes les personnes visées au paragraphe (2).

Limitation

(10) 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

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 76, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que ceux qui ont été allégués dans la demande de permission accordée en vertu des paragraphes (7) ou

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VOLUME I

(*b*) to promote a business or commercial interest.

b) en vue de favoriser un intérêt d'affaires ou un intérêt commercial.

Publication of statement without proper test

(2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

(2) Quiconque publie ou fait publier, dans une annonce, une déclaration ou une garantie du rendement, de l'efficacité ou de la durée d'une chose, qui n'est pas fondée sur une épreuve suffisante et convenable de cette chose, dont la preuve incombe au prévenu, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité, si l'annonce est publiée en vue de faciliter, directement ou indirectement, la vente ou l'aliénation de cette chose.

Publication d'une déclaration non fondée sur une épreuve suffisante

Saving

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(3) Les paragraphes (1) et (2) ne s'appliquent pas à une personne qui publie une annonce qu'elle accepte de bonne foi pour publication dans le cours ordinaire de ses affaires.

Réserve

What is proper test

(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council or by the deputy head of the public department, as the case may be.

(4) Aux fins du paragraphe (2), une épreuve faite par le Conseil national de recherches du Canada ou par tout autre service public constitue une épreuve suffisante et convenable, mais une annonce ne doit contenir aucune mention indiquant qu'une épreuve a été faite par le Conseil national de recherches ou autre service public, à moins qu'avant sa publication elle n'ait été approuvée et que la publication n'en ait été permise par écrit par le président du Conseil national de recherches ou par le sous-chef du service public, selon le cas.

Ce qui constitue une épreuve convenable

Idem

(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test. 1968-69, c. 38, s. 116.

(5) Rien au paragraphe (4) n'est censé exclure, pour les fins du présent article, une autre épreuve suffisante ou convenable. 1968-69, c. 38, art. 116.

Idem

"Dealer"

38. (1) In this section "dealer" means a person engaged in the business of manufacturing or supplying or selling any article or commodity.

38. (1) Dans le présent article, l'expression «marchand» signifie une personne dont les opérations consistent à fabriquer, fournir ou vendre quelque article ou produit.

«Marchand»

Resale price maintenance

(2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatever, require or induce or attempt to require or induce any other person to resell an article or commodity

(*a*) at a price specified by the dealer or established by agreement,

(*b*) at a price not less than a minimum price specified by the dealer or established by agreement,

(*c*) at a markup or discount specified by the dealer or established by agreement,

(*d*) at a markup not less than a minimum

(2) Nul marchand ne doit directement ou indirectement, par entente, menace, promesse ou quelque autre moyen, astreindre ou engager une autre personne, ni tenter d'astreindre ou d'engager une autre personne, à revendre un article ou produit

a) à un prix spécifié par le marchand ou établi par entente,

b) à un prix non inférieur à un prix minimum spécifié par le marchand ou établi par entente,

c) moyennant une majoration ou un rabais spécifié par le marchand ou établi par

Fixation du prix de revente

markup specified by the dealer or established by agreement, or

(*e*) at a discount not greater than a maximum discount specified by the dealer or established by agreement,

whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.

Refusal to sell or supply goods

(3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person

(*a*) has refused to resell or to offer for resale the article or commodity

(i) at a price specified by the dealer or established by agreement,

(ii) at a price not less than a minimum price specified by the dealer or established by agreement,

(iii) at a markup or discount specified by the dealer or established by agreement,

(iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or

(v) at a discount not greater than a maximum discount specified by the dealer or established by agreement; or

(*b*) has resold or offered to resell the article or commodity

(i) at a price less than a price or minimum price specified by the dealer or established by agreement,

(ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or

(iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

Penalty

(4) Every person who violates subsection (2) or (3) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both.

Defences

(5) Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or

entente,

d) moyennant une majoration non inférieure à une majoration minimum spécifiée par le marchand ou établie par entente, ou

e) à un rabais non supérieur à un rabais maximum spécifié par le marchand ou établi par entente,

que cette majoration ou rabais, ou majoration minimum ou rabais maximum, soit exprimée en pourcentage ou autrement.

Refus de vendre ou de fournir des marchandises

(3) Nul marchand ne doit refuser de vendre ou de fournir un article ou produit à une autre personne pour le motif que celle-ci

a) a refusé de revendre ou d'offrir en revente l'article ou le produit

(i) à un prix spécifié par le marchand ou établi par entente,

(ii) à un prix non inférieur à un prix minimum spécifié par le marchand ou établi par entente,

(iii) moyennant une majoration ou un rabais spécifié par le marchand ou établi par entente,

(iv) moyennant une majoration non inférieure à une majoration minimum spécifiée par le marchand ou établie par entente, ou

(v) à un rabais non supérieur à un rabais maximum spécifié par le marchand ou établi par entente; ou

b) a revendu ou offert de revendre l'article ou le produit

(i) à un prix moindre qu'un prix ou un prix minimum spécifié par le marchand ou établi par entente,

(ii) moyennant une majoration inférieure à une majoration ou une majoration minimum spécifiée par le marchand ou établie par entente, ou

(iii) à un rabais supérieur à un rabais ou rabais maximum spécifié par le marchand ou établi par entente.

Peine

(4) Quiconque enfreint les dispositions du paragraphe (2) ou (3) est coupable d'un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal, ou un emprisonnement d'au plus deux ans, ou ces deux peines à la fois.

Moyens de défense

(5) Lorsque, dans des poursuites relevant du présent article, il est prouvé que l'inculpé a refusé, ou conseillé le refus, de vendre ou

supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(*a*) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(*b*) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles;

(*c*) that the other person was making a practice of engaging in misleading advertising in respect of articles supplied by the person charged; or

(*d*) that the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person. R.S., c. 314, s. 34; 1960, c. 45, s. 14.

de fournir un article à quelque autre personne, aucune déduction défavorable à l'inculpé ne doit découler de cette preuve, si ce dernier établit, à la satisfaction de la cour, que lui-même et toute personne sur le rapport de qui il s'appuyait avaient des motifs raisonnables de croire et, de fait, croyaient

a) que l'autre personne se faisait une habitude d'utiliser des articles fournis par l'inculpé comme articles spécialement sacrifiés (non pour en tirer un profit mais aux fins de réclame);

b) que l'autre personne se faisait une habitude d'utiliser des articles fournis par l'inculpé, non pour les vendre à profit, mais afin d'attirer les clients à son magasin, dans l'espoir de leur vendre d'autres articles;

c) que l'autre personne se faisait une habitude de se livrer à une réclame trompeuse au sujet des articles fournis par l'inculpé; ou

d) que l'autre personne se faisait une habitude de ne pas fournir la qualité d'entretien (*servicing*) à laquelle les acheteurs desdits articles pouvaient raisonnablement s'attendre de la part de cette autre personne. S.R., c. 314, art. 34; 1960, c. 45, art. 14.

Civil rights not affected

39. Nothing in this Part shall be construed to deprive any person of any civil right of action. 1960, c. 45, s. 15.

Droits civils non atteints

39. Rien dans la présente Partie ne doit s'interpréter comme privant une personne d'un droit d'action au civil. 1960, c. 45, art. 15.

PART VI

OTHER OFFENCES

1960, c. 45, s. 16.

PARTIE VI

AUTRES INFRACTIONS

1960, c. 45, art. 16.

Penalty for failure to attend, etc.

40. If any person, who has been duly served with an order, issued by the Commission or any member thereof requiring him to attend or to produce any books, papers, records or other documents, and to whom, at the time of service, payment or tender has been made of his reasonable travelling expenses according to the scale in force with respect to witnesses in civil suits in the superior court of the province in which such person is summoned to attend, fails to attend and give evidence, or to produce any book, paper, record or other document as required by the said order, he is, unless he shows that there was good and sufficient cause for such

Peine pour omission de comparaître, etc.

40. Lorsqu'une personne, à qui a été dûment signifiée une ordonnance rendue par la Commission ou un de ses membres pour l'assignation de cette personne ou pour la production de livres, documents, archives ou autres pièces, et à qui, lors de la signification, a été fait le paiement ou l'offre de ses frais raisonnables de voyage, d'après le tarif en vigueur à l'égard des témoins dans les causes civiles de la cour supérieure de la province dans laquelle cette personne est sommée de comparaître, omet de comparaître et de rendre témoignage, ou de produire quelque livre, document, archive ou autre pièce, tel que le prescrit ladite ordonnance, cette personne, à

CHAPTER C-34

An Act to provide for the investigation of combines, monopolies, trusts and mergers

SHORT TITLE

Short title

1. This Act may be cited as the *Combines Investigation Act*. R.S., c. C-23, s. 1.

INTERPRETATION

Definitions

2. In this Act,

"article" *«article»*

"article" means real and personal property of every description including

(*a*) money,

(*b*) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

(*c*) deeds and instruments giving a right to recover or receive property,

(*d*) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(*e*) energy, however generated;

"business" *«entreprise»*

"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;

"Commission" *«Commission»*

"Commission" means the Restrictive Trade Practices Commission appointed under subsection 18(1);

"Director" *«directeur»*

"Director" means the Director of Investigation and Research appointed under subsection 7(1);

CHAPITRE C-34

Loi relative à la tenue d'enquêtes sur les cc tions, monopoles, trusts et fusions

TITRE ABRÉGÉ

1. *Loi relative aux enquêtes sur les co tions*. S.R., ch. C-23, art. 1.

DÉFINITIONS

2. Les définitions qui suivent s'appliquei la présente loi.

«article» Biens meubles et immeubles de t nature, y compris :

a) de l'argent;

b) des titres et actes concernant ou con tant un droit de propriété ou autre d relatif à des biens ou un intérêt, act éventuel ou autre, dans une persc morale ou dans des éléments de l'a d'une personne morale;

c) des titres et actes donnant le droi recouvrer ou de recevoir des biens;

d) des billets ou pièces de même g attestant le droit d'être présent en un donné à un ou certains moments donné des titres de transport;

e) de l'énergie, quelle que soit la fa dont elle est produite.

«commerce, industrie ou profession» Y est a milée toute catégorie, division ou brai d'un commerce, d'une industrie ou d profession.

«Commission» La Commission sur les prati restrictives du commerce constituée pa paragraphe 18(1).

«directeur» Le directeur des enquêtes et rec ches nommé en vertu du paragraphe 7(1)

(*a*) the act or omission giving rise to the offence with which he is charged was the result of error;

(*b*) he took reasonable precautions and exercised due diligence to prevent the occurrence of the error;

(*c*) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(*d*) the measures referred to in paragraph (*c*), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

a) l'infraction résulte d'une erreur;

b) elle a pris les précautions raisonn fait preuve de diligence pour préven erreur;

c) elle a pris ou fait prendre des raisonnables pour porter l'erreur à l'a des personnes susceptibles d'être cor par les indications ou l'attestation;

d) les mesures mentionnées à l'aliné été prises sans délai après la publica indications ou de l'attestation, sauf celles-ci concernent des valeurs mobil

Exception

(3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial. 1974-75-76, c. 76, s. 18.

(3) Le paragraphe (2) ne s'applique personne qui, au Canada, donne des inc au public ou publie une attestation compte d'une personne se trouvant à l'é 1974-75-76, ch. 76, art. 18.

Price maintenance

61. (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, trademark, 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 or advertises 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.

61. (1) Quiconque exploite une entr production ou de fourniture d'un prod du crédit, au moyen de cartes de c d'une façon générale, exploite une e dans le domaine des cartes de crédit, o les droits et privilèges exclusifs que co brevet, une marque de commerce, d'auteur ou un dessin industriel enre peut, directement ou indirectement :

a) par entente, menace, promesse ou autre moyen semblable, tenter monter ou d'empêcher qu'on ne r prix auquel une autre personne e une entreprise au Canada fournit ou fournir un produit ou fait de la pul sujet d'un produit au Canada;

b) refuser de fournir un produit à personne exploitant une entrep Canada, ou prendre quelque autr discriminatoire à l'endroit de cel raison du régime de bas prix de celle

Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

(*a*) the same corporation, partnership or sole proprietorship, or

(*b*) corporations, partnerships or sole proprietorships that are affiliated,

(2) Le paragraphe (1) ne s'applique que la personne qui tente d'influence duite d'une autre personne et cette der entre elles des relations de mandant taire ou sont des personnes morales a des administrateurs, mandataires, diri employés :

a) soit de la même personne moral de personnes ou entreprise unipersor

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

ited retail

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

tion

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

il to

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his 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.

ation, rship or oprietor- filiated

(7) For the purposes of subsection (2),

(*a*) a corporation is affiliated with another corporation if

(i) one is a subsidiary of the other,

(ii) both are subsidiaries of the same corporation,

(iii) both are controlled by the same person, or

(iv) each is affiliated with the same corporation; and

(*b*) a partnership or sole proprietorship is affiliated with another partnership, sole pro-

b) soit de personnes morales, sociétés de personnes ou entreprises unipersonnelles qui sont affiliées.

(3) Pour l'application du présent article, le fait, pour le producteur ou le fournisseur d'un produit, de proposer pour ce produit un prix de revente ou un prix de revente minimal, quelle que soit la façon de déterminer ce prix, lorsqu'il n'est pas prouvé que le producteur ou fournisseur faisant la proposition, en la faisant, a aussi précisé à la personne à laquelle il l'a faite que cette dernière n'était nullement obligée de l'accepter et que, si elle ne l'acceptait pas, elle n'en souffrirait en aucune façon dans ses relations commerciales avec ce producteur ou fournisseur ou avec toute autre personne, constitue la preuve qu'il a tenté d'influencer, dans le sens de la proposition, la personne à laquelle il l'a faite.

(4) Pour l'application du présent article, la publication, par le fournisseur d'un produit qui n'est pas détaillant, d'une réclame mentionnant un prix de revente pour ce produit constitue une tentative de faire monter le prix de vente demandé par toute personne qui le reçoit pour le revendre, à moins que ce prix ne soit exprimé de façon à préciser à quiconque prend connaissance de la publicité que le produit peut être vendu à un prix inférieur.

(5) Les paragraphes (3) et (4) ne s'appliquent pas à un prix apposé ou inscrit sur un produit ou sur son emballage.

(6) Nul ne peut, par menace, promesse ou quelque autre moyen semblable, tenter de persuader un fournisseur, au Canada ou à l'étranger, en en faisant la condition de leurs relations commerciales, de refuser de fournir un produit à une personne donnée ou à une catégorie donnée de personnes en raison du régime de bas prix de cette personne ou catégorie.

(7) Pour l'application du paragraphe (2) :

a) une personne morale est affiliée à une autre personne morale dans l'un ou l'autre des cas suivants :

(i) elle est une filiale de l'autre,

(ii) l'une et l'autre sont des filiales de la même personne morale,

(iii) l'une et l'autre sont contrôlées par la même personne,

(iv) chacune est affiliée à la même personne morale;

prietorship or a corporation if both are controlled by the same person.

b) une société de personnes ou une prise unipersonnelle est affiliée à une société de personnes ou entreprise unip nelle ou à une personne morale si l'u l'autre sont contrôlées par la même per

Where corporation is deemed to be controlled

(8) For the purposes of this section, a corporation is deemed to be controlled by a person if shares of the corporation carrying voting rights sufficient to elect a majority of the directors of the corporation are held, other than by way of security only, by or on behalf of that person.

(8) Pour l'application du présent articl personne morale est réputée contrôlée p personne si des actions de cette pe morale assorties de droits de vote sont dét non à titre de garantie, par cette personne son nom, en nombre suffisant pour lui p tre d'élire la majorité de ses administrate

Offence and punishment

(9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

(9) Quiconque contrevient aux parag (1) ou (6) commet un acte criminel et e sur déclaration de culpabilité, une amen discrétion du tribunal et un emprisonn maximal de cinq ans, ou l'une de ces pein

Where no unfavourable inference to be drawn

(10) Where, in a prosecution under paragraph (1)(*b*), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

(*a*) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(*b*) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(*c*) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(*d*) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person. R.S., c. C-23, s. 38; 1974-75-76, c. 76, s. 18.

(10) Aucune conclusion défavorable culpé ne peut être tirée de la preuve f cours d'une poursuite intentée en vertu d néa (1)*b*) et indiquant qu'il a refusé de un produit à une autre personne ou cons le faire, s'il convainc le tribunal de ce qu toute personne aux dires de laquelle il s croyaient alors, pour des motifs raison que l'autre personne avait l'habitude, qu produits fournis par l'inculpé :

a) de les sacrifier à des fins de publ non de profit;

b) de les vendre sans profit afin d'att clients dans l'espoir de leur vendre d produits;

c) de faire de la publicité trompeuse;

d) de ne pas assurer la qualité de se laquelle leurs acheteurs pouvaient ra blement s'attendre. S.R., ch. C-23, 1974-75-76, ch. 76, art. 18.

Civil rights not affected

62. Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action. R.S. c. C-23, s. 39; 1974-75-76, c. 76, s. 18.

62. Sauf disposition contraire de la p partie, celle-ci n'a pas pour effet de pri personne d'un droit d'action au civil. S C-23, art. 39; 1974-75-76, ch. 76, art. 18

CANADA

CONSOLIDATION

CODIFICATION

Copyright Act

Loi sur le droit d’auteur

R.S.C., 1985, c. C-42

L.R.C. (1985), ch. C-42

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(*b*) applies in respect of a country covered by that statement, as if that country were Canada.

b) au pays visé par la déclaration, comme s'il s'agissait du Canada.

Application of Act

(4) Subject to any exceptions that the Minister may specify in a statement referred to in subsection (1) or (2), the other provisions of this Act also apply in the way described in subsection (3).

Autres dispositions

(4) Les autres dispositions de la présente loi s'appliquent de la manière prévue au paragraphe (3), sous réserve des exceptions que le ministre peut prévoir dans la déclaration.

R.S., 1985, c. C-42, s. 22; 1994, c. 47, s. 59; 1997, c. 24, s. 14; 2001, c. 27, s. 239; 2012, c. 20, s. 16.

L.R. (1985), ch. C-42, art. 22; 1994, ch. 47, art. 59; 1997, ch. 24, art. 14; 2001, ch. 27, art. 239; 2012, ch. 20, art. 16.

Term of Rights

Durée des droits

Term of copyright — performer's performance

23. (1) Subject to this Act, copyright in a performer's performance subsists until the end of 50 years after the end of the calendar year in which the performance occurs. However,

Durée des droits : prestation

23. (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur sur la prestation expire à la fin de la cinquantième année suivant l'année civile de son exécution. Toutefois :

(*a*) if the performance is fixed in a sound recording before the copyright expires, the copyright continues until the end of 50 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs; and

a) si la prestation est fixée au moyen d'un enregistrement sonore avant l'expiration du droit d'auteur, celui-ci demeure jusqu'à la fin de la cinquantième année suivant l'année civile de la première fixation de la prestation au moyen d'un enregistrement sonore;

(*b*) if a sound recording in which the performance is fixed is published before the copyright expires, the copyright continues until the earlier of the end of 70 years after the end of the calendar year in which the first such publication occurs and the end of 100 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs.

b) si un enregistrement sonore au moyen duquel la prestation est fixée est publié avant l'expiration du droit d'auteur, celui-ci demeure jusqu'à la fin de la soixante-dixième année suivant l'année civile où un tel enregistrement sonore est publié pour la première fois ou, si elle lui est antérieure, la fin de la centième année suivant l'année civile où la prestation est fixée au moyen d'un enregistrement sonore pour la première fois.

Term of copyright — sound recording

(1.1) Subject to this Act, copyright in a sound recording subsists until the end of 50 years after the end of the calendar year in which the first fixation of the sound recording occurs. However, if the sound recording is published before the copyright expires, the copyright continues until the earlier of the end of 70 years after the end of the calendar year in which the first publication of the sound recording occurs and the end of 100 years after the end of the calendar year in which that first fixation occurs.

Durée du droit : enregistrement sonore

(1.1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur sur l'enregistrement sonore expire à la fin de la cinquantième année suivant l'année civile de sa première fixation; toutefois, s'il est publié avant l'expiration du droit d'auteur, celui-ci demeure jusqu'à la fin de la soixante-dixième année suivant l'année civile de sa première publication ou, si elle lui est antérieure, la fin de la centième année suivant l'année civile de cette fixation.

Term of copyright — communication signal

(1.2) Subject to this Act, copyright in a communication signal subsists until the end of 50 years after the end of the calendar year in which the communication signal is broadcast.

Durée du droit : signal de communication

(1.2) Sous réserve des autres dispositions de la présente loi, le droit d'auteur sur le signal de communication expire à la fin de la cinquantième année suivant l'année civile de l'émission du signal.

CHAPTER C-42

An Act respecting copyright

SHORT TITLE

Short title

1. This Act may be cited as the *Copyright Act*. R.S., c. C-30, s. 1.

INTERPRETATION

Definitions

2. In this Act,

"architectural work of art" *«œuvre d'art...»*

"architectural work of art" means any building or structure having an artistic character or design, in respect of that character or design, or any model for the building or structure, but the protection afforded by this Act is confined to the artistic character and design, and does not extend to processes or methods of construction;

"artistic work" *«œuvre artistique»*

"artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

"book" *«livre»*

"book" includes every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan separately published;

"cinematograph" *«œuvre cinématographique»*

"cinematograph" includes any work produced by any process analogous to cinematography;

"collective work" *«recueil»*

"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

CHAPITRE C-42

Loi concernant le droit d'auteur

TITRE ABRÉGÉ

Titre abré

1. *Loi sur le droit d'auteur*. S.R., ch. C-30, art. 1.

DÉFINITIONS

Définition

2. Les définitions qui suivent s'appliquent à la présente loi.

«conférenc "*lecture*"

«conférence» Sont assimilés à une conférence les allocutions, discours et sermons.

«contrefaç "*infringin*

«contrefaçon» À l'égard d'un exemplaire d'une œuvre sur laquelle subsiste un droit d'auteur, toute reproduction, y compris l'imitation déguisée, faite ou importée contrairement à la présente loi.

«débit» "*delivery*"

«débit» Par rapport à une conférence, s'entend notamment du débit à l'aide d'un instrument mécanique quelconque.

«gravure» "*engravin*

«gravure» Sont assimilées à une gravure les gravures à l'eau-forte, les lithographies, les gravures sur bois, les estampes et autres œuvres similaires, à l'exclusion des photographies.

«livre» "*book*"

«livre» Sont assimilés à un livre tout volume, toute partie ou division d'un volume, toute brochure, feuille d'impression typographique, feuille de musique, carte, tout graphique ou plan publiés séparément.

«ministre» "*Minister*"

«ministre» Le ministre des Consommateurs et des Sociétés.

«œuvre» "*work*"

«œuvre» Est assimilé à une œuvre le titre de l'œuvre lorsque celui-ci est original et distinctif.

«œuvre

«œuvre artistique» Sont comprises parmi les

(*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire,

(*b*) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright,

(*c*) by way of trade exhibits in public, or

(*d*) imports for sale or hire into Canada,

any work that to the knowledge of that person infringes copyright or would infringe copyright if it had been made within Canada.

a) vend ou loue, ou commercialement met ou offre en vente ou en location;

b) met en circulation, soit dans un but commercial, soit de façon à porter préjudice au titulaire du droit d'auteur;

c) expose commercialement en public;

d) importe pour la vente ou la location au Canada,

une œuvre qui, à sa connaissance, viole le droit d'auteur ou le violerait si elle avait été produite au Canada.

Public performance for private profit without owner's consent

(5) Copyright in a work shall be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Représentation dans un but de lucre personnel, sans autorisation

(5) Est considéré comme ayant porté atteinte au droit d'auteur quiconque, dans un but de lucre personnel, permet l'utilisation d'un théâtre ou d'un autre local de divertissement pour l'exécution ou la représentation publique d'une œuvre sans le consentement du titulaire du droit d'auteur, à moins d'avoir ignoré et de n'avoir eu aucun motif raisonnable de soupçonner que l'exécution ou la représentation constituerait une violation du droit d'auteur.

Restriction on paragraph (2)(*i*) or (*j*)

(6) Nothing in paragraph (2)(*i*) or (*j*) authorizes any person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright has a right to do. R.S., c. C-30, s. 17; 1974-75-76, c. 50, s. 47; 1980-81-82-83, c. 111, s. 5; 1984, c. 40, s. 18.

Restriction s'appliquant aux al. (2)(*i*) et *j*)

(6) Les alinéas (2)*i*) et *j*) n'autorisent pas les personnes qui reçoivent communication de documents ou renseignements à exercer les droits que la présente loi ne confère qu'au titulaire d'un droit d'auteur. S.R., ch. C-30, art. 17; 1974-75-76, ch. 50, art. 47; 1980-81-82-83, ch. 111, art. 5; 1984, ch. 40, art. 18.

Report in newspaper of political speech no infringement

28. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper. R.S., c. C-30, s. 18.

Discours politiques

28. Nonobstant les autres dispositions de la présente loi, le fait de publier dans un journal le compte rendu d'une allocution de nature politique, prononcée lors d'une assemblée publique, ne constitue pas une violation du droit d'auteur à cet égard. S.R., ch. C-30, art. 18.

Making in Canada of records, etc.

29. (1) It shall not be deemed to be an infringement of copyright in any musical, literary or dramatic work for any person to make within Canada records, perforated rolls or other contrivances by means of which sounds may be reproduced and by means of which the work may be mechanically performed, if the person proves

(*a*) that the contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(*b*) that that person has given the prescribed notice of his intention to make the contrivances and that there has been paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royal-

La confection d'organes au Canada ne constitue pas une contrefaçon

29. (1) N'est pas considéré comme une violation du droit d'auteur sur une œuvre musicale, littéraire ou dramatique le fait de confectionner, au Canada, des empreintes, rouleaux perforés ou autres organes au moyen desquels des sons peuvent être reproduits et l'œuvre exécutée ou représentée mécaniquement, lorsque celui qui les confectionne prouve :

a) que de tels organes ont été fabriqués antérieurement par le titulaire du droit d'auteur sur l'œuvre, ou avec son consentement ou assentiment;

b) qu'il a fait la notification réglementaire de son intention de confectionner les organes et qu'il a été payé, de la manière réglementaire, au titulaire du droit d'auteur sur l'œuvre, ou pour son compte, des tantièmes par

ties in respect of all the contrivances sold by him, in accordance with subsection (5).

When alterations necessary for adaptation to contrivance

(2) Nothing in subsection (1) authorizes any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless the alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question.

Contrivance not included

(3) For the purposes of subsection (1), a musical, literary or dramatic work shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

Manuscript arrangements

(4) The making of the necessary manuscript arrangement and instrumentations of the copyrighted work, for the sole purpose of the adaptation of the work to the contrivances in question, shall not be deemed an infringement of copyright.

Rates of royalties

(5) The royalty mentioned in subsection (1) shall be two cents for each playing surface of each record and two cents for each perforated roll or other contrivance.

Apportionment of royalties when several owners

(6) Where any contrivance is made reproducing on the same playing surface two or more different works in which copyright subsists, and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned among the several owners of the copyright equally. R.S., c. C-30, s. 19.

Provisions respecting musical works heretofore published

30. (1) In the case of musical, literary or dramatic works published before January 1, 1924, section 29 shall have effect, subject to the following modifications and additions:

(*a*) the conditions with respect to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions with respect to alterations in or omissions from the work, do not apply; and

(*b*) notwithstanding any assignment made before June 4, 1921 of the copyright in a literary, dramatic or musical work, any rights conferred by this Act in respect of the making, or authorizing the making, of con-

rapport à tous ces organes vendus par lui, tels qu'ils sont mentionnés au paragraphe (5).

Altérations nécessaires à l'adaptation

(2) Le paragraphe (1) n'a pas pour effet d'autoriser à modifier ou tronquer l'œuvre reproduite, à moins que des organes reproduisant l'œuvre semblablement modifiée ou tronquée n'aient été antérieurement faits par le titulaire du droit d'auteur, ou avec son consentement ou assentiment, ou que ces modifications ou retranchements ne soient raisonnablement nécessaires pour adapter l'œuvre aux organes en question.

Ne comprend pas un organe

(3) Pour l'application du paragraphe (1), une œuvre musicale, littéraire ou dramatique n'est pas réputée comprendre un organe au moyen duquel des sons peuvent être reproduits mécaniquement.

Adaptations

(4) Les adaptations et orchestrations manuscrites nécessaires de l'œuvre protégée, aux seules fins de rendre celle-ci propre aux organes en question, ne sont pas considérées comme des violations du droit d'auteur.

Taux des tantièmes

(5) Le tantième mentionné au paragraphe (1) est de deux cents pour chaque face de reproduction de toute semblable empreinte, et de deux cents pour chaque rouleau perforé ou autre organe.

Répartition des tantièmes entre divers titulaires

(6) Lorsqu'un tel organe reproduit, sur la même face de reproduction, deux ou plusieurs œuvres différentes encore protégées, et à l'égard desquelles le droit d'auteur appartient à diverses personnes, la somme payable à titre de tantièmes, dus en vertu du présent article, est répartie en parts égales entre les divers titulaires du droit d'auteur. S.R., ch. C-30, art. 19.

Réserve relative aux œuvres musicales antérieurement publiées

30. (1) L'article 29 est applicable aux œuvres musicales, littéraires ou dramatiques, publiées avant le 1er janvier 1924, sous réserve, toutefois, des modifications et adjonctions que voici :

a) ne sont applicables ni les conditions concernant la confection préalable des organes par le titulaire du droit d'auteur sur l'œuvre ou leur confection faite avec son consentement ou assentiment, ni les restrictions relatives aux modifications ou retranchements de l'œuvre;

b) quand bien même le droit d'auteur sur une œuvre littéraire, dramatique ou musicale aurait été cédé avant le 4 juin 1921, tout

trivances by means of which the work may be mechanically performed shall belong to the author or the legal representatives of the author and not to the assignee, and the royalties shall be payable to, and for the benefit of, the author of the work or the legal representatives of the author.

droit, conféré par la présente loi, de confectionner, ou d'autoriser que soient confectionnés, des organes servant à l'exécution mécanique de l'œuvre appartient, non pas au cessionnaire, mais à l'auteur ou à ses représentants légaux à qui, ou pour le compte de qui, les tantièmes précités doivent être payés.

Copyright deemed to exist at date of making of original plate

(2) Notwithstanding anything in this Act, where a record, perforated roll or other contrivance by means of which sounds may be mechanically reproduced has been made before January 1, 1924, copyright shall, from that date, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived, and the person who, on January 1, 1924, is the owner of the original plate shall be the first owner of the copyright.

(2) Nonobstant les autres dispositions de la présente loi, lorsqu'une empreinte, un rouleau perforé ou autre organe au moyen desquels des sons peuvent être reproduits mécaniquement ont été confectionnés avant le 1er janvier 1924, le droit d'auteur existe à leur égard, à partir de cette date, de la même manière et pour la même durée que si cette loi avait été en vigueur au moment où la planche originale dont l'organe a été tiré, directement ou indirectement, a été fabriquée; la personne qui, le 1er janvier 1924, est propriétaire de la planche originale est le premier titulaire de ce droit d'auteur.

Le droit d'auteur est réputé exister à la date de la confection de la planche originale

Restriction

(3) Nothing in subsection (2) shall be construed as conferring copyright in any contrivance if the making thereof would have infringed copyright in some other contrivance, if that subsection had been in force at the time of the making of the first-mentioned contrivance. R.S., c. C-30, s. 19.

(3) Le paragraphe (2) n'a pas pour effet d'assurer le droit d'auteur à l'égard d'un organe semblable, dont la confection aurait porté atteinte au droit d'auteur sur un autre organe de ce genre, si ce paragraphe avait été en vigueur au moment où l'organe mentionné en premier lieu a été fabriqué. S.R., ch. C-30, art. 19.

Restriction

Contrivance made for persons unable to read print

31. For the purposes of sections 29 and 30, a record, perforated roll or other contrivance by means of which sounds may be reproduced and by means of which a literary or dramatic work may be mechanically performed made within Canada with the consent or acquiescence of the owner of the copyright in the work and intended for and primarily distributed to persons unable to read print because of a physical handicap is deemed not to be a contrivance made with the consent or acquiescence of the owner of the copyright in the work. R.S., c. C-30, s. 19; 1980-81-82-83, c. 47, s. 9.

31. Pour l'application des articles 29 et 30, une empreinte, un rouleau perforé ou un autre organe au moyen desquels des sons peuvent être reproduits et une œuvre exécutée ou représentée mécaniquement, confectionnés au Canada avec le consentement ou l'assentiment du titulaire du droit d'auteur sur l'œuvre et destinés principalement à l'usage de personnes incapables, en raison de déficiences physiques, de lire les caractères imprimés sont réputés ne pas être un organe confectionné avec le consentement ou l'assentiment du titulaire du droit d'auteur sur l'œuvre. S.R., ch. C-30, art. 19; 1980-81-82-83, ch. 47, art. 9.

Organe destiné aux personnes incapables de lire les caractères imprimés

When owner deemed to consent to making of contrivances

32. When any contrivances by means of which a literary, dramatic or musical work may be mechanically performed have been made, then for the purposes of sections 29 to 31, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of the contrivances if he fails to reply to those inquiries within the prescribed time. R.S., c. C-30, s. 19.

32. Lorsque des organes servant à l'exécution mécanique d'une œuvre littéraire, dramatique ou musicale ont été confectionnés, le titulaire du droit d'auteur sur l'œuvre est, pour l'application des articles 29 à 31 et à l'égard de quiconque lui adresse les requêtes prescrites, réputé avoir donné l'autorisation de confectionner ces organes, s'il ne répond pas à ces requêtes dans le délai prévu. S.R., ch. C-30, art. 19.

Lorsque le titulaire est réputé avoir donné son autorisation

Regulations and notices by Governor in Council

33. For the purposes of sections 29 to 32, the Governor in Council may make regulations prescribing anything that under those sections is to be prescribed, and prescribing the mode in which notices are to be given, the particulars to be given in the notices, and the mode, time, and frequency of the payment of royalties, and the regulations may, if the Governor in Council thinks fit, include regulations requiring payment in advance or otherwise securing the payment of royalties. R.S., c. C-30, s. 19.

Règlements et avis par le gouverneur en conseil

33. Pour l'application des articles 29 à 32, le gouverneur en conseil peut prendre toute mesure d'ordre réglementaire prévue par ces articles ainsi que tout règlement déterminant la façon de donner des avis ainsi que les détails à y indiquer, de même que le mode, l'époque et la fréquence des versements de tantièmes. Ces règlements peuvent, si le gouverneur en conseil le juge à propos, comprendre des prescriptions exigeant le paiement anticipé, ou autre garantie de l'acquittement, des tantièmes. S.R., ch. C-30, art. 19.

CIVIL REMEDIES

RECOURS CIVILS

Civil remedies

34. (1) Where copyright in any work has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts and otherwise that are or may be conferred by law for the infringement of a right.

Recours civils

34. (1) Lorsque le droit d'auteur sur une œuvre a été violé, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours, par voie d'injonction, dommages-intérêts, reddition de compte ou autrement, que la loi accorde ou peut accorder pour la violation d'un droit.

Costs

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the court.

Frais

(2) Les frais de toutes les parties à des procédures relatives à la violation du droit d'auteur sont à la discrétion absolue du tribunal.

Presumptions respecting copyright and ownership

(3) In any action for infringement of copyright in any work in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto,

(*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and

(*b*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright.

Présomption de propriété

(3) Dans toute action pour violation du droit d'auteur sur une œuvre, si le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

a) l'œuvre est, jusqu'à preuve contraire, présumée être une œuvre protégée par un droit d'auteur;

b) l'auteur de l'œuvre est, jusqu'à preuve contraire, présumé être le titulaire du droit d'auteur.

Idem

(4) Where any question referred to in subsection (2) is at issue, and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act,

(*a*) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work; and

(*b*) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person

Idem

(4) Dans toute contestation de cette nature, si aucune concession du droit d'auteur ou d'un intérêt dans le droit d'auteur par cession ou par licence n'a été enregistrée sous l'autorité de la présente loi :

a) si un nom paraissant être celui de l'auteur de l'œuvre y est imprimé ou autrement indiqué, en la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être l'auteur de l'œuvre;

b) si aucun nom n'est imprimé ou indiqué de cette façon, ou si le nom ainsi imprimé ou indiqué n'est pas le véritable nom de l'auteur ou le nom sous lequel il est généralement connu, et si un nom paraissant être celui de l'éditeur ou du propriétaire de l'œuvre y est imprimé ou autrement indiqué de la manière

CHAPTER 10 (4th Supp.)

An Act to amend the Copyright Act and to amend other Acts in consequence thereof

[1988, c. 15 assented to 8th June, 1988]

R.S., c. C-42; R.S., c. 10 (1st Supp.), c. 1 (3rd Supp.), c. 41 (3rd Supp.)

COPYRIGHT ACT

1. (1) The definitions "architectural work of art" and "artistic work" in section 2 of the *Copyright Act* are repealed and the following substituted therefor in alphabetical order within the section:

"architectural work of art" *«œuvre d'art...»*

" "architectural work of art" means any building or structure or any model of a building or structure;

"artistic work" *«œuvre artistique»*

"artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship and architectural works of art;"

(2) The definition "literary work" in section 2 of the said Act is repealed and the following substituted therefor:

"literary work" *«œuvre littéraire»*

" "literary work" includes tables, compilations, translations and computer programs;"

(3) Section 2 of the said Act is further amended by adding thereto, in alphabetical order within the section, the following definitions:

"Board" *«Commission»*

" "Board" means the Copyright Board established by subsection 66(1);

CHAPITRE 10 (4e suppl.)

Loi modifiant la Loi sur le droit d'auteı apportant des modifications connex corrélatives

[1988, ch. 15, sanctionné le 8 juin 1988]

LOI SUR LE DROIT D'AUTEUR

1. (1) Les définitions de «œuvre artisti et «œuvre d'art architecturale», à l'article la *Loi sur le droit d'auteur*, sont abrogé respectivement remplacées par ce qui suit :

«œuvre artistique» Sont compris parm œuvres artistiques les œuvres de pein de dessin, de sculpture et les œuvres a tiques dues à des artisans, les œuvres architecturales, les gravures et photo phies ainsi que les graphiques, les c géographiques et marines et les plans.

«œuvre d'art architecturale» Tout bâti ou édifice ou tout modèle ou maquett bâtiment ou d'édifice.»

(2) La définition de «œuvre littéraire l'article 2 de la même loi, est abrogée et placée par ce qui suit :

«œuvre littéraire» Sont assimilés à une œ littéraire les tableaux, les compilations traductions et les programmes d'ord teur.»

(3) L'article 2 de la même loi est modifié insertion, suivant l'ordre alphabétique, d qui suit :

«Commission» La Commission du droit d teur constituée au titre du paragra 66(1).

person ceases to be the owner of the copy of the computer program."

6. The said Act is further amended by adding thereto, immediately after section 28 thereof, the following heading and sections:

"MORAL RIGHTS INFRINGEMENT

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

28.2 (1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(*a*) distorted, mutilated or otherwise modified; or

(*b*) used in association with a product, service, cause or institution.

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

(3) For the purposes of this section,

(*a*) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or

(*b*) steps taken in good faith to restore or preserve the work

shall not, by that act alone, constitute a distortion, mutilation or other modification of the work."

7. Sections 29 to 33 of the said Act are repealed.

8. Section 34 of the said Act is amended by adding thereto, immediately after subsection (1) thereof, the following subsection:

"(1.1) In any proceedings for an infringement of a moral right of an author, the court may grant to the author all remedies by way of injunction, damages, accounts or delivery up and otherwise that are or may be conferred by law for the infringement of a right."

9. Section 41 of the said Act is repealed and the following substituted therefor:

6. La même loi est modifiée par insertion, après l'article 28, de ce qui suit :

«VIOLATION DES DROITS MORAUX

28.1 Constitue une violation des droits moraux de l'auteur sur son œuvre tout fait — acte ou omission — non autorisé et contraire à ceux-ci. Atteinte aux droits moraux

28.2 (1) Il n'y a violation du droit à l'intégrité que si l'œuvre est, d'une manière préjudiciable à l'honneur ou à la réputation de l'auteur, déformée, mutilée ou autrement modifiée, ou utilisée en liaison avec un produit, une cause, un service ou une institution. Nature du droit à l'intégrité

(2) Toute déformation, mutilation ou autre modification d'une peinture, d'une sculpture ou d'une gravure est réputée préjudiciable au sens du paragraphe (1). Présomption de préjudice

(3) Pour l'application du présent article, ne constitue pas nécessairement une déformation, mutilation ou autre modification de l'œuvre un changement de lieu, du cadre de son exposition ou de la structure qui la contient ou toute mesure de restauration ou de conservation prise de bonne foi.» Non-modification

7. Les articles 29 à 33 de la même loi sont abrogés.

8. L'article 34 de la même loi est modifié par insertion, après le paragraphe (1), de ce qui suit :

«(1.1) Le tribunal, saisi d'un recours en violation des droits moraux, peut accorder à l'auteur les réparations qu'il pourrait accorder, par voie d'injonction, de dommages-intérêts, de reddition de compte, de restitution ou autrement, et que la loi prévoit ou peut prévoir pour la violation d'un droit.» Droits moraux

9. L'article 41 de la même loi est abrogé et remplacé par ce qui suit :

Second Session, Forty-first Parliament,
62-63-64 Elizabeth II, 2013-2014-2015

Deuxième session, quarante et unième législature,
62-63-64 Elizabeth II, 2013-2014-2015

STATUTES OF CANADA 2015

LOIS DU CANADA (2015)

CHAPTER 36

CHAPITRE 36

An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures

Loi portant exécution de certaines dispositions du budget déposé au Parlement le 21 avril 2015 et mettant en oeuvre d'autres mesures

ASSENTED TO

23rd JUNE, 2015

BILL C-59

SANCTIONNÉE

LE 23 JUIN 2015

PROJET DE LOI C-59

Coming into Force

January 3, 2016

80. This Division comes into force on January 3, 2016.

Entrée en vigueur

80. La présente section entre en vigueur le 3 janvier 2016.

3 janvier 2016

DIVISION 5

COPYRIGHT ACT

SECTION 5

LOI SUR LE DROIT D'AUTEUR

R.S., c. C-42

L.R., ch. C-42

81. (1) Paragraph 23(1)(*b*) of the *Copyright Act* is replaced by the following:

(*b*) if a sound recording in which the performance is fixed is published before the copyright expires, the copyright continues until the earlier of the end of 70 years after the end of the calendar year in which the first such publication occurs and the end of 100 years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs.

81. (1) L'alinéa 23(1)*b*) de la *Loi sur le droit d'auteur* est remplacé par ce qui suit :

b) si un enregistrement sonore au moyen duquel la prestation est fixée est publié avant l'expiration du droit d'auteur, celui-ci demeure jusqu'à la fin de la soixante-dixième année suivant l'année civile où un tel enregistrement sonore est publié pour la première fois ou, si elle lui est antérieure, la fin de la centième année suivant l'année civile où la prestation est fixée au moyen d'un enregistrement sonore pour la première fois.

(2) Subsection 23(1.1) of the Act is replaced by the following:

Term of copyright — sound recording

(1.1) Subject to this Act, copyright in a sound recording subsists until the end of 50 years after the end of the calendar year in which the first fixation of the sound recording occurs. However, if the sound recording is published before the copyright expires, the copyright continues until the earlier of the end of 70 years after the end of the calendar year in which the first publication of the sound recording occurs and the end of 100 years after the end of the calendar year in which that first fixation occurs.

(2) Le paragraphe 23(1.1) de la même loi est remplacé par ce qui suit :

Durée du droit : enregistrement sonore

(1.1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur sur l'enregistrement sonore expire à la fin de la cinquantième année suivant l'année civile de sa première fixation; toutefois, s'il est publié avant l'expiration du droit d'auteur, celui-ci demeure jusqu'à la fin de la soixante-dixième année suivant l'année civile de sa première publication ou, si elle lui est antérieure, la fin de la centième année suivant l'année civile de cette fixation.

No revival of copyright

82. Paragraph 23(1)(*b*) and subsection 23(1.1) of the *Copyright Act*, as enacted by section 81, do not have the effect of reviving the copyright, or a right to remuneration, in a sound recording or performer's performance fixed in a sound recording in which the copyright or the right to remuneration had expired on the coming into force of those provisions.

Aucune réactivation du droit d'auteur

82. L'alinéa 23(1)*b*) et le paragraphe 23(1.1) de la *Loi sur le droit d'auteur*, édictés par l'article 81, n'ont pas pour effet de réactiver le droit d'auteur ou le droit à rémunération, selon le cas, sur un enregistrement sonore ou une prestation fixée au moyen d'un enregistrement sonore si ce droit était éteint à l'entrée en vigueur de ces dispositions.

CANADA

CONSOLIDATION

CODIFICATION

Competition Tribunal Rules

Règles du Tribunal de la concurrence

SOR/2008-141

DORS/2008-141

Current to October 27, 2015

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Documents

Memorandum of fact and law

6. Where in these Rules a reference is made to a memorandum of fact and law, the memorandum of fact and law shall contain a table of contents and, in consecutively numbered paragraphs,

(*a*) a concise statement of fact;

(*b*) a statement of the points in issue;

(*c*) a concise statement of the submissions;

(*d*) a concise statement of the order sought, including any order concerning costs;

(*e*) a list of the authorities, statutes and regulations to be referred to; and

(*f*) an appendix, and if necessary as a separate document, a copy of the authorities (or relevant excerpts) as well as a copy of any statutory or regulatory provisions cited or relied on that have not been reproduced in another party's memorandum.

Subpoena

7. (1) The Registrar or the person designated by the Registrar may issue a writ of subpoena for the attendance of witnesses and the production of documents.

In blank

(2) The Registrar may issue a writ of subpoena in blank and the person to whom it is issued shall complete it and may include any number of names.

Service of Documents

Originating document

8. (1) Service of an originating document shall be effected

(*a*) in the case of an individual, by leaving a certified copy of the originating document with the individual;

Documents

Mémoire des faits et du droit

6. Le mémoire des faits et du droit comprend une table des matières, est divisé en paragraphes numérotés consécutivement et comporte les éléments suivants :

a) un exposé concis des faits;

b) les points en litige;

c) un exposé concis des arguments;

d) un énoncé concis de l'ordonnance demandée, notamment toute ordonnance relative aux frais;

e) la liste des décisions, des textes de doctrine, des lois et des règlements qui seront invoqués;

f) en annexe et, au besoin, dans un document distinct, copie des arrêts cités — ou des extraits pertinents de ceux-ci — et des dispositions législatives ou réglementaires citées ou invoquées qui ne sont pas reproduits dans le mémoire d'une autre partie.

Assignation

7. (1) Le registraire ou une personne désignée par celui-ci peut délivrer des assignations à témoigner et à produire des documents.

En blanc

(2) Le registraire peut délivrer une assignation en blanc; la personne à qui elle est délivrée la remplit et peut y inclure un nombre indéterminé de noms.

Signification de documents

Acte introductif d'instance

8. (1) La signification d'un acte introductif d'instance se fait :

a) s'il s'agit d'un particulier, par remise d'une copie certifiée de l'acte à celui-ci;

b) s'il s'agit d'une société de personnes, par remise d'une copie certifiée de l'acte

(*b*) in the case of a partnership, by leaving a certified copy of the originating document with one of the partners during business hours;

(*c*) in the case of a corporation, by leaving a certified copy of the originating document with an officer of the corporation or with a person apparently in charge of the head office or of a branch of the corporation in Canada during business hours;

(*d*) in the case of the Commissioner, by leaving a certified copy of the originating document at the Commissioner's office during business hours; and

(*e*) in the case of a person referred to in any of paragraphs (*a*) to (*d*) who is represented by counsel, by leaving a certified copy of the originating document with the counsel who accepts service of the document.

à l'un des associés pendant les heures de bureau;

c) s'il s'agit d'une personne morale, par remise d'une copie certifiée de l'acte à l'un de ses dirigeants ou à une personne qui semble être responsable de son siège social ou d'une de ses succursales au Canada, pendant les heures de bureau;

d) s'il s'agit du commissaire, par livraison d'une copie certifiée de l'acte à son bureau pendant les heures de bureau;

e) s'il s'agit d'une personne visée à l'un des alinéas *a*) à *d*) qui est représentée par un avocat, par la remise d'une copie certifiée de l'acte à l'avocat qui est disposé à en accepter la signification.

Alternative manner

(2) If a person is unable to serve an originating document in a manner described in subrule (1), the person may apply to a judicial member for an order setting out another manner for effecting service.

Mode alternatif

(2) La personne qui ne peut signifier l'acte introductif d'instance de la manière prévue au paragraphe (1) peut demander à un membre judiciaire de rendre une ordonnance prévoyant un autre mode de signification.

Service of order

(3) The person who obtains an order made under subrule (2) shall serve the order on each person named in the originating document.

Signification de l'ordonnance

(3) La personne qui obtient l'ordonnance visée au paragraphe (2) la signifie à chacune des personnes nommées dans l'acte introductif d'instance.

Deemed served

9. If a document has been served in a manner not authorized by these Rules or by an order of the Tribunal, the Tribunal may, on motion, order that a document be deemed validly served if it is satisfied that the document came to the notice of the person to be served or that it would have come to that person's notice except for the person's avoidance of service.

Signification réputée valide

9. Si un document a été signifié d'une manière non autorisée par les présentes règles ou une ordonnance du Tribunal, celui-ci peut, sur requête, ordonner que la signification soit réputée valide, s'il est convaincu que le destinataire en a pris connaissance ou qu'il en aurait pris connaissance s'il ne s'était pas soustrait à la signification.

Service

116. (1) The applicant shall, within five days after the application for leave is filed, serve a copy of the application for leave on each person against whom an order is sought and on the Commissioner.

Signification

116. (1) Dans les cinq jours suivant le dépôt de la demande de permission, le demandeur en signifie copie à chacune des personnes à l'égard desquelles une ordonnance pourrait être rendue ainsi qu'au commissaire.

Proof of service

(2) The applicant shall, within five days after the service of the copy of the application for leave, file proof of service.

Preuve de signification

(2) Dans les cinq jours suivant la signification de la copie de la demande de permission, le demandeur dépose la preuve de la signification.

Certification by the Commissioner

117. The certification by the Commissioner under subsection 103.1(3) of the Act shall be made by filing a letter.

Certificat du commissaire

117. Le certificat du commissaire visé au paragraphe 103.1(3) de la Loi est remis par le dépôt d'une lettre.

Notice by the Tribunal

118. The Tribunal shall, within five days after receiving the Commissioner's certification, notify the applicant, the Commissioner and any person against whom an order is sought under section 75 or 77 of the Act as to whether the hearing of the application for leave is precluded by the operation of subsection 103.1(4) of the Act.

Avis du Tribunal

118. Dans les cinq jours suivant la réception du certificat du commissaire, le Tribunal fait parvenir au demandeur, au commissaire et à toute personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75 ou 77 de la Loi un avis indiquant si l'audition de la demande de permission est exclue en raison du paragraphe 103.1(4) de la Loi.

Representations in writing

119. (1) A person served with an application for leave referred to in rule 115 who wishes to oppose the application shall, within 15 days after receiving the Tribunal's notice under rule 118,

(*a*) serve a copy of their representations in writing on the applicant, on any other person against whom the order is sought and on the Commissioner; and

(*b*) file the representations with proof of service.

Observations écrites

119. (1) Dans les quinze jours suivant la réception de l'avis du Tribunal visé à la règle 118, la personne qui reçoit signification de la demande de permission visée à la règle 115 et qui souhaite s'y opposer :

a) d'une part, signifie une copie de ses observations écrites au demandeur, au commissaire et à toute autre personne à l'égard de laquelle une ordonnance pourrait être rendue;

b) d'autre part, dépose ses observations avec la preuve de leur signification.

Content

(2) Representations in writing shall contain a memorandum of fact and law and shall set out the official language the person opposing the application intends to use.

Contenu

(2) Les observations écrites comportent un mémoire des faits et du droit et précisent la langue officielle que la personne qui s'oppose à la demande entend utiliser dans l'instance.

Affidavit evidence

(3) Representations in writing shall not contain affidavit evidence, except with leave of the Tribunal.

(3) Les observations écrites ne comprennent pas de preuve par affidavit, sauf avec la permission du Tribunal.

Preuve par affidavit

Reply

120. 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 and on the Commissioner within seven days after being served with the representations in writing under rule 119 and shall file the reply with proof of service.

120. La personne qui présente la demande de permission en vertu de l'article 103.1 de la Loi peut, dans les sept jours suivant la signification des observations écrites conformément à la règle 119 signifier une réplique au commissaire et à chacune des personnes à l'égard desquelles une ordonnance pourrait être rendue, et la dépose avec la preuve de sa signification.

Réplique

Decision without oral hearing

121. The Tribunal may render its decision on the basis of the written record without a formal oral hearing.

121. Le Tribunal peut rendre sa décision en se fondant sur le dossier sans tenir d'audience formelle.

Décision sans audience

Power of Tribunal

122. The Tribunal may grant the application for leave to make an application, with or without conditions, or refuse the application.

122. Le Tribunal peut accueillir la demande de permission, avec ou sans conditions, ou la rejeter.

Pouvoirs du Tribunal

Service

123. The Registrar shall serve the decision without delay on the applicant, on each person against whom an order is sought and on the Commissioner who may intervene under section 103.2 of the Act.

123. Le registraire signifie sans délai la décision au demandeur, à chacune des personnes à l'égard desquelles une ordonnance pourrait être rendue ainsi qu'au commissaire qui est autorisé à intervenir en vertu de l'article 103.2 de la Loi.

Signification

Leave granted

124. (1) If leave is granted in full, the notice of application that the applicant proposed to file is, for the purposes of the proceedings, deemed to have been filed and served on the date on which the order granting leave was made.

124. (1) Si la permission est accordée dans son ensemble, l'avis de demande que le demandeur avait l'intention de déposer est réputé, en ce qui a trait à l'instance, avoir été déposé et signifié à la date à laquelle la permission a été accordée.

Permission accordée

Leave granted in part

(2) If leave is granted in part, an amended notice, in accordance with the order granting leave, shall be filed and served within five days after the order is made.

(2) Si la permission est accordée en partie, un avis modifié, conforme à l'ordonnance qui accorde la permission, est déposé et signifié dans les cinq jours suivant la date à laquelle est rendue l'ordonnance.

Permission accordée en partie

Registration

125. The filing of a consent agreement by parties to a private action under section 106.1 of the Act shall be made in accordance with rule 106.

125. Le dépôt du consentement par des parties privées en vertu de l'article 106.1 de la Loi se fait conformément à la règle 106.

Enregistrement

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to October 27, 2015

À jour au 27 octobre 2015

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(i) appointment to a public office incompatible with the solicitor's profession,

(ii) suspension or disbarment as a solicitor, or

(iii) an order made under rule 125.

(i) il a été nommé à une charge publique incompatible avec sa profession,

(ii) il a été suspendu ou radié en tant qu'avocat,

(iii) une ordonnance a été rendue en vertu de la règle 125.

SERVICE OF DOCUMENTS

Personal Service

Service of originating documents

127. (1) An originating document that has been issued, other than in an appeal from the Federal Court to the Federal Court of Appeal or an *ex parte* application under rule 327, shall be served personally.

Exception

(2) A party who has already participated in the proceeding need not be personally served.

Service of notice of appeal on the Crown

(3) Despite subsections (1) and (2), in the case of an appeal from Federal Court to the Federal Court of Appeal, if the Crown, the Attorney General of Canada or any other minister of the Crown is a respondent, the notice of appeal shall be served personally on them in accordance with rule 133.

SOR/2004-283, s. 13; SOR/2010-177, s. 1.

Personal service on individual

128. (1) Personal service of a document on an individual, other than an individual under a legal disability, is effected

(*a*) by leaving the document with the individual;

(*b*) by leaving the document with an adult person residing at the individual's place of residence, and mailing a copy of the document to the individual at that address;

SIGNIFICATION DES DOCUMENTS

Signification à personne

Signification de l'acte introductif d'instance

127. (1) L'acte introductif d'instance qui a été délivré est signifié à personne sauf dans le cas de l'appel d'une décision de la Cour fédérale devant la Cour d'appel fédérale et dans le cas d'une demande visée à la règle 327 et présentée *ex parte*.

Exception

(2) Il n'est pas nécessaire de signifier ainsi l'acte introductif d'instance à une partie qui a déjà participé à l'instance.

Signification de l'avis d'appel à la Couronne

(3) Malgré les paragraphes (1) et (2), dans le cadre de l'appel d'une décision de la Cour fédérale devant la Cour d'appel fédérale, lorsque la Couronne, le procureur général du Canada ou tout autre ministre de la Couronne est l'intimé, l'avis d'appel est signifié à personne conformément à la règle 133.

DORS/2004-283, art. 13; DORS/2010-177, art. 1.

Signification à une personne physique

128. (1) La signification à personne d'un document à une personne physique, autre qu'une personne qui n'a pas la capacité d'ester en justice, s'effectue selon l'un des modes suivants :

a) par remise du document à la personne;

b) par remise du document à une personne majeure qui réside au domicile de la personne et par envoi par la poste

(*c*) where the individual is carrying on a business in Canada, other than a partnership, in a name or style other than the individual's own name, by leaving the document with the person apparently having control or management of the business at any place where the business is carried on in Canada;

(*d*) by mailing the document to the individual's last known address, accompanied by an acknowledgement of receipt form in Form 128, if the individual signs and returns the acknowledgement of receipt card or signs a post office receipt;

(*e*) by mailing the document by registered mail to the individual's last known address, if the individual signs a post office receipt; or

(*f*) in any other manner provided by an Act of Parliament applicable to the proceeding.

Effective day of service

(2) Service under paragraph (1)(*b*) is effective on the tenth day after the copy is mailed.

Effective day of service

(3) Service under paragraph (1)(*d*) or (*e*) is effective on the day of receipt indicated on the acknowledgement of receipt form or post office receipt, as the case may be.

Personal service on individual under legal disability

129. Personal service of a document on an individual under a legal disability is effected by serving the individual in such a manner as the Court may order, having regard to the manner in which the interests of the person will be best protected.

Personal service on corporation

130. (1) Subject to subsection (2), personal service of a document on a corporation is effected

d'une copie du document à cette dernière à la même adresse;

c) lorsque la personne exploite une entreprise au Canada, autre qu'une société de personnes, sous un nom autre que son nom personnel, par remise du document à la personne qui semble diriger ou gérer tout établissement de l'entreprise situé au Canada;

d) par envoi par la poste du document à la dernière adresse connue de la personne, accompagnée d'une carte d'accusé de réception selon la formule 128, si la personne signe et retourne la carte d'accusé de réception;

e) par envoi par courrier recommandé du document à la dernière adresse connue de la personne si la personne signe le récépissé du bureau de poste;

f) le mode prévu par la loi fédérale applicable à l'instance.

Prise d'effet

(2) La signification effectuée selon l'alinéa (1)*b*) prend effet le dixième jour suivant la mise à la poste de la copie du document.

Prise d'effet

(3) La signification effectuée selon les alinéas (1)*d*) ou *e*) prend effet le jour indiqué sur l'accusé de réception ou le récépissé du bureau de poste comme étant le jour de la réception.

Signification à une personne qui n'a pas la capacité d'ester en justice

129. La signification à personne d'un document à une personne physique qui n'a pas la capacité d'ester en justice s'effectue selon le mode qu'ordonne la Cour de manière à ce que les intérêts de la personne soient le mieux protégés.

Signification à une personne morale

130. (1) Sous réserve du paragraphe (2), la signification à personne d'un document à une personne morale s'effectue selon l'un des modes suivants :

(*a*) by leaving the document

(i) with an officer or director of the corporation or a person employed by the corporation as legal counsel, or

(ii) with the person apparently in charge, at the time of the service, of the head office or of the branch or agency in Canada where the service is effected;

(*b*) in the manner provided by any Act of Parliament applicable to the proceeding; or

(*c*) in the manner provided for service on a corporation in proceedings before a superior court in the province in which the service is being effected.

a) par remise du document :

(i) à l'un des dirigeants ou administrateurs de la personne morale ou à toute personne employée par celle-ci à titre de conseiller juridique,

(ii) à la personne qui, au moment de la signification, semble être le responsable du siège social ou de la succursale ou agence au Canada où la signification est effectuée;

b) le mode prévu par la loi fédérale applicable à l'instance;

c) le mode prévu par une cour supérieure de la province où elle est effectuée, qui est applicable à la signification de documents aux personnes morales.

Personal service on municipal corporation

(2) Personal service of a document on a municipal corporation is effected by leaving the document with the chief executive officer or legal counsel of the municipality.

Signification à une administration municipale

(2) La signification à personne d'un document à une administration municipale s'effectue par remise du document à son chef de la direction ou à son conseiller juridique.

Personal service on partnership

131. Personal service of a document on a partnership is effected by leaving the document with

(*a*) where the partnership is a limited partnership, a general partner; and

(*b*) in any other case, a partner or the person who has the control or management of the partnership business at its principal place of business in Canada.

Signification à une société de personnes

131. La signification à personne d'un document à une société de personnes s'effectue par remise du document :

a) dans le cas d'une société en commandite, à l'un des commandités;

b) dans tout autre cas, à l'un des associés ou à la personne qui dirige ou gère les affaires de la société de personnes à son établissement principal au Canada.

Personal service on sole proprietorship

131.1 Personal service of a document on a sole proprietorship is effected by leaving the document with

(*a*) the sole proprietor; or

(*b*) the person apparently in charge, at the time of the service, of the place of business of the sole proprietorship in Canada where the service is effected.

SOR/2002-417, s. 14.

Signification à une entreprise à propriétaire unique

131.1 La signification à personne d'un document à une entreprise à propriétaire unique non dotée de la personnalité morale s'effectue par remise du document :

a) soit au propriétaire unique;

b) soit à la personne qui, au moment de la signification, semble être le responsable de l'établissement de l'entreprise

au Canada où la signification est effectuée.

DORS/2002-417, art. 14.

Personal service on unincorporated association

132. Personal service of a document on an unincorporated association is effected by leaving the document with

(*a*) an officer of the association; or

(*b*) the person who has the control or management of the affairs of the association at any office or premises occupied by the association.

Signification à une association sans personnalité morale

132. La signification à personne d'un document à une association sans personnalité morale s'effectue par remise du document :

a) soit à un dirigeant de l'association;

b) soit à la personne qui dirige ou gère les affaires de l'association à tout bureau ou établissement occupé par celle-ci.

Personal service of originating document on the Crown

133. (1) Personal service of an originating document on the Crown, the Attorney General of Canada or any other Minister of the Crown is effected by filing the original and two paper copies of it at the Registry.

Signification d'un acte introductif d'instance à la Couronne

133. (1) La signification à personne d'un acte introductif d'instance à la Couronne, au procureur général du Canada ou à tout autre ministre de la Couronne s'effectue par dépôt au greffe de l'original et de deux copies papier.

Copy to Deputy Attorney General

(2) The Administrator shall forthwith transmit a certified copy of an originating document filed under subsection (1)

(*a*) where it was filed at the principal office of the Registry, to the office of the Deputy Attorney General of Canada in Ottawa; and

(*b*) where it was filed at a local office, to the Director of the regional office of the Department of Justice referred to in subsection 4(2) of the *Crown Liability and Proceedings (Provincial Court) Regulations*.

Transmission d'une copie au sous-procureur général

(2) L'administrateur transmet sans délai une copie certifiée conforme de l'acte introductif d'instance déposé conformément au paragraphe (1) :

a) au bureau du sous-procureur général du Canada à Ottawa, dans le cas où l'acte introductif d'instance a été déposé au bureau principal du greffe;

b) au directeur du bureau régional du ministère de la Justice qui est compétent aux termes du paragraphe 4(2) du *Règlement sur la responsabilité civile de l'État et le contentieux administratif (tribunaux provinciaux)*, dans le cas où l'acte introductif d'instance a été déposé à un bureau local.

When service is effective

(3) Service under subsection (1) is effective at the time the document is filed.

SOR/2015-21, s. 14.

Prise d'effet de la signification

(3) La signification faite conformément au paragraphe (1) prend effet à l'heure du dépôt du document.

DORS/2015-21, art. 14.

Acceptance of service by solicitor

134. Personal service of a document on a party may be effected by the acceptance of service by the party's solicitor.

Deemed personal service on a person outside Canada

135. Where a person

(*a*) is resident outside Canada and, in the ordinary course of business, enters into contracts or business transactions in Canada in connection with which the person regularly makes use of the services of a person resident in Canada, and

(*b*) made use of such services in connection with a contract or business transaction,

in a proceeding arising out of the contract or transaction, personal service of a document on the person resident outside Canada is effected by personally serving the person resident in Canada.

Substituted service or dispensing with service

136. (1) Where service of a document that is required to be served personally cannot practicably be effected, the Court may order substitutional service or dispense with service.

Motion may be made *ex parte*

(2) A motion for an order under subsection (1) may be made *ex parte*.

Order to be served

(3) A document served by substitutional service shall make reference to the order that authorized the substitutional service.

Service outside Canada

Service outside Canada

137. (1) Subject to subsection (2), a document to be personally served outside Canada may be served in the manner set out in rules 127 to 136 or in the manner prescribed by the law of the jurisdiction in which service is to be effected.

Acceptation de la signification par l'avocat

134. La signification à personne d'un document à une partie peut être effectuée auprès de son avocat si celui-ci en accepte la signification.

Signification présumée

135. Dans une instance découlant d'un contrat ou d'une opération commerciale, la signification à personne d'un document à une personne résidant au Canada vaut signification à la personne résidant à l'étranger si cette dernière, à la fois :

a) dans le cours normal des affaires, conclut des contrats au Canada ou effectue des opérations commerciales au Canada dans le cadre desquelles elle utilise régulièrement les services de la personne résidant au Canada;

b) a utilisé les services de la personne résidant au Canada relativement à ce contrat ou à cette opération commerciale.

Ordonnance de signification substitutive

136. (1) Si la signification à personne d'un document est en pratique impossible, la Cour peut rendre une ordonnance autorisant la signification substitutive ou dispensant de la signification.

Requête *ex parte*

(2) L'ordonnance visée au paragraphe (1) peut être demandée par voie de requête *ex parte*.

Signification de l'ordonnance

(3) Un document signifié selon un mode substitutif fait mention de l'ordonnance autorisant ce mode de signification.

Signification à l'étranger

Signification à l'étranger

137. (1) Sous réserve du paragraphe (2), le document devant être signifié à personne à l'étranger peut l'être soit de la manière prévue aux règles 127 à 136, soit de la manière prévue par les règles de droit en vigueur dans les limites territoriales où s'effectue la signification.

Hague Convention

(2) Where service is to be effected in a contracting state to the Hague Convention, service shall be as provided by the Convention.

Convention de La Haye

(2) La signification dans un État signataire de la Convention de La Haye s'effectue de la manière prévue par celle-ci.

Proof of service

(3) Service of documents outside Canada may be proven

(*a*) in the manner set out in rule 146;

(*b*) in the manner provided by the law of the jurisdiction in which service was effected; or

(*c*) in accordance with the Hague Convention, if service is effected in a contracting state.

Preuve de signification

(3) La preuve de la signification de documents à l'étranger peut être établie :

a) de la manière prévue à la règle 146;

b) de la manière prévue par les règles de droit en vigueur dans les limites territoriales où la signification a été effectuée;

c) conformément à la Convention de La Haye, dans le cas où la signification a été effectuée dans un État signataire.

Other Forms of Service

Autres modes de signification

Personal service of originating documents

138. Unless otherwise provided in these Rules, personal service is required only for originating documents.

SOR/2015-21, s. 15.

Signification à personne — acte introductif d'instance

138. Sauf disposition contraire des présentes règles, seul l'acte introductif d'instance est signifié à personne.

DORS/2015-21, art. 15.

Manner of service — other documents

139. (1) If a document is not required to be served personally, service on a party is to be effected by

(*a*) personal service;

(*b*) leaving it at the party's address for service;

(*c*) mailing it or delivering it by courier to the party's address for service;

(*d*) transmitting it by fax to the party's solicitor of record, or, if the party has no solicitor of record, to the party;

(*e*) transmitting it to the electronic address set out by the party in Form 141A; or

(*f*) any other means that the Court may direct.

Modes de signification — autres documents

139. (1) La signification à une partie d'un document dont la signification à personne n'est pas obligatoire s'effectue par l'un des modes suivants :

a) signification à personne;

b) livraison du document à son adresse aux fins de signification;

c) envoi du document par la poste ou par service de messagerie à son adresse aux fins de signification;

d) transmission du document par télécopieur à l'avocat inscrit au dossier de la partie ou, si celle-ci n'est pas représentée, à la partie;

e) transmission du document à l'adresse électronique indiquée par la partie sur la formule 141A;

f) tout autre mode que la Cour ordonne.

Competition Tribunal | Tribunal de la Concurrence

Reference: *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4
File no.: CT2003009
Registry document no.: 0005a

IN THE MATTER OF an application by Allan Morgan and Sons Ltd., 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.

B E T W E E N:

Allan Morgan and Sons Ltd.
(applicant)

and

La-Z-Boy Canada Ltd.
(respondent)

Decided on the basis of the written record.
Member: Lemieux J. (presiding)
Date of reasons and order: 20040205
Reasons and order signed by: Lemieux J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

I. THE APPLICATION FOR LEAVE

[1] Allan Morgan and Sons Ltd. ("Morgan's Furniture") 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, as amended, (the "Act"), for leave to make an application under section 75 of that Act.

[2] Morgan's Furniture is a family business established in 1957. It is a furniture retail store serving primarily the area of Conception Bay North to St. John's, Newfoundland, as well as throughout the Avalon Peninsula. It deals with moderate to high end furniture.

[3] Morgan's Furniture alleges La-Z-Boy Canada Limited ("La-Z-Boy"), a Canadian furniture manufacturer of various types of upholstered and leather furniture including occasional chairs, stationary sofas and love seats, motion furniture, recliners, sofa beds and high leg chairs (the "products"), is refusing to supply it with its products contrary to the provisions of section 75 of the Act. It seeks an order from the Tribunal that La-Z-Boy accept forthwith Morgan's Furniture as a customer and dealer of its products on the usual trade terms.

[4] Morgan's Furniture states in the 1970s it secured the dealership for La-Z-Boy products and over the course of 25 years developed a significant market for La-Z-Boy products, notably, its recliners. It says that on August 27, 2002, La-Z-Boy notified Morgan's Furniture that their relationship would be terminated effective December 31, 2002.

[5] Morgan's Furniture acknowledges over the period 1998 to 2001 inclusive, its sales of La-Z-Boy products had been declining but denies this decline was as a result of inadequate representation of La-Z-Boy's products or the failure to promote them. It says the declining sales were a direct result of La-Z-Boy's restrictions placed on Morgan's Furniture to obtain product and these restrictions were implemented to the exclusivity of a newly established retail furniture store competitor in St. John's.

[6] The restrictions in place since 1997 included (1) difficulties in obtaining product information directly from La-Z-Boy or from its Atlantic Canada sales representative; (2) restrictions on access to products; and (3) restrictions on advertising and promotional campaigns.

[7] Morgan's Furniture adds the sales figures for 2002 are misleading because they represent only the first eight months of that year. For that year, it states it ordered approximately 100 pieces from La-Z-Boy, a figure comparable to the other years mentioned.

II. LA-Z-BOY'S POSITION

[8] La-Z-Boy opposes the Tribunal granting leave in this matter. It states that La-Z-Boy justifiably terminated the right of Morgan's Furniture to act as its representative and the termination has not had an adverse effect on competition in the furniture market and there continues to be adequate supplies of comparable products to that which La-Z-Boy and other furniture manufacturers with whom it competes, sell to the public.

[9] La-Z-Boy states in 1997 it implemented a series of changes in its policy by which it determined what products would be supplied to retailers it permitted to sell its products. This policy was put in place to improve service to its customers.

[10] La-Z-Boy's position is that it terminated its relationship with Morgan's Furniture because it felt Morgan's Furniture's low volume indicated it had inadequately represented La-Z-Boy products and had failed to promote them.

III. ANALYSIS

[11] This is the third application for leave brought to the Tribunal under the recent amendments to the Act providing for what has been termed "a private access action" because the proceeding is initiated by private interests rather than the Commissioner of Competition.

[12] The first application for leave was decided by Justice Dawson in *National Capital News v. Milliken*, 2002 Comp. Trib. 41 ("National Capital News") and the other I decided in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1 ("Barcode").

[13] 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)

[14] In Barcode I wrote, commencing at paragraph 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.
>
> 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.
>
> 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.

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.

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.

[15] In an affidavit filed in support of the application for leave, Perry Morgan, Vice-President of Morgan's Furniture, details the efforts made to obtain replacement brands without success. He states Morgan's Furniture has for some years carried another brand alongside La-Z-Boy products. He provides evidence of sales, in particular recliners, showing the other brand is a weak sales performer which he attributes to the fact the products of the other brand are not equivalent to La-Z-Boy's products as to quality, styles and fabrics.

[16] As a result, he attests, Morgan's Furniture is losing customers.

[17] Perry Morgan's affidavit contains four tables. Table B, at tab 49, sets out for the period 1998 to 2002 inclusive (the "period"), Morgan's Furniture's sales by category comparing sales of recliners with other lines such as wood, sofas, beds, lamps, clocks and appliances.

[18] Table C to his affidavit, at tab 50, for the same period and categories, provides figures in gross profits earned while Table D, at tab 51, calculates the percentage of gross profits earned by category of products sold by Morgan's Furniture.

[19] Finally, Table E to that affidavit, at tab 52, compares profit figures for the period generated by all the products sold with the La-Z-Boy products and estimates the profit loss due to La-Z-Boy restrictions.

[20] The impact of the financial data for 2003 would be magnified because as La-Z-Boy admits it is no longer supplying Morgan's Furniture.

[21] The data provided by Morgan's Furniture is sufficient to convince me the applicant may have been directly and substantially affected by the actions of La-Z-Boy. Morgan's Furniture, at the leave stage, is not required to meet any higher standard of proof threshold.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[22] This application for leave is granted.

[23] 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.

DATED at Ottawa, this 5th day of February, 2004.

SIGNED on behalf of the Tribunal by the judicial member.

(s) François Lemieux

COUNSEL

For the applicant:

Allan Morgan and Sons Ltd.

Deborah L.J. Hutchings

For the respondent:

La-Z-Boy Canada Ltd.

Myron W. Shulgan, Q.C.

Competition Tribunal Tribunal de la Concurrence

Reference: *Audatex Canada, ULC v. CarProof Corporation,* 2015 Comp. Trib. 13
File No.: CT-2015-010
Registry Document No.: 0027

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

AND IN THE MATTER OF an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make an application under section 75 of the *Competition Act*.

B E T W E E N:

Audatex Canada, ULC

(applicant)

and

CarProof Corporation, Trader Corporation, and eBay Canada Limited

(respondents)

Decided on the basis of the written record.
Before Judicial Member: Gascon J. (Chairperson)
Date of Reasons for Order and Order: October 29, 2015

REASONS FOR ORDER AND ORDER REGARDING REQUESTS FOR LEAVE TO FILE AFFIDAVIT EVIDENCE IN RESPONSE TO AN APPLICATION FOR LEAVE

I. OVERVIEW

[1] On October 20, 2015, CarProof Corporation ("CarProof") made a request for leave to file affidavit evidence as part of its response to the application for leave filed in the present matter by Audatex Canada, ULC ("Audatex") on October 1, 2015. Audatex seeks leave to bring a refusal to deal application under section 75 of the *Competition Act*, RSC 1985, c. C-34 (the "Act") against CarProof and the other respondents.

[2] On October 23, 2015, Audatex filed a letter opposing CarProof's request. CarProof replied by letter dated October 26, 2015.

[3] On October 26, 2015, Marktplaats B.V. ("Marktplaats"), as owner of the confidential and proprietary "eBay" data that Audatex is seeking to access, made a similar request for leave to file affidavit evidence as part of its response to Audatex' application for leave. On October 28, 2015, Audatex filed a letter responding to Marktplaats' request and opposing it in part. The Tribunal observes that Marktplaats is not yet a respondent in these proceedings but that its counsel has asked counsel for Audatex to amend his materials so as to substitute Marktplaats for eBay Canada Limited.

[4] In their respective letters, CarProof and Marktplaats argue that Rule 119(3) of the *Competition Tribunal Rules*, SOR/2008-141 (the "Rules") provides the Tribunal with the discretion to allow a respondent to file affidavit evidence as part of its written representations made in response to an application for leave under section 103.1 of the Act.

[5] CarProof contends that, when determining to grant leave to file affidavit evidence under Rule 119(3), the Tribunal should consider whether (i) the filing of the proposed affidavit evidence would cause substantial or serious prejudice to the applicant; (ii) the filing of the proposed affidavit evidence would assist the Tribunal in making its final determination; and (iii) the filing of the proposed affidavit evidence would serve the interests of justice. CarProof claims that the affidavit evidence it seeks to adduce would allow the Tribunal to receive evidence regarding numerous issues relevant to the Tribunal's decision on Audatex' application for leave and to have a full evidentiary record.

[6] Marktplaats, for its part, affirms that the affidavit evidence it seeks to file would provide evidence on whether the license sought by Audatex from Marktplaats is in ample supply and on the usual trade terms for such a license.

[7] For the reasons that follow, the Tribunal concludes that CarProof's and Marktplaats' requests should be granted on the conditions set out herein.

II. ANALYSIS

[8] 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.

[9] 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. Milliken*, 2002 Comp. Trib. 41, at para 14. It was subsequently adopted by the Federal Court of Appeal in *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339 ("*Barcode*"), and has been followed since then by the Tribunal in section 103.1 matters. Pursuant to this test, the Tribunal must determine whether the application for leave 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 its business by the refusal to deal, and that the practice in question could be subject to an order.

[10] Since the Tribunal must only be convinced that the reviewable conduct "could" be subject to an order, what is being considered in an application for leave need not be supported by a full evidentiary record. As Madam Justice Simpson said in *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10, at para 32:

> 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.

[11] In *Barcode*, the Federal Court of Appeal further noted that, when determining whether to grant leave, the Tribunal's role is a screening function based on the sufficiency of evidence advanced and that leave applications are to be dealt with summarily (*Barcode* at para 24).

[12] In other words, pursuant to the language and intent of section 103.1 of the Act, decisions on applications for leave are not meant to be final determinations made on the basis of a full evidentiary record.

[13] In that context, Part 8 of the Rules details the procedure to be followed on applications for leave under section 103.1. Rule 115 provides that an application for leave shall include an affidavit setting out the facts in support of the proposed application, a proposed notice of application and a memorandum of fact and law. Rule 119 authorizes the respondents to file

representations in writing. Rule 119(3) expressly states that such "[r]epresentations in writing shall not contain affidavit evidence, except with leave of the Tribunal". The rule is therefore that respondents are only allowed to file written representations without affidavit evidence. The filing of affidavit evidence is the exception, subject to the discretion of the Tribunal.

[14] Rule 119(3) was included in the Rules as part of the latest round of amendments to the Rules made as of May 14, 2008. Before these May 2008 amendments, the Rules were silent on whether responding parties in applications for leave were permitted to file evidence in support of their written representations. However, the practice had been that, in many instances, respondents had in fact filed affidavit evidence as part of their responding materials to applications for leave under section 103.1. The Tribunal observes that, in those cases, the filing of affidavit evidence was done without seeking leave from the Tribunal and that the applicants did not object to the filing of the respondents' evidence. The Tribunal had not issued an order or direction granting the respondent permission to file evidence along with their written representations.

[15] Since the new rules came into force in May 2008, the Tribunal has dealt with affidavit evidence from respondents in two applications for leave. In *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Canada et al*. (CT-2008-008), cited by CarProof in its letters, the respondent's affidavit evidence was filed on consent. In *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority* (CT-2011-001), the Tribunal issued a direction refusing to grant the respondent leave to file affidavit evidence. In both cases, no reasons were issued. There is therefore no precedent from the Tribunal on the interpretation of Rule 119(3) and the situations where leave to file affidavit evidence could be granted.

[16] Considering the new language of Rule 119(3) and the summary process contemplated by section 103.1 of the Act, the Tribunal is of the view that, on applications for leave, it is now the burden of the respondent to demonstrate the existence of specific facts and circumstances justifying the filing of affidavit evidence, bearing in mind that an application for leave is a screening process meant to be decided expeditiously and not on the basis of a full evidentiary record.

[17] In a refusal to deal leave application, this specific evidence needs to focus on the issues to be determined by the Tribunal, namely whether sufficient credible evidence exists to give rise to a *bona fide* belief that the applicant is directly and substantially affected in its business by an alleged conduct that could be the subject of an order under section 75. Such specific evidence could include affidavit evidence adduced to demonstrate that an applicant is not willing and able to meet the usual trade terms of the supplier, that the supplier does not sell the product sought to be supplied, that other sources of supply are available or that regulatory, contractual or legislative limits would not allow a product to be in ample supply. This list is not exhaustive and may vary with the circumstances. But the party seeking leave to file affidavit evidence needs to set out, in as much detail as possible, the discrete facts and specific evidence that it wishes to include in the proposed affidavit. It also needs to indicate how the evidence intended to be filed is necessary to its written representations and would be of assistance to the Tribunal in its screening function.

[18] In its October 20 letter, CarProof claims that it should be granted permission to file affidavit evidence as Audatex "has failed to provide the full evidentiary record required by the Tribunal" to properly consider whether leave should be granted. This cannot be the test at the leave application stage as the Act does not contemplate that the Tribunal requires such a full evidentiary record in order to make its determination under section 103.1.

[19] The Tribunal must also take into account the interests of justice which, in a case like this, will include an expedited resolution of the application for leave. The filing of affidavit evidence simply aiming to provide a full evidentiary record could reasonably be expected to result in lengthening the leave application process, to the detriment of the applicant. Leave applications are intended to be summary processes and to be dealt with on a burden of proof that is lower than the ordinary civil burden of balance of probabilities. To allow wide-ranging affidavit evidence would not be in the interests of justice.

[20] In the present case, the Tribunal notes that, in its October 20 and 26 letters, CarProof refers to its intent to provide affidavit evidence on specific issues described as follows: "the numerous alternative sources of data that are currently available within the industry; other steps that [Audatex] could have taken and can take to remain as an effective competitor; the proprietary and confidential nature of the data that it seeks to license; […] the terms on which CarProof has made the data in question available both to [Audatex] and to other parties in the market"; "the course of dealing between the parties and the current status of the extensive and ongoing negotiations between [Audatex] and CarProof"; and the fact that "[Audatex] is not willing to meet the relevant terms of trade". CarProof specifically states in its October 26 letter that the evidence it is requesting to adduce is "limited to "discrete" issues and is not part of an effort to "adduce wide-ranging evidence"."

[21] Marktplaats, for its part, indicates that its affidavit evidence would relate to the "confidential and proprietary nature of the data Audatex is seeking to license from Marktplaats, including but not limited to the data licensing agreement between CarProof and Marktplaats".

[22] The Tribunal is of the view that, in many respects, these requests deal with narrowly identified issues which the Tribunal considers to be different from the more fulsome type of evidence that the Act clearly intended not to be filed and considered at the leave application stage. This is the case for Marktplaats' requests. In the Tribunal's opinion, the confidential and proprietary nature of Marktplaats' data and the specific data licensing agreement with CarProof both constitute discrete facts meeting the exception contemplated by Rule 119(3) and relevant to the screening function to be exercised by the Tribunal in section 103.1 applications for leave.

[23] Turning to CarProof, the Tribunal similarly considers that its request regarding alternative sources of data available to Audatex, the proprietary and confidential nature of the sought data, CarProof's terms of sale and Audatex' alleged unwillingness to meet the relevant terms of trade also fall in the category of specific evidence for which leave to file affidavit evidence should be granted. However, this is not the case for CarProof's history of dealings with Audatex or for the other steps that Audatex could have taken to remain an effective competitor. CarProof has failed to convince the Tribunal that evidence on these two issues constitute discrete facts and specific evidence which should be allowed to be filed by respondents at the leave

application stage. Such evidence is more in the nature of wide-ranging evidence that the Tribunal is not expected to consider in section 103.1 applications.

[24] The Tribunal further finds that CarProof and Marktplaats have provided sufficient detail on the specific evidence they wish to include in the proposed affidavits and on the reasons why such evidence is necessary to their written representations and would be of assistance to the Tribunal in the context of Audatex' section 103.1 application.

[25] Further to its review of the contents of the letters filed by CarProof and Marktplaats, the Tribunal is therefore satisfied that, in the circumstances of this case and for the discrete issues identified above, the affidavit evidence intended to be filed by CarProof and Marktplaats meets the exception contemplated by Rule 119(3) and the specificity called for by the screening function to be exercised by the Tribunal in section 103.1 applications for leave. The Tribunal is thus of the view that CarProof and Marktplaats should be allowed to file affidavit evidence, along the lines set out above, with their written representations in response to Audatex' application for leave.

[26] The Tribunal pauses to note that it is mindful of Audatex' claims that any delays in the treatment of its application for leave is prejudicial to it. The continuous commitment of the Tribunal to expeditious proceedings will serve to ensure that Audatex' application will be dealt with as rapidly as possible.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[27] Leave is herewith granted to CarProof and Marktplaats to file affidavit evidence as part of their representations in writing in response to Audatex' application for leave.

[28] With respect to Carproof, such affidavit evidence shall deal with the following specific issues identified by CarProof in its October 20 and 26 letters: 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.

[29] With respect to Marktplaats, such affidavit evidence shall deal with the following specific issues identified by Marktplaats in its October 26 letter: the confidential and proprietary nature of the data Audatex is seeking to license from Marktplaats; and the data licensing agreement between CarProof and Marktplaats.

[30] As neither CarProof nor Marktplaats is seeking costs for their requests, no order as to costs is made.

DATED at Ottawa, this 29th day of October, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL

For the applicant:

Audatex Canada, ULC

Donald B. Houston
Julie K. Parla
Jonathan Bitran

For the respondents:

CarProof Corporation

Adam Fanaki

Trader Corporation

Michael Koch

eBay Canada Limited

Davit Akman

Competition Tribunal | Tribunal de la Concurrence

Reference: *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1
File no.: CT2003008
Registry document no.: 0011

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.

B E T W E E N:

Barcode Systems Inc.
(applicant)

and

Symbol Technologies Canada ULC
(respondent)

Decided on the basis of the written record.
Member: Lemieux J. (presiding)
Date of reasons and order: 20040115
Reasons and order signed by: Lemieux J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

[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 Comp. Trib. 41 ("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.

DATED at Ottawa, this 15th day of January, 2004.

SIGNED on behalf of the Tribunal by the judicial member.

(s) François Lemieux

REPRESENTATIVES

For the applicant:

Barcode Systems Inc.

David P. Church

For the respondent:

Symbol Technologies Canada ULC

Colin MacArthur, Q.C.

Competition Tribunal Tribunal de la Concurrence

Reference: *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38
File No.: CT-2005-006
Registry Document No.: 0041

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

AND 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 103.1 for leave to make an application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an interim order pursuant to section 104 of the *Competition Act*.

B E T W E E N :

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)

Decided on the written record.
Judicial Member: Simpson J. (Chairperson) sitting alone.
Date of Reasons: November 14, 2005
Reasons signed by: Madam Justice Sandra J. Simpson

REASONS FOR PREVIOUS ORDER DATED NOVEMBER 4, 2005, GRANTING LEAVE TO APPLY ONLY UNDER SECTION 75 OF THE *COMPETITION ACT*

THE INTRODUCTION

[1] B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. (the "Applicants") have applied to the Competition Tribunal (the "Tribunal") pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for leave to make an application under sections 75 and 77 of the Act (the "Leave" or the "Application"). The Applicants seek an order under section 75 directing the Bank of Nova Scotia (the "BNS") to accept the Applicants as customers on usual trade terms, and an order under section 77 prohibiting the BNS from engaging in exclusive dealing.

[2] The Applicants' business involves offering purchasers who hold bank debit cards (the "Purchasers") the ability to use those cards to pay participating vendors (the "Merchants") for the purchase of goods and services over the internet (the "Applicants' Business" or "GPAY"). The Applicants started their business in 1999, but it “took off” in the spring of 2004 and now has approximately 20,000 customers, generates fees of $100,000 per month, and sees enormous potential for further growth. The Applicants' Business is new and unregulated. When it began, no other entity in Canada (including the Chartered Banks) offered a service which allowed debit card holders to pay for their online purchases with their debit cards.

[3] The Applicants began as small business customers of the BNS at its branch in Sherwood Park (the "Branch") near Edmonton, Alberta. As the Applicants' Business grew, it opened numerous accounts at the Branch. In May 2005, the BNS sent a notice terminating the accounts.

THE PROCEDURAL HISTORY

[4] This application has developed as follows:

- Notice of Application, filed on June 20, 2005
- Statement of Grounds and Material Facts filed on June 20, 2005
  - 1st Affidavit of Mr. Raymond Grace, affirmed on June 15, 2005 (the "1st Grace Affidavit")
- Certificate from the Commissioner of Competition dated June 23, 2005 indicating that the matter is not under inquiry and was not the subject of an inquiry which was discontinued because of a settlement
- Representations on behalf of the BNS in Response, filed on July 13, 2005
  - 1st Affidavit of Mr. Robert Rosatelli, sworn on July 12, 2005 (the "1st Rosatelli Affidavit")
  - Affidavit of Mr. David Metcalfe, sworn on July 12, 2005 (the "Metcalfe Affidavit")
- Applicants’ Reply Submissions, filed on September 6, 2005
  - 2nd Affidavit of Mr. Raymond Grace, affirmed on September 1, 2005 (the "2nd Grace Affidavit")

    - Affidavit of Mr. Joseph Iuso, affirmed on August 29, 2005 (the "Iuso Affidavit")
- Responding Affidavit from the BNS, filed with leave of the Tribunal
    - 2nd Affidavit of Mr. Robert Rosatelli, sworn on September 21, 2005 (the "2nd Rosatelli Affidavit")
- Motion by the BNS for Summary Disposition filed on September 30, 2005 and dismissed by Order of the Tribunal dated October 14, 2005
- Order of the Tribunal dated November 4, 2005 granting Leave under section 75 of the Act

THE FACTS

[5] The Applicants are corporations incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Each Applicant is registered extra-provincially in the Province of Alberta and each carries on business in the City of Sherwood Park in Alberta. Mr. Raymond Grace ("Mr. Grace") is the President of all the Applicants. Mr. Grace is the person who dealt with the Branch and opened the Applicants' BNS accounts.

[6] The Respondent, the BNS, is a chartered bank incorporated pursuant to the *Bank Act*, S.C. 1991, c. 46. It carries on business throughout Canada.

[7] In the spring of 2005, the Applicants' Business was operated using bank accounts at the BNS and at the Royal Bank of Canada (the "RBC").

[8] The Applicants' Business uses three services offered by the BNS: (i) E-mail Money Transfers ("EMTs"), (ii) internet banking, which includes bill payee services and (iii) bank accounts (collectively, the "Banking Services"). These services are used to complete the payment, clearing and settlement procedures which allow money to be transferred from the Purchasers to the Merchants.

[9] When Mr. Grace first opened an account for B-Filer Inc. at the Branch in August 1999, the Applicants' Business was the processing of payments through telephone and internet banking. Mr. Grace later opened the NPAY and GPAY accounts. Sometime in early 2004, the Applicants' Business started to expand rapidly because of a relationship it had developed with UseMyBank Services ("UMB").

[10] Mr. Joseph Iuso is the President of UMB and Mr. Grace is its Chief Financial Officer. UMB and GPAY entered into a joint venture agreement in November 2002. It appears from the evidence now before the Tribunal that, as a result of that agreement, Purchasers can pay for a Merchant's goods and services by appointing GPAY as their agent. GPAY can then access Purchasers' bank accounts and effect payment either by direct debit of the funds from their bank accounts to GPAY as bill payee or by EMT of the funds from their bank accounts to GPAY's bank account.

[11] Between the spring of 2004 and the spring of 2005, the Applicants opened over one hundred accounts at the Branch. Mr. Grace says that it was necessary to have a large number of accounts because of the limited number of transactions which could be made each month in each account. The amount of money deposited by the Applicants in their accounts at the BNS between June 1, 2004, and May 31, 2005, was approximately 10 million dollars.

[12] In a letter dated May 11, 2005, the BNS advised the Applicants that, pursuant to the Financial Agreement which customers sign on opening an account, it was giving the Applicants thirty days notice of the termination of their Banking Services, without cause (the "Termination").

[13] In the same month (May 2005), the Interac network announced that it would soon start providing bank customers with a new payment option whereby they could pay for purchases online with their debit cards ("Interac Online"). The Applicants submit that Interac Online is similar to GPAY. However, the BNS says that the businesses are entirely different for the reasons described below.

[14] Every time a Purchaser wishes to make a purchase from a Merchant, it contacts UMB online. When that contact is made, UMB's terms and conditions for the transaction make UMB and GPAY the Purchaser's agents. In the online session with UMB, the Purchaser provides his debit card number and online banking password (the "Confidential Data"). Thereafter, those Data are used to access the Purchaser's bank account and withdraw the amount required to pay for the purchase. The money is then transferred from the Purchaser's bank account to a GPAY account, either by EMT (if the Purchaser's bank account is not with the BNS) or by having GPAY listed as a bill payee (if the Purchaser's bank account is with the BNS). Immediately after the funds are transferred, GPAY advises the Merchant that the funds are available and payment is made.

[15] The evidence about how Interac Online will work is not comprehensive. However, it appears that it may differ from GPAY in the following respects:

- it will operate in real time whereas GPAY involves rapid successive transactions
- it may not involve the appointment of an agent (it is not clear if Interac will be an agent for its members)
- it may not involve disclosure of confidential information outside financial institutions' computers (it is not clear if disclosure to Interac will be outside financial institutions' computers)
- it will not make payments to offshore online casinos

These features will collectively be described as the "Differences".

THE PRELIMINARY ISSUES

A. THE PRODUCT

[16] For the purposes of this Application, the "product" is the Banking Services defined above, i.e. EMTs, internet bank transfers (bill payee service) and bank accounts. These are interrelated services that are all needed for the Applicants' Business, since the Applicants must have a means to obtain payment from the Purchaser (through EMTs or bill payee services) and a location (bank accounts) to make a deposit before paying the Merchant.

[17] Dealing first with EMTs, the Applicants allege that the BNS and the RBC are the only two banks which offer EMTs into business accounts without a charge per deposit in situations in which the recipient is not a bank. This evidence was not contradicted by the BNS. The Applicants further allege that the RBC has refused to increase the volume it processes in the accounts. This suggests that there may be no equivalent substitute suppliers for the BNS' EMT deposit services. The other EMT option for the Applicants would be to use a service called CertaPay, at much greater expense to the Applicants.

[18] The BNS states that the Applicants can carry on their business without EMT, by joining Interac. In response, the Applicants submit that joining Interac is not a viable option at this time because connection services to Interac are not offered online. Today connection services are only available through an Automatic Teller Machine ("ATM") or a point-of-sale (“POS”) connector. Neither of these facilities is compatible with the Applicants' services. Further, it appears that it is not possible to establish an indirect connection to Interac through an existing Interac member.

[19] Internet bank transfers (also described as bill payee services) require payees to be listed with financial institutions. The Applicants' evidence shows that, until late 2003, GPAY was listed as a bill payee by six banks: Toronto-Dominion ("TD"), Canadian Imperial Bank of Commerce ("CIBC"), Alberta Treasury Board ("ATB"), Bank of Montreal ("BMO"), RBC and BNS. However, the first three banks terminated the Applicants as bill payees in late 2003 and they have now lost their privileges at the BNS. This constrains the Applicants' ability to do business, and has increased their dependence on EMTs as a means of facilitating debit card payments on the internet.

B. THE MARKET

[20] For present purposes, the parties appear to agree that online debit payment is the market. As noted above, until very recently, the Applicants were the only ones to offer this service, but in May 2005, the Interac Association announced that Interac Online would soon be a reality. Although the BNS submits that Interac Online is completely different from the Applicants’ Business, the Tribunal has concluded that

the Differences are not sufficient to support a finding that they do not operate in the same market.

[21] The evidence shows that, at the present, there is no supplier in the market other than the Applicants' Business and that Interac Online will soon enter the market.

C. THE AGENCY RELATIONSHIP

[22] The Applicants submit that they function as Purchasers' agents. The Tribunal accepts that GPAY could be characterized as the agent of the Purchaser because of the terms and conditions under which the Purchaser appoints GPAY as agent for each purchase. The terms and conditions, which appear when the Purchaser uses UseMyBank and GPAY, include the following:

> Online accounts access is provided by you from the Transaction Providers [banks offering online banking services]. By providing Login Information, you authorize UseMyBank and its facilitation service [GPAY] to act as your agent to access, retrieve your Account Information, and make bill payments or email transfer from the web sites of your Transaction Provider on your behalf. You hereby grant UseMyBank and its facilitation service a limited power of attorney, and you hereby appoint UseMyBank and its facilitation service as your true and lawful attorney-in-fact and agent (…). YOU ACKNOWLEDGE AND AGREE THAT WHEN USEMYBANK AND ITS FACILITATION SERVICE ACCESSES AND RETRIEVES INFORMATION FROM THE TRANSACTION PROVIDER, USEMYBANK AND ITS FACILITATION SERVICE ARE ACTING AS YOUR AGENT, AND NOT THE AGENT OR ON BEHALF OF SUCH TRANSACTION PROVIDER.

[23] The Purchaser, by using the services of the Applicants, gives GPAY the authorization to access his account for the purpose of having GPAY withdraw the funds from the Purchaser's account and deposit these funds in a GPAY account. This is done with the understanding that such funds will be credited to the Merchant's account.

THE DISCRETION TO REFUSE LEAVE

[24] In this case, the Tribunal has been asked to exercise its discretion to refuse Leave under subsection 103.1(7) of the Act. The BNS is saying that, even if the requirements of subsection 103.1(7) are met, Leave should be denied.

[25] The BNS bases its submission on the following allegations:

(i) The Applicants' Business involves the disclosure of customers' Confidential Data and jeopardizes the integrity of the Canadian banking system.

(ii) The Applicants' Business could be used to launder money to finance terrorist and other illegal activities.

(iii) The Applicants' Business is being used to facilitate Purchasers' payments for criminal conduct in the form of offshore internet casino gambling.

(iv) Providing Banking Services to the Applicants would place the BNS in breach of Rule E2 of the Rules of the Canadian Payments Association (the "CPA").

(v) The Applicants misrepresented the true nature of their business to the BNS and failed to disclose material information to the Tribunal.

(vi) The BNS, as a matter of policy, does not carry on business with money services businesses such as the Applicants' and the BNS has a contractual right to close the Applicants' accounts and terminate Banking Services.

[26] I will discuss each allegation in turn but before doing so, some comments should be made about the context in which these allegations are presented.

[27] First, as described above, the BNS is about to become the Applicants' competitor as a member of Interac Online. Second, the Applicants' Business grew dramatically in the period from spring 2004 to spring 2005, and the BNS accommodated the Applicants' expanding requirements for internet banking by providing an unusually large number of bank accounts. Third, there is no allegation that the Applicants have engaged in fraudulent conduct or money laundering.

(i) The Disclosure of Confidential Data

[28] There is no issue that, if they choose to use the Applicants' Business, Purchasers must provide their Confidential Data to the Applicants. The BNS says that when its customers provide their Confidential Data to the Applicants, the customers "breach" the BNS cardholder agreement. However, a review of that agreement shows that it expressly contemplates that customers may share their Confidential Data on a confidential basis in a secure environment. In this regard, the agreement states:

> Limitation for Authorized & Unauthorized Use of the Card
> 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.

[29] There is a debate in the evidence about whether a Purchaser's Confidential Data is encrypted at every stage during the time it is in the Applicants' computer and there is debate about whether and how it is stored. As well, there is a debate about the relative efficacy of the parties' fraud detection systems. These are not issues which can be finally resolved at this early stage in the proceedings. I am, however, satisfied that the Applicants' Business makes a sophisticated effort to protect the Purchasers' Confidential Data. It has not been demonstrated that the Applicants' computer and internet security does not create a secure environment and, accordingly, lack of security is not a reason to refuse Leave.

[30] There is evidence that fraud has occurred in connection with the Applicants' Business. The parties agree that there have been twenty fraudulent transfers of funds

totalling $7,000.00. This is a small amount given the scale of the Applicants' Business. As well, there is no evidence of the Applicants' involvement in any fraud and they have reimbursed all the fraud victims. In these circumstances, the evidence of fraud is not of sufficient consequence to justify refusing Leave.

[31] The BNS says that funds in Purchasers' accounts and related credit facilities are at risk of theft by computer hackers because of the disclosure of Purchasers' Confidential Data to the Applicants. Computer hackers are a fact of life. Purchasers who are making internet purchases of goods and services can reasonably be expected to understand the risk. The BNS acknowledges that even services related to banks have been victims of hackers. In these circumstances, although there is a risk, I am not satisfied that it justifies refusing Leave.

[32] The next question is whether to accept the BNS' submission that the Applicants' Business threatens the integrity of the Canadian banking system. The evidence does not support this submission and, were it otherwise, I would expect Parliament to regulate the Applicants' Business to eliminate any such threat.

(ii) Money Laundering

[33] In the absence of any evidence actually linking the Applicants' Business and money laundering, I am not persuaded that speculative concerns about money laundering justify refusing Leave. As the Applicants' Business is conducted entirely by the electronic transfer of funds, all the steps are recorded and presumably can be traced. The BNS refers to a report entitled "Summary of the 911 Commission Recommendation" dated February 25, 2005 and notes that, in response to the 911 attacks, the United States passed legislation which cracks down on illegal internet gambling by barring financial institutions from processing internet gambling transactions. However, in the absence of any evidence that similar legislation exists in Canada or that the Purchasers are gambling illegally, I am not prepared to refuse Leave.

(iii) Criminal Conduct

[34] There is no doubt that the vast majority of Purchasers who use the Applicants' Business are paying amounts owed to offshore internet casinos. I have reviewed sections 202 and 207 of the *Criminal Code*, R.S. 1985, c. C-46, and have concluded that paragraph 202(1)(*e*) could make it an offence for a person in Canada to make an agreement on the internet as a prelude to gambling at an offshore internet casino. However, there would be, among others, issues about the terms and meaning of any such agreement and about whether it was made in Canada.

[35] In the absence of any reference to cases about the criminality of Canadians using the internet to gamble at offshore internet casinos and, in the absence of any evidence about how or where the Applicants' Purchasers arrange their gambling privileges at offshore internet casinos, I am not prepared to conclude that the fact

that the Applicants' Purchasers are paying amounts due to offshore internet casinos is a reason to refuse Leave.

(iv) The CPA's Rule E2

[36] The CPA's Rule E2 became effective on February 3, 2005 (the "Rule"). It applies only to CPA members. It is noteworthy that the Applicants are not members and that the Rule does not govern their conduct. Accordingly, the only question is whether the Rule operates to prevent the BNS from supplying Banking Services to the Applicants.

[37] The relevant portion of the Rule is part 5(a). It reads:

> In all matters relating to the Exchange, Clearing and Settlement of On-Line Payment Items for the purpose of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and the Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation. . . In particular, only that information or data that is necessary to effect the processing of the On-line Payment Item is to be made available to the Acquirer and/or the Payee during the session. For greater clarity, the Payor'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 during the On-line Payment Transaction session.

[38] The BNS submits that the Applicants are the acquirer and/or the payee under the Rule and that the Rule prevents it from dealing with the Applicants because, during the Purchasers' online session with the Applicants, the Purchasers' Confidential Data are disclosed. I do not agree with this submission. In my view, given the Applicants' status as agents, it is the Merchants not the Applicants who should be considered Payees for the purposes of the Rule.

[39] In any event, the Rule does not address the Purchaser's decision to share its Confidential Data with the Applicants on a confidential agency basis. Nothing in the Rule justifies the BNS' refusal to supply Banking Services to the Applicants' Business and, for this reason, the Rule does not provide a basis for exercising discretion to refuse Leave.

[40] The BNS also refers to a statement on the CPA's website (the "Statement"). It reads:

> **PAYMENT SERVICES** that require consumers to provide their on-line user banking ID and password to a party other than their financial institution are not eligible for clearing under this rule. [emphasis added]

[41] When it speaks of payment services, the Statement appears to say that a CPA member cannot clear transactions for non-members if those non-members, such as the Applicants, who are not bound by the Rule, offend its privacy provisions. However, on examination, the Rule itself says no such thing and the Statement is

therefore misleading. The Rule is simply a privacy provision. It does not refer to payment services and does not address eligibility for clearing or impose restrictions on clearing if the privacy requirements it imposes on its members are not met by non-members such as the Applicants.

(v) Misrepresentation and Non-Disclosure

[42] The BNS notes that in Leave applications there is no provision in the Tribunal's Rules for cross-examination on an applicant's affidavit. This fact, it submits, suggests that an applicant bears an onus of full and accurate disclosure which is akin to that imposed when injunctions are sought on an *ex parte* basis. I am not persuaded by this analogy. Leave applications are not made *ex parte*. The BNS has had a full opportunity to express its position.

[43] Although I am therefore not prepared to treat this Leave as if it were *ex parte*, I acknowledge that it would be appropriate to deny Leave if the Tribunal had clearly been misled on a significant and material issue. That said, I have reviewed the BNS' allegations of non-disclosure and have concluded that none can be described as either significant or material. The earlier investigation by the Competition Bureau and the Alberta litigation are not relevant, and the Applicants were entitled to defer the other matters for reply.

[44] The BNS alleges that Mr. Grace made serious misrepresentations in his dealings with the bank which were not disclosed to the Tribunal. The BNS is particularly vexed by the information Mr. Grace supplied when he opened the many bank accounts.

[45] In this regard, there is no dispute that many of the Applicants' accounts at the BNS were opened using the BNS telephone service which is linked to a computer. One of the questions posed by the computer during the call reads as follows:

> And will this account be used to conduct business on behalf of someone other than the named account holder?

[46] The BNS informally describes this as the "money laundering question". In each case, Mr. Grace answered it in the negative and the BNS characterizes his answers as lies. However, in my view, the answers were appropriate. Given that the Applicants' Business is to facilitate the payment of internet debts using debit cards there is no question that the accounts were used for that business.

[47] Further, Mr. Grace's description of the Applicants' Business as "financial collection" in 1999 was accurate at that time. It is clear that, after a slow start in 2002, the Applicants' Business evolved and changed into an active internet debit payment facilitation business in 2004/2005.

[48] As well, the fact that Mr. Grace opened a great many more accounts at the Branch than normal for a small business customer is not a reason to deny Leave in the

circumstances of this case. The number of accounts was not a secret and is explained by the number of transactions required by the Applicants' Business. Further, although Mr. Grace offered to discuss opening commercial accounts, his offers were ignored.

[49] The BNS also alleges that the UMB website untruthfully states that the Applicants' Business complies with the Canadian Code of Practice for Consumer Debit Card Services (the "Code"). However, this allegation is not accurate. The UMB website actually says that UMB "endorses" the Code. Subsection 1(3) of the Code says that "Organizations endorsing the code will maintain or exceed the level of consumer protection it establishes". There is no evidence that the Applicants' Business fails to comply with this provision. This allegation therefore does not justify refusing Leave.

(vi) BNS Policies and Contractual Rights

[50] There is no policy document or other record in evidence to support the BNS' allegation that, as a matter of policy, it does not clear payments to offshore casinos and does not offer accounts and Banking Services to unregulated money services businesses. However, even if such policies were in place, their mere existence would not justify refusing Leave.

[51] Finally, the BNS emphasizes that, under its signed agreements with the Applicants, it has the right to close the Applicants' accounts without cause on thirty days notice. It says that its contractual rights should be respected and Leave denied. However, the Tribunal has jurisdiction to force parties to deal with one another if the requirements of the Act are met. Accordingly, the fact that a termination clause has been applied does not justify the exercise of discretion to deny Leave.

SECTION 75 ANALYSIS

[52] In an application for leave to make an application under section 75, the applicant must show that an order "could" issue under section 75. In *Symbol Technologies ULC v. Barcode Systems Inc.*, 2004 FCA 339, the Federal Court of Appeal held as follows:

> 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(l), 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).

[53] The Tribunal must thus be satisfied that each of the elements set out in subsection 75(1) could be met when the application is heard on the merits. This means that there must be "sufficient credible evidence" to give rise to a *bona fide* belief. The elements of section 75 which the Tribunal must find before issuing an order are the following:

> **75.** (1) …(*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,

> **75.** (1) … *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,

[54] The Tribunal has accepted the Applicants' evidence that they could be substantially affected in their business because 50% of their revenue is dependent on the Banking Services provided by the BNS.

[55] The uncontradicted evidence of the Applicants shows that the RBC and the BNS are the only suppliers of Banking Services which allow EMTs into business accounts that are not bank operations. The evidence shows that EMTs are at the heart of the Banking Services and that the Applicants cannot carry on business without them. As a result of the Termination, the RBC is the only EMT supplier left in the market and it has refused to accept more business from the Applicants. Accordingly, the Tribunal could conclude that there is insufficient competition among suppliers.

[56] The Applicants have met the BNS' usual trade terms, in the sense that there have been no allegations that they did not respect the terms of payment or honour their commitments to the BNS or the Purchasers. The BNS disputes that the Applicants met its usual trade terms, since they exceeded the account and monetary limits imposed on small business accounts. However, the Applicants allege that they tried to open a commercial account to accommodate the expansion of their business, to no avail.

[57] The usual trade terms, insofar as this Leave application is concerned, must mean the trade terms which have thus far applied to the Applicants since the BNS allowed the Applicants to operate outside its normal small business account and monetary limits.

[58] The Tribunal is satisfied that it could find that the Banking Services are in ample supply.

[59] The Tribunal also concludes that it could find that the BNS' refusal to supply Banking Services to the Applicants' Business is likely to have an adverse effect on competition in the market for internet debit payments. The Applicants' uncontradicted evidence is that without the Banking Services supplied by the BNS, the revenue from the Applicants' Business is reduced by 50% and the business cannot grow because the RBC has refused to offer additional Banking Services. At the moment, the Applicants are the sole supplier of internet debit payment services so there is no competition to be adversely affected by these changes. However, the evidence shows that Interac Online will soon be operational. In that event, the Tribunal could find that there would likely be an adverse effect on competition because the Applicants' Business will not have the Banking Services it needs to function as a viable competitor.

[60] The Tribunal concludes from this analysis that there is sufficient credible evidence to give rise to a *bona fide* belief that the elements of section 75 could be satisfied.

SECTION 77 ANALYSIS

[61] The Applicants submit that the BNS is practising exclusive dealing in its refusal to continue to supply the Banking Services. From the Statement of Grounds and Material Facts filed by the Applicants, it appears that the Applicants understand "exclusive dealing" in this instance to mean that the BNS, and the other major banks that are part of the Interac network, intend by their actions (i.e. refusing to deal with the Applicants) to be the exclusive purveyors of bank debit payment services by internet.

[62] "Exclusive dealing" is a defined term in section 77 of the Act. It reads as follows:

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;

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.

[63] There is no evidence of exclusive dealing as defined in the Act. For this reason, the Tribunal finds that an order could not issue under section 77. Leave will, therefore, not be granted for the section 77 application.

THE CONCLUSION

[64] For all these Reasons, an order was made on November 4, 2005 granting Leave to apply only under section 75 of the Act.

DATED at Ottawa, this 14th day of November, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

COUNSEL:

For the Applicants B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc.:

Mr. Adam N. Atlas

For the Respondent Bank of Nova Scotia:

Mr. F. Paul Morrison
Mr. Glen G. MacArthur
Ms. Lisa M. Constantine

Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42
File No.: CT-2005-006
Registry Document No.: 0159

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

AND 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 E T W E E N :

B-Filer Inc.,
B-Filer Inc. doing business as
GPAY GuaranteedPayment and
Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)

Dates of hearing: 20060828 to 20060901, 20060905 to 20060908, 20060925 to 20060929, 20061003, 20061005 to 20061006
Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo
Date of Reasons: December 20, 2006
Reasons signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

PUBLIC VERSION OF CONFIDENTIAL REASONS FOR ORDER

TABLE OF CONTENTS **Paragraph**

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) 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 UseMyBank 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 IP 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	√		1
April 15, 2004	GPay	√		1
June 11, 2004	GPay	√		6
October 7, 2004	B-Filer	√		5
November 15, 2004	NPay	√		15
February 25, 2005	B-Filer		√	30
March 1, 2005	NPay		√	1
March 3, 2005	NPay		√	22
March 8, 2005	GPay		√	10
March 9, 2005	GPay		√	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	**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*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,	*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*) 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.

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 the 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 *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff'd (1991) 38 C.P.R. (3d) 25; [1991] F.C.J. No. 943 (QL) (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 and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, "[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]

[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.

(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]

(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-Filer 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]

[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 UseMyBank 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. You will keep your electronic signature confidential; secure from all persons without exception 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 record-keeping 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 On-line 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: *Firearms Act (Canada)*, [2000] 1 S.C.R. 783 at paragraph 17; and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 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 Corporation Ltd.*, 2006 FCA 233, 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 and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 and *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (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 and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, 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, rev'd 2001 FCA 104, leave to appeal to S.C.C. refused, [2001] 2 S.C.R. xiii. 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; aff'd [2002] F.C.J. No. 424 (FCA), 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 re-drafted 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 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 (2nd 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 and Research) v. Air Canada* (1988), 32 Admin. L.R. 157 rev'd on other grounds [1989] 2 F.C. 88 (C.A.); aff'd [1989] 1 S.C.R. 236. In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1990), 111 N.R. 368; rev'd [1992] 2 S.C.R. 394 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 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 *La Commissionaire de la Concurrence v. Gestion Lebski Inc. et al*.

[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 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. 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:

> 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.

[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. Canada*, [1994] 1 F.C. 3 (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.

DATED at Ottawa, this 20th day of December 2006

SIGNED on behalf of the Tribunal by the panel members

(s) Eleanor R. Dawson

(s) Lorne R. Bolton

(s) Lilla Csorgo

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[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.

[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.

[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.

[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.

[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.

[288] SCHEDULE A

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	**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*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,	*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*) 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,	*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*) 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,	*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*) the product is in ample supply, and	*d*) que le produit est disponible en quantité amplement suffisante;
(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,	*e*) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
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	le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans

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.

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) 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.

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) 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.

(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.

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.

[289] SCHEDULE B

The Applicants' Experts

Mr. Jack Bensimon

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 WestJet. 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.

[290] SCHEDULE C

Undertaking

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. NPAY Inc. B-Filer Inc cob GuaranteedPayment GPAY

Per: (s) Raymond Grace Per: (s) Raymond Grace Per: (s) Raymond Grace

Raymond F. Grace, Pres. Raymond F. Grace, Pres. Raymond F. Grace, Pres.

APPEARANCES:

For the applicants:

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc.

Michael Osborne
Sharon Dalton
Jennifer Cantwell

For the respondent:

The Bank of Nova Scotia

Paul Morrison
Lisa Constantine
Ben Mills
Tanya Pagliaroli

Competition Tribunal Tribunal de la Concurrence

Reference: *Broadview Pharmacy* v. *Pfizer Canada Inc.*, 2004 Comp. Trib. 23
File No.: CT-2004-006
Reference: Registry Document No.: 0006

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C34;

AND IN THE MATTER OF an application by Broadview Pharmacy (Broadview) for an order pursuant to section 103.1 of the *Competition Act* granting leave to bring an application under section 75 of the Act;

B E T W E E N:

Broadview Pharmacy
(applicant)

and

Pfizer Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

APPLICATION

[1] The applicant is 1177057 Ontario Inc., carrying out business as Broadview Pharmacy (Broadview), a corporation incorporated under the laws of the Province of Ontario. Broadview has been operating at its Toronto address since 1960. Within a two block radius, there are six other retail pharmacies.

[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] The applicant has sold the respondent's products for many years; approximately 20 per cent of its pharmaceutical sales ($300,000 out of a total of $1.5 million in pharmaceutical sales) are from the sale of the respondent's products. A number of important patented medicines are available only from the respondent.

[4] The respondent has ceased supplying the applicant with its pharmaceutical products. In the past, Broadview sold some pharmaceutical products over the internet. It asserts that it has now ceased that practice, and is willing to sign an undertaking to that effect. It is also willing to agree to audits by the respondent to verify that it is not exporting Pfizer products outside of Canada. However, Broadview is not willing to agree to a cross-ownership clause, whereby none of its owners, directors or officers may hold any interest whatsoever in any Canadian pharmacy which may be exporting medical drugs out of Canada. This undertaking, according to the applicant, is "unnecessary, unreasonable and overreaching." The applicant found this clause to be applied in an arbitrary fashion, since other pharmacies held by one group of principals (the example given is Medicine Shoppe pharmacies) do not have to sign such a clause on cross-ownership.

[5] In its response, the respondent submits the following points:

[6] Broadview states that Pfizer products represent 20 per cent of its pharmaceutical sales, but presents no figures to support that statement.

[7] Two of the products attributed to Pfizer have been divested to another company.

[8] Broadview estimates the losses as a percentage of pharmaceutical sales, not as a percentage of its total sales. Yet the test under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), indicates that the substantial effect must be on the applicant's business, not part of it. The respondent argues that according to the annual survey of pharmacy owners and managers, sales of pharmaceutical products represent 78 per cent of sales for independent pharmacies. Taking into account that factor to calculate the impact of the loss of the respondent's products, as well as the figures according to IMS for 2002 (when there were no internet sales), the loss is around 11 per cent.

[9] As to the undertaking on cross-ownership, the respondent replies that in the case of Medicine Shoppe pharmacies, there is no cross-ownership. Rather, it is a franchise agreement where individual pharmacists are wholly owners of their own Medicine Shoppe franchise, so that cross-ownership considerations do not apply. The respondent considers the cross-ownership clause essential to ensure that further sales by Broadview to internet pharmacies do not occur.

ANALYSIS

[10] Section 103.1 of the Act is a new section which has been the basis of five decisions so far, which can be briefly summarized as follows:

[11] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, 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 Competition Tribunal (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.

[12] In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, 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.

[13] In *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (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.

[14] 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."

[15] Madam Justice Simpson has recently rendered two decisions on section 103.1 applications, *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13 and *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15. 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.

[16] 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.

[17] The Tribunal has never defined specifically what was to be considered “substantial”; however, it stated as follows in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1:

> 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.

[18] The applicant has not established that it is substantially affected in its business, both in terms of percentage and sales figures.

[19] The cross-ownership issue which arises between the parties in this case is not relevant to the subsection 103.1(7) enquiry; it has to do with the usual terms of trade, which would have to be considered under section 75. The only consideration for now is the substantial effect which again, has not been sufficiently established to satisfy the Tribunal and enable it to grant leave.

[20] Unfortunately for the applicants, the evidence presented in support of the application is not sufficient to grant leave for an application under section 75 of the Act.

THEREFORE THE TRIBUNAL ORDERS THAT:

[21] The application for leave is dismissed.

DATED at Ottawa, this 20th day of September 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Pierre Blais

REPRESENTATIVES

For the applicant:

Broadview Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Pfizer Canada Inc.

Philip Spencer, Q.C.
Emily Larose

Competition Tribunal Tribunal de la Concurrence

Reference: *Broadview Pharmacy v. Wyeth Canada Inc*., 2004 Comp. Trib. 22
File No.: CT-2004-005
Reference: Registry Document No.: 0009

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

AND IN THE MATTER OF an application by 1177057 Ontario Inc. c.o.b. as Broadview Pharmacy (Broadview) for an order pursuant to section 103.1 of the *Competition Act* granting leave to bring an application under section 75 of the Act;

B E T W E E N:

1177057 Ontario Inc. c.o.b. as Broadview Pharmacy
(applicant)

and

Wyeth Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

APPLICATION

[1] The applicant is 1177057 Ontario Inc., carrying out business as Broadview Pharmacy (Broadview), a corporation incorporated under the laws of the Province of Ontario. The pharmacy operates in Toronto.

[2] The respondent is Wyeth Canada Inc. (Wyeth), a corporation incorporated under the laws of Canada, which carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

[3] Broadview has been operating at its Toronto address since 1960. Within a two block radius, there are six other retail pharmacies.

[4] Broadview has sold Wyeth products for the past several years. The sale of Wyeth drugs represents a little more than 5 per cent of Broadview's total annual sales. Some of Wyeth's patented medicines include an anti-depressant (Effexor), a number of very popular birth control pills (Tripasil, Alesse, Minovral) and female hormone replacement drugs (Premarin and Premplus).

[5] In a letter dated April 26, 2004, Wyeth informed its Canadian distributors that they were not to sell any Wyeth products to purchasers appearing on a list of "unapproved purchasers". Broadview being on this list, it can no longer obtain pharmaceutical products from Wyeth.

[6] Broadview believes this refusal to deal is linked to the fact that Broadview has in the past supplied some pharmaceutical products through the internet pharmacy business. Broadview has ceased this practice. Despite assurances to this effect given by Broadview, Wyeth continues to refuse to supply or deal with Broadview.

[7] For now, Broadview has managed to obtain some short-term substitute supplies; however, this solution cannot be long-term. Without the supply coming directly from Wyeth, Broadview will not be able to serve its customers, which will have a significant negative impact on its business. Broadview argues that customers who cannot fill all their prescriptions in one location will take their business elsewhere.

[8] Broadview's alleges that its financial viability is threatened. Wyeth occupies a dominant position in the market place with respect to its patented pharmaceutical products. Wyeth's products are widely available in the Toronto area, including from Broadway's neighbouring competitors.

RESPONDENT'S POSITION

[9] Wyeth Canada Inc. (respondent) opposes the application on the grounds that there is no reason to believe the applicant will suffer direct and substantial effects from the alleged conduct of the respondent, and no reason to believe that the conduct could be subject to an order under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[10] The applicant had engaged in internet selling of pharmaceutical products. The applicant contends it has stopped doing so, but has given the respondent no assurance that it would abide by the usual terms of trade and refrain from selling products through the internet.

No direct and substantial effect

[11] Given the small percentage which the respondent's pharmaceutical products represent for the applicant, the first branch of the test under subsection 103.1(7), direct and substantial effect, would not be satisfied. As acknowledged in the applicant's affidavit, only 5 per cent of the applicant's sales of pharmaceutical drugs (not total sales) are from the sale of drugs manufactured by the respondent. At present, the applicant is able to obtain the respondent's pharmaceutical drugs from other sources. The applicant provides no figures to support its contention that it will suffer from loss of clientele because customers cannot fill multiple prescriptions.

Test under section 75

[12] The applicant states that there is significant competition among retail pharmacies in the area where it is located. The respondent contends that the test under section 103.1 must include an assessment of whether an order could be granted under section 75. Since all the conditions of section 75 are not met, namely paragraph 75(l)(e) (adverse effect on competition), an order could not be granted, according to the respondent.

ANALYSIS

[13] Section 103.1 of the Act is a new section which has been the basis of five decisions so far, which can be briefly summarized as follows:

[14] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, 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 Competition Tribunal (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.

[15] In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, 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.

[16] In *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (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.

[17] 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."

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[19] 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.

[20] The Tribunal has never defined specifically what was to be considered "substantial"; however, it stated as follows in Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1:

> 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.
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> 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 US.-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.

[21] In this case, the losses are speculative and undocumented. From the applicant's affidavit, Wyeth products represent 5 per cent of its annual sales of pharmaceutical drugs. The applicant fears losing customers because they will not be able to fill multiple prescriptions including the respondent's products. No figures are provided to show the impact or potential impact of the loss of the respondent's products, and no evidence presented to support the assertion that not

filling all the prescriptions for a given patient will mean not filling any. A loss of 5 per cent of pharmaceutical sales, which does not represent the totality of the business of the pharmacy, cannot in good faith be considered a substantial impact.

THEREFORE THE TRIBUNAL ORDERS THAT:

[22] The application for leave is dismissed.

DATED at Ottawa, this 20th day of September, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Pierre Blais

REPRESENTATNES

For the applicant:

Broadview Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Wyeth Canada Inc.

Neil Finkelstein
Jeff Galway
Matthew Homer

Competition Tribunal Tribunal de la Concurrence

Reference: *Broadview Pharmacy v. Wyeth Canada Inc*., 2004 Comp. Trib. 22
File No.: CT-2004-005
Reference: Registry Document No.: 0009

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

AND IN THE MATTER OF an application by 1177057 Ontario Inc. c.o.b. as Broadview Pharmacy (Broadview) for an order pursuant to section 103.1 of the *Competition Act* granting leave to bring an application under section 75 of the Act;

B E T W E E N:

1177057 Ontario Inc. c.o.b. as Broadview Pharmacy
(applicant)

and

Wyeth Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

APPLICATION

[1] The applicant is 1177057 Ontario Inc., carrying out business as Broadview Pharmacy (Broadview), a corporation incorporated under the laws of the Province of Ontario. The pharmacy operates in Toronto.

[2] The respondent is Wyeth Canada Inc. (Wyeth), a corporation incorporated under the laws of Canada, which carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

[3] Broadview has been operating at its Toronto address since 1960. Within a two block radius, there are six other retail pharmacies.

[4] Broadview has sold Wyeth products for the past several years. The sale of Wyeth drugs represents a little more than 5 per cent of Broadview's total annual sales. Some of Wyeth's patented medicines include an anti-depressant (Effexor), a number of very popular birth control pills (Tripasil, Alesse, Minovral) and female hormone replacement drugs (Premarin and Premplus).

[5] In a letter dated April 26, 2004, Wyeth informed its Canadian distributors that they were not to sell any Wyeth products to purchasers appearing on a list of "unapproved purchasers". Broadview being on this list, it can no longer obtain pharmaceutical products from Wyeth.

[6] Broadview believes this refusal to deal is linked to the fact that Broadview has in the past supplied some pharmaceutical products through the internet pharmacy business. Broadview has ceased this practice. Despite assurances to this effect given by Broadview, Wyeth continues to refuse to supply or deal with Broadview.

[7] For now, Broadview has managed to obtain some short-term substitute supplies; however, this solution cannot be long-term. Without the supply coming directly from Wyeth, Broadview will not be able to serve its customers, which will have a significant negative impact on its business. Broadview argues that customers who cannot fill all their prescriptions in one location will take their business elsewhere.

[8] Broadview's alleges that its financial viability is threatened. Wyeth occupies a dominant position in the market place with respect to its patented pharmaceutical products. Wyeth's products are widely available in the Toronto area, including from Broadway's neighbouring competitors.

RESPONDENT'S POSITION

[9] Wyeth Canada Inc. (respondent) opposes the application on the grounds that there is no reason to believe the applicant will suffer direct and substantial effects from the alleged conduct of the respondent, and no reason to believe that the conduct could be subject to an order under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[10] The applicant had engaged in internet selling of pharmaceutical products. The applicant contends it has stopped doing so, but has given the respondent no assurance that it would abide by the usual terms of trade and refrain from selling products through the internet.

No direct and substantial effect

[11] Given the small percentage which the respondent's pharmaceutical products represent for the applicant, the first branch of the test under subsection 103.1(7), direct and substantial effect, would not be satisfied. As acknowledged in the applicant's affidavit, only 5 per cent of the applicant's sales of pharmaceutical drugs (not total sales) are from the sale of drugs manufactured by the respondent. At present, the applicant is able to obtain the respondent's pharmaceutical drugs from other sources. The applicant provides no figures to support its contention that it will suffer from loss of clientele because customers cannot fill multiple prescriptions.

Test under section 75

[12] The applicant states that there is significant competition among retail pharmacies in the area where it is located. The respondent contends that the test under section 103.1 must include an assessment of whether an order could be granted under section 75. Since all the conditions of section 75 are not met, namely paragraph 75(l)(e) (adverse effect on competition), an order could not be granted, according to the respondent.

ANALYSIS

[13] Section 103.1 of the Act is a new section which has been the basis of five decisions so far, which can be briefly summarized as follows:

[14] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, 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 Competition Tribunal (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.

[15] In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, 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.

[16] In *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (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.

[17] 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."

[18] Madam Justice Simpson has recently rendered two decisions on section 103.1 applications, *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13 and *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15. 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.

[19] 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.

[20] The Tribunal has never defined specifically what was to be considered "substantial"; however, it stated as follows in Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1:

> 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 US.-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.

[21] In this case, the losses are speculative and undocumented. From the applicant's affidavit, Wyeth products represent 5 per cent of its annual sales of pharmaceutical drugs. The applicant fears losing customers because they will not be able to fill multiple prescriptions including the respondent's products. No figures are provided to show the impact or potential impact of the loss of the respondent's products, and no evidence presented to support the assertion that not

filling all the prescriptions for a given patient will mean not filling any. A loss of 5 per cent of pharmaceutical sales, which does not represent the totality of the business of the pharmacy, cannot in good faith be considered a substantial impact.

THEREFORE THE TRIBUNAL ORDERS THAT:

[22] The application for leave is dismissed.

DATED at Ottawa, this 20th day of September, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Pierre Blais

REPRESENTATNES

For the applicant:

Broadview Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Wyeth Canada Inc.

Neil Finkelstein
Jeff Galway
Matthew Homer

Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated,* 2013 Comp. Trib. 10
File No.: CT-2010-10
Registry Document No.: 0337

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

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 76 of the *Competition Act*;

AND IN THE MATTER OF certain agreements or arrangements implemented or enforced by Visa Canada Corporation and MasterCard International Incorporated.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Visa Canada Corporation
MasterCard International Incorporated
(respondents)

and

The Toronto-Dominion Bank
The Canadian Bankers Association
(intervenors)

Dates of hearing: 20120508 to 20120510, 20120514 to 20120517, 20120522 to 20120525, 20120528 to 20120601, 20120604 to 20120607, 20120618 to 20120621
Before: Phelan J. (presiding), Dr. W. Askanas and Mr. K. Montgomery
Date of Reasons and Order: July 23, 2013
Reasons and Order signed by: Mr. Justice M. Phelan, Dr. W. Askanas and Mr. K. Montgomery

REASONS FOR ORDER AND ORDER DISMISSING THE COMMISSIONER'S APPLICATION

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).

[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	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) a person referred to in subsection (3) directly or indirectly	a) que la personne visée au paragraphe (3), directement ou indirectement :
(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	(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) 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	(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) the conduct has had, is having or is likely to have an adverse effect on competition in a market.	b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.
(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.	(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) An order may be made under subsection (2) against a person who	(3) Peut être visée par l'ordonnance prévue au paragraphe (2) la personne qui, selon le cas :
(a) is engaged in the business of producing or supplying a product;	a) exploite une entreprise de production ou de fourniture d'un produit;

(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.

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, 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 *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *R. v. Lohnes*, [1992] 1 S.C.R. 167) 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,	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) 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	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) refuse to supply a product to or otherwise discriminate against any other person engaged	b) refuser de fournir un produit à une autre personne exploitant une entreprise au Canada,

in business in Canada because of the low pricing policy of that other person.	ou établir quelque autre distinction à l'encontre de celle-ci, en raison du régime de bas prix de celle-ci.
[…]	
[emphasis added]	[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.

[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,	**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
(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	(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	**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 :

sujet d'un produit au Canada	(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 *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233, leave to appeal to SCC refused, 31637 (May 10, 2007).

[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: *The Commissioner of Competition v. CCS Corporation et al*., 2012 Comp. Trib. 14, at para. 58, aff'd 2013 FCA 28). 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 Corporation et al.*, 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) <u>The application of the test to two-sided forums</u>

[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, 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]

[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.

[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 ¼ 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 x 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]**.

[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].

[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.

[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 *Director of Investigation and Research v. Laidlaw Waste Systems Ltd*., 40 C.P.R. (3d) 289, 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 *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd*., 41 C.P.R. (3d) 289, 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 *Director of Investigation and Research v. Tele-Direct*, 73 C.P.R. (3d) 11, decision to be "extraordinarily high." The fact situation in *Tele-Direct* 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 et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42. Paragraph 75(1)(*e*) also requires an adverse effect on competition, but is limited to two time frames. In *B-Filer*, 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 Poultry Farm Limited v. Groupe Westco Inc. et al*., 2009 Comp. Trib. 6, aff'd 2011 FCA 188, leave to appeal to SCC refused, 34401 (December 22, 2011).

[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 *Commissioner of Competition v. Canada Pipe Company Ltd*., 2006 FCA 233, 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. 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. 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.

DATED at Ottawa, this 23rd day of July, 2013.

SIGNED on behalf of the Tribunal by the panel members.

(s) Michael L. Phelan

(s) Wiktor Askanas

(s) Keith L. Montgomery

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[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.

[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.

[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.

[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.

[5] Using Dr. Winter's approach CSL = SSNIP/(2xSSNIP + MARGIN) = **[CONFIDENTIAL]**. Using Dr. Church's approach, CSL = **[CONFIDENTIAL]**.

APPEARANCES:

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Jason MacLean

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Adam Ship

Indexed as:

Canada (Competition Act, Director of Investigation and Research) v. Warner Music Canada Ltd.

Reasons and Order on Respondents' Motion to Strike Director's Application
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;
AND 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.
Between:
The Director of Investigation and Research, Applicant, and Warner Music Canada Ltd., Warner Music Group Inc., WEA International Inc., Respondents

[1997] C.C.T.D. No. 53

Trib. Dec. No. CT9703/22

Also reported at:78 C.P.R. (3d) 321

Canada Competition Tribunal
Ottawa, Ontario

Before: McKeown J., Presiding Judicial Member
Simpson J., L.R. Bolton, Members

Heard: December 4 - 5, 1997
Decision: December 18, 1997

(21 pp.)

Counsel for the Applicant:

Director of Investigation and Research

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Duane Schippers

Counsel for the Respondents:

Warner Music Canada Ltd.
Warner Music Group Inc.
WEA International Inc.

John F. Rook, Q.C.
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Reasons and Order on Respondents' Motion to
Strike Director's Application

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]

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]

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
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> (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,
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> 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).

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 non-exclusive, 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
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> (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,
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> the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.
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> (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:
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> (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 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.[4]

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.

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]

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. Canada and said:

> 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]

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.

VIII. ORDER

40 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the Director's application pursuant to section 75 of the Act, filed with the Tribunal on September 30, 1997 against the respondents, be struck.

DATED at Ottawa, this 18th day of December, 1997.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown W.P. McKeown

qp/d/lls

1 R.S.C. 1985, c. C-34.

2 R.S.C. 1985, c. F-7.

3 R.S.C. 1985, c. C-42.

4 (1997), 73 C.P.R. (3d) 1 at 32, [1997] C.C.T.D. No. 8 (QL) (Comp.Trib.).

5 R.S.C. 1985, c. T-13.

6 Director of Investigation and Research v. Imperial Oil Limited (10 November 1994), CT8903/463, Reasons for Decision Regarding Jurisdiction Over Undertakings at 14-15, [1994] C.C.T.D. No. 23 (QL) (Comp. Trib.).

7 C.R.C. 1978, c. 663.

8 [1991] 3 F.C. 383 at 388.

Competition Tribunal Tribunal de la Concurrence

Reference: *Construx Engineering Corporation* ***v.*** *General Motors of Canada*, 2005 Comp. Trib. 21
File no.: CT-2005-004
Registry Document no.: 0007a

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

AND IN THE MATTER OF an application by Construx Engineering Corporation for an order pursuant to section 103.1 granting leave to make application under sections 75 and *77* of the *Competition Act;*

AND IN THE MATTER OF an application by Construx Engineering Corporation for an interim order pursuant to section 104 of the *Competition Act.*

BETWEEN:

Construx Engineering Corporation
(applicant)

And

General Motors of Canada Ltd
(respondent)

Decided on the basis of the written record.
Member: Simpson J. (Chairman)
Date of reasons and order: Monday June 13, 2005
Signed by: Simpson J.

REASONS AND ORDER IN LEAVE APPLICATION UNDER SECTIONS 75 AND 77

[I] This application, pursuant to section 103.1 of the Competition Act, R.S.C. 195, c. C-34, as amended, (the "Act") is for leave to apply to the Competition Tribunal (the "Tribunal") for orders under section 75 of the Act - refusal to deal - and section 77 - market restriction. Construx Engineering Corporation ("Construx") alleges that General Motors of Canada Ltd. ("GM") is refusing to supply it with new GM motor vehicles (the "Vehicles"). Construx also alleges that this practice amounts to market restriction.

[2] GM acknowledges that its policy is to prohibit authorized GM dealers in Canada from selling Vehicles to persons or businesses who will resell or export. This policy is clearly stated in the agreements between GM and its authorized dealers. Those agreements also provide for various enforcement mechanisms which are designed to ensure that dealers will respect the prohibition. These include loss of rebates and allowances, loss of warranty coverage for the vehicle sold, etc. GM also acknowledges its policy of prohibiting the import of Vehicles manufactured outside Canada by persons other than its authorized dealers. For ease of reference, these policies will collectively be described as the "Policies".

[3] Construx filed its application for leave on April 25, 2005. The Commissioner certified on May 3,2005, pursuant to subsection lO3.l(3), that the matter was not the subject of an inquiry and had not been the subject of an inquiry which was discontinued because of a settlement. On May 5, 2005, the Tribunal issued a notice stating that it could hear the application for leave. GM filed its response on May 20, 2005. Counsel for Construx inquired about the possibility of filing a reply, and was given 7 days to do so. No reply was filed.

I. BACKGROUND

[4] On leave applications, an applicant must provide the Tribunal with sufficient information about its business to allow the Tribunal to grant leave. The affidavit of Construx' president, affirmed on April 1 I, 2005, discloses that:

(i) Construx describes itself as a "wholesale dealer and broker of transportation products, including automobiles". Historically, once Construx purchased atransportation product, it either exported it to a buyer outside Canada or resold it to buyers in Canada. Construx' president states that, to the best of his knowledge, those buyers "generally" exported the product.

(ii) In the course of its business, Construx has purchased Vehicles primarily from authorized GM dealers in Ontario. However, Construx has also acquired Vehicles from other suppliers which had previously purchased them from authorized Ontario GM dealers.

(iii) Construx states that it cannot purchase Vehicles from authorized GM dealers because of GM's Policies which prohibit the export of Vehicles from Canada and the resale of Vehicles in Canada. As well, Construx would like to begin importing Vehicles but this option is also precluded by GM's Policies.

(iv) Construx alleges that the Policies have had a "devastating" effect. Between 1997 and 2003, Construx' Vehicle sales figure was $6.8M, representing 38% of its total sales. Construx says that in 2003, it sold 53 Vehicles, which represented 67% of all its new motor vehicle sales in 2003. However, in 2004, by contrast, Construx was unable to acquire any Vehicles.

(v) Construx states that GM's efforts to prevent the export of Vehicles from Canada has meant that Construx has been unable to fill a number of purchase orders described as orders for 120 sport utility vehicles and other similar vehicles and 200 Chevrolet Avalanche and heavy duty pickup trucks, for a total loss of $490,000.

(vi) Construx also claims that if allowed to do so, authorized GM dealers would place orders with Construx to purchase Vehicles manufactured outside Canada. Since Construx cannot import Vehicles from outside Canada, it says that it is also losing those prospective sales. Also because of the import prohibition, Construx was unable in 2003 to satisfy orders of 15 Chevrolet SSRs for a total loss of $75,000.

[5] The Tribunal notes the following serious deficiencies in the evidence presented by Construx:

(i) There is no evidence, except in relation to the Vehicles, concerning either the nature of or the volume of the transportation products Construx sells.

(ii) There is no evidence setting out Construx' annual sales figures for the Vehicles in the period from 1997 to 2003.

(iii) There is no evidence of Construx' total annual sales of transportation products in those years.

(iv) There is no evidence about the geographic market, except that Construx primarily purchased fiom authorized GM dealers in Ontario, and resold mainly for export.

(v) There is no evidence about how many Vehicles sold by Construx remained in Canada and how many were exported.

(vi) There is no evidence about what constitutes the product market. In particular, no attempt is made to show that the Vehicles constitute a separate product.

(vii) Finally, there is no evidence that the Policies have led to a substantial lessening of competition.

II. DISCUSSION

[6] The starting point in the consideration of a leave application is subsection 103.1(7) which states:

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 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 a une demande de permission de prhsenter 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 gent 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.

[7] The threshold in a leave application is low, but there must be some evidence presented that would, if the facts were proven, justify an order requiring supply or prohibiting market restriction *(Symbol Technologies Canada ULC v. Barcode Systems Inc.* 2004 FCA 339). In that case, the Federal Court of Appeal confirmed the test for leave under section 103.1 first enunciated by Madam Justice Dawson in *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41 at paragraph 14:

> 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.

[8] In the present case, the Tribunal need not consider whether Construx is "directly" affected, because even if it is assumed that it is directly affected by GM's Policies, there is no evidence that it is "substantially" affected. As noted in the list of deficiencies above, Construx' evidence does not provide sufficient information about its business and the impact of the Policies on its business. Construx claims that the sale of Vehicles represented 38% of its total sales from 1997 to 2003, but given the absence of a yearly breakdown, the Tribunal cannot assess the significance of those sales. Construx claims that the sales of Vehicles in 2003 represented 67% of the sales of new motor vehicles, but since the business of Construx is "transportation products" and no total sales figure has been provided, the Tribunal cannot know what this means for the whole enterprise. There is therefore no reasonable basis for the Tribunal to believe that Construx has been substantially affected as required by subsection 103.1(7).

[9] The Tribunal therefore concludes that the application for leave is not supported by "sufficient credible evidence" to give it reason to believe that the applicant is substantially affected in its business. That being so, it is not necessary to consider sections 75 and 77 of the Act, nor the submissions made by GM.

III. ORDER

[10] For these Reasons, this application is hereby dismissed without costs.

DATED at Toronto, this 13th da y of June, 2005,

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

REPRESENTATIVES:

For the applicant:

Construx Engineering Corporation

Donald S. Affleck, Q.C.
Angela Yadav

For the respondent:

General Motors of Canada Ltd.

Peter Franklyn
Mahmud Jamal
Steve Sansom

Indexed as:

Molnlycke AB v. Kimberly-Clark of Canada Ltd. (F.C.A.)

Between
Molnlycke AB, Appellant, and
Kimberly-Clark of Canada Limited, Kimberly-Clark Corporation and Proctor & Gamble Inc., Respondents

[1991] F.C.J. No. 532

[1991] A.C.F. no 532

132 N.R. 315

36 C.P.R. (3d) 493

27 A.C.W.S. (3d) 794

Action No. A-365-90

Federal Court of Appeal
Ottawa, Ontario

Mahoney, Stone and MacGuigan JJ.

Heard: June 11, 1991
Judgment: June 14, 1991

(6 pp.)

Practice -- Setting aside service ex juris of statement of defence and counterclaim -- Whether arguable case made out.

This was an appeal from the refusal to set aside an ex parte order for service ex juris of Notice of the Statement of Defence and Counterclaim of P Inc. and the service effected pursuant thereto in a patent infringement action. A patent originally issued to the appellant was surrendered and reissued after which it was assigned to KC. The defence alleged that the petition for reissue contained material representations and that the reissue was invalid. The defence also argued that the

counterclaim alleged contravention of the Trade-marks Act and the Competition Act. The evidence consisted of the affidavit of P Inc.'s corporate counsel and exhibits thereto in which the deponent construed the licence relative to the initial patent in a manner which the document did not bear.

HELD: The appeal was allowed. The order for service had to be founded on the claims advanced in the counterclaim and the Court had to be satisfied that there was an arguable case. There was no evidence of any agreement or alleged conspiracy relative to any wrongful act. The trial judge erred in concluding that P Inc. had a good cause of action against the appellant.

STATUTES, REGULATIONS AND RULES CITED:

Competition Act, R.S.C. 1985, c. C-34, ss. 36(1)(a), 45(1). Criminal Code, R.S.C. 1985, c. C-46, s. 498(1). Patent Act, R.S.C. 1985, c. P-4, s. 53(1). Trade-marks Act, R.S.C. 1985, c. T-13, s. 7(e).

David Morrow, for the Appellant.
Alexander Macklin and Hélène D'Iorio, for Procter & Gamble.
Kenneth Sharpe, for Kimberly-Clarke of Canada Limited, Kimberly-Clark Corporation.

MAHONEY J.:-- This is an appeal by a Swedish company, which does no business and has no presence in Canada, from the refusal of the Trial Division to set aside an ex parte order for service ex juris of Notice of the Statement of Defence and Counterclaim of Proctor and Gamble Inc., hereafter "P&G", and the service effected pursuant to that order. The Respondents, Kimberly-Clark Corporation, "K-C U.S.", which had also been served pursuant to the same order, and its subsidiary, Kimberly-Clark of Canada Limited, "K-C Canada", took no position on this appeal.

The counterclaim against the Appellant is made in an action by K-C Canada against P&G for infringement of Canadian patent entitled "Disposable Diapers with Refastenable Tabs". A patent for the invention was originally issued to the Appellant, under no. 1,213,702, November 12, 1986. K-C U.S. was a licensee of that patent and K-C Canada its sublicensee. That patent was surrendered and reissued August 2, 1988, under no. 1,239,752. By assignment recorded in the Patent Office October 14, 1988, the Appellant assigned the reissued patent to K-C Canada and it commenced the action October 21.

P&G alleges, in its Defence, that, contrary to s. 53(1) of the Patent Act, R.S.C. 1985, c. P-4, the petition for reissue contains material misrepresentations which the Appellant knew to be untrue and that the reissued patent is therefore invalid. It alleges, in its Counterclaim, an agreement or conspiracy among the Appellant, K-C Canada and K-C U.S., which contravenes s. 7(e) of the Trade Marks Act, R.S.C. 1985, c. T-13, and s. 45(1) of the Competition Act, R.S.C. 1985, c. C-34, as a

result of which it has suffered loss and damage which it is entitled to recover.

The Rules provide:

> 307.(1) When a defendant ... is out of the jurisdiction of the Court ... the Court, upon application, supported by affidavit or other evidence showing that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country, such defendant is or probably may be found, may order that a notice of the statement of claim or declaration may be served on the defendant in such place or country or within such limits as the Court thinks fit to direct.

It is to be observed that the Rule provides for the service of notice of a claim, not a defence. Thus, the order for service ex juris must be founded on the claims advanced against the Appellant in the Counterclaim, not on the allegations of the Statement of Defence which, if proved, may result in impeachment of the reissued patent. It is also to be observed that what is required is not merely the assertion of a reasonably arguable cause of action. The Court must be satisfied, by evidence, that there is a good arguable case [Footnote: Muzak v. CAPAC, [1953] 2 S.C.R. 182].

Here, the evidence consists of the affidavit of P&G's corporate counsel and exhibits thereto which are subject of a protective order. One of its deficiencies is that, in paragraph 24, the deponent construes the license relative to the initial patent in a manner which the document does not bear and which leads him to assert, without foundation, that the Appellant retains a financial interest in the assigned reissued patent and the outcome of the present litigation. It was for the trial judge, not the deponent, to construe the document. I infer from his brief reasons that the learned trial judge did not direct his mind to the evidence supporting that proposition.

The nub of the evidence, insofar as it relates to claims asserted against the Appellant, as distinct from the validity of the reissued patent, is found in paragraph 30 of the affidavit.

> 30. Based on my review of the foregoing facts and documents, I have concluded and verily believe that the Defendants by Counterclaim have been operating in concert at least since October, 1987, when [P&G] adopted its present tape fastening system in Canada, to secure for K-C Canada, rights under the Molnlycke A.B. Canadian patent to which none of the defendants by Counterclaim were entitled including, in particular, to a reinforcing plastic strip for diapers having a smooth and shiny surface, and to reissue the original patent with the intent to assert the reissued patent against [P&G] in respect of a refastenable tape construction for disposable diapers, which they knew or ought to have known did not represent any invention made by Lief U.R. Widlund, for the purpose of attempting to prevent [P&G] from manufacturing and selling in Canada its disposable diapers with a reusable tape tab fastening system as described above and, as such, have conspired together for this purpose, knowing that by reason of the aforesaid facts, their activities were improper and in breach

> of Section 7(a)[sic] of the Trade Marks Act and Section [45(1)] of the Competition Act ...

We were pointed to no direct evidence of an agreement or the alleged conspiracy in relation to any wrongful act; the deponent infers wrongdoing from such documented events as the issuance of the original patent, the licence and sublicence, reissue, assignment and the bringing of the action against it. What P&G seems to be saying is that what was done was illegal because, for all the reasons alleged by it, the patent is invalid.

There is no doubt that the Appellant, K-C Canada and K-C (U.S.) entered into an arrangement whereby the Appellant divested itself of the reissued Canadian patent and K-C Canada, who was competing with P&G in the Canadian market, acquired it so that it could assert the monopoly rights of the patent against P&G and that it proceeded to assert those rights as soon as it was registered as owner. That, of itself, does not give rise to a cause of action. What has recently been said by Décary, J.A., of the purchase of a patent, absent any right to sue for past infringement, may equally be said of its sale [Footnote: Amsted Industries v. Wire Rpe Industries, 32 C.P.R. (3d) 334 at 339].

> I fail to see anything unlawful in itself in the purchase of property, in this case a patent, which the purchasers can only enjoy by defeating existing or future claims.

In his decision the learned trial judge concluded

> ... I am satisfied that, especially with respect to the alleged contravention of the Competition Act, the plaintiff by counterclaim has established that it has the required "good arguable case" against the defendant by counterclaim.

He did not, as I read that, necessarily exclude the contravention of s. 7(e) of the Trade Marks Act as a sustainable cause of action. Paragraphs (a) to (d) of s. 7 of the Trade Marks Act prohibit false or misleading statements about a competitor's business, wares or services; advertising so as to cause confusion of one's wares, services or business with those of another; passing off and material misdescription of wares or services. Paragraph 7(e) provides:

> 7. No person shall
>
> ...
>
> (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

To the extent that s. 7(e) has any force in the wake of the decision of the Supreme Court of Canada in MacDonald v Vapour Canada, 22 C.P.R. (2d) 1 (S.C.C.), it remains, as was held in Eldon Industries v Reliable Toy, 48 C.P.R. 109 at 123. (Ont. C.A.) that

> Section 7(e) must be read ejusdem generis with s. 7(a), (b), (c) or (d). The principle governing cases of product simulation have been carefully evolved both at common law and in equity and are now stated in statutory form in s. 7(a) to (d). They were never intended to yield to a subjective or unknown standard in the words "any other business practice contrary to honest industrial or commercial usage in Canada" which would be the effect of the provisions of s. 7(e) if removed from the contextual influence of the foregoing clauses of the section.

The evidence simply does not suggest any conduct on the Appellant's part that could conceivably fall within the ambit of s. 7(e) thus circumscribed.

The proscription of the Competition Act is found in s. 45(1) and the right of action in respect thereof in s. 36(1)(a).

> 45.(1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
> (b) to prevent , limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price there of,
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an offence ...
>
> 36. (1) Any person who has suffered any loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI
>
> ...

> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct ... an amount equal to the loss or damage proved to have been suffered by him...
>
> ...
>
> (3) For purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Certainly the existence of a patent is apt to limit, lessen, restrain or injure competition - monopolies do - but its issuance and the inherent impairment of competition has been expressly provided for by an Act of Parliament, which has made provision for compulsory licensing in circumstances where it has considered the ordinary incidence of the statutory monopoly to be contrary to public policy. It is the existence of the patent, not the manner in which issue was obtained or how and by whom its monopoly is agreed to be enforced and defended, that impairs competition.

A good cause of action founded on s. 45(1) of the Competition Act must necessarily assert that competition has been unduly impaired. For service ex juris that must be supported by some evidence. It has been held that interpretation of the word "unduly" in a legislative ancestor of s. 45(1), s. 498(1) of the Criminal Code, R.S.C. 1927, c. 36, is a matter of law [Footnote: Howard Smith paper Mills v. he Queen, [1957] S.C.R. 403 at 423 ff.]. Cartwright, J., as he then was, concluded:

> "Undue" and "unduly" are not absolute terms whose meaning is self evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", "excessive", "oppressive", or "wrong" in the absence in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.

Parliament has, in the Patent Act, defined a "due" impairment of competition. In my opinion, as a matter of law, it is not arguable that the impairment of competition inherent in the exercise of rights expressly provided by that Act - the obtaining of a patent or reissue of a patent, its assignment and action by the assignee to enforce its monopoly - can be undue. It follows that undue impairment of competition cannot be inferred from evidence of the exercise of those rights alone.

In my respectful opinion, the learned trial judge erred in concluding that, as pleaded in the Counterclaim, P&G has a good cause of action against the Appellant. I would allow the appeal with costs here and below and, pursuant to s. 52(b)(i) of the Federal Court Act, set aside the order for service ex juris on the Appellant and the service effected pursuant to it.

MAHONEY J.
STONE J.:-- I agree.
MacGUIGAN J.:-- I agree.

Competition Tribunal Tribunal de la Concurrence

Reference: *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24
File No.: CT-2004-003
Registry Document No. : 0006

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

AND 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;

B E T W E E N:

Mrs. O's Pharmacy
(applicant)

and

Pfizer Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

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. 0'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. *Milliken, 2002* Comp. Trib. 41, 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, 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 and Sons Ltd.* ***v.*** *La-Z-Boy Canada Ltd.,* 2004 Comp. Trib. 4 (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 Limited. v. Fred Deeley Imports Ltd.,* 2004 Comp. Trib. 13 and *Quinlan* 's *of Huntsville Inc.* ***v.*** *Fred Deeley Imports Ltd.,* 2004 Comp. Trib. 15. 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 Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1:

> The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de rninirnis. 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 edible 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.

DATED at Ottawa, this 20th day of September 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Pierre Blais

REPRESENTATIVES

For the applicant:

Mrs. O's Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Pfizer Canada Inc.

Philip Spencer, Q.C.
Emily Winter

Competition Tribunal Tribunal de la Concurrence

Reference: *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41
File no.: CT2002005
Registry document no.: 0004

IN THE MATTER OF an application by Mr. Robert Gilles Gauthier, carrying on business as The National Capital News Canada, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, for leave to make an application under section 75 of the Act.

B E T W E E N:

The National Capital News Canada
(applicant)

and

The Honourable Peter Milliken, M.P.
(respondent)

Decided on the basis of the written record.
Member: Dawson J. (presiding)
Date of reasons and order: 20021213
Reasons and order signed by: Dawson J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

I. INTRODUCTION

[1] This is the first application to the Competition Tribunal ("Tribunal") brought by a party other than the Commissioner of Competition ("Commissioner"). Pursuant to recent amendments to the *Competition Act*, R.S.C. 1985, c. C-34, ("Act") an application by a party other than the Commissioner can only be commenced if leave is granted by a judicial member of the Tribunal.

II. RELEVANT FACTS

[2] Mr. Robert Gilles Gauthier ("applicant") filed, pursuant to subsection 103.1(1) of the Act, an application for leave ("leave application") to make an application under section 75 of the Act ("application") against the Honourable Peter Milliken. Mr. Milliken is named in his capacity as Speaker of the House of Commons ("Speaker"). Sections 75 and 103.1 of the Act are attached to these reasons as Schedule A.

[3] In substance, Mr. Gauthier, as proprietor of The National Capital News Canada ("National Capital News"), seeks an order under section 75 of the Act requiring that he and his associates and employees be provided with access to the Parliamentary Press Gallery, without becoming a member of Canadian Parliamentary Press Gallery Inc., and without " . . . being required to meet unfair or arbitrarily restrictive conditions of any other person, group or government official."

[4] Contained within the leave application is a statement of grounds and material facts on which the applicant relies. The applicant also filed an affidavit sworn by him in support of the leave application. The applicant asserts that he has been substantially affected in his business, and is significantly precluded from carrying on business, due to his alleged inability to obtain full access to substantial supplies of information and to essential services (including listing on the Press Gallery journalist list) that are provided to his competitors by the Speaker. The Speaker is said to control such access on behalf of the Parliament of Canada. The affidavit describes the history of the National Capital News and its business environment, its alleged need to gain access to sources of information related to the Parliament and Government of Canada and the difficulties encountered over the years to obtain access. Exhibits attached to the affidavit consist of: (1) a copy of a March 25, 1994, letter from Mr. Brian A. Crane, Q.C., counsel for the Speaker of the House of Commons at the time; (2) a letter dated November 10, 1989, from Mr. Marcel R. Pelletier, Q.C., the House of Commons Law Clerk and Parliamentary Counsel, confirming that there has been no legislation ceding a certain power to the Parliamentary Press Gallery; (3) an order of the Ontario Court (General Division) dated January 8, 1996, prohibiting Mr. Gauthier from coming onto the premises of the Canadian Parliamentary Press Gallery; and (4) a letter dated October 16, 1995, from M.G. Cloutier, the Sergeant-at-Arms, House of Commons, confirming there is no restriction on Mr. Gauthier's access to the buildings on Parliament Hill on the same basis as other visitors, with the exception of access to the Press Gallery premises.

[5] The affidavit does not describe in any detail the facilities and services provided to the media by the Speaker, the physical location of the Parliamentary Press Gallery, or the location at which other services are provided.

[6] The Speaker did not file any material in reply to the leave application. While a respondent to a leave application is not required to make any response, the Tribunal would generally be assisted by relevant material and submissions filed by a respondent in opposition to a leave application.

III. THE TEST FOR THE GRANTING OF LEAVE UNDER SECTION 103.1 OF THE ACT

[7] The test for the granting of leave is contained 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 applicants' business by any practice referred to in one of those sections that could be subject to an order under that section. (emphasis added)

[8] In order to exercise its discretion to grant leave, the Tribunal must therefore be satisfied that it has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.

IV. THE REQUIREMENT OF "REASON TO BELIEVE"

[9] While the phrase "reason to believe" is new to the Act, it has been judicially considered in other contexts. In *Regina* v. *Rollins*, 80 C.C.C. (3d) 385, the British Columbia Supreme Court considered the phrase as it was contained in section 756 of the *Criminal Code*, R.S.C. 1985, c. 27 (1st Supp), which generally allowed a justice to place an offender in custody for observation where there was *reason to believe that evidence might be obtained* as a result of the observation that would be relevant to dangerous offender proceedings. The Court concluded that the expression "reason to believe" requires *reasonable grounds* for the "reason to believe". McKinnon J. wrote, at page 395, that:

> I accept that s. 756 *requires reasonable grounds for the "reason to believe."* That is a precondition to the belief and in most cases will come from the medical opinion but might come from other sources as well; however, in any event, there nevertheless exists the requirement that the court's opinion must be supported by the evidence of at least one medical practitioner. There are, therefore, criteria which offer controlled direction in the exercise of the court's discretion and an ability to obtain a "settled meaning" in relation to the wording or test enunciated in s. 756 which can be used in each application.

> I find that s. 756 is a broad test that is not unduly vague and which does set forth an "intelligible" standard, albeit not a difficult one to meet. (emphasis added)

[10] I accept that the requirement that the Tribunal has "reason to believe" does not require that it be satisfied that an applicant be directly and substantially affected, but rather that there are reasonable grounds to believe the applicant's allegations that he has been so affected.

[11] As to the nature of the evidence required to establish reasonable grounds upon which to believe that an applicant has been directly and substantially affected, the Federal Court has considered the standard of proof required to show the existence of reasonable grounds for a belief.

[12] In *Canada (Attorney General)* v. *Jolly*, [1975] F.C. 216 (C.A.), the Federal Court of Appeal was asked to determine whether there were "reasonable grounds for believing" that an organization, with whom the respondent was associated, was a subversive organization. The Court concluded that, even after *prima facie* evidence had been adduced by the respondent denying the fact, it was only necessary for the Minister to show the existence of reasonable grounds for believing the fact. It was unnecessary for the Minister to go further and establish the subversive character of the organization. The Court stated at paragraph 18:

> . . . But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. *It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing* that the organization is one that advocates subversion by force, etc. In a close case the failure to observe this distinction and to resolve the precise question dictated by the statutory wording can account for a difference in the result of an inquiry or an appeal. (emphasis added)

[13] Subsequently, in *Chiau* v. *Canada (Minister of Citizenship and Immigration)* (C.A.), [2001] 2 F.C. 297, the Federal Court of Appeal, when asked to determine the proper interpretation of the term "reasonable grounds" in the context of paragraph 19(1)(c.2) of the *Immigration Act of Canada*, R.S.C. 1985, c. I-2, stated at paragraph 60:

> As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" . . . as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "*a bona fide belief in a serious possibility based on credible evidence*." See Attorney General of Canada v. Jolly, [1975] F.C. 216 (C.A.). (emphasis added)

Leave to appeal to the Supreme Court of Canada was denied (see [2001] S.C.C.A. No. 71).

[14] 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.

V. APPLICATION OF THE TEST TO THIS LEAVE APPLICATION

[15] I turn now to whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe that:

> (1) the applicant is directly and substantially affected in his business by a practice referred to in section 75 of the Act; and
> (2) the alleged practice could be subject to an order under section 75 of the Act.

[16] It is the second element of the test which I consider to be dispositive of the leave application. I conclude that, for the following reasons, the applicant has failed to establish that the alleged reviewable practice could be subject to an order under section 75 of the Act.

[17] The order sought by the applicant against the Speaker is an order that:

> . . . pursuant to Section 75(1), (2) and (3) of the *Competition Act*, Restrictive Trade Practices, Refusal to Deal . . . full access to the Press Gallery facilities and services, including mailbox, listing and other benefits, be provided immediately to the applicant and his employees and associates without further delay . . . (application, paragraph 10)

[18] In the statement of grounds and material facts the applicant alleges that access to the services which he seeks is controlled by the Speaker, " . . . who controls such access on behalf of the Parliament of Canada." (application, paragraph 3) The evidence adduced by the applicant in his affidavit as it touches on this point is as follows:

> 6. I have invested 20 years of my life and more than my own financial resources into this business and have been seriously impeded by the Speaker of the House of Commons who finances and controls the facilities and services provided for the media by the House of Commons.
>
> . . .
>
> 17. The House of Commons provides substantial facilities and services made available to members of the media and which allow journalists and their employers to earn their living and realize serious commercial rewards.
>
> . . .

36. The facilities and services provided by the House of Commons fall under the direct control of the Speaker of the House of Commons who has the sole authority to determine who may have access to the Press Gallery facilities and services.

. . .

38. The power to regulate the admission of strangers to the precincts of Parliament, including the Press Gallery, resides with Parliament alone and has customarily been exercised by the Speaker. (Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. London: Butterworths, 1976.)

39. There has been no delegation of that power by either Parliament itself nor the Speaker of the House of Commons to the privately-owned Canadian Parliamentary Press Gallery Corporation, as confirmed by the House of Commons Law Clerk and Parliamentary Counsel, in his letter 10 November 1989 to the applicant's Legal Counsel at that time, **being Exhibit "B" to this my affidavit.**

40. The applicant alleges that the Speaker is the sole person in control of the media facilities and services and therefore to the resultant commercial benefits derived by journalists and publishers who have access.

41. The Speaker has the duty to administer these publicly-funded facilities and services in a fair manner pursuant to the provisions of the *Competition Act.*

[19] The applicant is, I believe, correct that it is the Speaker who alone has the power to control access to any part of the House, including the Press Gallery. What is significant, however, is that the Speaker does so through constitutional powers and parliamentary privilege.

[20] The origin and nature of parliamentary privilege was reviewed by the Supreme Court of Canada in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319. There, Justice McLachlin, as she then was, writing for the majority noted that Canadian legislative bodies possess those historically recognized inherent constitutional powers which are necessary to their proper functioning. Writing with respect to the historical tradition of parliamentary privilege, Justice McLachlin stated at pages 378 to 379:

> . . . It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.
>
> The Parliamentary privilege of the British Parliament at Westminster sprang originally from the authority of Parliament as a court. Over the centuries, Parliament won for itself the right to control its own affairs, independent of the Crown and of the courts. The

> courts could determine whether a parliamentary privilege existed, but once they determined that it did, the courts had no power to regulate the exercise of that power. One of those privileges, held absolutely and deemed to be constitutional, was the power to exclude strangers from the proceedings of the House.

[21] Justice McLachlin went on to confirm that Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies (page 381), and, added at page 383, that:

> *. . . If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.* (emphasis added)

[22] As to the scope of that exclusive jurisdiction, at page 384 Justice McLachlin wrote:

> *. . . The parameters of this jurisdiction are set by what is necessary to the legislative body's capacity to function.* So defined, *the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges.* Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. *The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function?* A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory. (emphasis added)

[23] One of the specific privileges discussed by Justice McLachlin was the parliamentary privilege to eject strangers from the House and its precincts. She observed that this ancient privilege was now reposed in the Speaker "who alone has the power, whenever he or she sees fit, to order the withdrawal of strangers from any part of the House" (page 386). This privilege is necessary because the legislative chamber is at the core of the system of representative government (page 387).

[24] J.P. Joseph Maingot, Q.C., in *Parliamentary Privilege in Canada,* 2nd Ed. (Montreal: McGill-Queen's University Press, 1997) enumerates the rights, privileges and powers of the Senate and House of Commons in Chapter 11. One such privilege is the right to regulate internal affairs free from interference. This is said to include the right to administer internal affairs both within its precincts and beyond the debating chamber.

[25] No evidence or information was provided to suggest that any of the facilities or services that the applicant seeks fall outside the scope of Parliamentary privilege. The applicant asserts that the facilities and services which he seeks are provided by the House of Commons, and are financed and controlled by the Speaker who exercises Parliament's power to regulate the admission of strangers to its precincts.

[26] Applying the principles articulated in *New Brunswick Broadcasting*, cited above, to the evidentiary record before me, I am satisfied that the Speaker's alleged refusal to grant to the applicant full access to the Parliamentary Press Gallery facilities and services is an exercise of the parliamentary privilege to control access to the House and its precincts and to regulate the internal affairs of the House. Such privilege also encompass the power to adjudicate and apply those privileges.

[27] A similar conclusion was reached by the Ontario Court (General Division) in *Gauthier* v. *Canada (Speaker of the House of Commons)*, (1994), 25 C.R.R. (2d) 286 where Madam Justice Bell found that the Court did not have jurisdiction to review the Speaker's decision to deny the plaintiff access to the precincts of Parliament.

[28] Just as a court may not examine a particular exercise of these privileges, I conclude that the Tribunal is without jurisdiction to embark upon such examination. The Tribunal is, pursuant to section 9 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), a court of record and principles of Parliamentary privilege are as important and applicable to it as they are to other courts. Therefore the practice complained of could not be the subject of any order of the Tribunal under section 75 of the Act.

[29] It follows that the Tribunal does not have, and can not have, any basis upon which to believe that the practice complained of by the applicant could be subject to an order. This requirement of subsection 103.1(7) of the Act is not met and therefore the application for leave must fail. In view of this conclusion it is unnecessary to consider whether the applicant adduced sufficient evidence to meet the first element of the test for leave.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[30] The leave application is denied.

DATED at Ottawa, this 13th day of December, 2002.

SIGNED on behalf of the Tribunal by the judicial member.

(s) Eleanor R. Dawson

[31] Schedule A: Legislative References to sections 75 and 103.1 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. (emphasis added)

(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.

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.

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

(3) 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 or 77 is sought.

(4) 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 or 77.

(5) 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.

(6) 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).

(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.

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

(9) 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).

(10) The Commissioner may not make an application for an order under section 75, 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), if the person granted leave has already applied to the Tribunal under section 75 or 77.

(11) 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.

(12) 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.

REPRESENTATIVE

For the applicant:

Robert Gilles Gauthier, carrying on business as the National Capital News Canada

Robert Gilles Gauthier

For the respondent:

The Honourable Peter Milliken, M.P.

not represented

Competition Tribunal Tribunal de la Concurrence

Reference: *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21
File No.: CT-2004-004
Registry Document No.: 0008

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

AND IN THE MATTER OF an application by Paradise Pharmacy Inc. and Rymal Pharmacy Inc. (Paradise et al.) for an order pursuant to section 103.1 of the *Competition Act*, granting leave to bring an application under section 75 of the Act;

BETWEEN:

Paradise Pharmacy Inc. and Rymal Pharmacy Inc.
(applicants)

And

Novartis Pharmaceuticals Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

APPLICATION

[1] The applicants are Paradise Pharmacy Inc. and Rymal Pharmacy Inc. (Paradise et al.), corporations incorporated under the laws of the Province of Ontario carrying on business in Hamilton, Ontario. Both pharmacies are owned and operated by Shirley Silberg, a licensed pharmacist.

[2] The respondent is Novartis Pharmaceuticals Canada Inc./Novartis Pharma Canada Inc. (Novartis), corporations incorporated under the laws of Canada. Novartis carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

[3] Paradise et al. operate retail pharmacies in Hamilton since 1996, for Paradise, and 1997, for Rymal. The applicants offer the products and services associated with a neighbourhood pharmacy - health and beauty aides, cosmetics and prescription and over the counter medicines.

[4] There is significant competition among retail pharmacies in the area adjacent to Paradise et al. Both pharmacies have at least one large drugstore operation - Shoppers Drug Mart, Pharma Plus, Wal-Mart - within one mile of their location. Pharmacies depend on manufacturers to supply pharmaceutical products. In some cases, generic products are available. In other patent-protected cases, the drug manufacturer (including its authorized distributors) is the sole source of supply.

[5] Paradise et al. have been selling Novartis products since they began operating. Drugs produced by Novartis represent for each pharmacy approximately 7 per cent of their total annual pharmaceutical drug sales. Novartis manufactures a variety of prescription drugs for various ailments, including diabetes (Actos), high blood pressure (Diovan, Lotensin), breast cancer prevention (Femara) and psychiatric disorders (Zyprexa).

[6] Paradise et al.'s two distributors have advised them that Novartis has directed the distributors not to supply the pharmacies with any Novartis product. This refusal to deal has led to very serious disruptions, in loss of sales and loss of customer base. Paradise et al. submit that if customers need to fill multiple prescriptions and one of the products is unavailable, customers will simply change pharmacies to enable them to fill all their prescriptions in one same location. Paradise et al. allege that Novartis is seriously threatening their financial viability.

[7] Novartis occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Its products are widely available in the Hamilton area, including from Paradise et al.'s large competitors.

RESPONDENT'S POSITION

[8] Novartis Pharmaceuticals Canada Inc./Novartis Pharma Canada Inc. (respondent) opposes the application on two grounds: the business of the applicants is not directly and substantially affected, and the test to be applied in considering an application under section 103.1 of the *Competition Act*, R.S.C. *1985, c.* C-34, (the "Act") includes a review of section 75.

Direct and substantial impact:

[9] Nine of the eleven products listed by the applicants as being Novartis products actually are, while two (Actos and Zyprexa) are manufactured and sold by Eli Lilly, a pharmaceutical competitor of the respondent. According to IMS, the total sales for the nine products to the applicants for 2003 was approximately $3149.

[10] The respondent argues that the applicants are not substantially affected, given the way the Competition Tribunal (the "Tribunal") has construed this term in past decisions.

[11] The respondent has reason to believe the applicants have been involved in internet export sales of pharmaceutical products, contrary to the directions that the respondent has given to its independent distributors, in conformity with its Terms and Conditions of Sale.

Test for leave under section 103.1:

[12] The respondent argues that there are two separate conditions which must be satisfied for leave to be granted under section 103.1 : the business of the applicant must be directly and substantially affected by the practice of the respondent, and the practice could be subject to an order under section 75.

[13] The respondent submits that for a refusal to deal to be subject to a section 75 order, all five conditions specified at section 75 must be met. Yet the Tribunal has been provided with no evidence as to the inability of the applicants to obtain adequate supplies (75(l)(a)) when complying with usual trade terms, nor have the applicants shown that there is any adverse effect on competition (75(l)(e)). In the latter case, in fact, the applicants indicate that competition thrives in the areas surrounding both pharmacies. The respondent therefore contends that the Tribunal has no reason to believe that the respondent's practice could be subject to an order under section 75, since its conditions are not met.

ANALYSIS

[14] Section 103.1 of the Act is a new section which has been the basis of five decisions so far, which can be briefly summarized as follows:

[15] In *National Capital News Canada* v. *Milliken*, 2002 Comp. Trib. 41, 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 l03.l(7) was not met.

[16] *In Barcode Systems Inc.* ***v.*** *Symbol Technologies Canada ULC,* 2004 Comp. Trib. 1, 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.

[17] In *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (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.

[18] 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."

[19] Madam Justice Simpson has recently rendered two decisions on section 103.1 applications, *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13 and Quinlan 's of Huntsville Inc. v. Fred Deeley Imports Ltd., 2004 Comp. Trib. 15. 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.

[20] In this case, I believe the applicants have 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 be issued 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.

[21] The Tribunal has never defined specifically what was to be considered "substantial"; however, it stated as follows in Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1:

> 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 US-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler US. 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.

[22] In its application, the applicants submit that the action of the respondent will have consequences for the business beyond the loss of sales of the respondent's products. Customers will go elsewhere if they cannot fill their prescription, or part of their prescription, at the applicants' pharmacies.

[23] No figures are provided to show exactly what has occurred in terms of the impact of the decision of the respondent on the applicants' businesses. Subsection 103.1(7) states that the Tribunal may grant leave if it has reason to believe that the applicant is directly and substantially affected. In other words, the evidence must be direct, not speculative. Since no figures are given, it is difficult for the Tribunal to form a *bona fide* belief that the financial viability of the business is threatened.

[24] From the materials submitted, it appears the applicants fear that loss of business will occur. There are no explanations given as to how loss is calculated, no basis nor reference point to show the effect of the loss of the respondent's product. In my view, evidence is insufficient to grant leave.

THEREFORE THE TRIBUNAL ORDERS THAT:

[25] Leave to make an application under subsection 75 is dismissed.

DATED at Ottawa, this 20th day of September, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Pierre Blais

REPRESENTATIVES

For the applicants:

Paradise Pharmacy Inc. et al.

Mark Adilman
D.H. Jack

For the respondents:

Novartis Pharmaceuticals Canada Inc.

A. Neil Campbell
Karen S. Kuzumowich

Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6
File No.: CT-2007-001
Registry Document No.: 0030

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

AND 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*

B E T W E E N :

Sears Canada Inc.
(applicant)

and

Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.
(respondents)

Date of hearing: 20070314
Presiding Judicial Member: Simpson J. (Chair)
Date of Reasons and Order: March 23, 2007
Reasons and Order signed by: Madam Justice S. Simpson

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE UNDER SECTION 103.1 OF THE ACT

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 multi-channel, 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.	**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 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.
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.** (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) 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]	**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 *Director of Investigation & Research v. Chrysler Canada Ltd*., 27 C.P.R. (3d) 1, aff'd 38 C.P.R. (3d) 25 (F.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 Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21, 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 *Symbol Technologies ULC v. Barcode Systems Inc.*, [2004] F.C.A. 339 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.

DATED at Ottawa, this 23th day of March, 2007

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

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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:
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PREFACE

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the "Act"), the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act* and the *Precious Metals Marking Act*.

The Bureau endeavours to be as transparent as possible in providing information to Canadians on the application of the laws under its jurisdiction. One of the ways it does so is by issuing enforcement guidelines, which describe the Bureau's general approach to enforcing specific provisions in the Act.

Intellectual property ("IP") and intellectual property rights are increasingly important in today's knowledge-based economy. In such an environment, there has been interest in how the Bureau will deal with competition issues involving IP. Accordingly, the Bureau has made it a priority to provide increased clarity on this subject.

These Guidelines articulate how the Bureau approaches the interface between competition policy and IP rights. They describe how the Bureau will determine whether conduct involving IP raises an issue under the Act. They also explain how the Bureau distinguishes between those circumstances that warrant a referral to the Attorney General under section 32 of the Act, and those that will be examined under the general provisions.

These Guidelines are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of each case. Final determination of the law is the responsibility of the Competition Tribunal (the "Tribunal') and the courts.

The Bureau may revisit certain aspects of these Guidelines in the future in light of experience, changing circumstances and decisions of the Tribunal and the courts.

John Pecman
Commissioner of Competition

TABLE OF CONTENTS

1. INTRODUCTION

Today's economy is increasingly based on knowledge and innovation and driven by rapid advancements in information and communications technologies. New technologies create economic, cultural, social and educational opportunities for people to put ideas to work in innovative ways that increase productivity and create employment and wealth. Adequate protection of IP plays an important role in stimulating new technology development, artistic expression and knowledge dissemination, all of which are vital to the knowledge-based economy.[1] In this context, IP becomes a valuable asset for firms' profitability and growth. However, given the importance of IP, there is a risk that it may be used strategically to lessen or prevent competition.

Owners of IP, like owners of any other type of private property, profit from property laws that define and protect owners' rights to exclude others from using their private property. The special characteristics of IP have made it necessary in many instances for governments to develop laws that confer property rights to IP comparable to those for other kinds of private property.

IP laws and competition laws are two complementary instruments of government policy that promote an efficient economy. IP laws provide incentives for innovation and technological diffusion by establishing enforceable property rights for the creators of new and useful products, technologies and original works of expression. Competition laws may be invoked to protect these same incentives from anti-competitive conduct that creates, enhances or maintains market power or otherwise harms vigorous rivalry among firms. Given that competition law may result in limitations on the terms and conditions under which the owners of IP rights may transfer or license the use of such rights to others, and on the identity of those to whom the IP is transferred or licensed, these Guidelines seek to clarify the circumstances under which the Bureau would consider such intervention to be appropriate and also illustrate situations that would not call for intervention under the Act.

In the interest of transparency, the Bureau recognizes the importance of providing information on its treatment of IP under the Act. This document, the Intellectual Property Enforcement Guidelines, sets out how the Bureau views the interface between IP law and competition law. It also explains the analytical framework that the Bureau uses to assess conduct involving IP.

The Guidelines discuss the circumstances in which the Bureau, under the Act, would seek to restrain anti-competitive conduct associated with the exercise of IP rights to maintain competitive markets. The approach elaborated in this document is based on the premise that the Act generally applies to conduct involving IP as it applies to conduct involving other forms of property.

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1 The Canadian Intellectual Property Office (CIPO) defines intellectual property and summarizes the role of IP rights as follows: "Intellectual Property (IP) refers to the creations of the mind, such as inventions, literacy and artistic works, as well as symbols, names, pictures, designs and models used in business. Patents, trade-marks, copyright, industrial designs, integrated circuit topographies and plant breeders' rights are referred to as "IP rights." Just as rights are acquired when a building or land is purchased, IP rights are "property" in the sense that they are based on the legal right to exclude others from using the property. Ownership of the rights can also be transferred." For more information, see the CIPO website: http://www.cipo.ic.gc.ca/.

The Bureau's overall approach to the application of the Act to IP is as follows:

- The circumstances in which the Bureau may apply the *Act* to conduct involving IP or IP rights fall into two broad categories: those involving something more than the mere exercise of the IP right, and those involving the mere exercise of the IP right and nothing else. The Bureau will use the general provisions of the *Act* to address the former circumstances and section 32 (special remedies) to address the latter.
- In either case, the Bureau does not presume the conduct violates the general provisions of the *Act* or should be remedied under section 32.
- The analytical framework that the Bureau uses to determine the presence of anti-competitive effects stemming from the exercise of rights to non-IP forms of property is sufficiently flexible to apply to conduct involving IP, even though IP has important characteristics that distinguish it from other forms of property.
- When conduct involving an IP right warrants a special remedy under section 32, the Bureau will act only in the very rare circumstances described in this document and when the conduct cannot be remedied by the relevant IP statute.

Circumstances will determine how the Bureau uses its enforcement discretion to respond to any alleged contravention of the *Act*. Therefore, individuals contemplating a business arrangement involving IP should either consult qualified legal counsel or contact the Bureau when evaluating the risk of the arrangement contravening the *Act*. The final interpretation of the law rests with the Tribunal and the courts.

When developing these Guidelines, the Bureau considered the current global economic and technological environment and, in particular, the rapid rate of technological changes occurring in many industries. The Bureau also took into account its past enforcement experience, Canadian case law, and the approaches taken in the Antitrust Guidelines for the Licensing of Intellectual Property issued by the U.S. Department of Justice and the Federal Trade Commission in 1995, and in other jurisdictions, including the European Union. The Bureau recognizes that the interface between competition and IP policy is a constantly evolving area. Accordingly, to ensure appropriate coordination between IP and competition policy, the Bureau has entered into a Memorandum of Understanding with CIPO that will serve to identify areas of mutual interest and facilitate discussions between the two agencies.

The remainder of this document is organized into six parts:

- Part 2 discusses the purpose of IP laws, lists the various statutes that deal with IP, reviews the purpose of competition law and lists the principal provisions of the *Act* that relate to IP;
- Part 3 discusses the interface between IP law and competition law;
- Part 4 outlines the principles underlying the application of the general provisions and section 32 of the *Act* to business conduct involving IP;
- Part 5 describes the Bureau's analytical framework, which is sensitive to the particular characteristics of IP;

- Part 6 discusses the Bureau's mandate to promote competition, which may include intervening in proceedings in which IP rights are being defined, strengthened or extended inappropriately; and
- Part 7 presents a series of hypothetical scenarios to illustrate how the Bureau would apply the *Act* to a wide variety of business conduct involving IP.

2. OVERVIEW OF IP LAW AND COMPETITION LAW

2.1 IP Law

IP laws create legally enforceable private rights that protect to varying degrees the form and/or content of information, expression and ideas. The primary purpose of these laws is to define the scope of these rights and determine under what circumstances they have been infringed upon or violated. While the nature and scope of protection provided by each respective IP Act are different, by protecting exclusive rights, the IP laws provide an incentive to pursue scientific, artistic and business endeavours, which might not otherwise be pursued.

In the Guidelines, IP rights include rights granted under the *Copyright Act*, the *Patent Act*, the *Trade-marks Act*,[2] the *Industrial Design Act*, the *Integrated Circuit Topography Act* and the *Plant Breeders' Rights Act*.

- The *Copyright Act* confers upon the creator of an original work, for a limited term, exclusive rights to reproduce or communicate that work.
- The *Patent Act* protects an inventor by granting, for a fixed term, the exclusive right to prevent others from making, selling or using an invention.
- The *Trade-marks Act* allows the registration of distinctive marks and confers upon the owner the exclusive right to use that mark.
- Upon registration of a design, the *Industrial Design Act* confers on the owner the right to limit the production and sale of articles that incorporate the design.
- The *Integrated Circuit Topography Act* confers similar rights for a topography, which is a design for the disposition of an integrated circuit product.
- The *Plant Breeders' Rights Act* grants the owner of a new plant variety the exclusive rights to produce, for sale and to sell, reproductive material of the variety.

The term IP rights also encompasses the protection afforded IP under common law and the Civil Code of Quebec, including that given to trade secrets and unregistered trademarks.

There are also remedies available under the IP statutes to protect against abuses. For example, as stipulated in section 65 of the *Patent Act*, three years after the grant of a patent, a party may apply to the Commissioner of Patents alleging abuse of the patent, such as unduly restrictive licensing conditions. If the Commissioner of Patents is satisfied that there has been abuse of conduct, there are a number of actions he/she may take, including ordering the grant to the applicant of a license on such terms as the Commissioner of Patents may think expedient, or ordering the patent to be revoked.

2 Although the same general competition law principles apply to trademarks as to other forms of IP, the Guidelines are generally concerned with technology transfer and innovation related issues. Consequently, when applying its enforcement approach to trademarks, the Bureau will additionally consider in its analysis the source and quality differentiation issues that arise in respect of trademarks.

2.2 Competition Law

The principle underlying competition law is that the public interest is best served by competitive markets, which are socially desirable because they lead to an efficient allocation of resources. Competition law seeks to prevent companies from inappropriately creating, enhancing or maintaining market power that undermines competition without offering offsetting economic benefits. Market power refers to the ability of firms to profitably cause one or more facets of competition, such as price, output, quality, variety, service, advertising or innovation, to significantly deviate from competitive levels for a sustainable period of time.[3] However, a firm would not contravene the Act if it attains its market power solely by possessing a superior product or process, by introducing an innovative business practice or by other reasons of exceptional performance.[4]

The provisions of the Act that set out when it may be necessary for the Bureau to intervene in business conduct, including conduct involving IP, fall into two categories: those that cover criminal offences and those that cover reviewable (civil) matters. Several civil provisions state that the Bureau must, before it intervenes, show that the conduct substantially lessens or prevents competition.[5]

Criminal offences include conspiracy (section 45), bid-rigging (section 47), and some forms of misleading advertising and related deceptive marketing practices (sections 52 to 55).[6]

The provisions on reviewable (civil) matters deal with conduct that is generally pro-competitive but that may, in certain economic circumstances, significantly constrain competition. Reviewable matters include abuse of dominant position (section 79), exclusive dealing, tied selling and market restriction (section 77), price maintenance (section 76), refusal to deal (section 75), agreements or arrangements between competitors (section 90.1), mergers (section 92), and misleading advertising and related deceptive marketing practices (sections 74.01 through 74.06).[7] In general, the Tribunal may order remedies under these provisions if the conduct is likely to substantially lessen or prevent competition.

When a court determines that a firm has contravened the criminal provisions of the Act, it can impose fines, imprisonment and prohibition orders.[8] In addition, parties may bring private

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3 *R. v. Nova Scotia Pharmaceutical Society et al., (1992) 2 S.C.R. (606)*, defines market power as "…the ability to behave relatively independently of the market." *DIR v. The NutraSweet Co., (1990) 32 C.P.R. (3d) 1(Comp. Trib.)*, defines it as the ability to maintain prices above competitive levels for a considerable period.

4 In the abuse of dominance provision of the Act, subsection 79(4) provides that superior competitive performance is a consideration in determining whether a practice has an anti-competitive effect in a market.

5 The refusal to deal provision (section 75) and the price maintenance provision (section 76) require proof that the refusal is having or is likely to have an adverse effect on competition in a market. Section 75 also requires that the person's inability to obtain adequate supply is the result of insufficient competition among suppliers. The deceptive marketing practices provisions (sections 74.01 through 74.06) do not require a competition effects test.

6 These provisions do not require proof of market power or anti-competitive effects.

7 Section 103.1 of the Act allows parties to apply to the Tribunal for leave to make an application under section 75, 76 or 77.

8 See the Bureau's *Conformity Continuum Bulletin*, June 18, 2000, for a detailed discussion of case resolution alternatives.

actions seeking damages.[9] With respect to reviewable (civil) matters, the Tribunal may issue a variety of remedial orders, some of which restrict private property rights. For example, the Tribunal has, in the past, ordered merging firms to divest themselves of assets, including IP, when it concluded that the proposed merger was likely to substantially lessen or prevent competition, thereby overriding the rights of property owners to acquire or dispose of their private property.[10] Similarly, remedies under the abuse of dominant position provision have involved orders affecting IP.[11]

Section 32, which is in the special remedies part of the Act, gives the Federal Court the power, when asked by the Attorney General, to make remedial orders if it finds that a company has used the exclusive rights and privileges conferred by a patent, trademark, copyright or registered integrated circuit topography to unduly restrain trade or lessen competition (see section 4.2 of this document for circumstances in which the Bureau may seek to have the Attorney General bring an application under section 32).

When the Federal Court determines that a special remedy is warranted under section 32, it may issue a remedial order declaring any agreement or licence relating to the anti-competitive use void, ordering licensing of the IP right (except in the case of trademarks), revoking the right or directing that other things be done to prevent anti-competitive use. This provision provides the Attorney General with the statutory authority to intervene in a broad range of circumstances to remedy an undue lessening or prevention of competition involving the exercise of statutory IP rights. In practice, the Attorney General likely would seek a remedial order under the Act only on the recommendation of the Commissioner.

9 See section 36 of the Act.

10 See DIR v. Southam Inc. (1997), 71 C.P.R. (3d) 417 (S.C.C.), and (1995), 63 C.P.R. (3d) 67 (F.C.A.), aff'd (1992), 47 C.P.R. (3d) 240 (Comp. Trib.).

11 See DIR v. D&B Companies of Canada Ltd. (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) (hereafter referred to as *Nielsen*).

3. INTERFACE BETWEEN IP AND COMPETITION LAW

3.1 Property Rights

Private property rights are the foundation of a market economy. Property owners must be allowed to profit from the creation and use of their property by claiming the rewards flowing from it. In a market system, this is accomplished by granting owners the right to exclude others from using their property, and forcing those wishing to use it to negotiate or bargain in the marketplace for it, thereby rewarding the owner. This creates incentives to invest in developing, and leads to the exchange of, private property, thus contributing to the efficient operation of markets.

3.2 IP Law

IP has unique characteristics that make it difficult for owners to physically restrict access to it and, therefore, exercise their rights over it. The owner of physical property can protect against its unauthorized use by taking appropriate security measures, such as locking it away, but it is difficult, if not impossible, for the creator of a work of art to prevent his or her property from being copied once it has been shown or distributed. This is exacerbated because IP, while often expensive to develop, is often easy and inexpensive to copy. IP is also typically non-rivalrous — that is, two or more people can simultaneously use IP. The fact that a firm is using a novel production process does not prevent another firm from simultaneously using the same process. In contrast, the use of a physical property by one firm prevents concurrent use by another.[12]

Accordingly, IP laws confer on an IP owner the right to unilaterally exclude others from using that property. While each IP statute grants this right to varying degrees and the right may be subject to limitations that vary across statutes, it allows the owners of the IP to maximize its value through trade and exchange in the marketplace. This claim on the rewards flowing from IP enhances the incentive for investment and future innovation in IP as it does for other forms of private property. With the exception of the protections afforded unregistered trademarks and other common law rights, the legal protection of IP is a function of and does not exist outside the scope of IP statutory regimes.

3.3 Competition Law

Since the right to exclude, which is the basis of private property rights, is necessary for efficient, competitive markets, the enforcement of the Act rarely interferes with the exercise of this basic right. Enforcement action under the Act may be warranted when there are conspiracies, agreements or arrangements among competitors or potential competitors;

12 To enforce common law property rights, it must be possible to identify the property's owner and to clearly delineate the boundaries of the property. Both tasks can prove problematic in the case of IP. For other kinds of private property, possession can generally be seen as an indication of ownership. However, since many individuals can possess IP simultaneously, it may be difficult to establish the identity of the original creator and true owner of the IP. Furthermore, since IP is generally intangible, it is often difficult to clearly delineate the boundaries of the property. Without a legal delineation of these boundaries, IP owners may have difficulty showing that others have infringed on their property.

when anti-competitive conduct creates, enhances or maintains market power;[13] or when firms use deceptive marketing practices.

3.4 Interface

IP and competition laws are both necessary for the efficient operation of the marketplace. IP laws provide property rights comparable to those for other kinds of private property, thereby providing incentives for owners to invest in creating and developing IP and encouraging the efficient use and dissemination of the property within the marketplace. Applying the Act to conduct associated with IP may prevent anti-competitive conduct that impedes the efficient production and diffusion of goods and technologies and the creation of new products. The promotion of a competitive marketplace through the application of competition laws is consistent with the objectives underlying IP laws.

13 An example of conduct involving IP that could create market power is the assignment of patents. See *Apotex Inc. v. Eli Lilly and Co.* [2005] F.C.J. No. 1818 (Fed. C.A.).

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.

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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.

5. THE ANALYTICAL FRAMEWORK IN THE CONTEXT OF IP

5.1 Relevant Markets

Relevant markets provide a practical tool for assessing market power.[30] When the anti-competitive concern is prospective (that is, the conduct is likely to have a future anti-competitive effect),[31] relevant markets are normally defined using the hypothetical monopolist test.[32]

When the anti-competitive concern is retrospective[33] (that is, the conduct has already had an anti-competitive effect), applying the hypothetical monopolist test could lead to erroneous conclusions about the availability of substitutes and the presence of market power. Accordingly, the Bureau takes into account the impact of any alleged anti-competitive conduct that may have preceded the investigation when determining the relevant market. In this context, the Bureau analyzes market definition and competitive effects concurrently.

For conduct involving IP, the Bureau is likely to define the relevant market based on one of the following: the intangible knowledge or know-how that constitutes the IP, processes that are based on the IP rights, or the final or intermediate goods resulting from, or incorporating, the IP.

Defining a market around intangible knowledge or know-how is likely to be important when IP rights are separate from any technology or product in which the knowledge or know-how is used. For example, consider a merger between two firms that individually license similar patents to various independent firms that, in turn, use them to develop their own process technologies. Such a merger may reduce competition in the relevant market for the patented know-how: if the two versions of that know-how are close substitutes for each other: if there are no (or very few) alternatives that are close substitutes for the know-how: and if there are barriers that would effectively deter the development of conceptual approaches that could replace the know-how of the merging firms. This last condition may hold if the scope of the patents protecting the merging firms' know-how is sufficiently broad to prevent others from "innovating around" the patented technologies, or if the development of such know-how requires specialized knowledge or assets that potential competitors would be unlikely to develop or obtain in a timely manner sufficient to constrain a material price increase in the relevant market.

In cases involving the licensing of IP, the Bureau generally treats the licence as the terms of trade under which the licensee is entitled to use the IP. The Bureau does not define a relevant market around a licence, but rather focuses on what the legal rights granted to the licensee actually protect (i.e., intangible knowledge or know-how, processes, or final or intermediate goods).

30 The market definition exercise focuses on demand substitution factors (i.e., possible consumer responses). The Bureau considers the potential constraining influence of firms that can participate in the market through a supply response (i.e., a possible production response) after it has defined the relevant market.

31 This is generally the case with mergers.

32 See paragraphs 4.3, 4.4 and 4.5 of the Competition Bureau's *Merger Enforcement Guidelines*.

33 This is generally the case with alleged abuse of dominant position.

The Bureau does not define markets based on research and development activity or innovation efforts alone. The Bureau usually concentrates on price or output effects. Conduct that directly reduces the innovation effort of the firms under scrutiny or restricts or prevents the innovation efforts of others may be anti-competitive. The appropriate relevant market definition or definitions will depend specifically on the knowledge or know-how, process, or final or intermediate good toward which the innovation effort is directed.

5.2 Market Power

Whether conduct involving IP results in an increase in market power in the relevant market depends on a number of factors, including the level of concentration, entry conditions, the rate of technological change, the ability of firms to "leap-frog over" seemingly entrenched positions and the horizontal effects, if any, on the market.[34] The order in which the Bureau assesses these factors may vary depending on the section of the Act under which the Bureau is examining the conduct and on the circumstances of the relevant market.

5.2.1 Market Concentration

The Bureau examines the degree of market concentration to get a preliminary indication of the competitiveness of the relevant market. In general, the more firms there are in the relevant market, the less likely it is that any one firm acting unilaterally, or any group of firms acting cooperatively, could enhance or maintain market power through the conduct being examined. However, a high degree of concentration is not enough to justify the conclusion that the conduct will create, enhance or maintain market power. This is particularly true of industries with low barriers to entry, a high rate of technological change and a pattern of firms "innovating around" or "leap-frogging over" technologies that had previously controlled a dominant share of a market.

To measure concentration in markets for intermediate or final goods, the Bureau typically calculates the market shares of the firms identified as actual participants in the relevant market. These include the firms identified as currently offering products that are demand substitutes as well as those that represent potential supply sources of these products (i.e., firms that are likely to respond to a price increase in the relevant market with minimal investment).[35] Firms that are unable to respond quickly to a price increase or whose entry requires significant investment are not considered to be participants within the relevant market for purposes of assessing market concentration. That said, the potential competitive influence of such firms will be considered as part of the assessment of whether the conduct in question is likely to lessen or prevent competition substantially.

34 The *Merger Enforcement Guidelines* discuss other factors the Bureau considers when it assesses market power. These include foreign competition, business failure and exit, the availability of acceptable substitutes, effective remaining competition, removal of a vigorous and effective competitor, and change and innovation.

35 The following factors are relevant to determining when a firm will rapidly divert sales in response to a price increase: the cost of substituting production in the relevant market for current production (i.e., switching costs), the extent to which the firm is committed to producing other products or services, and the profitability of switching from current production.

The Bureau generally does not challenge the conduct of a firm that possesses less than a 35 percent market share.[36] (Market shares of more than 35 percent indicate circumstances that may warrant further review.) Market share may be calculated based on the firms' entire actual output, total sales (dollars or units) or total capacity (used and unused).[37, 38] However, some of these factors may be difficult to assess in cases involving IP. Accordingly, the Bureau's assessment of market power is likely to focus on qualitative factors such as conditions of entry into the relevant market, whether IP development is resulting in a rapid pace of technological change, the views of buyers and market participants, and industry and technology experts.

5.2.2 Ease of Entry

The Bureau also examines how easily firms can enter the relevant market to determine whether new entrants have the ability to restrain any creation, enhancement or maintenance of market power that may result from conduct involving IP. When assessing effects in markets involving IP, conditions of entry are often more important than market concentration. For instance, evidence of a rapid pace of technological change and of the prospect of firms being able to "innovate around" or "leap-frog over" an apparently entrenched position is an important consideration that may, in many cases, fully address potential competition law concerns.

The Bureau also considers the extent to which the conduct itself erects or has erected barriers to entry or, alternatively, induces or has induced competitors to exit the market (see examples 3.2 and 4).[39] Entry into markets in which IP is important may be difficult because of the sunk costs associated with developing assets that comprise specialized knowledge. Additionally, IP rights can serve to increase barriers to entry independent of any conduct.[40]

5.2.3 Horizontal Effects

In evaluating the competitive effects of conduct that involves an IP right, whether it is a merger transaction, licensing arrangement or other form of contractual arrangement, the Bureau focuses on whether the conduct will result in horizontal anti-competitive effects — consequences for firms producing substitutes or firms potentially producing substitutes (see examples 3.1 and 3.2).

Even though an arrangement may be vertical, such as the acquisition of a retail shoe outlet by a shoe manufacturer or the licensing of the right to use a particular food additive to a food producer, it can still have horizontal effects in a relevant market (see example 4). If an

36 The Bureau generally does not challenge the conduct of a group of firms alleged to be jointly dominant that possess a combined market share of less than 65 percent.

37 If the actual participants in the market include firms that represent potential sources of supply for the market, then market shares, even in terms of production capacities, may be difficult to accurately estimate. Accordingly, it must be recognized that the market shares attributed to firms whose products are actually sold within the relevant market will overstate the relative market position of these firms in such circumstances.

38 The Competition Tribunal stated in *Laidlaw*, that market share calculations based on sales may overstate market power when the market is characterized by excess capacity.

39 The fact that anti-competitive conduct can create barriers to entry was recognized by the Tribunal in *Laidlaw*.

40 Of course, the purpose of providing innovators with IP rights is to foster the development of new products. In this sense, IP rights may encourage firms to participate in environments in which technology changes very rapidly.

arrangement is vertical, the Bureau considers whether it is likely to result in horizontal effects among either sellers or buyers.

5.3 Anti-competitive Effects

Conduct must create horizontal effects for the Bureau to conclude that it is anti-competitive. In this regard, the Bureau analyzes whether conduct facilitates a firm's ability to exercise market power, either unilaterally or in a coordinated manner, in areas such as pricing and output.[41]

Anti-competitive horizontal effects may arise if the conduct increases competitors' costs. For example, a transaction can prevent, or raise the cost of, competitors' access to important inputs. IP licensing arrangements that involve one firm selling the right to use IP to another are inherently vertical, but can have horizontal effects, particularly if the licensor and licensee would have been actual competitors in the absence of the licensing arrangement. In addition, conduct that reduces innovation activity could be anti-competitive if it prevents future competition in a prospective product or process market.

5.4 Efficiency Considerations

A fundamental objective of competition law is to ensure the efficient use of resources through vigorous competition. However, there may be instances in which restrictions on competition can lead to a more efficient use of resources. This may be particularly true of agreements, arrangements and transactions involving IP that are inherently vertical and combine complementary factors. Moreover, there may be instances when creating or increasing market power is justified because of the efficiencies created. Indeed, this principle is consistent with the protection afforded by IP laws, which foster dynamic efficiency and competition by facilitating the creation of valuable works or processes that result in long-term increases in product selection, quality, output and productivity. In providing incentives for investment, IP laws grant exclusivity to the protected works that may result in temporary market power. Consequently, the Bureau considers both the short-term and long-term efficiency implications of conduct when analyzing efficiencies in cases involving IP. Efficiencies are explicitly recognized in sections 90.1 and 96 of the Act in the context of agreements or arrangements among competitors[42] and mergers.[43] In addition, under the abuse of dominant position provision (sections 78 and 79), business justifications may be relevant to determining whether conduct is, on balance, anti-competitive.[44]

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41 The term 'pricing' refers to all aspects of firms' actions that affect the interest of buyers. These include a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

42 Section 90.1 also applies to agreements between parties that are potential competitors.

43 Section 95 provides a specific exemption under the merger provision to research and development joint ventures that satisfy certain criteria outlined in the provision.

44 In *Tele-Direct*, the Competition Tribunal stated that, "(w)hat the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, 'exclusionary, predatory or disciplinary'. Relevant factors 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. 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..."

If the Bureau concludes that conduct is likely to substantially lessen or prevent competition in a relevant market, it will, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, make an assessment of whether the efficiency gains brought about or likely to be brought about by the conduct are greater than and offset the anti-competitive effects arising from the conduct. Part 12 of the *Merger Enforcement Guidelines* more fully describes the Bureau's approach to the analysis of efficiencies.

In assessing whether conduct involving IP is for an anti-competitive purpose under the abuse of dominant position provisions, the Bureau considers any pro-competitive effects (business justifications) generated by or associated with the conduct. For example, a licensing arrangement between an IP owner and a distributor may restrict intra-brand competition, but at the same time further inter-brand competition. A licensing arrangement between two potential competitors may result in a new product being developed that would not otherwise have been developed. In each case, the level of competition in the market may be enhanced.[45]

The Bureau also considers whether the firms could have used commercially reasonable means to achieve efficiencies that are or were less harmful to competition. If such alternatives exist, the Bureau would compare the anti-competitive effect of the conduct to such alternatives. In making this comparison, the Bureau does not attempt to uncover all of the theoretically possible alternatives for achieving the efficiencies. It considers only those means that are commercially reasonable and consistent with the firm's IP rights. The Bureau also considers the impact that using an alternative would have on the firm's ability to exercise its IP rights.

45 In *Nielsen*, the Competition Tribunal held that even if there is some justification for the alleged anti-competitive conduct, this must be weighed against any anti-competitive effects.

6. COMPETITION POLICY ADVOCACY

The Bureau may use its mandate to promote competition and the efficient allocation of resources to intervene in policy discussions and debates regarding the appropriate scope, definition, breadth and length of IP rights.[46] The Bureau may also seek leave to intervene in Federal Court and Superior Court cases when it believes it is important to bring a competition perspective to proceedings that will not be brought by the parties. In other proceedings, when the Bureau believes that IP rights could potentially be defined, strengthened or extended inappropriately, the Bureau may seek leave to intervene to make representations concerning the scope of the protection that should be accorded IP rights.

An example of Bureau advocacy occurred when it applied for and was granted leave to intervene by the Federal Court of Appeal (FCA) in *Apotex Inc. v. Eli Lilly and Co*.[47] In this case, the Bureau argued that the assignment of a patent could constitute an agreement or arrangement to lessen competition contrary to section 45 of the Act. This position meant that section 50 of the *Patent Act*, which gives patentees the right to assign their patents, does not preclude application of the Act to patent assignments. The Bureau's intervention served the purpose of protecting its ability to administer the Act in respect of patent rights. The FCA agreed with the Bureau's position and noted that, "…this interpretation is consistent with the Competition Bureau's *Intellectual Property Enforcement Guidelines*. [citation omitted]"

Part 7 of this document sets out hypothetical situations to illustrate the Bureau's enforcement approach.

46 Section 125 of the Act provides that the Commissioner may make representations to and call evidence before any federal board, commission or other tribunal in respect of competition. Section 126 of the Act provides that the Commissioner may do the same for any provincial board, commission or other tribunal as long as the board, commission or tribunal consents.

47 *Supra* note 13.

7. APPLICATION OF COMPETITION LAW TO IP: HYPOTHETICAL EXAMPLES

Example 1: Alleged Infringement of an IP Right

TAX is a software company that produces and distributes a sophisticated and complex tax management program to help households with their tax planning. As is customary in the software industry, TAX assigns a serial number to each copy of the program that it distributes. A customer may register with TAX by providing the serial number listed on the packaging along with certain personal information. TAX offers upgrades to its software from time to time to respond to changes in the tax code and technological advances, and users need to be registered to receive these upgrades at low prices. If TAX finds that a serial number has been used more than once, it knows that its software has been illegally reproduced. TAX realizes that serial numbers do not prevent duplication but do provide a mechanism for detection, thus weakening incentives to copy. TAX has been selling its product for a number of years and is now widely recognized as a leading producer of tax management software.

More than two years ago, a key member of TAX's software engineering team left the company to start her own software business, called UPSTART. Recently, UPSTART began to market its own tax management program to be used in conjunction with TAX's product. UPSTART designed its program to operate as a graphical user interface to TAX's software. Furthermore, relatively minor changes in the tax code can be incorporated into UPSTART's product. As a consequence, for users who already own TAX's product, there is no longer a need to get upgrades from TAX. Instead, they can purchase UPSTART's product for a much lower price and can continue to buy upgrades from UPSTART.

TAX has publicly alleged that UPSTART must have infringed TAX's copyright because it would have been impossible for UPSTART to have created its program without having copied TAX's source code. Despite its claims, TAX has not filed a suit against UPSTART. Instead, TAX has made a formal complaint to the Bureau that UPSTART's conduct is predatory since it has undermined TAX's serial number policy by making it less valuable for users to become registered with TAX. TAX claims that since UPSTART's product came on the market, there has been widespread piracy of TAX's program and, consequently, the market for its product has evaporated.

Analysis

The Bureau would likely conclude that the underlying issue in this case is the possibility that UPSTART infringed TAX's copyright. Therefore, the Bureau would inform TAX that it does not view the matter as raising any issues under the Act and would suggest that TAX seek legal advice on other remedies, if any, that might be available.

Example 2: Price-fixing

Three firms, each of which have developed and own a patented technique, offer competing cosmetic surgical procedures to treat a particular condition. All three procedures involve several visits to a private clinic over six months, produce no side effects and have approximately

equal success rates. The only existing alternative to the three procedures is an expensive medication that causes undesirable side effects in some patients. Each of the three firms has developed a business plan to market its procedure and industry analysts widely agree that competition among the procedures will be the most important factor limiting shareholder returns. Rather than proceed with their business plans in anticipated competition with one another, the three firms agree on a minimum price at which each will perform the procedure as well as a minimum fee to license each procedure to third parties.

Analysis

The Bureau would likely examine this agreement under the conspiracy provision in section 45 of the Act given that it involves fixing prices for the supply of a product. The Bureau would likely take the view that the three participants in the agreement are competitors based on the views of industry analysts and given the fact that each of them supplies treatments that are functionally interchangeable and comparable to one another. For example, the duration, the success rate and the risk of side effects are approximately the same for each procedure. Moreover, section 45 applies to agreements between parties that are potential competitors. Accordingly, even if the parties had not been in competition when the agreement was concluded or during the term of the agreement, the parties would still be deemed to be competitors for purposes of section 45.

Given that the price-fixing agreement is not ancillary to a broader or separate agreement or arrangement, which itself does not offend section 45, the Bureau would refer the matter to the Public Prosecution Service of Canada (the "PPSC") for criminal prosecution.

Example 3.1: Exclusive Licensing

SHIFT recently developed a new gear system for mountain bikes. Two other firms manufacture systems that compete with SHIFT's. All three of these firms manufacture several varieties of bicycle gear systems and are engaged in research and development to improve gear system technology. SHIFT grants licences for the use of its patented gear system technology to manufacturers of mountain bikes as it does not have the ability to manufacture mountain bikes itself. Three large firms account for 80 percent of the sales of mountain bikes with the balance being supplied by six smaller firms. SHIFT has just granted ADVENTURE, the largest mountain bike manufacturer (accounting for 30 percent of sales), an exclusive licence to use its new patented gear system technology on its mountain bikes. ADVENTURE does not own or have the ability to develop gear system technology. Although SHIFT's new gear system offers a number of features not available on other current products, the demand for mountain bikes with these new features is uncertain. In addition, ADVENTURE expects to incur significant expense developing and promoting mountain bikes that use SHIFT's new gear system technology. SHIFT has refused requests from other mountain bike manufacturers for a licence for this technology. As a result of ongoing research and development, alternative gear system technologies are likely to become available in the future.

Analysis

The Bureau is likely to examine the conduct of both firms under the abuse of dominant position provision (section 79) of the Act.

SHIFT and ADVENTURE relate as supplier and customer, and are neither actual nor potential competitors in the markets for gear systems or mountain bikes. Since the firms do not compete, the exclusive licence would likely not lessen competition between the two firms. The Bureau would nonetheless examine the markets for gear systems and mountain bikes to determine if the exclusive licence lessened or prevented competition substantially in either or both of those markets.

Even though SHIFT's technology is not available to ADVENTURE's two principal rivals and the markets for gear systems and mountain bikes are concentrated, SHIFT's rivals in the gear system market may still sell to ADVENTURE. Furthermore, the other mountain bike manufacturers have access to other gear systems from SHIFT and to gear systems from other suppliers. The exclusive licence may have been granted in consideration for ADVENTURE's agreement to incur significant expense in the development and promotion of mountain bikes that use SHIFT's technology.

In the course of its assessment, the Bureau would consider the competitiveness of the mountain bike market before and after the exclusive licence. Since SHIFT is not a mountain bike manufacturer and has no obligation to license its gear system to a mountain bike manufacturer, a licence agreement in this case would enhance competition. The technology licence mandated the development and promotion of mountain bikes using the technology, thereby enhancing competition without in any way limiting the ability of other mountain bike manufacturers to access or use competing technologies. Consequently, the Bureau would conclude, given the facts of this case, that the exclusive licence arrangement did not raise any competition issues.

Example 3.2: Foreclosure by Purchaser

Consider a variation on the situation described in example 3.1, in which ADVENTURE's business has grown to represent approximately 70 percent of mountain bike sales. ADVENTURE has taken advantage of its increasing sales share to independently negotiate long-term exclusive licences and supply arrangements with the three competing suppliers of mountain bike gear systems. The inability of the competing manufacturers to obtain suitable gear system technology has put a number of them out of business and has substantially cut into the sales of the remaining firms. ADVENTURE has raised the prices of its mountain bikes by 25 percent. Although alternative gear system technologies are under development, it appears unlikely that a viable technology will be tested and in production in less than 36 months.

Analysis

The Bureau is likely to examine ADVENTURE's conduct under the abuse of dominant position provision (section 79) of the Act.

The Bureau would initially determine whether mountain bikes comprised a relevant market and assess whether ADVENTURE substantially or completely controlled the supply of product within that relevant market. The Bureau would likely view the apparent lack of good substitutes and ADVENTURE's high sales share and ability to successfully impose a 25 percent price increase as evidence that ADVENTURE substantially controlled the mountain bike business and that mountain bikes comprise a relevant market.

The Bureau would then consider whether ADVENTURE's exclusive licence agreements, through which it precluded its competitors from obtaining an adequate supply of gear systems, constituted anti-competitive conduct. While an exclusive licence arrangement may enhance competition, as was apparent in Example 3.1, the use of an exclusive licence arrangement to effectively control the supply of a competitively essential input may be anti-competitive. In the absence of a compelling business justification, the Bureau would likely view the systematic manner in which ADVENTURE prevented its competitors from obtaining access to this vital input (gear systems) through the execution of long-term exclusive licences with each supplier as a practice of anti-competitive acts.

The Bureau would then assess the impact of the exclusive licences on competition. It would likely conclude that the adverse impact on the ability of other mountain bike manufacturers to compete that resulted from ADVENTURE preventing them from gaining access to proven gear system technology and the manner in which ADVENTURE successfully imposed substantial price increases constituted evidence that ADVENTURE substantially lessened or prevented competition. Accordingly, the Bureau would likely seek to have the exclusive licences voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms of the licences.

Example 4: Exclusive Contracts

SPICE, by virtue of its international patents, is the sole supplier of Megasalt, a unique food additive that has effectively replaced salt in certain prepared foods in most countries. SPICE's Canadian patent recently expired; however, SPICE still has valid patent protection throughout much of the rest of the world. Shortly before its Canadian patent expired, SPICE signed five-year contracts, which included exclusive supply rights, with its two principal Canadian buyers. These contracts prevent the two buyers, which use Megasalt in specially prepared foods for hospitals and other health care institutions, from combining Megasalt with any other salt substitute on the same product line. SPICE does not have long-term exclusive supply contracts with other buyers of Megasalt in Canada or elsewhere. Recently, NUsalt, a firm that has developed a potential alternative to Megasalt, filed a complaint with the Bureau alleging that SPICE's contracts are preventing NUsalt from manufacturing and marketing its product in Canada. NUsalt claims that SPICE's contracts have "locked up" a substantial part of the market, thereby precluding NUsalt from profitably entering Canada.

Analysis

The NUsalt allegations suggest that SPICE, as a result of its contracts with its two largest buyers, is currently exploiting market power within the market for salt substitutes. The Bureau would likely investigate these allegations under the abuse of dominance provision (section 79) of the Act.[48]

The Bureau would initially determine whether salt substitutes comprise a relevant market. This would entail determining whether salt substitutes are subject to effective competition from other substances (for example, salt) or whether salt substitutes have specific properties

48 The Bureau may also choose to review the conduct under the exclusive dealing, tied selling and market restriction (section 77) of the Act.

and functional characteristics that make salt ineffective as a substitute. The Bureau would then seek to determine whether SPICE substantially controlled the market in which its salt substitute competed, and then assess SPICE's share of sales and barriers to entry to this market. Among others, the Bureau would consider all of the factors currently preventing alternative suppliers from offering their products to customers in Canada, including the effect of the exclusive supply contracts on the ability of alternative suppliers to obtain sales from a critical mass of customers. Assuming that the Bureau had determined that salt substitutes constitute a relevant market, it would likely conclude that SPICE substantially controlled that market.

The Bureau would then consider whether the exclusive supply contracts, through which SPICE had precluded its principal customers from obtaining salt substitutes from alternative suppliers, constituted a practice of anti-competitive acts. To make this assessment, the Bureau would examine the circumstances surrounding their negotiation and settlement, and the extent to which they were exclusionary and intended to erect barriers to effective competition in the relevant market. As part of this analysis, the Bureau would consider whether there are compelling business justifications for SPICE's exclusive contracts. For example, SPICE may have signed these contracts to ensure that it would have sufficient sales to justify investing in enough productive capacity to realize economies of scale. Also, the restriction preventing buyers from combining Megasalt with other salt substitutes could have a safety or quality rationale. If the Bureau found that the contracts in this case were intended to hold back a sufficient amount of market demand from potential entrants so that the remaining demand would provide an insufficient volume of sales to cover the cost of effective entry and future operating costs in Canada, then the Bureau would likely view the execution of the long-term exclusive licences as anti-competitive.

The Bureau would then assess the impact of the exclusive contracts on competition. In this regard, the adverse impact on the ability of other suppliers of salt substitutes to compete in Canada would be assessed to determine whether the contracts had substantially lessened or prevented competition. If the relevant market is narrowly defined as salt substitutes and SPICE's contracts are preventing the entry of potential salt substitute producers, the Bureau may conclude that the exclusive contracts have substantially lessened or prevented competition. By deterring firms from attempting to supply alternative salt substitutes in Canada, the exclusive contracts may cause other buyers in Canada not under contract with SPICE to pay higher prices than they would if SPICE faced effective competition.

The magnitude of the decrease in competition would depend on the extent to which the contracts prevent entry and the expected degree of substitution that would exist between Megasalt and alternative salt substitutes, such as NUsalt, in the absence of the exclusive terms in the contracts. In general, if the contracts are determined to be the principal barrier to new entry and the new entrants' products are likely to be close substitutes for Megasalt, then the Bureau is likely to conclude that the contracts have substantially lessened or prevented competition and would likely seek to have SPICE's exclusive contracts voluntarily terminated. Failing that, the Bureau would likely bring an application before the Tribunal seeking to terminate the exclusive terms in the contracts.

However, if the Bureau determines that, notwithstanding the contracts, there is still sufficient demand in Canada or the rest of the world to support effective competitive entry in Canada, then SPICE's exclusive contracts would not be considered to have substantially lessened or prevented competition. In this case the Bureau would close its inquiry without seeking remedial measures. Throughout its investigation the Bureau would work collaboratively with competition agencies in other jurisdictions as necessary to determine facts and their analytical approach relevant to the resolution of the matter.

Example 5: Output Royalties

MEMEX currently holds a patent for the design of a memory component it manufactures for use in personal home computers. MEMEX does not manufacture personal computers, but instead sells its memory components and licenses the use of its technology to computer manufacturers. Historically, MEMEX's licensing contracts required that the licensee pay a fee for each MEMEX memory component it installed in a computer. Because of its patent, MEMEX currently faces no competition from other memory component producers wishing to use a similar design; however, MEMEX's patent is to expire within a year and there is speculation that once it expires, other firms will begin manufacturing and selling memory components based on MEMEX's design. MEMEX has recently introduced a new licence agreement. Under the new agreement, MEMEX grants non-exclusive licences for the use of its technology and memory components to all personal computer manufacturers for a royalty on every computer shipped, regardless if any MEMEX memory components are installed. MEMEX claims that the previous licensing policy had the unintentional effect of encouraging computer manufacturers to install too few MEMEX memory components, which detracted from computer performance. MEMEX claims that the new licensing practice provides manufacturers an incentive to install a more appropriate quantity of memory in computers.

Analysis

The Bureau would likely investigate this case under the abuse of dominance provision (section 79) of the Act.

The Bureau would first determine whether memory components that employ MEMEX's technology comprise a relevant market and then assess whether MEMEX substantially or completely controls the supply of product within that market. In view of the rapid rate of technological development and intense competition in the production of integrated circuit devices, the Bureau may conclude that the MEMEX technology competes with other memory technologies, that barriers to entry are sufficiently low that the scope of the relevant market extends beyond the MEMEX technology, or that MEMEX is unable to substantially control the supply of products within the specified relevant market. If the Bureau determines that MEMEX faces substantial, effective competition from other suppliers of memory components then it would likely conclude that further investigation is not warranted. If, on the other hand, the Bureau concluded that the memory components supplied by the alternative suppliers are not considered good substitutes and would not allow computer manufacturers to build computers that could compete with those using MEMEX's memory component, the Bureau might determine that further inquiry was warranted.

Assuming that the Bureau determined that the MEMEX technology defines the relevant market and MEMEX substantially controls that market, the Bureau would then consider whether MEMEX's use of its new licensing arrangements constituted a practice of anti-competitive acts. This determination would depend on the specific terms of the contracts and the likely effect they would have on competition in the relevant market. While MEMEX's licensing contracts do not expressly prohibit computer manufacturers from using memory components based on technology other than MEMEX's, they effectively impose a tax on computer manufacturers who use memory components from another supplier.[49] The imposition by a dominant supplier of long-term licensing contracts containing such provisions could preclude competition and maintain the supplier's market power. Accordingly, the Bureau would determine whether these contracts are in widespread use and their duration, and consider MEMEX's business justification for charging the per computer royalty. It would also consider whether the per computer royalty is sufficient to deter computer manufacturers from buying memory components from alternative suppliers.

If the Bureau determined the relevant market to be memory components based on the MEMEX technology, MEMEX had market power, and the licensing contracts were a practice of anti-competitive acts, the Bureau would then assess the likely impact of MEMEX's new licensing practice on competition and the price of memory components. If the Bureau determines that this practice would permit MEMEX to exercise a significantly greater measure of market power than would otherwise have been the case, the Bureau would likely seek to have the new licensing practice voluntarily terminated. Failing that, it would likely bring an application before the Tribunal seeking to terminate this practice.

Example 6: A Patent Pooling Arrangement

Five firms hold patents on technologies required by producers to develop widgets that conform to an international standard. To facilitate the licensing of their patents, the five firms hire an independent expert to review the patents of each firm and determine those that are essential for implementing the standard based on the underlying technical characteristics of the technologies. Upon completion of the review, the five firms create a patent pool and each of them licenses its essential patents on a non-exclusive basis to the pool. The pool is organized as a separate corporate entity whose role is to grant a non-exclusive sub-licence to all the patents in the pool on a non-discriminatory basis to any party requesting one. The patent pool administrator collects royalties from licensees and re-distributes the revenue to pool members according to a formula that is partly based on the number of patents that each member has contributed to the pool. Each of the five members of the pool retains its right to license its own essential patents outside the pool to third parties to make widgets that conform to the standard or widgets that may compete with those that conform to the standard.

The patent pool agreement specifies that if a final court judgment declares a patent in the pool to be invalid, that patent will immediately be excluded from the pool. In addition, the agreement requires that an independent expert re-assesses the patents in the pool every four years to ensure that they are essential to developing widgets conforming to the international

49 A manufacturer who wishes to use alternative memory products must pay twice, once for the alternative component and a second time for the per computer royalty payable to MEMEX.

standard. Licensees also have the ability to hire an independent expert to review any patent that they feel is not essential for developing widgets conforming to the standard. If, in either case, the expert concludes that one or more patents are not essential to developing widgets that conform to the standard, those patents are excluded from the pool. The decisions of experts are final and are binding upon the pool members.

The patent pool agreement also includes provisions allowing each pool member to audit the books of the pool administrator, and provisions allowing the pool administrator to audit the books of each licensee to verify royalty amounts. In each case, provisions are put in place to guard against confidential business information being divulged to either pool members or licensees.

Analysis

The Bureau recognizes that patent pools can often serve a pro-competitive purpose by, among other things, integrating complementary technologies, reducing transaction costs and clearing blocking patents. Where patent pools may represent an agreement between competitors or potential competitors, the Bureau is likely to review them under section 90.1 of the Act rather than section 45 unless the Bureau has evidence that the patent pool was simply a sham used as a means to facilitate an agreement prohibited under subsection 45(1).

Despite their potential benefits, patent pools may also raise competition concerns. If the patented technologies inside the pool are substitutes then the pool can be a mechanism for the pool members to restrict competition between themselves and increase royalty rates above levels that would have existed in a competitive market. Alternatively, if a patented technology inside the pool is a substitute for a technology outside the pool, the pool could be used as a bundling mechanism to effectively foreclose the outside technology. Other potential competition concerns are that a pool's members may discriminate among licensees or use the pool to share confidential business information so as to reduce competition in a downstream market.

To evaluate whether a patent pool would likely cause a competition issue, the Bureau would first seek to determine whether each patent placed inside the pool is essential for developing the product or service that is the basis behind the formation of the pool. In the case at hand, if each patent inside the pool is required to implement the widget standard, then the members of the pool cannot be viewed as horizontal competitors; a firm looking to buy technologies to develop widgets conforming to the standard would need permission to use each patented technology in the pool. A pool comprised of only essential patents would not have the potential to harm competition among suppliers of technology either inside or outside the pool.

In this example, the Bureau would look positively on the fact that pool members engaged an independent expert to determine which of their patents are essential to the widget standard. However, the Bureau would evaluate whether the expert is qualified to provide such an opinion, and whether he/she was provided with incentive to work independently, without influence from pool members. The Bureau would take additional assurance from the fact that an expert would continue to periodically review the patents to ensure they are essential, as well as from the ability of licensees to challenge patents by requiring a separate independent review. The fact that any patents found to be invalid would also be removed from the pool would also contribute to the Bureau's assurance that the pool has taken adequate measures to only include essential patents.

Given that the pool administrator issues licences on a non-discriminatory basis to all interested parties, the Bureau would likely conclude that the technologies inside the pool were not being used to distort competition in a downstream widget market. The fact that pool members remain free to license their patents independently to other widget producers provides more evidence that competition in the downstream widget market would not be distorted by the pool.

As a final step, the Bureau would review the pool agreement's provisions relating to the sharing of confidential information and ensure that such provisions provide adequate safeguards against the pool being used to facilitate coordination among pool members or licensees.

Absent any evidence that the patent pool is used as a sham to facilitate an agreement to restrict competition, based on the analysis above, the Bureau would likely conclude that the patent pool does not raise any issues under the Act.

Example 7: Agreement to Foreclose Complementary Products

There are five major record labels. The largest two, ROCKCO and POPCO, which together account for more than 65 percent of total sales and 70 percent of all major label artists, have formed a joint venture (DISCO) to develop, produce and market a new generation of digital playback devices. The DISCO technology provides a level of sound quality and other features far superior to those offered by existing technologies. DATCO has also developed a digital sound technology with similar high-fidelity qualities, but which is also portable and allows users to record. The costs of the two technologies are similar, but the technologies themselves are incompatible: music digitally encoded in DISCO format must be re-encoded for playback on DATCO's player. Under the terms of their joint venture agreement, ROCKCO and POPCO agree to not release, or license any other person to release, their copyrighted recordings in a digital format other than the DISCO format. Consistent with that agreement, ROCKCO and POPCO have declined DATCO's request for a licence to convert and release ROCKCO and POPCO recordings in the DATCO format. The other three record labels predict — correctly — that consumers will be reluctant to purchase the DATCO technology if they are unable to obtain music from either ROCKCO or POPCO in that format. The other record companies are willing to release their recordings in the DATCO format, but find that there is no market for it and are compelled by popular demand to license the DISCO technology to release their recordings in the DISCO format. As a result of the foregoing, DATCO's digital sound technology, which reviewers have generally viewed as superior to the DISCO technology, is being withdrawn and DISCO is substantially increasing both the price of the playback equipment that it sells and the royalties charged to the other record companies for the use of the DISCO technology to release recordings in the DISCO format. The Bureau has concluded that the joint venture would not meet the definition of a merger as specified in section 91 of the Act.

Analysis

The Bureau would examine this case under the agreements and arrangements provision (section 90.1) and/or the abuse of dominance provision (section 79) of the Act.

The matter would not be considered under section 45 because it is not an agreement between competitors to fix prices, allocate markets or customers nor is it an agreement to restrict output. Even if the refusal to release recordings in another format or grant a licence are

considered output restrictions, the ancillary restraints defence would likely apply because they are ancillary and directly related to the broader joint venture agreement to develop the DISCO technology. As well, these restraints appear reasonably necessary to attract a sufficient number of customers to the DISCO technology to make the joint venture viable.

As a first step, the Bureau would consider whether the alleged anti-competitive conduct, namely the refusal of ROCKCO and POPCO to license the reproduction of their copyrighted recordings in the DATCO format, was a mere exercise of their IP rights or involved something more. In this case, the Bureau would likely determine that the terms of the DISCO joint venture agreement and the refusal to license constituted joint conduct and hence would be considered conduct that was beyond the mere exercise of an IP right.

The Bureau may elect to review the agreement under section 90.1 of the Act if ROCKCO and POPCO could be considered competitors in a relevant market. In this example, the important consideration in determining if the firms are competitors is determining if ROCKCO and POPCO would have likely developed the DISCO, or similar technology, independently in the absence of the agreement. If the Bureau were to determine that this would be the case, then ROCKCO and POPCO could have been expected to compete in the market for digital playback devices in the absence of their joint venture and the agreement would be reviewed under section 90.1.

If, on the other hand, ROCKCO and POPCO were determined not to be competitors, the Bureau would elect to review the joint venture agreement under the abuse of dominance provision, on the basis that the joint venture agreement established and provided for the joint abuse of a dominant position. The review would be carried out in accordance with the framework and criteria for abuse of dominance outlined in the previous examples. Whichever provision of the Act would apply, the Bureau would have to establish the affected relevant market or markets, consider barriers to entry and evidence of market power or dominance, demonstrate a substantial lessening or prevention of competition and assess any business justifications.

If the Bureau were to proceed under sections 79 or 90.1, it would have to establish that the DISCO joint venture has substantial market power in either the market for digital sound technology or digital playback equipment. In addition, it would have to find that the DISCO joint venture had engaged in anti-competitive conduct that substantially lessens or prevents competition. The anti-competitive acts in this case would relate to the acquisition and foreclosure by the DISCO joint venture of access by its competitors to the music in the ROCKCO and POPCO music libraries. Foreclosure of access to these materials is apparently preventing alternative sound recording technologies from acquiring the critical mass of desirable music content required for them to achieve viability. It appears that this conduct may be substantially preventing or lessening competition and leading to the monopolization or the creation of dominance in the markets for digital sound technology and/or digital playback equipment sound reproduction. The foreclosure of other technologies creates market power for DISCO in these markets and is inefficient, as it reduces consumer choice, leads to increases in the royalties paid by the record companies to use this type of technology and increases the price of playback devices. The Bureau would likely seek an order requiring that ROCKCO and POPCO divest themselves of DISCO or that ROCKCO and POPCO license their works for release in alternative formats.

Example 8: Refusal to License a Standard

ABACUS and two other firms were the first to market a spreadsheet for personal computers. Electronic spreadsheet software was one of the applications that established personal computers as an essential tool for business. In the first five years, ABACUS out-sold its nearest competitor nearly two to one and its installed base (cumulative sales) grew to 50 percent. In the next two years, its annual market share grew to more than 75 percent and one of the other original firms left the market. At about the same time and after three years of programming, CALCULATOR introduced spreadsheet software that had a number of innovative features not found in ABACUS. However, CALCULATOR soon ran into financial difficulties despite the innovative features and a lower price. CALCULATOR approached ABACUS and requested a licence to copy the words and layout of its menu command hierarchy (for the purpose of this example, assume that permission was required since ABACUS had valid IP rights in these works). With permission, CALCULATOR could have relaunched its product with minor changes, which would have given CALCULATOR the ability to read ABACUS files and ensured compatibility between the two products. ABACUS refused to grant a licence and publicly announced that it would enforce its IP rights against CALCULATOR if it copied the ABACUS hierarchy. In light of this, several other prominent software makers announced that they were discontinuing their spreadsheet development programs.

An important characteristic of spreadsheets that determines their benefits to a purchaser is network effects. Network effects exist if the value of a product increases with the number of others who purchase compatible spreadsheets. Network effects for spreadsheets arise since the greater the size of the network (the installed base of compatible spreadsheets), the greater the number of individuals with whom files can be shared, the greater the variety of complementary products (utilities, software enhancements and macros), the more prevalent consulting and training services, and the greater the number of compatible data files.

Analysis

Given the circumstances surrounding this case, ABACUS's refusal to license its IP would constitute a "mere exercise" of its IP rights and would, therefore, be subject to review only under section 32 of the Act.

To establish whether ABACUS's refusal created an undue restraint of trade or unduly lessened competition, the Bureau would determine whether the refusal adversely affected competition in a relevant market that was different or significantly larger than the subject matter of ABACUS's IP rights or the products or services that result directly from the exercise of such IP rights. In this case, competitive harm is alleged in the market for ABACUS-compatible spreadsheets.

Whether the relevant market is determined to be ABACUS-compatible spreadsheets depends on the extent and importance of network effects and switching costs. If network effects are important, consumers that have never purchased a spreadsheet may still purchase the more expensive ABACUS product. Consumers who are already on the ABACUS network may be locked in by the switching costs of joining a new spreadsheet network (for example, their sunk investments in training, files and complementary products) and the loss in network benefits. If network effects and switching costs are material, then existing consumers are likely to stay and new consumers to choose ABACUS even if it is priced above competitive levels.

If the relevant market is determined to be ABACUS-compatible spreadsheets, then ABACUS would be the only producer and thus have 100 percent control of this market. If, in addition, entry barriers were found to be high, which is likely in an industry experiencing network effects, the Bureau would conclude that ABACUS is dominant. In determining whether the installed base of ABACUS contributes materially to entry barriers, the Bureau would consider the pace of innovation and the potential for a new technology to "leap-frog over" ABACUS despite its advantages (that is, its installed base and the switching costs). The Bureau would also endeavour to determine whether there are other efficient avenues for creating compatibility that would not infringe on the IP rights of ABACUS.

If the relevant market is determined to be ABACUS-compatible spreadsheets and the Bureau concluded that the relevant market was significantly larger than the subject matter of ABACUS's IP, and the products that result directly from the exercise of such IP rights, then the Bureau would likely conclude that ABACUS is dominant in the relevant market and that the IP is an essential input for firms participating in the relevant market. On this basis, ABACUS's refusal satisfies the first step of the Bureau's two-step analysis to determine whether it would seek to have an application brought under section 32.

In the second step, the Bureau determines whether ABACUS's refusal to license its IP would adversely alter firms' incentives to invest in research and development in the economy. In this case, the facts suggest that it is possible that ABACUS's ability to impose incompatibility may have a chilling effect on the development of more advanced spreadsheets. In addition, the choice by ABACUS of the words and layout of its menu hierarchy was likely arbitrary and likely involved little innovative effort and had little value relative to other substitutes. In the absence of an installed base and switching costs, ABACUS's terms and menu hierarchy would be no better or worse than CALCULATOR's (or any other). It is only after consumers make sunk investments and adoption creates an installed base that ABACUS spreadsheets become the market or standard and that its choice of words and menu interface required for compatibility with the ABACUS network creates unintended and unwarranted market power, a situation that can be corrected through enforcement action under section 32. On this basis, the Bureau would likely conclude that a special remedy invoked under section 32 would restore incentives for other firms to engage in research and the development of competing compatible spreadsheet programs.

If the facts of the case suggest potential enforcement under section 32, the Bureau would seek a special remedy that would allow other spreadsheet firms to gain access to the words and layout of ABACUS's menu hierarchy.

Example 9: Product Switching

BRAND sells innovative pharmaceutical drugs. One of its top sellers in terms of revenue, Product A, has been sold in Canada for many years, and continues to be sold, but will lose patent protection in six months. Two years ago BRAND introduced another product, Product B, which has a different chemical composition but alleviates the same affliction as that treated by Product A. The number of prescriptions for Product B remains low. Product B will remain under patent protection for the next 10 years.

GENERIC is set to launch a generic version of Product A ("Generic A") as soon as Product A's patent protection expires. Before its patent expires, BRAND withdraws Product A from the market by ceasing to manufacture it and by buying back inventories from wholesalers and pharmacies. BRAND notifies health care professionals that Product A is no longer available. In response to this development, physicians prescribe Product B to patients in place of Product A and a large number of prescriptions for Product A are replaced by prescriptions for Product B. Because Product A is the reference product for (or bioequivalent to) Generic A, pharmacies are prohibited from automatically substituting Generic A for the prescribed Product B. As a result, the success of GENERIC's entry becomes uncertain and drug payers (both patients and drug plan providers) must continue to buy Product B at high prices rather than have the option of buying Generic A at low prices.

Analysis

Because BRAND's conduct could be for the purpose of excluding entry by GENERIC and Generic A, the Bureau would not view the withdrawal of Product A by BRAND as a mere exercise of its patent right and thereby conduct exempt under section 79(5). Accordingly, the Bureau is likely to examine the conduct of BRAND under the abuse of dominant position provision (section 79) of the Act.

The Bureau would first seek to define a relevant market around Product A. Given that Generic A is bioequivalent to Product A and that empirical evidence from past generic entry events show that a generic drug largely supplants the brand when it becomes available; the Bureau would likely conclude that both drugs are in the same relevant market. The Bureau would also consider whether other drugs are sufficiently close substitutes to Product A to be considered in the relevant market. Important evidence as to what drugs may be in the relevant market would come from the evidence of physician/patient switching behaviour when BRAND withdrew Product A from the marketplace.

If the Bureau determined that BRAND was dominant in a relevant market that included Generic A, it would then proceed to determine whether BRAND's conduct, including that of withdrawing Product A from the marketplace, constituted a practice of anti-competitive acts. In making this determination, the Bureau would examine the likely effect of BRAND's conduct on the ability of GENERIC to enter and compete in the relevant market. For example, the Bureau would examine the possibility of GENERIC marketing Generic A directly to physicians. Ultimately, the Bureau would seek to determine whether BRAND's conduct would either foreclose the entry of GENERIC or delay that entry for a significant period.

The Bureau would also examine whether the purpose of BRAND's conduct was to delay or foreclose the supply of Generic A by GENERIC, or whether there was some other compelling business justification. In assessing any business justification, the Bureau would examine the evidence of physician prescribing behaviour for Product B when Product A was available as an alternative (i.e., before Product A's withdrawal). The Bureau would also consult with persons with relevant expert medical knowledge concerning the products at issue. If the Bureau determined that physicians viewed Product B as providing no substantive medical benefit over Product A, it would doubt any argument advanced that Product B is

superior to Product A and the purpose of the withdrawal of Product A was to transition patients to a higher quality treatment.

If the Bureau concluded that BRAND was dominant in a relevant market and that it had engaged in a practice of anti-competitive acts, it would also assess whether BRAND's conduct had caused a substantial lessening or prevention of competition. As part of this analysis, the Bureau would likely examine the difference between the price of Product B and the price at which Generic A would have been expected to be sold if it had not been delayed or foreclosed by BRAND's conduct. As other evidence of harm resulting from BRAND's conduct, the Bureau would likely cite the negative effect of Product A's withdrawal on limiting physician/patient choice for prescription drugs.

If the Bureau concluded that the constituent elements of 79(1) were met, it would likely seek to negotiate a remedy with BRAND and failing that, bring an application before the Tribunal.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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Gatineau, Quebec K1A 0C9

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Competition Bureau Canada
Bureau de la concurrence Canada

Enforcement Guidelines

Price Maintenance
(Section 76 of the *Competition Act*)

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:
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For information on the Competition Bureau's activities, please contact:

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PREFACE

The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act* (the "Act"),[1] the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

In 2009, important amendments modernized the Act to enhance the predictability, efficiency and effectiveness of its enforcement and administration and to better protect Canadians from the harm caused by anti-competitive conduct. Among other things, these amendments decriminalized price maintenance conduct under the Act, repealing the former criminal offence in section 61 and introducing a new non-criminal provision in section 76. Under the new non-criminal provision, it is necessary to demonstrate that price maintenance conduct has had, is having or is likely to have an adverse effect on competition in a market.

The *Enforcement Guidelines – Price Maintenance (Section 76 of the Competition Act)* (the "Guidelines") describe the Bureau's general approach to enforcing section 76 of the Act, including with respect to common business practices such as minimum resale pricing, manufacturer-suggested resale pricing ("MSRP") and minimum advertised pricing ("MAP"). Issuance of these Guidelines supports the Bureau's Action Plan on Transparency, which aims to promote the development of a more cost-effective, efficient and responsive agency, while providing Canadians with more opportunities to learn about the Bureau's work.

These Guidelines supersede all previous statements made by the Commissioner of Competition (the "Commissioner") or other Bureau officials regarding the Bureau's approach to the administration and enforcement of section 76 of the Act. These Guidelines do not replace the advice of legal counsel and are not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question. Final interpretation of the law is the responsibility of the Competition Tribunal (the "Tribunal") and the courts.

The Bureau may revisit certain aspects of these Guidelines in light of experience and changing circumstances.

1 R.S.C. 1985, c. C-34, as amended.

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY

Price maintenance under the Act occurs when a person influences upward or discourages the reduction of another person's selling or advertised prices by means of a threat, promise or agreement, or when a person refuses to supply another person or otherwise discriminates against them because of their low pricing policy, in each case with the result that competition in a market is likely to be adversely affected.

More specifically, section 76 of the Act permits the Tribunal to make a remedial order in respect of three types of price maintenance conduct where the conduct has had, is having or is likely to have an adverse effect on competition in a market:

(i) First, subparagraph 76(1)(a)(i) applies where a person, by agreement, threat, promise or any like means, influences upward or discourages 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. This can include minimum resale price, MSRP and MAP policies, and the Act sets out the circumstances in which such practices will be deemed to influence prices.

(ii) Second, subparagraph 76(1)(a)(ii) applies when a person refuses to supply a product or otherwise discriminates against a person or class of persons engaged in business in Canada because of the low pricing policy of that person or class of persons. However, the Act provides exceptions where the person refused supply was engaged in certain conduct in respect of the products, namely loss leadering, bait-and-switch selling, misleading advertising or not providing the level of service that purchasers might reasonably expect.

(iii) Third, subsection 76(8) applies when a person, by agreement, threat, promise or any like means, induces a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a person or class of persons because of the low pricing policy of that person or class of persons.

Price maintenance practices are common in many markets, and can be pro-competitive in many circumstances. For example, depending on the nature of the product, price maintenance conduct can enhance non-price dimensions of intra-brand competition, such as service and inventory levels, among competing retailers of the same brand of product, and can correct "free-riding" among retailers. Price maintenance conduct can also stimulate inter-brand competition among competing brands of products, such as by facilitating the entry or expansion of competitors by encouraging retailers to stock and promote the supplier's products, or by encouraging retailers to engage in marketing efforts for a particular product.[2]

2 The terms "supplier" and "retailer" are used in these Guidelines for convenience, to differentiate persons operating at different levels of the distribution chain with respect to a product (who may also or alternatively be competitors of each other). Use of the term "retailer" should not be taken to suggest that the person necessarily supplies a product to consumers or end-users; in some circumstances a "retailer" could be a "supplier" to persons other than end-users of the product.

An important requirement under section 76 is that price maintenance conduct has had, is having or is likely to have an adverse effect on competition in a market, which is only likely to occur in some circumstances. This may occur, for example, if price maintenance conduct resulted in the exclusion of rivals or new entrant competitors to the supplier or the exclusion of discount or more efficient retail competitors. It may also occur if price maintenance conduct was being used to inhibit competition among suppliers or retailers.

When examining whether price maintenance conduct is likely to adversely affect competition in a market, market power is a key factor in the Bureau's analysis. In a general sense, market power is the ability of a firm (or group of firms) to profitably maintain prices above the competitive level, or other elements of competition, such as quality, choice, service or innovation, below the competitive level, for a significant period of time. Where price maintenance conduct is unlikely to create, preserve or enhance market power, the conduct is unlikely to have an adverse effect on competition in a market.

Upon finding that price maintenance conduct is likely to adversely affect competition in a market, the Tribunal may make a remedial order prohibiting the conduct. Alternatively, the Tribunal may make an order requiring a supplier or a retailer, as the case may be, to do business with another person on usual trade terms. The Act provides that no order may be issued in respect of conduct that falls under paragraph 76(1)(a) if the supplier and retailer are principal and agent, affiliated corporations, or representatives of the same entity or of affiliated entities.

In considering enforcement action under section 76 of the Act, the Bureau evaluates allegations of price maintenance on a case-by-case basis, in the context of structural and other market-specific characteristics. In the course of an examination or inquiry, the Commissioner will generally afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 76 and to propose an appropriate resolution to address them. Where the Bureau believes that price maintenance conduct satisfies the elements of both section 76 and another provision of the Act, the Bureau will generally base its choice of enforcement provision on the particular facts of each case, the market situation and any other relevant circumstances, including the nature of the remedy available under each section of the Act.

Pursuant to section 103.1 of the Act, private parties may seek leave of the Tribunal to bring an application under section 76 if they are directly affected by conduct that falls within the price maintenance provision.

2. INFLUENCING UPWARD OR DISCOURAGING THE REDUCTION OF SELLING OR ADVERTISED PRICES OF A PRODUCT (s. 76(1)(a)(i))

2.1 The Statutory Elements

Subparagraph 76(1)(a)(i) of the Act applies where a person, by agreement, threat, promise or any like means, influences upward or discourages 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.

Four elements must be established before subparagraph 76(1)(a)(i) can apply:

(i) a type of person specified in subsection 76(3) of the Act;

(ii) by agreement, threat, promise or any like means;

(iii) directly or indirectly influences upward or discourages the reduction of selling or advertised prices of a product in Canada;

(iv) of the person's customer or any other person to whom the person's product comes for resale.

2.1.1 A Person Specified in Subsection 76(3) of the Act

Pursuant to subsection 76(3) of the Act, paragraph 76(1)(a) applies only to a person that falls within one or more of the following three categories:

(i) persons engaged in the business of producing or supplying a product;

(ii) persons who extend credit by way of credit cards or otherwise engage in a business relating to credit cards; or

(iii) persons who have the exclusive rights and privileges conferred by a patent, trademark, copyright, registered industrial design or registered circuit topography.

The Bureau's view is that, depending on the circumstances, section 76 may apply to more than one person. For example, where several competing suppliers each engage in price maintenance conduct within the scope of paragraph 76(1)(a) of the Act, the Bureau may consider enforcement action against more than one of those suppliers where there is an adverse effect on competition in a market resulting from that price maintenance conduct. Where such conduct is the result of an agreement between competitors or potential competitors, it could also raise issues under section 45 of the Act, the criminal conspiracy provision, or section 90.1 of the Act, the civil competitor collaboration provision, depending on the circumstances.

Notwithstanding that a person may fall under subsection 76(3) of the Act, subsection 76(4) provides that the Tribunal cannot issue a remedial order in respect of conduct that falls under paragraph 76(1)(a) if the supplier and retailer are principal and agent, affiliated corporations, or representatives of the same entity or of affiliated entities. Section 2 of the Act sets out the rules by which affiliation is to be determined. The Bureau will consider relevant legal principles in determining whether a valid agency relationship exists for the purposes of subsection 76(4).

2.1.2 By Agreement, Threat, Promise or any Like Means

Subparagraph 76(1)(a)(i) of the Act applies to price maintenance conduct that arises by way of an "agreement, threat, promise or any like means". The Bureau considers this element to include any conduct by which a supplier implicitly or explicitly purports to either confer a benefit on a retailer who adheres to the supplier's influence on the retailer's selling or advertised prices, or to impose a penalty on a retailer if the retailer disregards the supplier's influence on its prices.

2.1.3 Directly or Indirectly Influences Upward or Discourages the Reduction of Selling or Advertised Prices of a Product

Under subparagraph 76(1)(a)(i), it must be shown that the supplier's price maintenance conduct has directly or indirectly influenced another person's selling or advertised prices upward or discouraged their reduction. An increase by a supplier in the wholesale price of a product may lead to an increase in the price of a retailer's product. However, the Bureau will not consider a supplier's increase of a wholesale price, in and of itself, to have satisfied the requirement that the supplier influenced upward or discouraged the reduction of selling or advertised prices of a product.

The Bureau's approach in this respect is consistent with the Tribunal's decision in *Visa/MasterCard,* where the Tribunal concluded that an increase in prices in the market in which a retailer sells or advertises a product as a consequence of the mere exercise of market power by a supplier is not determinative.[3] In other words, a price increase in a downstream market is insufficient, in and of itself, to establish that a particular supplier has directly or indirectly influenced upward or discouraged the reduction of a retailer's prices.

The Tribunal considers that a supplier's influence on a retailer's selling or advertised prices could represent something more than the mere exercise of market power when, for example, the supplier's conduct results in a retailer setting the price of its product at a level higher than it would otherwise sell the product.[4] Indications that the retailer has set the price above this level could include, for example, evidence that the retailer's price was lower prior to implementation of the price maintenance conduct, or internal documentary evidence prepared in the ordinary course of business that shows the retailer would have charged or advertised a lower price absent the supplier's price maintenance conduct.

3 *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at para. 162 [*Visa/MasterCard*].

4 *Ibid*. at paras. 162 and 269.

Subparagraph 76(1)(a)(i) of the Act provides that a supplier's influence on selling or advertised prices may occur "directly or indirectly". In the Bureau's view, a "direct" influence on prices will typically occur where a supplier specifies a particular price to the retailer at or above which the retailer is to sell or advertise a product.

In contrast, an "indirect" influence on selling or advertised prices may occur where a supplier does not specify a particular price, but nevertheless influences the level of prices through non-price-based conduct, such as the terms and conditions on which the supplier provides a product to a retailer. For example, and as the Tribunal recognized in *Visa/MasterCard*, a supplier's terms and conditions of sale may reduce or eliminate downstream competitive forces that would otherwise discipline the supplier's upstream pricing, such that the supplier's price for the product supplied, and by extension the price of the retailer's product, is higher than would be the case absent the price maintenance conduct.[5] Similarly, a supplier's use of parity agreements may also indirectly influence a retailer's selling or advertised prices upwards, for example, to the extent the agreement may prevent a retailer in a lower-cost sales channel from setting prices at a level less than retailers in a higher-cost sales channel.[6]

2.1.4 Of the Person's Customer or Any Other Person to Whom the Supplier's Product Comes for Resale

Subparagraph 76(1)(a)(i) provides that price maintenance conduct must influence upward or discourage 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". While subparagraph 76(1)(a)(i), and section 76 more generally, refers to "products", both physical articles and services fall within the scope of the provision.[7]

The Tribunal has interpreted this element of subparagraph 76(1)(a)(i) to mean that a supplier's customer, or any other person who obtains the supplier's product, must resell a product to another person, and that the product resold "should be identical or substantially similar on the important characteristics of the product" supplied.[8] This could be the case, for example, when a manufacturer distributes its products to end-users through a network of distributors or retailers.

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5 *Ibid*. at para. 321-322.

6 For the purposes of these Guidelines, the Bureau considers a "parity agreement", broadly speaking, to be a type of agreement pursuant to which a supplier's customer is required to set the selling or advertised price of a product not at a particular (absolute) level, but rather in reference to the selling or advertised price of the product of another of the supplier's customers or types of customers.

7 Subsection 2(1) of the Act defines a "product" to include an "article" and a "service". The term "article" is in turn defined broadly to mean real and personal property of every description, including energy, tickets, money and deeds and instruments relating to property or an interest in a corporation or its assets. A "service" is also defined broadly to mean a service of any description, whether industrial, trade, professional or otherwise.

8 *Visa/MasterCard*, supra note 3 at paras. 115 and 134.

That said, the Tribunal has not concluded that the product a retailer resells must be identical to the product supplied to it by the supplier, or that it must be in the same product market as the product supplied.[9] For example, circumstances where the product resold is repackaged, reapportioned, processed or transformed from the product supplied, or is bundled with products other than the product supplied, could satisfy the Tribunal's interpretation where the product resold is substantially similar on the important characteristics of the product supplied.

2.2 Minimum Resale Price, MSRP and MAP Policies

In some circumstances, the Act deems a supplier's use of minimum resale prices, MSRP or MAP to satisfy the "influencing" requirement of subparagraph 76(1)(a)(i) of the Act.

With respect to MSRP and minimum resale pricing practices, subsection 76(5) of the Act stipulates that a supplier's suggestion to a retailer of a resale price or a minimum resale price for the product supplied is proof that the retailer has been "influenced" in its pricing. The presumption does not apply, however, where the supplier establishes that, in suggesting a price, it made clear to the retailer that the person is under no obligation to accept the suggestion and will in no way suffer in its business relations with the supplier or with any other person if it fails to accept the suggestion.

With respect to advertised prices, subsection 76(6) of the Act stipulates that the publication of an advertisement by a supplier, other than a retailer, that mentions a resale price for the product is proof that the supplier is "influencing upward" the selling price of any person to whom the product comes for resale. The presumption does not apply, however, where the price is expressed in the advertisement in a way that makes it clear to any person who may view the advertisement that the product may be sold at a lower price. In the Bureau's view, a supplier may establish this latter exception where the advertisement clearly indicates, in plain language, that a retailer may sell the product for less than the advertised price.

Pursuant to subsection 76(7) of the Act, subsection 76(5) and subsection 76(6) do not apply to a price that is affixed or applied to a product or its package or container.

Where a supplier establishes that an exception applies to the application of subsection 76(5) or subsection 76(6) of the Act, such that the supplier's minimum resale pricing, MSRP or MAP pricing practices are not deemed to satisfy the "influencing" requirement, this is not a complete defence to subparagraph 76(1)(a)(i) of the Act. Rather, the Bureau may still establish, based on the available evidence, that the supplier's minimum resale pricing, MSRP or MAP pricing practices have in fact influenced a retailer's pricing.

9 *Ibid*. at para. 134.

3. REFUSING TO SUPPLY DUE TO A LOW PRICING POLICY (s. 76(1)(a)(ii))

3.1 The Statutory Elements

Subject to the applicability of an exception in subsection 76(9) of the Act, subparagraph 76(1)(a)(ii) applies where a person refuses to supply a product or otherwise discriminates 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.

Four elements must be established before subparagraph 76(1)(a)(ii) can apply:

(i) refusal to supply a product or discrimination in the supply of a product;

(ii) to or against a person or class of persons engaged in business in Canada;

(iii) due to that person's or class of persons' low pricing policy;

(iv) by a type of person specified in subsection 76(3) of the Act.[10]

The refusal to supply provision in subparagraph 76(1)(a)(ii) of the Act shares similarities with the general refusal to deal provision in section 75 of the Act. Where evidence suggests that a refusal to supply has occurred due to a person's low pricing policy, the Bureau will typically examine such conduct under subparagraph 76(1)(a)(ii), rather than under section 75.

3.1.1 Refusal to Supply a Product or Discrimination in the Supply of a Product

Subparagraph 76(1)(a)(ii) of the Act encompasses two types of conduct: refusals to supply a product and discrimination in the supply of a product. As is discussed in Section 3.1.3 of these Guidelines, in each case the occurrence of the conduct must be due to the low pricing policy of the person who is refused supply or discriminated against for subparagraph 76(1)(a)(ii) to apply.

A refusal to supply can be either express or constructive. In the Bureau's experience, most alleged refusals to supply under section 76 are express, whereby a supplier simply withholds supply of a product from a customer. However, owing to the fact that an available remedy for refusals to supply under section 76 is an order requiring a person to do business with a customer (or supplier, as the case may be) "on usual trade terms", the Bureau will also consider whether a supplier has constructively refused to supply a customer. Such constructive refusals could involve price or non-price conduct by the supplier. With respect to the former, for example, a wholesale price for the product supplied that is patently in excess of any price that could reasonably be expected to be obtained for the product in a downstream market could constitute a constructive refusal to supply. Non-price constructive refusals to supply could include, for example, delays in filling orders or filling orders in an incomplete manner.

10 Section 2.1.1 of these Guidelines discusses the Bureau's approach to subsection 76(3).

In the Bureau's view, discrimination in the supply of a product based on another person's low pricing policy will typically occur when a supplier provides a product to a customer at a price that is less favourable than the price at which the supplier provides the same product to a similar customer that does not engage in a low pricing policy. Thus, the Bureau considers that a supplier's discriminatory pricing to customers due to their low pricing policy will generally fall within the scope of subparagraph 76(1)(a)(ii) of the Act. Discrimination may also take the form of non-price conduct, such as supplying a product on less favourable terms or conditions than are provided to other customers, or withholding certain benefits from customers that have a low pricing policy, such as marketing or advertising support in respect of the product supplied.

For the purposes of subparagraph 76(1)(a)(ii) of the Act, a single incidence of a refusal to supply or discrimination is sufficient to engage the provision. In other words, there is no requirement that the conduct constitute a "practice" or that a supplier engage in the conduct on multiple occasions or over a period of time. That said, where the supplier's conduct is isolated in time or in scope, it may be more difficult to establish that the price maintenance conduct is likely to result in an adverse effect on competition in a market.

3.1.2 To or Against a Person or Class of Persons Engaged in Business in Canada

Subparagraph 76(1)(a)(ii) applies only in respect of refusals to supply, or discrimination against, a person or class of persons engaged in business in Canada. The Bureau considers a "class of persons" to be a group of firms that share common distinguishing attributes or characteristics. The Bureau interprets the provision's reference to a "class of persons" to mean that it may apply when firms that do not have a low pricing policy are refused supply or otherwise discriminated against because they fall within a class of persons that, as a group, generally employs a low pricing policy.

In determining whether a person or class of persons is "engaged in business in Canada", the Bureau will have regard to the definition of "business" in subsection 2(1) of the Act and previous Bureau guidance with respect to the location of a business. In this latter respect, the Bureau's *Pre-Merger Notification Interpretation Guideline Number 1* notes that a business with a physical location or office in Canada will be considered to be "in Canada", as may a business that is partly or predominantly in another jurisdiction if it has some component or presence in Canada.[11] The Bureau will consider all relevant factors in determining whether a person has a sufficient link to Canada so as to be considered to be engaged in business in Canada, including the location of its tangible, intangible and financial assets, and the nature of any revenues generated from sales to customers in Canada.[12]

11 Competition Bureau, *Pre-Merger Notification Interpretation Guideline Number 1: Definition of "operating business" (Section 108 of the Act)*, 20 June 2011, p. 2.

12 See Competition Bureau, *Pre-Merger Notification Interpretation Guideline Number 15: Assets in Canada and Gross Revenues From Sales in, from or into Canada (Sections 109 and 110 of the Act)*, Draft for Public Consultation, 11 April 2012, p. 2 ff.

3.1.3 Due to that Person's or Class of Persons' Low Pricing Policy

The Bureau considers that a refusal to supply or discrimination in the supply of a product will have occurred "because of the low pricing policy" of a person or class of persons where the low pricing policy is the proximate cause of the supplier's refusal or discrimination. To be clear, a person's low pricing policy need not be the only or even the primary reason for the refusal or discrimination, but rather a factor informing the supplier's decision.

The Bureau will consider any available evidence in assessing whether a refusal to supply or discrimination in the supply of a product is due to another person's low pricing policy. For example, the Bureau will consider any statements by a supplier, be they internal to the supplier or in external communications, that suggest a reason for the refusal or discrimination is the other person's low pricing policy. The Bureau will also consider whether it is reasonable to infer from the other person's low pricing policy that such policy is in fact the proximate cause of the refusal to supply or discrimination.

In this regard, a "low pricing policy" consists of two elements: "low pricing" and a "policy". Several factors may be relevant in assessing "low pricing", including whether the retailer's price is below a supplier's MSRP, MAP or other pricing suggestions, and whether the retailer's price is less than the price the retailer charges for similar products or the price that other retailers typically charge for the same or similar products. Because subparagraph 76(1)(a)(ii) (and subsection 76(8)) refer to a "policy" rather than a "practice", the Bureau considers that a retailer's stated intent with respect to a future course of low pricing conduct may constitute a low pricing policy, even where the retailer has not yet engaged in the conduct. Conversely, a retailer that has engaged in low pricing conduct to a limited or isolated extent could be considered not to have a "policy" of low pricing, depending on the circumstances.

Section 76 of the Act does not require that a person's "low pricing policy" be in respect of a product previously supplied by the particular supplier who now refuses to supply or discriminates in the supply of a product. In other words, the section applies to circumstances where, for example, a person has a low pricing policy generally, such as a discount retailer, and, on that basis, is refused supply of a product that it has never previously purchased or resold. Thus, there is no requirement that a person be an existing or previous customer of a supplier for the "refusal to supply" provisions of section 76 to apply.

3.2 Exceptions to the Applicability of Subparagraph 76(1)(a)(ii)

An exception to the applicability of subparagraph 76(1)(a)(ii) of the Act is available to a supplier whose product has previously been resold by a person or class of persons that engaged in certain conduct in respect of the product. In particular, pursuant to subsection 76(9) of the Act, the Tribunal cannot make a remedial order in respect of a supplier's refusal to supply or discrimination in the supply of a product where the retailer was engaged in any of the following practices in respect of the product:

- loss leadering, or more specifically, selling the product at a low price for the purpose of advertising, rather than for the purpose of making a profit;

- bait-and-switch selling, or more specifically, using the product not for the purpose of selling it at a profit, but for the purpose of attracting customers in the hope of selling them other products;
- misleading advertising; or
- not providing the level of service that purchasers of the products might reasonably expect.

During the course of an investigation, the Bureau will consider any available evidence that may suggest one or more of the above exceptions may apply. However, in the Bureau's view, a supplier that purports to rely on an exception in subsection 76(9) of the Act bears the burden of proving the applicability of the exception.

For any of the exceptions in subsection 76(9) to apply, the conduct in question must have constituted a "practice" by the retailer. As the Bureau indicates in its Abuse of Dominance Guidelines, a "practice" normally involves more than one isolated act, but may also constitute a single act that is sustained and systemic or that has had or is having a lasting impact in a market.[13] With respect to the "misleading advertising" exception in paragraph 76(9)(c) of the Act, in determining whether an advertisement is misleading, the Bureau will consider the factors relevant to an assessment of allegedly false or misleading representations under sections 52 and 74.01 of the Act, including the literal meaning of the advertisement and the general impression it conveys.

13 Competition Bureau, *Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the* Competition Act*)*, 20 September 2012, Section 3.1 [Abuse of Dominance Guidelines].

4. INDUCING A SUPPLIER TO REFUSE TO SUPPLY A PERSON OR CLASS OF PERSONS DUE TO THAT PERSON'S OR CLASS OF PERSONS' LOW PRICING POLICY (s. 76(8))

4.1 The Statutory Elements

Subsection 76(8) of the Act applies when a person, by agreement, threat, promise or any like means, induces a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a person or class of persons because of the low pricing policy of that person or class of persons, with the result that competition in a market has been, is or is likely to be adversely affected.

Five elements must be established before subsection 76(8) can apply:

(i) a person, as a condition of doing business with a supplier;

(ii) induces the supplier by agreement, threat, promise or any like means;

(iii) to refuse to supply a product to a particular person or class of persons;

(iv) because of that person's or class of persons' low pricing policy;

(v) with the result that the inducement has had, is having or is likely to have an adverse effect on competition in a market.

Sections 3.1.1 and 3.1.3 of these Guidelines discuss the Bureau's approach under section 76 of the Act to refusals to supply attributable to another person's or class of persons' low pricing policy, while Section 5 discusses the Bureau's approach to the competitive effects test. The two remaining elements of subsection 76(8) are discussed below.

4.1.1 A Person, as a Condition of Doing Business with a Supplier

In the Bureau's view, subsection 76(8) applies both to a person that is currently doing business with a supplier, as well as to a person that has not previously done business with a supplier but who engages with the supplier with a view to doing business. In other words, depending on the circumstances, the provision may apply where a supplier refuses to supply a retailer in anticipation or expectation of securing the business of another person who induces the refusal as a condition of doing business with the supplier.

Pursuant to subsection 76(8) of the Act, a supplier's refusal to supply a person must occur as a condition of another person doing business with the supplier. Put differently, the provision will not be engaged where a person induces a supplier to refuse supply to another person if the person would have done business with the supplier regardless of the success of the inducement.

4.1.2 Induces the Supplier by Agreement, Threat, Promise or Any Like Means

Section 2.1.2 of these Guidelines discusses the Bureau's approach to the "agreement, threat, promise or any like means" requirement of subparagraph 76(1)(a)(i) of the Act, which approach the Bureau will similarly apply to subsection 76(8).

In the Bureau's view, the requirement that a person "has induced" a supplier to refuse to supply requires that any agreement, threat, promise or any like means which a person brings to bear against a supplier actually results in a refusal to supply by the supplier. Thus, the Bureau considers that this element of subsection 76(8) will generally not be met where, for example, a supplier agrees with a person to refuse supply to another person but does not actually implement the agreement.

Where an actual refusal to supply has occurred, the Bureau will consider whether the refusal was "induced" by another person. In this regard, if it can be shown that a supplier would have refused to supply a particular person regardless of any agreement, threat, promise or any like means with or by another person, the Bureau will not generally consider that other person to have "induced" the supplier's refusal to supply.

5. ADVERSE EFFECT ON COMPETITION IN A MARKET

Price maintenance conduct that falls under subparagraph 76(1)(a)(i), subparagraph 76(1)(a)(ii) or subsection 76(8) of the Act can be made subject to a remedial order by the Tribunal only where the conduct "has had, is having or is likely to have an adverse effect on competition in a market". The Tribunal has held that, based on its plain meaning, "adverse effect" is "a lower threshold" than "substantial lessening or prevention of competition", which is the standard for effects under sections 77, 79, 90.1 and 92 of the Act.[14]

The Tribunal has said that "without market power there can be no adverse effect in a market".[15] In *Visa/MasterCard*, the Tribunal confirmed its approach in earlier cases that for conduct to have an "adverse effect" on competition, the remaining market participants must be placed in a position, as a result of the conduct, of created, enhanced or preserved market power.[16] As a result, the Bureau will be concerned with price maintenance conduct under section 76 of the Act only where it is likely to create, preserve or enhance market power.

The Bureau discusses its approach to assessing market power and competitive effects in its Abuse of Dominance Guidelines, Merger Enforcement Guidelines and Competitor Collaboration Guidelines.[17] When assessing adverse effects on competition in this context, the exercise is a relative one; the Bureau will compare the level of competitiveness in the market in the presence of the particular price maintenance conduct with that which would exist in its absence to determine whether the effect of the conduct, in the past, present or future, creates, preserves or enhances market power. In this regard, the Bureau will consider whether the price maintenance conduct facilitates or is a result of coordination between suppliers or retailers that inhibits their competitive vigour, or whether the conduct excludes actual or potential competition at the supplier or retailer level, such that in either case the market would be more competitive in the absence of the price maintenance conduct.

5.1 Market Definition

Defining the relevant product and geographic markets is typically an important first step in assessing a person's ability to exercise market power. In defining relevant markets for the purposes of section 76 of the Act, the Bureau will follow the approach to market definition set out in the Abuse of Dominance Guidelines.[18]

14 *B.-Filer v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 211 [*B.-Filer*].

15 *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 at para. 369 [*Nadeau*].

16 *Visa/MasterCard*, supra note 3 at para. 350. See also *B-Filer*, supra note 14, and *Nadeau, ibid*.

17 Abuse of Dominance Guidelines, supra note 13; Competition Bureau, *Enforcement Guidelines: Merger Enforcement Guidelines*, 6 October 2011 [Merger Enforcement Guidelines]; and Competition Bureau, *Enforcement Guidelines: Competitor Collaboration Guidelines*, 23 December 2009 [Competitor Collaboration Guidelines].

18 Abuse of Dominance Guidelines, *ibid*. at Sections 2.1 and 2.2.

In price maintenance cases, it can be particularly important to properly distinguish between a product brand and a relevant product market. A particular brand of product may not, in and of itself, constitute a separate relevant product market where buyers of that product view other brands as substitutable products. That said, where a relevant product market is comprised of several competing brands, the Bureau will still assess the ability of any individual brand or brands to exercise market power within that market, based on the factors laid out in Section 5.2 of these Guidelines.

Of potential significance to market definition in price maintenance cases is the proliferation of e-commerce. In some instances, suppliers may employ price maintenance practices, such as MSRP and MAP policies, differentially across sales channels, such as between online and bricks-and-mortar retailers. In defining relevant markets for the purposes of section 76, the Bureau may consider whether, from a buyer's perspective, different sales channels are most appropriately viewed as competitive substitutes or complements. For example, an online sales channel may supply a wider geographic market than a locally-based bricks-and-mortar sales channel, and markets that would traditionally be defined around the physical store locations of retailers may need to be viewed more broadly where products are sold online.

5.2 Market Power

In a general sense, market power is the ability of a firm (or group of firms) to profitably maintain prices above the competitive level, or other elements of competition, such as quality, choice, service or innovation, below the competitive level, for a significant period of time. In assessing market power for the purposes of section 76 of the Act, the Bureau will follow the approach set out in the Abuse of Dominance Guidelines.[19]

In price maintenance cases, the relevant market in which market power is to be assessed may differ, depending on the conduct at issue and the particular provision of section 76. Thus, the relevant question is whether a person(s), be it a supplier(s) or a retailer(s), is able to profitably maintain its prices above the competitive level as a result of price maintenance conduct.

The Bureau will consider both a firm's pre-existing market power (*i.e.*, any market power held by the firm notwithstanding any price maintenance conduct) and any market power derived from its price maintenance conduct. The Bureau will have regard to any direct indicators of market power, such as profitability or supra-competitive pricing, as well as qualitative and quantitative indirect indicators. In this latter regard, the Bureau will consider a variety of factors, such as, market share, including share stability and distribution, barriers to entry, including barriers created as a result of any price maintenance conduct, and other market characteristics, including the extent of technological change and retailer or supplier countervailing power.

19 *Ibid*. at Section 2.3.

With respect to market share, the Bureau's general approach is that a share of less than 35 percent will typically not prompt further examination of whether the firm possesses market power.[20] However, consistent with the Tribunal's finding in *Visa/MasterCard*, the Bureau is of the view that a firm with a market share of less than 35 percent could have some degree of unilateral market power in some instances, depending on the characteristics of the relevant market.[21]

5.3 Circumstances in Which Price Maintenance Conduct May Adversely Affect Competition

From an economic perspective, price maintenance conduct can be pro-competitive or anti-competitive, depending on the circumstances.[22] In all cases, the conduct reduces intra-brand price competition downstream, since retailers cannot compete based on price in the sale of a particular branded product. At the same time, however, price maintenance conduct can be pro-competitive in many instances, by enhancing the overall level of demand in a market through the stimulation of inter-brand competition and non-price dimensions of intra-brand competition.[23] For example, depending on the nature of the product, price maintenance conduct may:

- **eliminate inefficiency in non-price dimensions of intra-brand competition** by, for example, correcting "free-riding" among downstream retailers. Absent the conduct, discounting retailers of some types of products may free-ride on the investments of full-service retailers that provide valuable product information and services to buyers, causing full-service retailers to lose sales to discounters and, as a result, to inefficiently reduce services. Price maintenance conduct may prevent discounters from undercutting the prices of full-service retailers, and may preserve incentives to offer efficient levels of service that benefit consumers; and
- **enhance inter-brand competition** by providing retailers with a margin with which to, for example:
    - invest in promotional efforts, store enhancements or increased service, so as to stimulate demand for the supplier's product in competition with rival retailers; or
    - stock and promote new or competing product brands, thereby facilitating entry or expansion.

20 *Ibid*. at Section 2.3.1.

21 *Visa/MasterCard*, supra note 3 at para. 267.

22 See, *e.g.*, *Visa/MasterCard*, *ibid* at para. 269.

23 The extent to which the overall level of demand in a market is likely to be enhanced as a result of a product being subject to price maintenance conduct may depend on the nature of the product.

Where price maintenance conduct is demand-enhancing in a market, the Bureau believes the conduct is unlikely to create, preserve or enhance market power, so as to have an adverse effect on competition in the market. However, in at least the following general circumstances, price maintenance conduct may be demand-restricting, adversely affecting competition in a market and serving to create, preserve or enhance market power:[24]

- **Inhibiting competition between suppliers:** Price maintenance conduct may be used by suppliers to facilitate less-vigorous price competition among them, or to help police a price-fixing arrangement;
- **Inhibiting competition between retailers:** One or more retailers may compel a supplier to adopt price maintenance conduct to facilitate less-vigorous price competition among them, or to help police a price-fixing arrangement;
- **Supplier exclusion:** An incumbent supplier may use price maintenance conduct to guarantee margins for retailers to make them unwilling to carry the products of rival or new entrant competitors to the supplier. To the extent this results in the foreclosure of downstream distribution channels to competing suppliers, it may limit or reduce the ability of such suppliers to discipline the supplier's wholesale pricing, so as to enable the supplier to charge a price that is higher than could be sustained absent the conduct; and
- **Retailer exclusion:** A person may compel a supplier to adopt price maintenance conduct with the objective to exclude competition to a retailer(s) from discount or more efficient retailers.

Supplier-based theories of harm are most likely to arise in the context of price maintenance conduct under paragraph 76(1)(a) of the Act, while retailer-based theories of harm are likely to be more common in respect of price maintenance conduct under subsection 76(8).[25] More specifically, in the Bureau's view, adverse effects on competition as a result of price maintenance conduct that falls within subparagraph 76(1)(a)(i) will typically manifest in the foreclosure of downstream distribution channels and the exclusion of suppliers that would otherwise compete with the firm engaging in the conduct. Similarly, in respect of price maintenance conduct under subsection 76(8), the Bureau will consider whether the conduct has excluded or is likely to exclude competitors of a retailer(s), such that prices in the relevant market can be profitably maintained above, or non-price dimensions of competition in the relevant market can be profitably maintained below, the level that would prevail absent the price maintenance conduct. Under either provision, the Bureau will also consider whether the price maintenance conduct facilitates or is a result of coordination at the supplier or retail lever that inhibits competitive vigour in the market.

24 See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

25 Depending on the facts of a case, the Bureau may evaluate the competitive effects of specific price maintenance conduct under both paragraphs 76(1)(a) and subsection 76(8).

Price maintenance conduct that falls within subparagraph 76(1)(a)(ii) of the Act also has the potential to exclude the retailer that the supplier refuses to supply or otherwise discriminates against from the relevant market. However, because a remedial order in respect of conduct engaged in under this provision can only be issued against the supplier, the Bureau will consider the extent to which the refusal to supply has created, preserved or enhanced the supplier's market power. For example, if the product supplied occupies a significant position in the relevant market, the supplier's refusal to supply may cause the low pricing retailer to alter its business practices to obtain supply, which may have an exclusionary effect on the supplier's competitors. The Bureau will also consider whether the supplier's conduct facilitates or is a result of coordination with other suppliers that inhibits competitive vigour in the market.

In some circumstances, price maintenance conduct may occur in connection with agreements or arrangements between competing suppliers or competing retailers, which arrangements may themselves engage section 45 or 90.1 of the Act. Similarly, where price maintenance conduct is used to exclude competition, it may also give rise to issues under section 77 and/or section 79 of the Act. Section 6 of these Guidelines discusses the Bureau's enforcement approach where the Bureau believes conduct may satisfy the elements of both section 76 and another provision of the Act.

6. REMEDYING ADVERSE COMPETITIVE EFFECTS OF PRICE MAINTENANCE CONDUCT

The Tribunal may issue remedial orders upon finding that price maintenance conduct is likely to adversely affect competition in a market. In respect of conduct that falls under subparagraph 76(1)(a)(i) or 76(1)(a)(ii), the Tribunal may make an order pursuant to subsection 76(2) of the Act prohibiting a person from engaging in the conduct or requiring the person to accept another person as a customer within a specified time on usual trade terms.[26] In respect of conduct that falls under subsection 76(8), the Tribunal may make an order pursuant to that subsection prohibiting a person from engaging in the conduct or requiring the person to do business with another person on usual trade terms. Subsection 76(12) of the Act defines "trade terms" to mean terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Prior to commencing formal proceedings with the Tribunal under section 76, the Commissioner will generally afford parties the opportunity to respond to the Bureau's concerns regarding alleged contraventions of section 76 and to propose an appropriate resolution to address them. A resolution to a matter could take many forms along a continuum ranging from the discontinuance of an inquiry to a consent agreement registered with the Tribunal pursuant to section 105 of the Act, depending on the circumstances.[27] Where a consensual resolution cannot be reached, the Commissioner may file an application with the Tribunal.

As noted previously in these Guidelines, in some instances price maintenance conduct may also raise concerns under one or more other provisions of the Act. Pursuant to subsection 76(11) of the Act, the Commissioner may not commence an application under section 76 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which the Commissioner has commenced proceedings under section 45 or 49 or sought an order under section 79 or 90.1 of the Act.

Where the Bureau believes that price maintenance conduct satisfies the elements of one or more provisions of section 76 and another section of the Act, the Bureau will generally base its choice of enforcement provision on the particular facts of each case, the market situation and any other relevant considerations, including the circumstance that led to the introduction of the price maintenance conduct. The Bureau's decision will also be informed by the nature of the remedy under each section of the Act, and the remedy that the Bureau believes is necessary to alleviate the competitive harm in the particular case.

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26 As noted in Section 2.1.2 and 3.2 of these Guidelines, the Tribunal cannot make an order under subsection 76(2) of the Act in respect of: (i) conduct that falls under paragraph 76(1)(a) of the Act where an exception in subsection 76(4) applies; or (ii) conduct that falls under subparagraph 76(1)(a)(ii) of the Act where an exception in subsection 76(9) applies.

27 For further information on the continuum of resolutions, please consult the Bureau's Information Bulletin on the *Conformity Continuum*, 18 June 2000.

Section 103.1 of the Act allows private parties to seek leave of the Tribunal to bring an application under section 76. The Tribunal may grant leave if it has reason to believe that the applicant is directly affected by conduct that falls within the price maintenance provision and that could be made subject to a remedial order under section 76.

7. HYPOTHETICAL ILLUSTRATIVE EXAMPLES

The following examples are intended to illustrate the analytical framework that the Bureau will generally apply in conducting a review of alleged price maintenance conduct. As with these Guidelines generally, the Bureau's discussion of the examples below does not replace the advice of legal counsel and is not intended to restate the law or to constitute a binding statement of how the Commissioner will exercise discretion in a particular situation. The enforcement decisions of the Commissioner and the ultimate resolution of issues will depend on the particular circumstances of the matter in question.

7.1 Example 1 – Co-operative Advertising Agreement

Scenario

Company X is a leading supplier of gadgets, which are sold to end-user consumers in Canada through an independent dealer network. X-branded gadgets are popular with consumers, representing more than 50% of the overall gadget market.

One year ago, Company X entered into standard-form co-operative advertising agreements with nearly all of its dealers. Pursuant to these agreements, Company X reimburses its dealers, on a quarterly basis, 50% of the dealer's cost of local audio and visual promotional expenses in respect of X-branded gadgets, up to a maximum of 2% of the value of all X-branded gadgets sold by the dealer during the quarter. To be eligible for the reimbursement, the co-operative advertising agreements stipulate that dealers must market X-branded gadgets using terminology and images pre-approved by Company X, and in addition must advertise X-branded gadgets, including on the Internet and dealer websites, at Company X's MAP. While dealers are permitted to sell X-branded gadgets in-store for less than the MAP and still receive reimbursement under the co-operative advertising agreements, Company X prohibits dealers from noting in their advertisements that dealers may sell for less.

Company X's cooperative advertising reimbursement is a significant contributor to dealer margins, since local advertising is a crucial driver of gadget sales. In practice, nearly all dealers today advertise and sell X-branded gadgets at Company X's MAP, and have prioritized the sales and marketing of advertising-supported X-branded gadgets over competing gadget brands.

Analysis

The Bureau would typically examine a co-operative advertising arrangement of the type described in this example under subparagraph 76(1)(a)(i) of the Act.[28] For the purposes of that provision, Company X: is a supplier within the meaning of subsection 76(3) of the Act; supplies X-branded gadgets to its dealers who sell a product, in this case the supplied gadgets, to consumers; and has implemented the co-operative advertising arrangement with its dealers

28 Where a supplier employs a dual-distribution arrangement, selling to end-users itself and through a dealer network, the Bureau may also examine a co-operative advertising agreement or arrangement under one or more other of the Act's civil provisions; see the Competitor Collaboration Guidelines, *supra* note 17 at Section 2.3.3.

through an express written agreement. As such, three of the four required elements for the applicability of subparagraph 76(1)(a)(i) are present in this case, leaving only the fourth element, a direct or indirect influence by Company X on dealer selling or advertised prices, for consideration.

Although dealer advertisements pursuant to the co-operative advertising agreements omit any indication that dealers may sell X-branded gadgets for less than the MAP, subsection 76(6) of the Act would not apply so as to deem the advertisements to have influenced dealer prices upward. This is because the advertisements are published by retailers, rather than Company X, and the deeming provision in subsection 76(6) only applies to the publication of an advertisement by a supplier.

Absent applicability of the deeming provision, the Bureau would consider whether the co-operative advertising agreements have in fact influenced upward or discouraged the reduction of dealer selling or advertised prices. Although a majority of dealers today advertise and sell X-branded gadgets at Company X's MAP, the Bureau would still need to consider whether dealer pricing in this regard has been "influenced upward" by Company X. The Bureau would consider any indications that, as a result of the co-operative advertising agreements, dealers advertise or sell X-branded gadgets at a higher price than they would have in the absence of the advertising reimbursement by Company X. For example, the Bureau would assess whether, in the one year since Company X has implemented the co-operating advertising arrangement, dealers advertise or sell X-branded gadgets at a higher (inflation-adjusted) price than they did prior to implementation of the arrangement. The Bureau would also have regard to any documentary evidence prepared by X-branded gadget retailers in the ordinary course of business that shows the retailer would have advertised or sold X-branded gadgets at a lower price absent the co-operative advertising arrangement.

If it could be demonstrated that the co-operative advertising agreements had influenced upward the advertised or selling prices of X-branded gadgets, the Bureau would consider the competitive impact of the conduct in the relevant market. In this regard, the Bureau would assess whether X-branded gadgets and other brands of gadgets should appropriately be characterized as separate product markets or as a single product market, and whether Company X possesses market power in the relevant market.

If the relevant market was found to include all brands of gadgets and the Bureau determined that Company X possessed market power in that market, based on its apparent greater than 50% share of the gadget market and any evidence of barriers to entry, the Bureau would consider to what extent Company X's market power had been preserved or enhanced as a result of the cooperative advertising agreements. For example, the Bureau would consider whether dealers' decisions to prioritize the sales and marketing of advertising-supported X-branded gadgets over competing gadget brands had excluded the entry or expansion of competitors, the presence of which may have resulted in lower prices in the gadget market or an increase in product quality, choice, service, innovation or another non-price dimension of competition. In the presence of exclusionary effects, the Bureau may conclude that the cooperative advertising agreements preserved or enhanced Company X's market power, so as to adversely affect competition in the gadget market.

7.2 Example 2 – Refusal to Supply a Retailer

Scenario

Company Y manufactures and supplies widgets and, in that regard, competes with four other widget suppliers, each of which (including Company Y) accounts for approximately 20% of total annual sales in Canada. Widget suppliers, including Company Y, sell widgets to end-user consumers through independent dealer networks in Canada. Some dealers operate only bricks-and-mortar stores, others sell exclusively online, and still others sell online and in-store.

For most consumers, widgets are a relatively high-cost purchase, and thus consumers demand a significant level of pre-purchase and after-sale support from dealers. Some online dealers provide this support by telephone and through interactive website chat. Nevertheless, not all widget suppliers are comfortable with the level of support offered by online dealers. As such, at least two widget suppliers, including Company Y, only distribute their widgets through dealers that agree to resell them exclusively in bricks-and-mortar stores and not online.

Company A is an online and bricks-and-mortar widget dealer in Canada that has been retailing the widgets of two suppliers. Company A seeks to expand its widget line by carrying Y-branded widgets, and obtains supply from Company Y on the condition that Company A not offer Y-branded widgets for sale online. Company Y permits Company A to advertise Y-branded widgets on Company A's website, and places no restrictions on Company A's advertised or retail price of Y-branded widgets. Soon after Company A has commenced retailing Y-branded widgets, Company Y begins receiving complaints from consumers about a lack of product knowledge, service and support in Company A stores, and complaints from its other dealers about the very low prices charged by Company A for Y-branded widgets. Although Company Y attempts to work with Company A to address these service and pricing concerns, the complaints persist six months later. As such, Company Y informs Company A that, due to these ongoing complaints, it is terminating the parties' dealer agreement and will no longer supply its widgets to Company A.

Analysis

Given the absence of any indication that Company Y was induced (by agreement, threat, promise or any like means) by another of its dealers to cease supplying widgets to Company A, the Bureau would typically examine the conduct in this example under subparagraph 76(1)(a)(ii) of the Act.[29] For the purposes of that provision: Company Y is a supplier within the meaning of subsection 76(3) of the Act; Company Y has refused to supply widgets to Company A; and Company A is engaged in business in Canada. As such, three of the four required elements for the applicability of subparagraph 76(1)(a)(ii) are present in this case.

29 The Bureau may instead examine the conduct in this example under section 75 of the Act, the general refusal to deal provision, in those cases where there is no indication that the refusal to supply was due to the customer's low pricing policy.

With respect to the fourth required element, the evidence suggests that Company Y refused to supply widgets to Company A due, at least in part, to the latter's low pricing policy. Nevertheless, because product support and service is especially important in the widget industry, it is possible that Company Y would have continued to supply Company A if it had satisfactorily addressed customer complaints about service, even if Company Y continued to receive complaints from other dealers about Company A's low pricing. As such, the Bureau would consider any available subjective and objective evidence in assessing whether Company A's low pricing, as opposed to its service, was a proximate cause of Company Y's refusal to supply.

If Company Y's refusal to supply widgets to Company A could be attributed to the latter's low pricing policy, the Bureau would consider any available evidence that may suggest an exception in subsection 76(9) of the Act would preclude the applicability of subparagraph 76(1)(a)(ii). In this case, in particular, the Bureau would consider any evidence, including any evidence put forth by Company Y, that Company A made a practice of not providing the level of service that purchasers of Y-branded widgets might reasonably expect. Such evidence in this case could include documented consumer complaints received by Company Y.

Absent the applicability of an exception in subsection 76(9), and if the required elements of subparagraph 76(1)(a)(ii) could be established, the Bureau would consider the competitive impact in the relevant market of Company Y's refusal to supply widgets to Company A. In this regard, the Bureau would assess whether the relevant product market includes both Y-branded widgets and other widget brands, and the scope of the market given the prevalence of bricks-and-mortar and online sales channels. If the relevant market were to be defined as all widgets sold in bricks-and-mortar and online channels in Canada, it would be unlikely that Company Y, with a market share of 20% and without evidence of competitor exclusion, would be placed in a position of created, preserved or enhanced market power as a result of the refusal to supply, so as to adversely affect competition in the market.

7.3 Example 3 – Inducing a Supplier to Refuse to Supply Another Person

Scenario

Company Z is a supplier of gizmos, which are sold to end-user consumers in Canada through independent retailers. Owing to their nature, gizmos are sold only in bricks-and-mortar stores, and not online. Gizmos are also highly differentiated, with a multitude of brands, varieties and packaging sizes. End-user consumers generally purchase gizmos from local retailers, with many retailers in a given area stocking full lines of gizmos. Z-branded gizmos currently account for approximately 10% of overall gizmo sales nationally.

Company B is the largest retailer by revenue of Z-branded gizmos in City T and nationally, accounting for more than 50% of total citywide and national sales of Z-branded gizmos. In an overall market for gizmos, however, Company B accounts for only 20% of sales in City T and nationally. Company B operates three flagship retail stores in City T, which offer extensive customer service in well-appointed outlets located in prime retail areas.

Recently, Company C, a family-owned start-up, began retailing Z-branded and other gizmos from a re-purposed warehouse located on the outskirts of City T in a former industrial park. Due to its lower-cost location and no-frills service, Company C profitably sells gizmos at prices up to 20% lower than other retailers in City T. As a result, Company C is capturing a growing share of gizmo sales in City T, with Company B experiencing a significant decline in store visits and revenues.

Company B informs Company Z that, unless it ceases supplying gizmos to Company C in City T, Company B will stop purchasing from Company Z on a national basis and only stock the gizmos of Company Z's competitors. Nationally and in City T, Company B is Company Z's largest customer, and the profitability of its business would be imperilled were Company Z to lose Company B as a customer. Consequently, Company Z informs Company C that, effective immediately, it will no longer supply it with gizmos. Some customers decide to purchase a different brand of gizmos from Company C to benefit from its lower prices, while other customers return to Company B's stores to purchase Z-branded gizmos. Company C believes it can remain in business, relying on sales of other gizmos from suppliers who have not yet refused supply; however, Company C is fearful of the future should those suppliers also come under pressure from Company B.

Analysis

The Bureau would typically examine the conduct of Company B in this example under subsection 76(8) of the Act.[30] For the purposes of that provision: Company B is a customer of Company Z; Company B has induced Company Z to refuse to supply gizmos to Company C by threatening to cease purchasing gizmos from Company Z; Company B's inducement was due to Company C's low pricing policy in respect of Z-branded gizmos; and Company Z's refusal to supply Company C was a condition of Company B continuing to do business with Company Z. As such, four of the five required elements for the applicability of subsection 76(8) are present in this case.

With respect to the remaining element, the Bureau would consider whether Company B's conduct has created, preserved or enhanced any market power, so as to adversely affect competition in a relevant market. In this regard, the Bureau would assess whether Z-branded gizmos and other brands of gizmos should appropriately be characterized as separate product markets or as a single product market. In considering whether consumers view different brands of gizmos as substitutable, the Bureau would assess, among other factors, the degree of consumer switching between brands, including in this case consumer switching between Company B, Company C and other retailers in City T that may stock different gizmo brands. From a geographic perspective, the Bureau would consider whether consumers consider retailers from cities other than City T to be alternative viable sources of gizmos.

30 Depending on the circumstances (such as where one or more of the required elements of subsection 76(8) cannot be established), the Bureau may instead examine the conduct under section 79 of the Act, the abuse of dominance provision. The Bureau's approach to the enforcement of section 79 is set out in the Abuse of Dominance Guidelines, *supra* note 13.

If the relevant market were to be defined as all gizmo brands in City T, the Bureau would assess whether Company B possess market power in that market, and whether any market power it may have has been preserved or enhanced by its inducement of Company Z to refuse to supply gizmos to Company C. In this regard, the Bureau would consider Company B's share of gizmo sales, which is only 20%. In addition, the apparent ease of successful entry by Company C may suggest that structural barriers to entry into the retail gizmo market in City T are not significant. That said, the Bureau would also consider any strategic barriers to entry created by Company B's conduct. If it could be established that such a barrier to entry was significant and would likely serve to exclude retail competitors, such that Company B's conduct would likely confer upon it market power in the gizmo market in City T, the Bureau may determine that Company B's conduct has had an adverse effect on competition in the market.

APPENDIX: SECTION 76 OF THE ACT

Price maintenance

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.

Order

(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.

Persons subject to order

(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.

Where no order may be made

(4) 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.

Suggested retail price

(5) 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.

Advertised price

(6) 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.

Exception

(7) Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply

(8) 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.

Where no order may be made

(9) 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.

Inferences

(10) 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.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) 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.

Definition of "trade terms"

(12) 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., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Textile Labelling Act*, the *Precious Metals Marking Act* or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Website

www.competitionbureau.gc.ca

Address

Information Centre
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone

Toll-free: 1-800-348-5358
National Capital Region: 819-997-4282
TTY (for hearing impaired) 1-800-642-3844

Facsimile

819-997-0324

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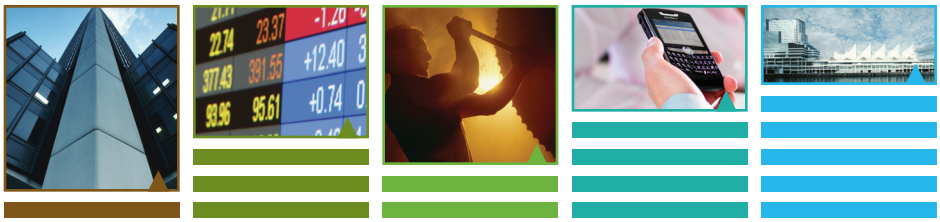
Compete to Win

Final Report – June 2008

Competition Policy Review Panel – Groupe d'étude sur les politiques en matière de concurrence



Canada

Compete to Win

Final Report – June 2008

Competition Policy Review Panel – Groupe d'étude sur les politiques en matière de concurrence

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Contents

Transmittal Letter

June 26, 2008

The Honourable Jim Prentice
Minister of Industry
235 Queen Street
Ottawa, Ontario
K1A 0H5

Dear Minister:

As members of the Competition Policy Review Panel, we are pleased and honoured to transmit our final report.

This report reflects almost a year of study and examination of the issues we feel are most central to Canada's competitiveness. We are encouraged by the interest in these issues. We are grateful to the many Canadians and others who submitted their views to us and who committed the time to meet with our Panel as we carried out our work.

We wish to acknowledge the assistance and able support of public servants representing a number of governments and departments. Our report benefits from their knowledge and advice.

Sincerely,

L. R. Wilson, Chair

N. Murray Edwards

P. Thomas Jenkins

Isabelle Hudon

Brian Levitt

Preface

This report is about our children and our grandchildren as well as the economy, the society and the nation they will inherit. It is about how Canada can succeed in the face of rapid global change and intense competition.

The Competition Policy Review Panel's mandate was to examine and report on the laws and policies that will underpin Canada's continued economic growth and development.

How can we continue to provide the well-paying, challenging and fulfilling jobs that recent generations have enjoyed? What career opportunities will be available for our most talented and ambitious young men and women? Where will we find leadership in all sectors of our society and the determination to "compete to win"? Do we as Canadians have what it takes to be the best?

In the course of our deliberations and in submissions, research reports and consultations, it has been made clear that economic activity is increasingly being organized on a global basis. New and more aggressive competitors are emerging, and new technologies are reshaping entire industries. In this context, standing still is not an option. As a Panel, we have no doubt about the need to adapt and move forward.

How do we meet the challenges and capitalize on the opportunities presented by these changes?

We believe that we must embrace competition as savvy and determined players with a focus on Canada's interests. We must skate harder, shoot harder and keep our elbows up in the corners, to use a recognizably Canadian metaphor.

We believe that Canadians need to become more active and willing participants in competitive markets here at home and around the world. We must not seek to insulate or protect ourselves from global competition, but to capitalize on it and harness it for our benefit.

Competition matters. It brings dynamism to our economy. It means good jobs for our citizens. It is not merely an economic concept. Being open to competition serves Canada's national interest. This is the principle that anchors our report and informs our recommendations to the government.

That said, we want to be clear that we are not unmindful of the anxiety that relentless competition can produce. Such unease is understandable in the face of rapidly changing circumstances and uncertain outcomes. However, as Canadians,

we have stepped up our game and our competitive aspirations in the past, and we have succeeded. We can do it again.

What will it take to deliver to our grandchildren the same measure of progress we have enjoyed? We believe that it will take a more competitive mindset. We need to view competition as being a necessary means to an end. We must become more engaged with enhanced competition domestically and with increased efforts to penetrate global markets.

While this report is centred on what governments at all levels can and must do in the public policy domain, our agenda is also addressed to the private sector. Like governments, we believe that the private sector has a central role to play in improving our competitiveness as a nation. We call on our business leaders to be ambitious, raise their sights, seek out and capitalize on new opportunities, and relentlessly focus on improving how their businesses operate.

Along with an increased focus on competition, we as a country need to regain our ambition to be the best. We cannot be content with simply being in the top ten or top twenty among our international competitors. Globalization and the accelerating pace of change will continue whether or not we step forward to address these fundamental transformations. If we want to control our destiny, we must acknowledge these issues and deal with them.

It is the Panel's view that this means working more closely and more successfully together as Canadians. It means better collaboration between and among all levels of government, the business community, our educational leaders and, indeed, all Canadians. We in Canada represent one team competing against many other, bigger teams. This means we must work together with a common agenda, a Competitiveness Agenda for Canada.

We offer this report as a contribution to that effort. We make a number of recommendations, point to several important areas for action, and propose a process and a new institution to sustain momentum on a long-term Competitiveness Agenda.

We very much hope that Canadians will share a commitment to the agenda we have laid out.

This report is not about remedies for today's short-term challenges. It is about how we position Canada for tomorrow.

Ultimately, we believe that Canadians must be better prepared to compete in the global economy. We are confident that we can and will win.

1. Our Mandate and Approach

On July 12, 2007, the Ministers of Industry and Finance announced the creation of the Competition Policy Review Panel. The Panel is chaired by L. R. Wilson, and includes N. Murray Edwards, Isabelle Hudon, P. Thomas Jenkins and Brian Levitt. We were mandated to review Canada's competition and foreign investment policies and to make recommendations to the Minister of Industry, on behalf of the Government of Canada, for making Canada more competitive in an increasingly global marketplace.[1] The Panel was tasked with conducting research, holding consultations and producing a report by June 2008.

Panel members represent diverse regions and sectors of this country and a range of business and professional expertise. We bring our collective experience to this mission and our shared passion to make Canada more successful. All of us have a strong interest in better understanding the economic forces at work in Canada and the world as well as the implications for our economy and our quality of life. We believe that Canada can compete and will win, if the conditions are right and barriers are removed.

Our report is about one simple proposition: **raising Canada's overall economic performance through greater competition will provide Canadians with a higher standard of living**. Strong economic performance translates into more and better jobs and higher earnings, which in turn mean higher government revenues to support the services and programs that Canadians have come to expect. Our recommendations are meant to address the slow growth in personal earnings in Canada. Our goal is to create the conditions that will sustain a robust economic legacy for future generations of Canadians.

In this report, we put forward a national Competitiveness Agenda to meet this goal. Pursuing it will strengthen competitiveness across our economy and support the emergence of new Canadian global success stories. Our recommendations are designed to promote the two-way flow of talent, capital and innovation between Canadian markets and world markets. Our approach requires a strong commitment to openness and is underpinned by collaboration and effective harmonization between governments, businesses and educational institutions.

Competitiveness involves much more than government policy. There is a clear and key role for other stakeholders — including businesses, labour groups, educational institutions and all Canadians — in advancing Canada's competitiveness. We believe that the role of government is to provide the framework that sets the right

conditions for competitiveness. This includes removing legal, regulatory and policy impediments to competition and providing the conditions to better enable Canadian companies to compete in global markets. The challenge for all Canadians is to be ambitious, show initiative, take risks, make investments and pursue the opportunities in the global economy for creating jobs and wealth for Canada.

In our deliberations and consultations, our Panel has journeyed widely to seek out the best ideas to better equip Canada to compete globally.

Our Consultation Paper, *Sharpening Canada's Competitive Edge*, released in October 2007, set out questions and invited submissions.[2] In response, we received 155 submissions from businesses, law firms, governments, individuals, academics, unions, cultural and public interest organizations in Canada as well as interests based abroad. We have benefited greatly from the range and breadth of advice offered us.

We also reviewed international best practices with US and Australian officials, and with representatives of the Organisation for Economic Co-operation and Development and the European Union. In addition, our Panel conducted a program of research to supplement its consultations and deliberations as well as research by other organizations. We commissioned more than 20 research studies on policy areas that affect both Canada's ability to attract capital and talent, and the international competitiveness of Canadian firms.

Between January and March 2008, we met across Canada with business groups and leaders, federal, provincial, territorial and civic leaders, public sector officials, unions, academics and policy experts, associations and public interest organizations. During 13 full-day sessions of consultations and round tables, our Panel heard from more than 150 individuals and organizations in a number of cities across Canada. We were impressed by the enthusiasm and commitment to improving Canadian competitiveness.

Our views and recommendations have been shaped by the submissions we received, by our deliberations, consultations and research, and by our experience.

2. Creating Wealth: Competitiveness and Productivity

We begin with a brief overview of the basic economic concepts that underlie the analysis necessary to deal with the issues before us. These are competition, competitiveness and productivity.

What Is Competition?

Economic competition is the contest between parties to grow and create wealth. At the firm level, the winners are those who consistently and constantly innovate, invest wisely and adapt quickly to the ever-changing social, demographic, technological, economic and political trends and forces bearing on their industry. Firms that fail to keep up do not survive. Firms that succeed provide superior returns for their investors, better jobs for their employees and the best value for their customers.

For **employees**, competition provides the opportunity to work for more productive, innovative companies, to earn higher wages and to pursue rewarding careers.

For **customers**, it means better products, lower prices, more choice and better service.

For **countries**, competition is the strongest spur to innovation and value creation, which leads to a higher standard of living for all.

A considerable economic literature documents the central role of innovation in driving productivity growth and the importance of competition in driving innovation.[1] Greater competition is the key to increasing productivity and prosperity.

The benefits of investment and innovation are not achieved without financial cost or personal dislocation and uncertainty. These actions entail the assumption of financial risk and respond to the unceasing pressure to improve and change. It is the lure of economic gain and personal success as well as the spectre of economic loss and personal failure as a result of competition that provide the incentive to motivate these behaviours and thereby capture their benefits.

What Is Competitiveness?

While competition refers to the nature and quality of rivalry, competitiveness refers to the outcome — who wins and who loses. In any industry, the most competitive firms survive and provide the benefits of competition to their investors, employees, customers and host societies. Public policy must deal with competitiveness in developing policies designed to enhance a country's ability to achieve its primary economic goal, which is to assure a rising standard of living for its citizens.

What Is Productivity?

Productivity measures the efficiency with which the resources available to an economy, such as labour, capital and business expertise, are being used to produce goods and services. The challenge for any country is to strengthen the key determinants of productivity growth — in colloquial terms, to get "more bang for the buck." Productivity is **not** about working harder for less. It is about working smarter to earn more.

Working smarter in terms of labour productivity can be achieved in many ways, for example, by equipping employees with more machinery and equipment, by having employees acquire greater skills through education, training or on-the-job experience, or by adopting advanced technologies.

Overall productivity growth at the firm level is the key determinant of increases in prosperity and opportunity for the citizens of a country.[2] The primary drivers of productivity growth are the investment, innovation and adaptation fostered by openness and competition. Economic research, confirmed by our Panel's experience, demonstrates that increases in productivity are not achieved without risk, stress and cost. The benefits outweigh the costs because successfully competitive firms provide better jobs, higher investor returns and more value to customers.

THE POWER OF PRODUCTIVITY

William Lewis of the McKinsey Global Institute measured employee productivity in individual industries within 13 countries over more than a decade. He found that productivity varies enormously around the world and, more importantly, that differences in productivity explain virtually all of the differences in national gross domestic product per capita.

Strong competition in product markets is critical to increasing productivity and prosperity. It is just as important for wealth creation as a sound macroeconomic foundation, a flexible labour market or top-class education.[3]

The greater the level of competition in an economy (competitive intensity), the better off its citizens will be and the better its successful firms will be able to compete beyond the boundaries of the domestic economy. Opening an economy to the free entry of goods, services, competitors and capital increases competitive intensity in the economy and, as a result, its productivity.

It is important to recognize that it takes time to realize the benefits of the interactions between competition, competitiveness and productivity. Just as we invest for the future by educating our children today, so too must we invest now in fostering greater competition for benefits to accrue in the future. Moreover, we cannot shy away from taking the tough decisions required to enhance productivity today because the benefits will be realized tomorrow.

The foregoing is a brief and high-level summary of the conclusions of an entire field of economic research. As befits any area of academic enquiry, there is ongoing debate about the nuances of these matters. However, our Panel's experience in business is consistent with the general thrust of this research. Accordingly, we base our analysis, views and recommendations on these basic premises.

3. Globalization and the Pace of Change

Canada is competing with other nations in a global economy in which powerful secular trends are changing the competitive landscape at an ever-quickening pace. An appreciation of these trends is essential to an analysis of Canada's position and to the development of measures to improve Canadians' standard of living. The Panel's recommendations have been developed with these trends in mind.

Economic globalization is not a new phenomenon. However, over the past 50 years, global economic forces have accelerated significantly in pace and intensity. Canadians must adapt to a global market that is undergoing rapid transformation as individuals and firms take advantage of the opportunities created by new enabling information and communications technologies, a substantial decrease in transportation costs, the spread of market-based economic ideologies, and countries' increased openness to trade and investment.

Technological developments, including containerization, improvements in information processing and the introduction of lower-cost, more reliable systems for communicating voice, data and video, have greatly facilitated the internationalization of businesses. Over four decades, transportation and warehousing costs have declined by about a third as a share of the cost of the inputs used to produce goods and services in Canada.[1]

THE INCREASING PACE OF TECHNOLOGICAL ADVANCE

"Capitalism is taking us toward a future of accelerating change. The first twenty years of the twentieth century saw as much technological progress as the entire nineteenth century. Currently, industrial societies appear to be doubling their rate of technological progress every ten years. If this continues, and there is every reason to suppose that it will, the twenty-first century will experience the equivalent of twenty thousand years of 'normal' human progress."

— Walter R. Mead, *God and Gold: Britain, America and the Making of the Modern World* (Knopf: New York, October 2007).

These forces have changed the frame of reference for economic activity from local to regional to continental and now to global. The notion of whom we compete with has changed. Today, Canadian firms compete against others not only in their city or region, but also across Canada, the continent and the world.

Globalization has increased the incentive for firms to search out the lowest-cost suppliers of materials and services, no matter where they are located. For the most part, multinational enterprises need no longer establish separate production

CANADA'S WINE INDUSTRY — THE IMPORTANCE OF OPENNESS

The Canadian wine industry had long been relying on hardy native species of grapes, producing low-quality wines that were protected from foreign competition. The Canada–US Free Trade Agreement (FTA) put an end to industry protection and required wine growers to innovate or perish. They uprooted the native grape varieties and planted high-quality European grapes. They introduced Vintners Quality Alliance (VQA) standards, which enhanced the reputation of Canadian wines. Canadian vineyards became tourist attractions and promoted new, unique products, further building the world-class reputations of Canadian wineries. Increased foreign competition can drive innovation and enhance competitiveness.[2]

facilities within a country to overcome tariff barriers. They base activities in a country or purchase materials and services from independent suppliers in a country only where this contributes to the overall efficiency of their operations.

The transition to a larger marketplace has been foreshadowed for a generation. For Canada, the 1965 Auto Pact with the US signalled the evolution of economic activity from a national to a continental scope. The 1989 Canada–US Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA) in 1994 advanced the integration of Canada into a North American economy anchored by the US. As a result, Canadians began to compete not only with other Canadians, but also with firms and workers from across North America.

The international community has implemented similar agreements governing world trade, beginning with the General Agreement on Tariffs and Trade (GATT) in 1948 and continuing to the World Trade Organization (WTO) in 1995. They opened up huge new market opportunities and increased global competition.

The Fundamentals of Global Competition

As firms and countries rethink their strategies for achieving success, they must recognize the following key trends arising from the current wave of globalization.

Greater Mobility of People and Capital

International migration has increased markedly as people seek the best jobs and opportunities. The US, Germany and Canada are expected to be the top three net recipients of international migrants over the next half-century.

Table 1 — Top Six Net Immigration and Net Emigration Countries, 2005–2050					
Net Immigration Countries			Net Emigration Countries		
Rank	Country	Migration (thousands)	Rank	Country	Migration (thousands)
1	United States	1107	1	China	-327
2	Germany	202	2	Mexico	-293
3	Canada	200	3	India	-241
4	United Kingdom	130	4	Philippines	-180
5	Italy	120	5	Indonesia	-164
6	Australia	100	6	Pakistan	-154

Source: United Nations Economic and Social Affairs, *World Population Prospects: The 2006 Revision*.

The availability of skilled talent is a key determinant of investment decisions and the location of economic activity. Many countries have increased their focus on immigration to acquire needed skills. The availability of skilled labour is a key to ensuring sustained growth in all regions and sectors.

Slowing population growth and the aging of the population in developed countries will become an important factor in labour mobility. In the future, new skilled labour will come increasingly from developing economies.[3]

Global foreign direct investment (FDI) flows have grown a hundredfold from 1970 to 2006.[4] FDI expansion significantly outpaced growth in gross domestic product and trade over this period.[5] This FDI growth has been largely driven by cross-border mergers and acquisitions, and has featured an increasing involvement of private equity funds and sovereign wealth funds.[6]

Going forward, being an attractive destination for skilled immigrants and foreign investment will be a critical success factor for developed countries.

Broader Competition for Raw Materials and Natural Resources

Accelerating global growth has increased world demand for raw materials ranging from food to base metals. Prices have increased rapidly over a broad range of commodity groups.[7] The growing demand for resources and the rise in associated prices, notably for energy and food, has had wide-ranging impacts, driving up the relative value of commodity-weighted currencies, raising costs for individuals, and obliging businesses and industries to find new strategies to adapt.

"Scale" Can Now Be Defined in Global Terms

In industries that benefit from economies of scale, large multinational enterprises increasingly dominate because they are able to achieve scale on a global basis. This scale in turn permits global operations, attracts talent and increases each firm's capacity to make investments and take political risks.

For example, the mining sector has recently experienced major structural change, with consolidation at all levels and the emergence of very large privately owned diversified corporations. For them, acquisitions are critical for securing new projects and diversifying portfolios in terms of commodities and geography. Canadian giant Alcan was acquired in 2007 for US$43 billion by Rio Tinto.[8]

Companies that have built global efficiencies often establish global and regional product mandates within their enterprise. A company may have several divisional or regional offices. A nation's productivity and competitiveness are important factors in helping business units dispersed across the world win global product mandates.

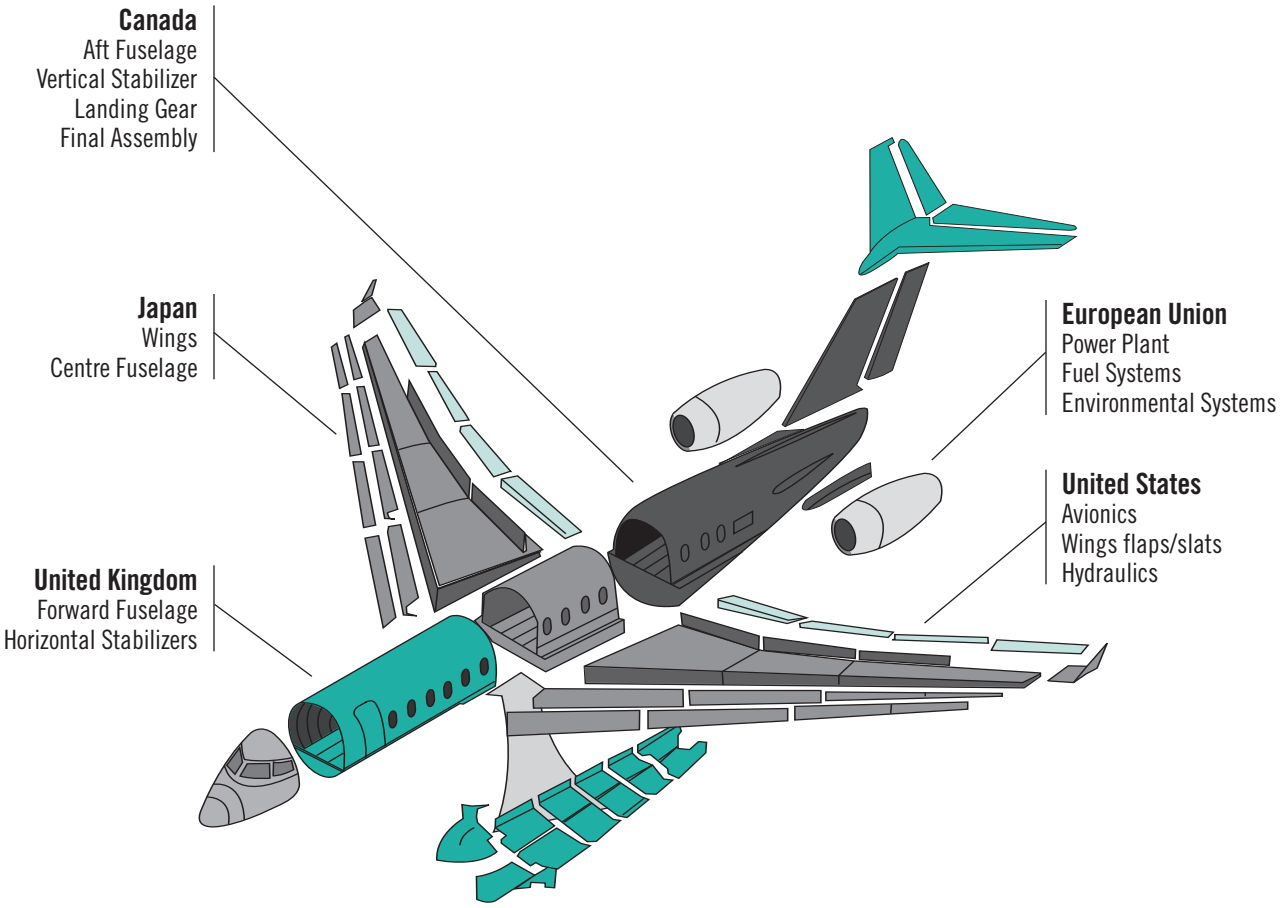
The Growth of "Global Value Chains"

Changing business dynamics are putting additional competitive pressures on firms. Cost pressures have increased as production cycles shorten to more quickly respond to changes in consumer demand. As new competitors emerge from anywhere in the world, business lines can move from profitability to loss with unprecedented speed.

Firms have responded to these challenges by casting aside the traditional paradigm of firms offering finished goods produced in a country for sale domestically or across a border. More firms now seek to organize their activities or position themselves within "global value chains."

A global value chain is the process whereby the production of increasingly complex goods and services is organized across international borders.[9] The term "value chain" captures the linkages in activity required to bring a product from conception through final production to market. This can include design, production, marketing, distribution and support activities. Whether a complex product like an aircraft or BlackBerry, or something as "simple" as a fashionable article of clothing, firms are competing for participation in successive stages of production.

Figure 1 — Bombardier's Global Express, Component Source by Country



Source: Industry Canada.

Many of the same phenomena described above that have contributed to globalization (e.g., declining trade barriers, burgeoning investment flows, decreasing transportation costs) have also contributed to the growth in global value chains.[10]

Firms have become more flexible, horizontally organized enterprises, converting from geographically concentrated production networks to geographically dispersed networks.[11]

SIEMENS MEDICAL BODY SCANNERS

SIEMENS has been global since the 19th century. Today it operates in 190 countries, with 80 percent of its sales, 70 percent of its factories and 66 percent of its workers abroad. Siemens "goes further than mere off-shoring of low-value-added work; [it] also does much of its research and product development abroad. For instance, a lower-cost version of one of its expensive medical body scanners, tailor-made for the Chinese market, was initially developed jointly at its headquarters in Munich and in China, where it is also being manufactured; but the latest version was developed entirely in China. This Chinese Siemens product is now sold in developing countries round the world."[12]

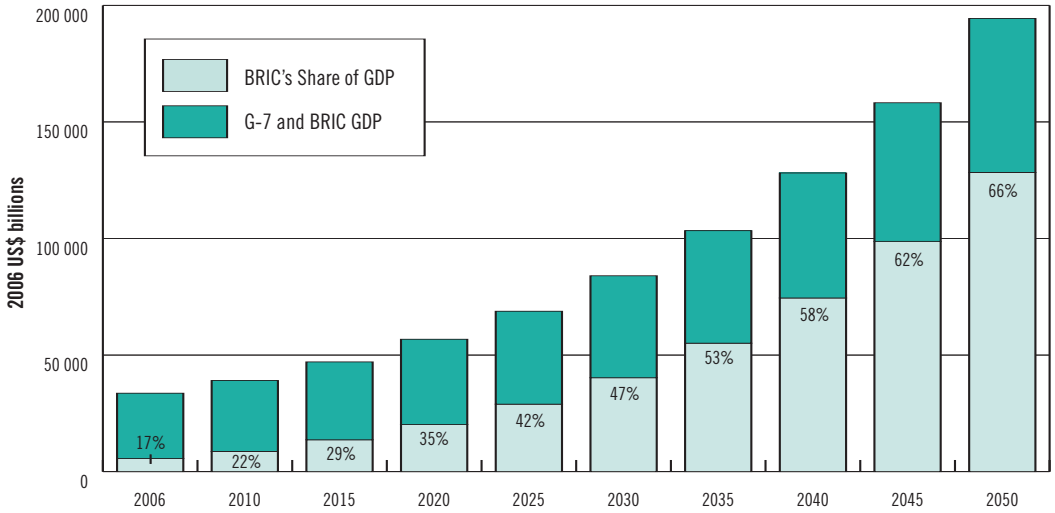
New Competitors Are Emerging

Economic relations between developed and developing countries are being altered by globalization. Capital no longer flows primarily from developed countries to developing countries. Capital today also flows from developing countries into developed countries.

In the past, developed countries maintained their advantage by using their advanced technology and skilled labour to export manufactured goods to developing countries. Then, companies reoriented their operations, designing products in developed countries but assembling products in lower-cost developing countries. Now, competition can come from anywhere, and high-tech products can be designed and engineered in what was formerly referred to as the developing world and disseminated via global distribution networks.[13]

In 2007, emerging economies produced just over half of world output and accounted for more than half of the increase in global gross domestic product.[14] These economies are rapidly becoming a major force in the world economy. As their prosperity increases, so will their demand for resources. Since the early 1990s, for example, China's shares in world consumption of oil, aluminum and steel have doubled.[15]

Figure 2 — Brazil, Russia, India, China (BRIC) Projected Share of Gross Domestic Product, 2006–2050



Source: Goldman Sachs Global Economics Paper No. 153, "The N-11: More Than an Acronym," March 28, 2008.

The Internet as an Agent of Change

The Internet is the dominant technology platform for a growing number of information and communications products that are radically changing how people around the world live and work and how businesses operate and generate wealth.[16] The Internet's pervasiveness is being felt across developing as well as developed countries. In 1997, nearly three quarters of the world's population living in developing countries accounted for just 5 percent of the world's Internet users. Now they account for over 30 percent.[17] Global mobile connections passed the one billion mark in 2004 and reached the three billion mark in 2008, with much of this growth occurring within developing countries. Today, new connections are being added to global mobile networks at the rate of 15 per second, 1.3 million per day.[18]

The Internet is bringing new competition into Canadian and global markets. Both buyers and sellers have more easily accessible information on market conditions and prices. Transaction costs for buying and selling goods and services are reduced, often significantly. New online businesses are being created, and the borders of formerly isolated national markets are more permeable. The Internet is also a force for productivity growth because it promotes the more efficient use of business resources.

A country's competitiveness depends on governments welcoming, rather than seeking to control, the new freedom and choices brought by the Internet as an agent of change.

The Challenge of Globalization and Change

Globalization has become a critical challenge to Canadian competitiveness. Canadians cannot be shielded from global forces. To chart our future, we must confront these forces and deal with them. This will require us to challenge some long-held notions that harken back to a different era. Strategies that were successful in the past must be replaced with new strategies that respond to a larger global marketplace.

In the new world economy, Canada must be ready to keep pace with change and develop a global mindset that is open to two-way trade, investment and talent. Canada's economic success will be determined by how well we deal with the economic, social and political forces that are driving globalization. The future well-being of Canadian businesses, jobs and incomes depends on concerted and continuing actions by all Canadians.

4. What We Heard and What We Learned

In developing our recommendations, we relied on what we heard during our consultations and what we learned from existing and original research, tempered by our own experiences as business people in competitive markets.

Canadians can take great pride in our economic performance over the past decade as Canada enjoyed economic growth and prosperity. We saw unprecedented budget surpluses, falling unemployment, strong growth in the service sector and the creation of millions of new jobs. In financial markets, Canadians experienced stable and low rates of inflation, falling interest rates and a rising Canadian dollar against other currencies, particularly the US dollar. More recently, as a resource-rich nation, Canada has benefited from growing world demand and rising natural resource prices.

But we heard from Canadians that they are worried about the current economic outlook and are less confident about the future. They spoke to us of risks and uncertainties arising from an array of indicators such as plant closures and job losses, little growth in earnings, escalating prices for basic staples such as food and energy, and the threats of new global rivals whose population and productivity are growing at a faster pace than Canada's. Canadians believe that something is wrong.

However, it became clear to us that Canadians do not perceive that there is an imminent crisis. What they want to avoid is a decline in Canada's standing in the world as other more nimble and aggressive countries rise to displace Canada. But Canadians do not appear to have a view about what needs to be done to avoid this outcome, nor a common view of the root causes of their unease. In the balance of this chapter, we set out the Panel's view of the key warning signs that Canadians told us they see and our conclusions about the underlying issues.

Hollowing Out — the Loss of Canadian Icons

We heard concern that Canadian businesses are being swallowed by foreign competitors in an era of global consolidation. The recent increase in foreign direct investment (FDI) in Canada, particularly through mergers and acquisitions (M&As), has raised concerns in many quarters about diminished control and influence by Canadians over the domestic economy. As multinational enterprises have consolidated, foreign investors have acquired a number of well-established Canadian companies, including Alcan, Falconbridge, Inco and Hudson's Bay Company. Such firms have been significant employers and anchors of Canadian communities.

RESEARCH IN MOTION

When Mike Lazaridis and Doug Fregin started their electronics company in 1984 with a small government grant and a family loan, they could hardly have predicted what the future had in store for Research In Motion (RIM). The pair knew only that they were pretty handy with a circuit board. Within four years, their electronics company focused on the transmission of wireless data. Co-chairman Jim Balsillie came on board in 1992 and began driving RIM's series of inventions to market. In 1998, RIM introduced the first BlackBerry with basic email, which it has turned into a popular consumer and corporate product for CEOs and soccer moms alike. The BlackBerry reached 1 million subscribers in 2004 and 10 million subscribers in 2007. RIM is expanding to Europe and Asia-Pacific. RIM is now the most valuable company in Canada, based on its market capitalization of nearly $60 billion.[4]

These transactions sparked questions regarding Canada's foreign investment policies as well as about the effect of losing corporate head offices and associated high-value jobs and services. The transactions have also highlighted the global nature of industry restructuring. Canada's biggest recent M&A transactions were initiated by firms based in the US, the United Kingdom, Switzerland, Brazil, Australia, the Netherlands and the United Arab Emirates.

The debate over the "hollowing out" of the Canadian economy has been emotionally charged. In the first half of this decade, Canada was the world's second most popular site for foreign takeovers.[1] It has been argued that, relative to the size of its domestic capital market, Canada has been both the biggest net seller of companies in the world and the easiest country in which to acquire firms.[2] Yet overall, the data indicate that the share of assets in Canada's non-financial industries under foreign control has not changed noticeably in recent years.[3]

SNC-LAVALIN

SNC-Lavalin (a leading group of engineering and construction companies) shows how an international orientation can provide access to large markets and hedge against economic downturns in a company's home economy. SNC-Lavalin leveraged its world-class technical expertise to develop an international network and a strong global supply chain. It consciously built on Canada's good reputation abroad.[6]

In fact, we see the increasing success of Canadian companies growing on the global stage. The number of Canadian-owned and headquartered firms that ranked in the top five of their respective industries grew from 15 to 40 over the past two decades.[5] Indeed, this period witnessed world-leading Canadian-based multinational enterprises such as Manulife Financial, Research In Motion (RIM) and SNC-Lavalin succeed in growing their international presence. While Canada has lost a number of leading companies in recent years, we are also the host country for a number of growing Canadian champions.

We do not believe that it is desirable — or possible — to stop the natural rhythm of creative destruction and renewal, which is a key tenet of a market-based economy. The benefits of competition are too great. However, we share the concern of Canadians about the effects on Canada and on opportunities for Canadians.

Declining Share of Foreign Investment

In contrast to the concern about foreign takeovers of Canadian companies, some analysts have noted that, over recent decades, Canada has become less successful in attracting international investment. Canada's share of the world FDI stock has fallen from almost 16 percent in 1970 to just over 3 percent in 2006. In terms of FDI relative to gross domestic product, Canada over the past 25 years has experienced the greatest decline in the Organisation for Economic Co-operation and Development (OECD).[7]

New Labour Market Dynamics

As business competition has become more global and companies have shifted some operations to lower-cost locations, many Canadian workers have faced painful labour market adjustments. Overall, Canada's economy has adjusted well, adding many more new jobs, benefiting from the recent commodity boom and registering an unemployment rate near a three-decade low. In some sectors, strong economic growth has created significant skills shortages, a problem that will worsen as our population ages and indigenous workforce growth declines.

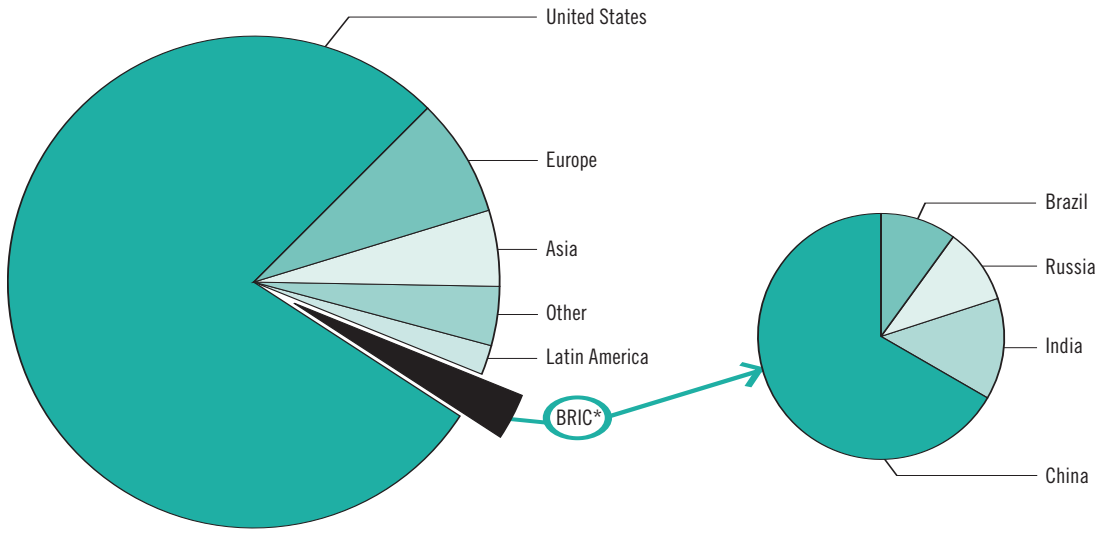
Workers in some sectors have been hard hit by recent global changes, particularly in sectors such as forestry and manufacturing, which have been heavily affected by the rapid appreciation of the Canadian dollar against the US dollar and other challenges.

Canada Has a Limited Presence in Markets Other than the US

Canada's primary trading partner is, and for the foreseeable future will continue to be, the United States.[8] But growing markets in the expanding European Union, South America and Asia present new opportunities.

For example, strong growth is forecast in developing markets, including the so-called "BRIC" countries (Brazil, Russia, India and China), where Canada has very limited presence.[9] There are expected to be significant opportunities in these markets, driven by the emergence of a vast middle class of many millions of new consumers that their economic growth represents. It is estimated that these new markets may account for as much as 50 percent of the world economy in the coming generation. However, priorities will have to be established to avoid deploying our efforts so widely that they become ineffective in specific markets.

Figure 3 — Geographical Distribution of Canadian Exports, 2007



*BRIC excluded from Asia, Latin America and Europe.

Source: Industry Canada Trade Data Online.

In part, our lack of presence in growing markets is due to the structure of the Canadian economy, which is characterized by small and medium-sized enterprises (SMEs) that tend not to be "first movers" into new markets.[10] In a world of global integration, the necessity to trade, invest and create strategic alliances will only intensify, and larger enterprises are better placed to meet these challenges. Pressure from low-cost, knowledge-oriented firms elsewhere means increased competition for Canadian firms at home and abroad.[11]

Canada's Cost Advantage Relative to the US Has Eroded

Canadian productivity is lagging behind that of the US, our biggest trading partner. When our dollar was valued as low as 63 cents per US dollar,[12] some Canadian companies grew complacent. Canada enjoyed a large trade surplus as the advantage went to Canadian exporters. The increase in our dollar relative to the US dollar occurred so quickly that firms have struggled to make the necessary adjustments to their operations at the same pace, and some have not been able to cope. Now, with exchange rate parity, the cost advantage is gone and Canada's poor productivity performance is exposed. This challenge is compounded by the "thickening" of the Canada–US border as a result of a US preoccupation with security and international terrorism.

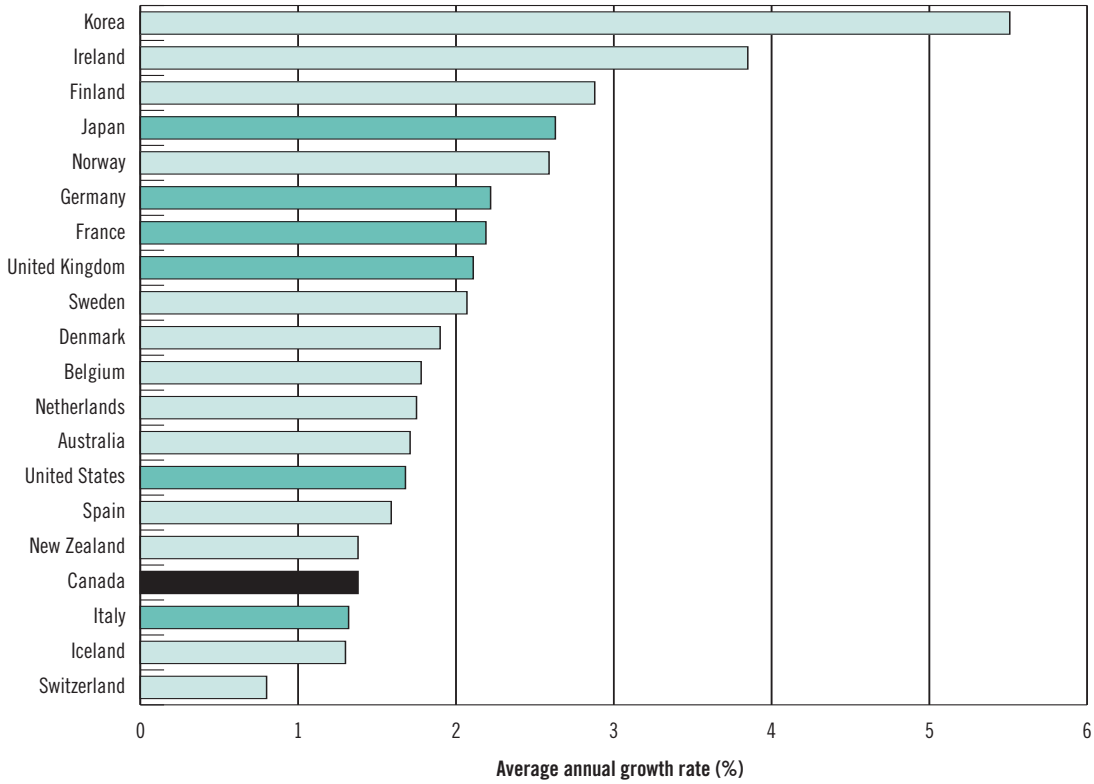
Weak Innovation

Much of Canada's poor productivity performance can be attributed to the comparatively poor performance of Canadian firms with respect to innovation. We rank poorly across almost all aspects of innovation: the creation of knowledge, the diffusion of knowledge, the transformation of knowledge and the use of knowledge through commercialization. This is seen by the Conference Board of Canada as "a serious weakness in Canada's overall performance and [an] alarming portent for the future."[13] Other research also indicates that Canadian firms lag behind firms in other major industrialized countries on a number of measures of innovation.[14]

Weak Productivity Growth

A number of these issues relate to one underlying problem — productivity. Figure 4 illustrates the deeply troubling fact that Canada's productivity growth lagged behind that of most industrialized countries over a 25-year period.[15]

Figure 4 — Labour Productivity Growth,[a] Selected OECD Countries, 1981–2006



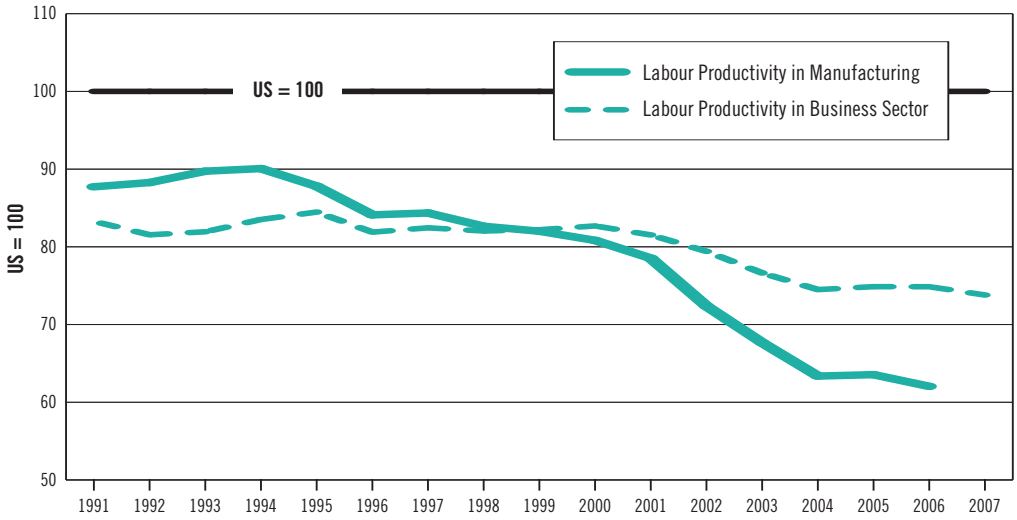
[a]Real gross domestic product per hour worked.

G7 countries shaded.

Source: OECD, Labour Productivity Database, July 2007.

In the business sector, labour productivity in Canada was only about 75 percent of the level in the US in 2007 (Figure 5). The gap has been growing, especially in the manufacturing sector. By 2007, the gap between Canadian and US labour productivity levels in manufacturing was estimated to be close to 40 percent.

Figure 5 — Relative Labour Productivity Gap in Canada, 1991–2007[16]



Source: Industry Canada calculations based on data from Statistics Canada, CANSIM VI409153, and US Bureau of Labor Statistics, BLS: PRS840006093.

The impact of Canada's weak productivity growth has been dramatic — the median real earnings of Canadian workers have not grown in a quarter-century.[17] Even during a period when the economy grew and Canadians became more educated, average earnings remained virtually the same. In fact, for the bottom fifth of earners, real earnings dropped by about 20 percent, and earnings of immigrants to Canada fell even further. Of course, much of this coincided with a period of rising employment and participation in the workforce, particularly for Canadian women. Consequently, total family incomes rose over this period, to some extent masking individual performance.

More recently (2002–2006), Canada's standard of living has increased faster than that of the US.[18] An important underlying factor was the takeoff in commodity prices after 2002 and the consequent improvement in Canada's terms of trade. This resulted in a strong increase in Canadian purchasing power, which benefited Canadians relative to Americans, who were largely unaffected by movements in their own country's terms of trade. In addition, the labour market has been much more buoyant in Canada than in the US during the past decade, making it easier for more of the population who want to work to obtain jobs. This favourable performance over a short time period does not change the long-term picture.

To sum up, Canada's weak personal earnings growth is cause for concern. This trend will be exacerbated in coming decades as Canada's population ages and labour force growth slows. This can be turned around only if Canadian businesses and governments urgently take steps to increase productivity performance.

When we assess what we heard and what we learned in the light of our premises about the benefits of productivity growth and the central importance of competition in achieving those benefits, we conclude that improving Canada's competitive position is the key to ensuring that future generations of Canadians will enjoy the levels of opportunity and prosperity that Canadians have come to expect. We also conclude that the factors driving the changes described above are unavoidable and irreversible, and represent either a serious threat or a great opportunity, depending on whether Canada rises to the challenges of globalization. Finally, we conclude that the longer Canada waits to address these issues, the greater will be the costs and dislocation arising from their resolution. Time is of the essence.

5. How Well Is Canada Positioned to Compete to Win?

How well is Canada positioned to create better jobs, more wealth and an improved standard of living in a changing world?

In evaluating Canada's prospects, we look at the strengths and weaknesses in those factors that most directly affect Canada's ability to attract investment and build competitive companies, and thereby produce quality jobs and opportunities for Canadians.

Our country gets mixed reviews from various studies of competitiveness rankings relative to other countries.[1] Overall, no simple or actionable conclusion can be drawn from the findings. The following is our assessment of Canada's strengths and weaknesses.

Competitive Strengths

Canada has many strengths. Our primary advantages lie in location, natural resources, a diverse economy, high-quality public education, and institutional and political stability.

Canada's proximity to, and unique relationship with, the US are definite advantages in accessing the large US market. This is bolstered by our trade agreements with the US, which gives preferential treatment for goods and services. Moreover, the location of our ports gives us closer access to key central US regional markets than US ports for both Asian and European sourced and destined goods.

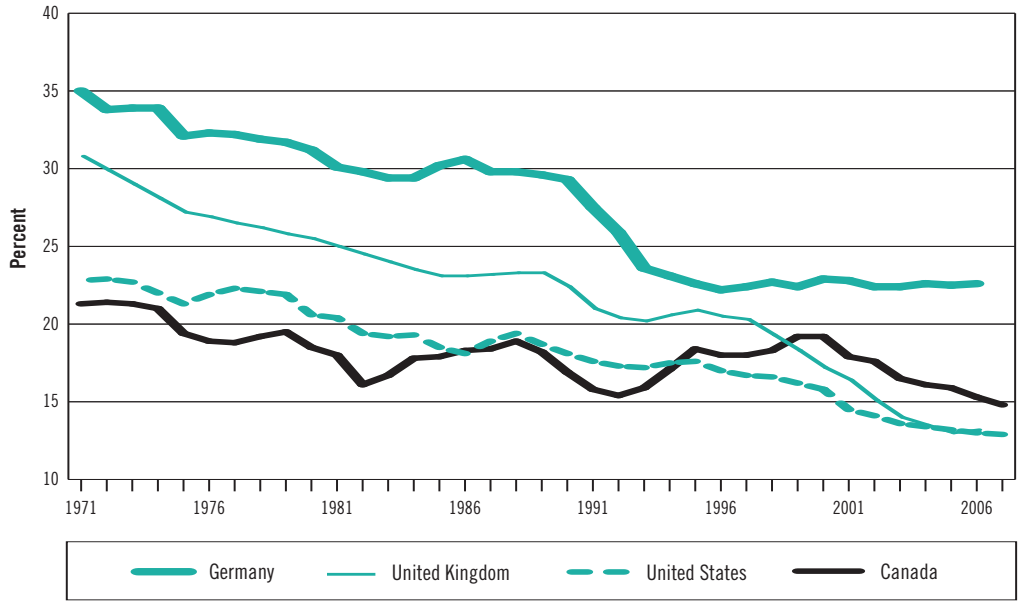
We have abundant natural resource wealth.[2] We are the world's largest producer and exporter of uranium, with the world's third largest reserves. Canada is also the world's largest producer of potash. We are the world's second largest generator of hydroelectricity. We are the world's third largest producer of natural gas. Canada is the largest supplier of crude oil, petroleum products and natural gas to the US. As much as $300 billion in private capital investment in Canadian resource projects is under consideration for the next five to ten years.[3]

As conventional sources of crude oil and natural gas continue to decline, we have the opportunity to develop unconventional sources, including the oil sands. Currently, the oil sands produce 1.2 million barrels per day. By 2030, this has the potential to increase to 5 million barrels per day. The proven reserves in the

Canadian oil sands rank second in the world only to Saudi Arabia. The potential goes well beyond the Alberta oil sands. Pipeline projects from the Mackenzie Delta can provide access to large and secure supplies of natural gas for the North American market.

Canada's economic base is diverse. In addition to our mineral and petroleum resources, Canada is among the world's leaders in fisheries, forestry and agriculture. Canada's traditional strengths in manufacturing have been challenged by recent exchange rate shifts. We believe that the appropriate adjustments will be made to pursue greater productivity and that our manufacturing sector will adapt. Our economy derives further strength from its burgeoning services sector. The mix of traditional and emerging products and services is a powerful basis on which to compete.

Figure 6 — Manufacturing's Declining Share of Gross Domestic Product in Developed Economies, 1971–2007



Source: Department of Finance Canada estimates based on data from Statistics Canada, US Bureau of Economic Analysis, United Kingdom Office of National Statistics, and OECD, as cited in Department of Finance Canada, Budget Plan 2008: Responsible Leadership, p. 41.

Canada has a highly educated population. Our students perform well in international skills assessments, and many Canadians possess college and university degrees. Canadians also have high rates of labour force participation, and are skilled and adaptable workers with a strong work ethic. Many Canadians have successfully

learned new labour market skills and have seized new opportunities, which are key assets in a value-added, knowledge-based economy. In addition, Canada's cultural diversity, tolerance and high level of acceptance of immigration are important attributes in a global world.

Canada has earned an international reputation for integrity and credibility through strong leadership and diplomacy. This record and reputation as an "honest broker" allows Canada to "punch above its weight" in key political and economic organizations. Canada's linguistic duality enables a strong presence in both La Francophonie and the Commonwealth. Canada is a well-respected member of the G7, and stands out in the world for its prudent fiscal policy (which has generated consistent surpluses), complemented by credible monetary policy. Canada also provides political stability through strong institutions and a commitment to the rule of law, an increasingly important competitive asset for economic and resource development.

Competitive Weaknesses

At the same time, there are factors on the opposite side of the ledger. These can be classified broadly as population density and geography, scale, jurisdictional fragmentation and regulatory burden, taxation and the cost of capital, and insufficient entrepreneurial ambition.

Although Canada's land mass is the second largest in the world, its population and economy are small by world standards. Canada accounts for 0.5 percent of the world's population and 2 percent of the world's economic activity. Canada ranks last in the G7 in terms of population size and share of total world economic activity.

Complicating this is our cold climate and dispersion of a modest population over a large area. Canada's large size imposes high infrastructure costs and places heavy demands on borders, ports and transportation corridors. Our small domestic market means that Canadian firms must look beyond our borders to achieve the scale necessary to compete on a more equal footing with their global rivals. Canada's firms must also overcome the tendency to remain small in a decentralized federation. Compounding these difficulties, Canada lacks effective mechanisms for addressing federal–provincial differences, leading to market fragmentation.

A multitude of internal barriers constrain the mobility of goods, services and people and make a small market even smaller. Canada also suffers from a "tyranny of small differences"[4] created by a regulatory approach that puts us at a competitive

disadvantage with even our closest trading partner, the United States. For example, Canada exports 90 percent of its manufactured motor vehicles to the US market.[5] Nevertheless, a number of automobile manufacturing regulations are not harmonized between Canada and the US. Such unnecessary differences operate as *de facto* barriers to trade, resulting in higher prices for Canadian consumers for the same vehicle.

Unnecessary regulations and procedures "slow down innovation, frustrate new product launches, operate to protect domestic producers from foreign competitors, and create a drag on competitiveness, productivity, investment and growth."[6]

There is too little interchange between the public and private sectors. Economic competitiveness is the result of a productive partnership between government and business, and our competitors have a better grasp of how important these types of relationships can be. As SECOR concludes in its analysis of Canada's competitiveness, "Competing jurisdictions have better aligned international business and public policy, and have clear and shared international ambitions."[7]

A recent study shows that in 2008 Canada's cost advantage over the US in manufacturing was only 0.1 percent, down significantly from 2002 when Canada had a 10 percent cost advantage in manufacturing.[8] Mexico has a 16 percent cost advantage relative to Canada. The same study notes the sensitivity of these results to exchange rates.

Our level and system of taxation and the associated impact on the cost of capital for Canadian enterprises are also drags on Canadian competitiveness. There is insufficient harmonization in federal and provincial consumption and business taxes. Canadian taxes on business investment in certain provinces discourage productivity-enhancing investment and reduce the attraction of Canada as a desirable destination for FDI.

A final weakness for Canadian competitiveness is the lack of sufficient entrepreneurial culture and ambition. A Panel research study concludes, "Canada lacks today the 'virtuous cycle' of talent creation that is driven by successful entrepreneurship, which generates positive financial returns which, in turn, generates a healthy risk capital market, which then generates a new round of entrepreneurs."[9] While the entrepreneurial spirit exists in certain companies and industries, Canada needs more aggressive and ambitious business leaders with the global mindset necessary to compete to win in the twenty-first century.

The Panel believes that Canada should build on its strengths and take steps to cope with its weaknesses. Having laid the foundation and set forth our analysis of the issues, we now turn to our agenda, findings and recommendations.

6. A Competitiveness Agenda for Canada

What we have heard consistently and what we learned through our work as a Panel is that competition in the global context is becoming more intense as powerful new competitors emerge. We heard this from those who had taken on new global challenges, as well as from those who expressed deep concerns about the potential for lost markets, lost companies, lost jobs and a reduction in living standards.

The biggest impediment to success for Canada lies in the lack of consensus about what the problem is, what needs to be done to solve it, and whether it constitutes the "imminent crisis" referred to earlier. Many voices argue for the status quo, which makes it even more difficult for us to recognize that difficult but important choices are required for Canada to keep pace with the rest of the world.

In this report, the Panel lays out the evidence underlying its conclusions about the nature of the problem and the urgent need for changes to Canadian public policy and the mindset of Canadians.

In the past, Canadians faced changing and adverse economic conditions, overcame risks and took great strides to improve our competitiveness, beginning with the implementation of the Canada–US Free Trade Agreement in 1989, the introduction of the Goods and Services Tax in 1991 and the signing of the North American Free Trade Agreement in 1994. We eliminated the federal government deficit by 1997. We can do great things again.

However, we have rested on the laurels of these successes. In the ensuing years, our public policy and political debate has been more about dividing the spoils, much of it due to past decisions and the good fortune of our natural resource endowments, rather than to increasing wealth and expanding opportunity. Global forces are putting pressure on Canada, like all nations, to revisit its economic position. Canada must take concerted action to remain current with competitive realities. We must plan and prepare for the future. We must act.

The Panel wants to establish the right conditions for Canada to ensure a high and rising standard of living for its citizens. These include:

- a world-class business environment to attract talent and capital
- strengthened businesses through competition, the essential driver of productivity and innovation
- more effective collaboration between businesses and all levels of government.

Such conditions will create more and better-paying jobs for Canadians now and for the next generation, and will generate more wealth to support our national objectives, including social and environmental goals. We are not saying that this will be achieved instantly by changing specific policies or without economic stress and dislocation. We are saying that the benefits will far outweigh the costs and that failure to act will result in declining opportunity and prosperity for Canadians.

Canada must improve its productivity by increasing competitive intensity. A precursor to succeeding internationally is the need to ensure that domestic markets are healthy and that unnecessary barriers to entry are reduced or eliminated. The freer flow of goods and services will import greater competition into our domestic markets. Canadian firms will have to sharpen their "competition tools" to take on the increased competition from outside. Greater competitive intensity domestically will translate into more success in world markets.

We turn now to the Competitiveness Agenda proposed in this report. Our Agenda focuses on talent, capital, innovation and an ambitious mindset. These are the areas that we believe require the most attention. Underlying our Agenda are the principles of openness and collaboration.

The remaining chapters of this report deal with our views and findings as well as the actions we recommend to address the concerns we have raised.

Chapter 7 reviews the legal underpinnings for competition in Canada. We look first at the core elements of our mandate — the *Investment Canada Act*, a number of sectoral regimes and the *Competition Act*. In public policy areas where market forces are constrained by regulation, the government must ensure that the objectives remain relevant and that the least restrictive mechanisms required to achieve them are being utilized.

In Chapter 8, we provide our views on public policy priorities for action that were raised during our deliberations and that we consider to be critical for Canadian competitiveness.

In Chapter 9, we recommend a powerful voice for competition advocacy in Canada. It is our hope that competitiveness will become a central pillar of Canadian economic policy and will be sustained long after the publication of this report.

At the outset, we state that this report is about one basic idea — raising Canada's economic performance through greater competition to provide Canadians with a higher standard of living. The balance of the report sets out an agenda to achieve this goal.

7. Competitiveness Agenda: The Legal Foundations

The Investment Canada Act

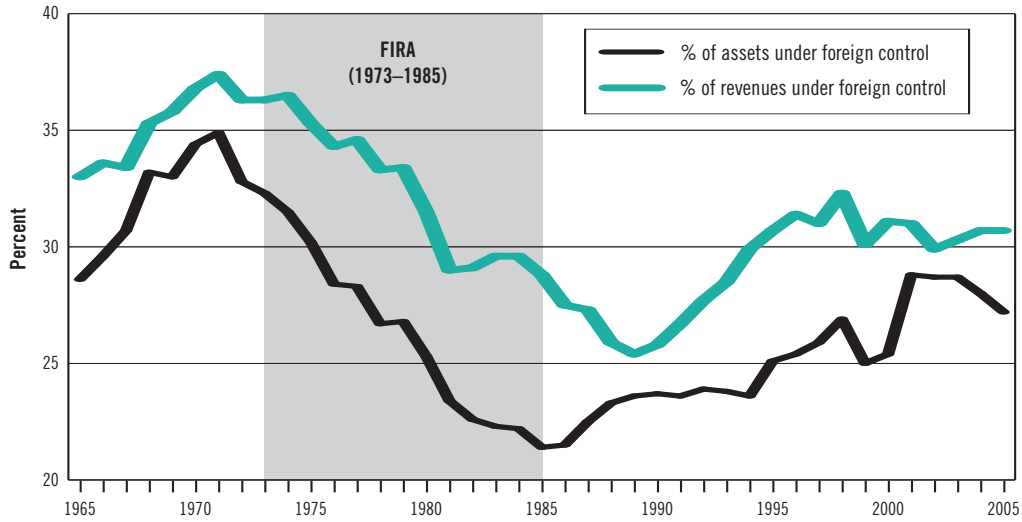
Foreign Investment Review

The *Investment Canada Act* (ICA) provides for federal government review of foreign investments in Canada. Under the ICA, direct acquisitions of control of Canadian businesses by non-Canadians are subject to notification to Industry Canada or the Department of Canadian Heritage. Investments are subject to review and the need for ministerial approval if they exceed the 2008 monetary threshold of $295 million in gross asset value of the acquired business.[1] Reviews of foreign investment at the $5-million threshold level are required in the case of financial services, transportation services (including pipelines), uranium mining and cultural businesses.[2]

A proposed acquisition is approved where the relevant minister is satisfied that the investment is likely to be of "net benefit" to Canada. The criteria used to assess net benefit, as set out in section 20 of the ICA, include employment, exports, productivity, technology development, and compatibility with Canada's national industrial, economic and cultural policies. Industry Canada reviews typically involve foreign acquirers providing specific undertakings to address these criteria. However, such undertakings are seldom made public for reasons of commercial confidentiality.

The ICA replaced the *Foreign Investment Review Act* (FIRA) in 1985. FIRA was enacted on the premise that the ability of Canadians to maintain effective control over their economic environment was a matter of national concern. The ICA changed course, seeking to reduce actual and perceived protectionism, and acknowledging that foreign investment typically delivers important economic benefits. Greater focus on Canada's investment review regime was achieved by raising review thresholds, changing the test of "significant benefit" to one of "net benefit," eliminating reviews for greenfield investments outside the cultural sector, and establishing stricter time limits for reviews.

Figure 7 — Percentage of Assets under Foreign Control, 1965–2005



Source: John R. Baldwin, Guy Gellatly and David Sabourin, *Insights on the Canadian Economy: Changes in Foreign Control under Different Regulatory Climates: Multinationals in Canada*, March 2006, Statistics Canada Cat. no. 11-624-MIE — No. 013.

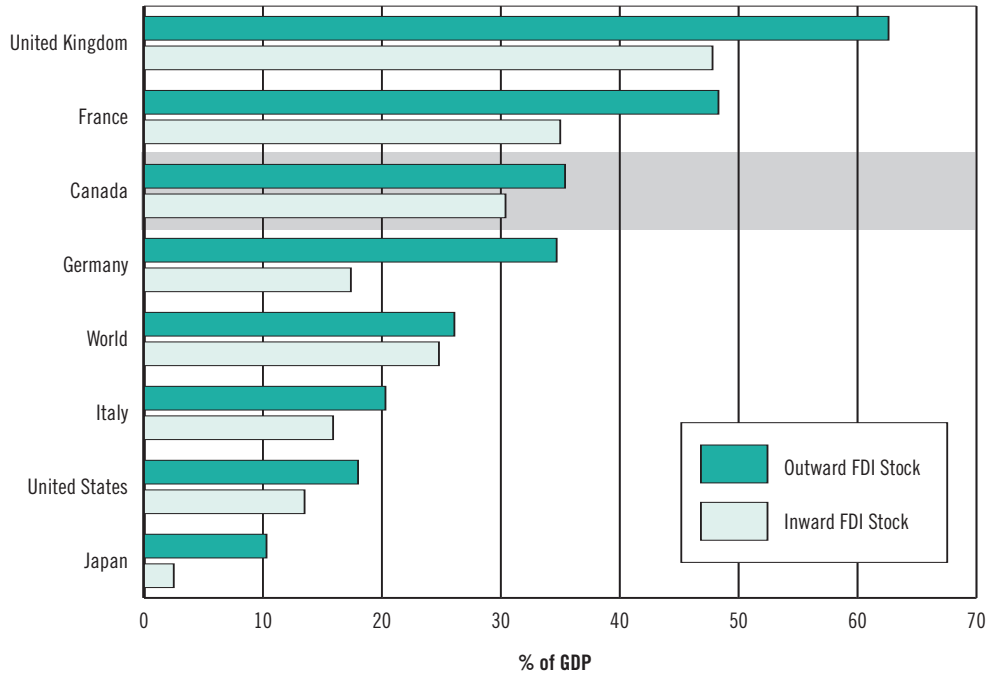
The ICA has not been an obstacle to foreign direct investment. Of the over 1500 non-culture sector reviews undertaken by the Minister of Industry under the ICA since 1985, only one proposal has been disallowed. Since 1999, the Minister of Canadian Heritage has reviewed and approved 98 cultural investments, while disallowing three proposals.[3]

Canada's Openness to Investment — Perception and Reality

Despite this track record, the ICA has been criticized as being unduly restrictive of foreign investment. In particular, the OECD has consistently ranked Canada as having among the most restrictive barriers to foreign direct investment among industrialized nations.[4]

This perception is not supported by the facts, and the Panel rejects it. Although Canada's global share of foreign direct investment (FDI) has fallen, Canada's total stock of inbound FDI as a proportion of gross domestic product is relatively high among industrialized countries, being more than twice the level in the US and over 12 times the level in Japan.[5] A recent Conference Board of Canada report indicates that, when the actual practices regarding foreign investment are taken into account, the impact of Canadian government intervention is not materially different from that of other industrialized countries.[6]

Figure 8 — Foreign Direct Investment Stock as a Percentage of Gross Domestic Product, 2006



Source: United Nations Conference on Trade and Development, *World Investment Report 2007*.

Canada is one of only a few countries (Australia being another) with a formal investment review process for foreign acquisitions that exceed prescribed monetary thresholds. This approach is more explicit and visible than the approach adopted in many other countries that employ informal barriers to foreign investment. These range from state-owned enterprises and special government rights in certain companies to overt political interference in the engineering of "national champions."[7]

The Panel subscribes to the widely held view that Canada benefits from openness to the world and that attracting greater foreign investment is in Canada's economic interest. Given that there has been no policy review of the ICA in more than 20 years, we believe that it is timely to update Canada's foreign investment policies to make Canada more competitive and align the appearance of such policies with the reality.

In addition, the Panel believes that it is in Canada's interests in a post-9/11 world to have in place an explicit national security test to support its trade and investment policies. As such, we support the Minister of Industry's statement that the government intends to carefully consider the creation of a new review requirement

for transactions that raise "national security" concerns.[8] We respectfully suggest that the scope of this review requirement should be aligned with that of the investment review process used by the Committee on Foreign Investment in the United States.[9] This would bring Canada into line with other countries that have introduced a national security screening procedure, including the United Kingdom, China, Japan and Germany.

The Panel also welcomes the Minister of Industry's recent clarification concerning the ICA's application to state-owned enterprises. We believe that the new guidelines will improve transparency in the administration of the ICA.[10]

The Panel believes that Canada should retain an investment review process, but it should be one of exceptional application in keeping with the practices of similarly situated industrialized countries. Consistent with Canada's legal traditions and our international reputation for sound governance practices, the review process should be predictable, timely and transparent.[11]

To deal with the perception issue that clearly exists, the Panel concludes that the scope of the ICA should be narrowed in the manner set forth below. Based on the submissions we received and on our consultations, research and experience, we are confident that implementing our recommendations will enhance Canada's attractiveness to foreign capital without undermining our capacity to safeguard our national interests on a basis consistent with that of other industrialized countries.

Raise Thresholds

We recommend raising the ICA's minimum review threshold to $1 billion in enterprise value from the current level of $295 million in gross assets of the acquired business, except for cultural businesses. We make this recommendation for two reasons. First, a higher threshold is consistent with the scope for intervention being narrower, and thus more exceptional, than under the current ICA. Second, a higher threshold would be aligned with Canada's underlying premise that foreign investment is, except in unique circumstances, beneficial to Canada.

The use of gross assets as the standard in the ICA for measuring the significance of Canadian businesses subject to foreign investment proposals is out of date. The concept of enterprise value[12] better reflects the increasing importance to our modern economy of service and knowledge-based industries in which much of the value of an enterprise is not recorded on its balance sheet because it resides in people, know-how, intellectual property and other intangible assets not recognized in a balance sheet by current accounting methods.

The dollar amount of the review threshold should continue to be indexed for inflation in accordance with the current NAFTA formula. Furthermore, the revised threshold should also apply to non-WTO investors.

The Panel also recommends eliminating the current separate threshold of $5 million that applies to foreign investment in non-federally regulated financial services,[13] transportation services (including pipelines) and uranium mining. Unlike the case of cultural businesses, the Panel has not been presented with any compelling policy rationale that would serve to distinguish foreign investment in these sectors from any other investment, given the broad array of other industry specific regulation as well as the forthcoming national security safeguards on foreign investment.

In the same connection, other than for cultural businesses, the Panel does not see the utility of mandatory reporting of foreign investment that does not exceed the review threshold in the ICA. If there is considered to be a continuing need to collect statistical information regarding foreign investment that is below the review threshold, the Panel is of the view that this activity should be undertaken by Statistics Canada.

The Net Benefit Test

The ICA currently requires applicants to demonstrate "net benefit" to Canada. We recommend narrowing the ICA by reversing the onus to require the relevant minister to assume the burden of being satisfied that the standard for disallowing a proposed foreign investment transaction has been met. The Panel also recommends narrowing the disallowance standard by changing it from "net benefit to Canada" to "contrary to Canada's national interest."

A number of issues would be addressed by these changes. First, it would align the test with Canada's basic policy premise that FDI generates positive benefits for the country. Second, it would counter the negative and misleading perception that the ICA discourages — and that Canada does not welcome — FDI.

In concrete terms, the change in the disallowance standard would mean that an investment that would not have been able to meet the former net benefit test would be able to proceed without intervention from the minister, unless it was a case where the minister's concern with regard to the factors required to be considered under the ICA rose to the level of the national interest.

In recommending this and other changes to the ICA, the Panel is mindful that, under NAFTA and other international treaty commitments, Canada may amend the ICA only to narrow, not broaden, the scope of its application.[14] The changes to the ICA that we are recommending would satisfy these commitments because, as explained above, the intention and effect of the recommendations is to narrow the scope of the ICA's application and to raise the standard for disallowance. In this report, the Panel is making policy recommendations. We leave it to the appropriate authorities to give legislative expression to them.

Improve Transparency and Predictability

In our consultations, the Panel heard criticisms that the administrative provisions of the ICA are deficient. In the fast-moving world of modern business, where significant investment decisions are made on a global basis, regulatory clarity and administrative efficiency are among the significant factors considered by foreign investors. As such, we believe that a key objective of the changes to the ICA should be to improve the transparency, predictability and timeliness of decision making in the review process. We recommend requiring ministers to report publicly on the disallowance of any individual transaction under the Act and, in doing so, to give reasons for the disallowance. The current inability of ministers to articulate the reasons for allowing or disallowing a foreign investment proposal does not meet contemporary standards for transparency.

In addition, the Panel recommends that ministers should publish annually a report on the operation of the ICA. The annual report should provide information on the development of any new policies or guidelines as well as an overview of all transactions subject to the ICA and undertakings provided by foreign investors in relation to the disallowance test under the legislation. The report should be required to provide sufficient detail, without breaching commercial confidences, to allow the Canadian public to assess whether the Act is meeting its objective of ensuring that foreign investment proposals are not contrary to Canada's national interests.

To further improve the administration of the ICA, we believe that the government should also make increased use of guidelines and other advisory materials to provide information concerning the review process, explain the basis for making decisions under the Act, and clarify interpretations by Industry Canada or the Department of Canadian Heritage regarding its application. The research finding that it generally takes longer to obtain a binding ministerial opinion than to conduct a complete review of a foreign investment proposal is perverse.[15] Therefore, the procedures and timelines for issuing compliance instruments under the ICA need to be streamlined.

Preserve a Distinct Approach for Cultural Businesses

We received many submissions regarding the importance of protecting and nurturing Canadian culture. We affirm the importance of Canadian culture, and believe that the review of foreign investment related to cultural businesses should continue to be administered separately by the Department of Canadian Heritage.[16] At the same time, the Panel believes that greater openness to two-way trade, foreign investment and talent would increase competitive intensity and ultimately ensure the long-term vitality of Canadian cultural businesses. Forgone competitive intensity may increase prices and reduce choice as well as incentives to innovate and seek out new markets. New technology and increased international exposure create new opportunities for Canadian cultural businesses in global markets, and the current Canadian cultural policy framework will need to be updated in light of this new economic reality.

The application of the ICA to cultural businesses differs in many respects from the general application of the Act. The threshold for review is set at $5 million in gross assets and has not been changed since the inception of the ICA in 1985. Foreign investment proposals involving Canadian cultural businesses are assessed against specific cultural business policies of the Department of Canadian Heritage. These policies are applied by the Minister of Canadian Heritage to foreign investment proposals involving cultural businesses whether they are above or below the $5-million threshold. Unlike in other sectors, these policies also apply to a review process governing the establishment of a new cultural business.

Over the past two decades, the federal government has issued a number of policy statements setting out its foreign investment policies for Canadian cultural businesses. Some of these policies are implemented through the ICA. For example, the 1988 Film Distribution Policy includes a prohibition on foreign takeovers of Canadian-owned and controlled film distribution businesses. The 1992 Revised Foreign Investment Policy in Book Publishing and Distribution includes provision for review under the ICA of all transactions involving book publishing, distribution and retailing businesses. The direct acquisition of Canadian-owned firms within the book publishing, distribution and retail sectors by non-Canadians is prohibited except in specific circumstances. In 1999, following the Canada–US Agreement on Periodicals, there was some liberalization of foreign investment restrictions in the periodical publishing, distribution and sales sector. However, Canada continues to prohibit foreign acquisitions of Canadian-owned periodical publishing businesses.[17]

Significant issues that emerged from the oral and written submissions received by the Panel as well as in the research conducted for the Panel included overreach of the review process to activities and transactions of minimal cultural significance, a lack of clarity on what constitutes cultural products, perverse incentives and outcomes, and adverse impacts on the ability to raise capital and on competition. The Panel believes that greater use of exemptions and guidelines and a more receptive approach to greenfield investment in the cultural sector would go a long way to resolving the deficiencies that have developed over the past two decades without eroding the ability of the ICA to serve as a tool to preserve Canada's cultural sovereignty.

While the current $5-million threshold seems to the Panel to be inordinately low with regard to purely economic considerations, the Panel has insufficient evidence and experience to suggest the magnitude of an increase in the threshold with confidence that the change would not undermine the ability of the Minister of Canadian Heritage to discharge responsibilities under the ICA. Accordingly, we are not recommending any change in the $5-million review threshold or the minister's ability to reach below it to review transactions involving cultural businesses. However, the Panel also believes that a change in the standard of measurement from gross assets to enterprise value would better reflect the economic value of cultural businesses, and this change should be considered along with an increase in the review threshold by the Minister of Canadian Heritage.

The Panel doubts that a review is needed where cultural activities of a commercial nature are only an ancillary part of the business operations proposed to be acquired. Business activities that are currently prescribed under the ICA as being related to Canada's cultural heritage or national identity should be clarified.

There is also a need to differentiate activities that directly relate to the creation and distribution of cultural products as opposed to other incidental commercial activities and products. It should be made clear that products such as telephone directories or technical manuals are not cultural products. Similarly, the Panel believes that

WHAT IS A CULTURAL BUSINESS?

Future Shop sells electronic equipment for home and office use. Yet when American retailer Best Buy acquired the Canadian company in 2001, the acquisition was reviewed by both Industry Canada (because the value of assets being acquired was over the existing review threshold) and the Department of Canadian Heritage (because Future Shop sold books as well as audio and video recordings). Foreign ownership in book retailing is subject to review, whatever the proportion of business this activity represents. Nevertheless, in another decision the following year, the Department of Canadian Heritage determined that the activities in Canada of the Internet book retailer Amazon were not subject to review under the ICA because Amazon does not own nor did it acquire a Canadian business.

investment review requirements ought to be eliminated in cases where other government policies actively encourage foreign investment in a specific cultural industry. This is the case in the film production industry, where tax incentives encourage foreign investment in specific film projects.

The Panel's attention was drawn to current foreign investment policy for book publishing, which prohibits the direct acquisition of Canadian publishing companies by foreign investors. The Panel questions the necessity to apply this prohibition so broadly as to capture even those companies that publish virtually no Canadian authors, sell the vast majority of their books outside Canada, and have no printing and distribution activities in Canada. This is likely to have the unintended consequence of driving investment, opportunity and talent outside Canada.[18]

The commercial reality of cultural businesses is changing. Scale and the ability to export Canadian cultural products are key competitiveness factors for the future. At the same time, the Internet is undermining business models and creating new markets and competitive pressures. Maintaining a "closed" regulatory system for the creation, distribution and consumption of cultural products is no longer feasible in the Internet age. Accordingly, Canadian cultural policies require urgent and systematic review in light of the changes wrought by new technology.

Investment Promotion

Finally, we suggest a further step to narrow the scope of the ICA by changing the Act's purpose clause to remove Industry Canada's responsibilities to promote foreign investment in Canada. These responsibilities for a number of years have been performed elsewhere within the federal government.

The Panel recommends that:

1. **The Minister of Industry should introduce amendments to the *Investment Canada Act* as follows:**

   a) **raise the review threshold to $1 billion, replace gross assets as the standard of measurement with enterprise value of the acquired business, and continue to index this threshold for inflation in accordance with the current NAFTA formula;**

   b) **raise the threshold for the review of foreign investment in the transportation sector (including pipelines), non-federally regulated financial services and uranium mining from $5 million to the $1-billion threshold recommended above;**

   c) **change the applicable review standard and reverse the onus within the ICA, which currently requires applicants to demonstrate "net benefit to Canada," to require the relevant minister to be satisfied that consummation of the proposed transaction would be contrary to Canada's national interest, before disallowing the transaction;**

d) remove the obligation under the ICA to notify Industry Canada with regard to an acquisition that falls below the threshold for review or for the establishment of any new business;

e) state that neither recommendation 1.a, 1.b nor 1.d would apply to the administration or enforcement of the ICA as they relate to cultural businesses; and

f) revise the ICA's purpose clause (section 2) to remove Industry Canada's responsibilities to promote foreign investment in Canada.

2. The Minister of Industry and the Minister of Canadian Heritage should increase the use of guidelines and other advisory materials to provide information to the public concerning the review process, the basis for making decisions under the ICA, and interpretations by Industry Canada and the Department of Canadian Heritage regarding the application of the ICA. Additionally, amendments to the ICA should require the Ministers to:

   a) report publicly on the disallowance of any individual transaction under the ICA, giving reasons for such action being taken; and

   b) table an annual report to Parliament on the operation of the ICA.

3. The Minister of Canadian Heritage should establish and make public a *de minimis* exemption clarifying that the acquisition of a business with cultural business activities that are ancillary to its core business would not be considered a separate cultural business nor be subject to mandatory review by the Department of Canadian Heritage. For the purpose of applying this exemption, the cultural business activities would be considered *de minimis* if the revenues from cultural business activities are less than the lesser of $10 million or 10 percent of gross revenues of the overall business.

4. Consistent with recommendations for other sectors, the Minister of Canadian Heritage, with advice from stakeholders and other interested parties, should conduct a review every five years of cultural industry policies, including foreign investment restrictions. The first such review should be launched in 2008. As a matter of priority, the first review should consider:

   a) increasing and revising the threshold for the review of acquisitions of cultural businesses; and

   b) the desirability of the Minister of Canadian Heritage continuing to have the right to require the review and approval under the ICA of any new cultural business establishments by foreign investors.

5. In administering the ICA, the ministers of Industry and Canadian Heritage should act expeditiously and give appropriate weight to the realities of the global marketplace and, in appropriate cases, the ministers should provide binding opinions and other less formal advice to parties concerning prospective transactions on a timely basis to ensure compliance with the ICA.

Sectoral Regimes*

As part of its core mandate, the Panel was asked to review Canada's sectoral restrictions on foreign direct investment having regard to their impacts on competition and other economic, social or security goals as well as the compatibility of Canada's policies with those of other countries. Canada has a multitude of laws and regulations governing ownership in specific sectors as well as a number of company-specific statutes. Many company-specific statutes had their genesis in the mid-1980s to early 1990s, when they were enacted for the purpose of privatizing former Crown corporations.[19]

The Panel's mandate includes a focus on sectoral foreign ownership restrictions, which led to our review of the air transport, uranium mining, telecommunications and broadcasting, and financial services sectoral regimes. Directly or indirectly, each one of these ownership regimes has an impact on the degree of foreign investment in these sectors and the overall economy. Liberalization of existing sectoral ownership restrictions raises complex questions about domestic control of some of Canada's largest and best known companies and the integrity of other economic, security and cultural policies deemed essential for the nation.

Each sectoral ownership regime was established to address particular policy objectives, originated at different times, and has undergone varying degrees of regulatory and policy changes over the past three decades or so. Each of these sectors is heavily influenced by technological change and globalization. Consequently, the Panel welcomes the opportunity to review each sector from the perspective of advancing Canadian competitiveness.

As discussed elsewhere in this report, other countries maintain formal as well as informal controls on ownership in these as well as other industry sectors. The long-term trend internationally has been to liberalize market access by various means, including reducing restrictions on foreign ownership. Other countries have realized substantial economic benefits where greater market access has led to increased competition, innovation and investment and has attracted new talent.

* Recusal Statement: The Panel Secretariat has received legal advice to the effect that since this report constitutes advice to government in the form of recommendations in a public report, Panel members need not recuse themselves from any of the Panel's deliberations. Notwithstanding this, Panel members reviewed their personal circumstances and decided to recuse themselves from discussion and finalization of recommendations concerning sectoral investment regimes where they have business relationships of a material nature, as follows:
- N. Murray Edwards – Air Transport; Telecommunications and Broadcasting
- Brian Levitt – Telecommunications and Broadcasting

The Panel notes that, for liberalization to achieve these positive outcomes, it must result in greater competitive intensity and bring new technology, know-how and entrepreneurial spirit. The Panel takes a realistic approach to sectoral regimes. We advocate liberalization where and to the extent that we are satisfied it will enhance Canada's competitive advantage.

A number of oral and written submissions maintained that Canada will eventually have to reduce certain sectoral ownership restrictions because other jurisdictions may adopt reciprocal policies or take other measures that could have an adverse impact on the ability of Canadian companies to compete abroad. Indeed, some argued that Canada should unilaterally and pre-emptively reduce or eliminate its ownership restrictions without obtaining any corresponding market access concessions on the part of other countries. However, the Panel questions whether it is appropriate for Canada to change the playing field in a way that disadvantages Canadian companies or competitiveness in Canada while foreign governments protect companies in the same industry from takeovers by Canadian investors. The Panel believes that reciprocity may be a relevant consideration for the assessment of liberalization in some sectoral regimes.

Other than with regard to the *Bank Act*, there has been no regular or comprehensive public review of these sectoral ownership restrictions for some time. The submissions received by the Panel and our work underscore the wisdom of mandated periodic reviews.

The Panel recommends that:

6. **Individual ministers responsible for the sectors addressed in this report should be required to conduct a periodic review of the sectoral regulatory regime with a view to minimizing impediments to competition as well as updating and adapting the regulatory regime to reflect the changing circumstances, needs and goals of Canada. This review should be modelled on the *Bank Act* process and should occur on a five-year cycle. Ownership restrictions should be reviewed on the basis of:**

   a) **a statement of policy goals that reflect the current Canadian reality;**

   b) **an understanding that limitations on competition and investment may be required to address a market failure, a paramount social policy or a security objective;**

   c) **an understanding of the costs and benefits of any such restriction on competitive intensity; and**

   d) **an evaluation of whether existing restrictions — or alternative approaches — are the optimal means of achieving the stated policy goals.**

Air Transport

Since the 1980s, the federal government has deregulated many economic aspects of the air transportation industry. The industry continues to be regulated with respect to public safety and security.

Canada limits foreign ownership of Canadian air carriers to 25 percent of voting equity. In addition, foreigners may own non-voting equity subject to the overall requirement that they are not permitted to control a Canadian air carrier. Basically, the same restrictions are in place in the US. Some countries have eased restrictions to allow up to 49 percent foreign ownership of their carriers. A few (e.g., Chile) have no restrictions on foreign ownership of their air transport industry. Still others permit 100 percent foreign ownership for carriers offering domestic services only, referred to as a "right of establishment." Right of establishment carriers are currently permitted in Australia and New Zealand. As well, the European Union (EU) functions as a common market in air transport. There are no ownership restrictions governing investment in air carriers between member states, whereas a 49 percent limit is applied to foreign ownership by non-EU investors.

Table 2 — Foreign Ownership Limits, Selected Countries, 2002

Jurisdiction	Domestic Routes (%)	International Routes (%)	Special Rule for Flag Carrier
Australia	100	49	n/a
New Zealand	100	49	n/a
Korea	50	50	n/a
China	35	35	n/a
Japan	33	33	n/a
Taiwan	33	33	n/a
India	n/a	40	26
United States	25	25	n/a
Canada	25	25	15
Brazil	20	20	n/a

Source: Chang and Williams (2004) as cited by David Gillen, "Foreign Ownership Restrictions in the Canadian Aviation Industry: A Review and Assessment," research paper prepared for the Competition Policy Review Panel, March 2008.

Notwithstanding ownership restrictions, integration through marketing alliances among international air carriers (e.g., Air Canada is a member of the Star Alliance) allows participating air carriers to use common reservation systems and serve a larger range of international destinations. More formal integration involving mergers of national flag carriers, such as the recent takeover of Swiss Air by Lufthansa and the merger of Air France and KLM, is creating larger global air carriers. The legacy of flag air carriers has contributed to industry overcapacity. There are over 1000 airlines globally. Industry experts predict a wave of consolidation in the large US and EU markets.

Internationally, air transportation is largely governed by bilateral agreements that include flyover, in-transit and landing rights between nations. Canada has concluded bilateral air transportation agreements with approximately 75 countries.

There is a nascent international trend of entering into "Open Skies" treaties, which provide for expanded landing rights on international routes. The EU and the US "Open Skies" agreement came into force in March 2008 and is expected to increase the degree of competition on intercontinental flights.[20] As a second stage in this liberalization process, the US and the EU are scheduled to embark on discussions regarding reciprocal reductions on foreign ownership restrictions in air transportation in 2008. The market integration effects of "Open Skies" agreements, particularly if combined with efforts to allow foreign ownership beyond 49 percent, will provide further impetus for consolidation among international air carriers.[21] Maintaining the existing 25 percent foreign ownership restriction could exclude Canadian air carriers from future consolidation transactions that would result in global carriers.

Air transportation facilitates social and business transactions, thereby increasing economic advantage and opportunity. An air transport sector characterized by competitive choices, fares and costs will be critical for Canadian businesses to realize their ambitions in foreign markets. The Panel was presented with no evidence that foreign-controlled airlines would be any more or less inclined than Canadian firms in servicing Canadian routes; airline capacity typically matches the economic opportunities available in a community whether they are large or small.[22]

Many industry participants have expressed concerns with respect to government policies that increase industry costs.[23] Ultimately, the benefits of lower industry costs could be passed on to the public in lower fares and better service in a competitive environment. Improving productivity in the industry is important for Canada's economic future. In line with Recommendation 6, fiscal arrangements affecting the competitiveness of the industry should be reviewed every five years.

There is a trend internationally toward greater liberalization of domestic aviation markets and a somewhat slower trend of international market liberalization. Both have yielded substantial economic benefits. The Panel is satisfied that increasing the level of foreign investment permitted in the air transportation sector would increase sustainable competition in the Canadian industry.[24] Appropriate safety and security measures that would apply to all airlines regardless of ownership are in place to protect the public. Other objectives, such as service to remote regions, are best met by an efficient and competitive private aviation sector. However, unilaterally eliminating foreign investment controls for Canada's international carriers would impact Canada's relationships with other countries with whom we have bilateral air transportation agreements. Complete liberalization of ownership restrictions would require a reciprocal or multilateral effort involving Canada and other countries.

The US is further advanced than Canada in securing "Open Skies" treaties. In practice, Canadian international air policy is still relatively restrictive. The Canadian industry now faces an increased risk of reduced intercontinental passenger traffic due to the stronger competitive position of the US industry stemming from its recent treaty with the EU. Successfully completing the "Open Skies" negotiations with the EU, which started in November 2007, has an economic importance for the nation.

The Panel recommends that:

7. **The Minister of Transport should increase the limit on foreign ownership of air carriers to 49 percent of voting equity on a reciprocal basis through bilateral negotiation.**

8. **The Minister of Transport should complete Open Skies negotiations with the European Union as quickly as possible.**

9. **The Minister of Transport, on the basis of public consultations, should issue a policy statement by December 2009 on whether foreign investors should be permitted to establish separate Canadian-incorporated domestic air carriers using Canadian facilities and labour.**

Uranium Mining

The uranium industry is unique among the sectors with restrictions on foreign ownership that the Panel has been asked to review. Indeed, it is unique among the mineral and energy industries. Uranium has only two uses of consequence, namely, as an essential component of nuclear weapons and as a fuel for the generation of electricity.

Today the Canadian uranium mining industry is centred in Saskatchewan, and there is a mine development proposal situated near Baker Lake, Nunavut. Canada is the world's largest primary uranium producer, and ranks third in known and reported reserves after Australia and Kazakhstan. Canadian uranium deposits are the richest in the world in terms of percentage content.

Development of Canadian uranium resources for civilian purposes began in the 1970s, and has been subject to foreign ownership controls since 1970. The current regime, known as the Non-Resident Ownership Policy (NROP), was established in 1987 by the Minister of Natural Resources. It provides:

- a minimum level of resident ownership of 51 percent in uranium mining
- resident ownership of less than 51 percent to be permitted if Canadian control in fact can be established as defined in the *Investment Canada Act*
- exemptions to be granted if Canadian partners in a mining development cannot be found.

There are no ownership restrictions on foreign participation in exploration.

Canadian production is dominated by the two largest uranium mining companies in the world, Cameco and Areva SA.[25] Cameco is Canadian controlled and has mines in Canada, the US and Kazakhstan as well as first-stage, value-added processing in Canada.[26]

The NROP also refers to the management of security and environmental issues through the Canadian Nuclear Safety Commission[27] and the Department of Foreign Affairs and International Trade. Concern over the potential proliferation of nuclear weapons from the beginning of the nuclear era has led to a high level of government involvement with the industry, including direct ownership. It has also led to high levels of regulatory and policy control at both the national and international levels. Canada has been a world leader in the development of an increasingly stringent and effective Nuclear Non-Proliferation Policy and accompanying export control regime. We now have more than 30 years of experience in ensuring that Canadian exports of nuclear material (including uranium), equipment and technology are used only for peaceful, non-explosive purposes.[28]

In order for uranium to be used in the operation of a nuclear power plant, additional processing steps are required, involving conversion of uranium ore, enrichment and fuel fabrication.[29] Production is heavily concentrated in very few countries. In 2006, six countries produced 82 percent of the world's primary uranium production. Enriched uranium trades at much higher prices than primary uranium or uranium that has been processed to fuel at the first stage of conversion.

Security of supply considerations has led some countries to intervene in the market. Intervention ranges from policy support and fiscal incentives to the development of state-owned enterprises for uranium production and processing. Many of these countries also have realized the economic benefits of developing domestic fuel processing capabilities and advanced processing has become part of their national industrial policy. Three of the world's largest economies — the United States, France and Japan — are heavily dependent on imported energy resources. It is no coincidence that they have become heavily reliant on nuclear energy. Those countries and others have integrated national nuclear policies designed to provide stable low-cost electricity, foster development of production facilities, secure the raw energy inputs, add value through domestic fuel processing capability, and develop and protect domestic technology. It appears unlikely that these policies will be dismantled in the face of rapidly increasing energy demand.

International concerns with the spread of "sensitive technologies" led to a 2004 proposal by the US to ban the sale of enrichment and reprocessing equipment or technology to any state that does not already possess full-scale, functioning enrichment and reprocessing plants. While the proposal is rooted in nuclear proliferation concerns posed by other countries, the practical effect of this proposal is the restriction of the development of uranium enrichment technology in Canada. Discussion of this proposal has been on the agenda of G8 Summits since 2004. Canada has never accepted the necessity of having a permanent moratorium on the development of uranium enrichment technology in Canada. There has been some progress in multilateral discussions in 2007 and 2008; however, a resolution of Canada's concerns has yet to be achieved.[30]

It would be a natural progression for Canada, as the world's leading uranium producer and converter, to develop the capacity to compete in this large and lucrative segment of the nuclear fuel market.

In summary, Canada's uranium resource base gives it a strategic advantage in global nuclear energy markets. In considering a more open ownership regime for the uranium sector, the Panel concludes that liberalizing the NROP should be on the condition that Canada receives some reciprocal benefits in return. This could take the form, for example, of requirements that the country provide reciprocal

access to its markets. Alternatively, Canada might want to secure access to certain technologies (e.g., enrichment) not otherwise available to it as a condition of granting improved access.

Unilateral liberalization of the policy would respond to the concerns of foreign investors and their governments. It is important to note that the vast majority of countries have ownership restrictions governing their uranium industries that are more restrictive than the NROP. Unconditional liberalization would do nothing to create a level playing field for Canadian companies that face investment and, in some cases, export restrictions or prohibitions in other countries, not only at the uranium mining stage but also at other stages of the nuclear fuel cycle.

Unilaterally lowering ownership restrictions without obtaining concessions from other countries that limit foreign competition or Canadian investment abroad would not be grounded in a hard-headed appraisal of Canada's national interest.

The Panel recommends that:

10. **The Minister of Natural Resources should issue a policy directive to liberalize the non-resident ownership policy on uranium mining, subject to new national security legislation coming into force and Canada securing commensurate market access benefits allowing for Canadian participation in the development of uranium resources outside Canada or access to uranium processing technologies used for the production of nuclear fuel for nuclear power plants.**

Telecommunications and Broadcasting

Canada has developed a strong cadre of businesses in the telecommunications and broadcasting sectors, which have grown to their present position in a highly regulated domestic Canadian market. Today, these businesses operate in Canadian and global markets characterized by continuous product innovation and under increasingly liberalized national regulatory regimes. In this context, the Panel believes that the competitiveness of these industries can and should be strengthened through liberalizing foreign investment restrictions that apply to them.

Twenty years ago, Canada's telecommunications and broadcasting industries were distinct sectors. Telecommunications carriers were in the business of carriage, not content. Cable television companies distributed broadcasting and provided no telecommunications services. Wireless (cellular telephone) communications were in their infancy, as was the Internet.

The Internet and other information and communications technologies have changed the business landscape for these industries. In essence, with convergence, it is increasingly difficult to define distinct "telecommunications" and "broadcasting" industries or sectors, particularly when it comes to delivery or distribution networks. For example:

- fixed wire telecommunication carriers, wireless carriers, and cable television companies now compete directly with one another in the delivery of voice communications, Internet (data) services and video services
- telecommunication and broadcasting services increasingly overlap; when a subscriber accesses the Internet through a mobile phone, he or she may download an email, a text message or a video clip of a television show
- major telecommunications carriers are investing in technology to deliver advanced video services, and large cable television companies already offer voice services and are upgrading their Internet capacity; wireless carriers are delivering voice and data and investing in new video services.

To some extent, the current Canadian regulatory regimes for these two sectors reflect the past rather than the present. We continue to have one regulatory structure for telecommunications and another for broadcasting, even though industry boundaries between the two are disappearing.[31] Some companies, because of the scope of their telecommunications and broadcasting activities (such as Bell Canada, Rogers, and TELUS), are subject to both regulatory regimes.

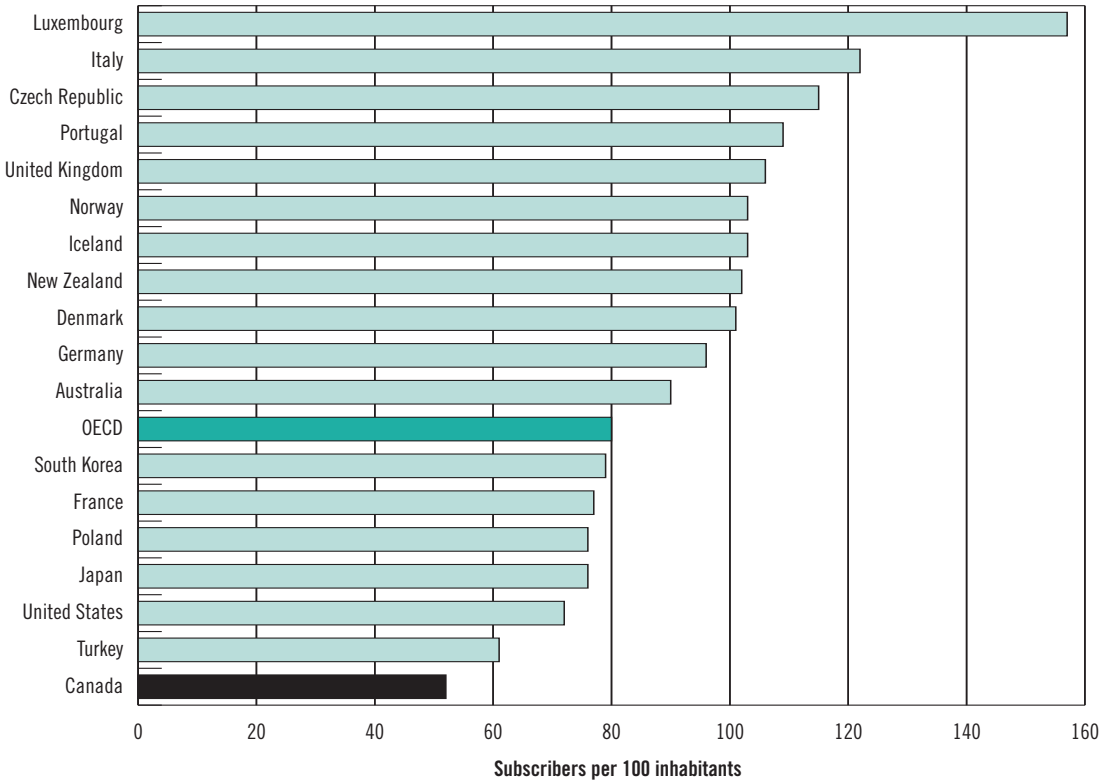
Both the *Telecommunications Act* and the *Broadcasting Act* contain restrictions on foreign investment that are largely similar in form. The *Telecommunications Act* states that one objective of Canadian telecommunications policy is "to promote the ownership and control of Canadian carriers by Canadians."[32] The *Broadcasting Act* states, "The Canadian broadcasting system shall be effectively owned and controlled by Canadians."[33] The foreign investment rules to achieve these objectives are similar under both acts and related regulations. In summary, they restrict the number of voting shares that can be held by non-Canadians in a telecommunications or broadcasting business as well as the number of board members who can be non-Canadian, and require the Canadian Radio-television and Telecommunications Commission (CRTC) to ensure that non-Canadians cannot exercise "control in fact" over the business. With respect to either a telecommunications company or a broadcast licensee, the rules limit the holding of voting shares by non-Canadians to 20 percent at the operating company level and to 33.3 percent at the holding company level.[34]

There is considerable evidence that liberalizing foreign investment restrictions brings demonstrable economic benefit through increasing competitive pressure on all participants in the market.[35] This is as important in new and emerging markets (including Internet-based communications platforms) as in well-established markets. Foreign investment restrictions reduce competitive intensity in a number of ways that are well known. In relation to telecommunications markets, they include placing potential new entrants (to the extent they can enter markets in the first place) at a cost disadvantage relative to incumbents, limiting the sources of finance available to existing incumbents, distorting optimal financing structures, preventing the transfer of the latest technology into the marketplace and, perhaps most fundamentally, removing pressure on existing firms to reduce or eliminate inefficiencies in their business practices and activities and to be world-class (rather than best-in-country-class) competitors.[36]

These arguments in favour of foreign investment liberalization are applicable across many economic sectors. However, submissions to the Panel provided a number of different views on the merits of liberalizing foreign investment restrictions in relation to telecommunications and broadcasting.[37] The Panel took account of these views and the following considerations in its assessment of foreign investment restrictions in telecommunications and broadcasting.

First, Canada is already reorienting its policies for telecommunications and broadcasting to place greater reliance on market forces in a number of specific areas other than foreign investment. In 2006, the federal government issued a Policy Direction to the CRTC to regulate in telecommunications in a manner that interferes to the minimum extent necessary with competitive market forces.[38] More recently, the Minister of Industry launched the Advanced Wireless Services radio spectrum auction which includes a set-aside of some spectrum exclusively for new entrants in the wireless market in order to stimulate greater competition and innovation.[39] In this context, it appears incongruous to retain existing foreign investment restrictions that prevent Canadians from capturing the full benefits of these and other regulatory policy changes for telecommunications and broadcasting industries.

Figure 9 — Cellular Mobile Penetration Rates, 2005



Source: OECD Communications Outlook 2007.

Second, the number of entrants in the marketplace has a bearing on increasing competitive intensity and achieving better results for consumers. The Canadian telecommunications market is characterized by the presence of a limited number of integrated wire line and wireless carriers. If foreign investment liberalization results in only a shift in control of these existing Canadian firms to foreign owners with no increase in competitive pressure, then no significant change to current competitive circumstances will necessarily ensue. The Panel believes that measures to liberalize foreign investment should provide an opportunity to promote the growth and development of new entrants rather than merely provide an opportunity for a shifting of corporate control between existing market participants.

Finally, the Panel is well aware that Canada's telecommunications policy and regulatory frameworks were subject to an extensive review during 2005–2006 by the Minister of Industry's Telecommunications Policy Review Panel (TPRP) chaired by Dr. Gerri Sinclair.[40] The TPRP received almost 200 written submissions and drew on the results of extensive consultations with Canadian stakeholders and experts in Canada and from abroad. The TPRP's final report, issued in March 2006, concluded that liberalization of the restrictions on foreign investment in the

Canadian telecommunications sector "would increase the competitiveness of the telecommunications industry, improve the productivity of Canadian telecommunications markets, and be generally more consistent with Canada's open trade and investment policies."[41]

Taking these considerations into account, the Panel finds that the TPRP's proposed phased liberalization of foreign investment rules for telecommunications and broadcasting has merit. In the first phase, for a period of five years, foreign investment would be permitted on a greenfield basis or by acquiring an incumbent Canadian telecom company with a market share of 10 percent or less. In a second phase, beginning at the end of the five-year period, there would be a broader liberalization of the foreign investment rules for both telecommunications and broadcasting. With respect to broadcasting distribution, in this second phase, liberalization would apply to the carriage side of broadcasting distribution, while broadcasting policies would focus any necessary Canadian ownership restrictions on "content."[42]

As pointed out by the TPRP, this approach should be competitively neutral for telecom carriers and holders of licences for broadcasting distribution undertakings.[43] However, of greater importance from the Panel's perspective is the increase in competitive intensity in markets through its initial focus on encouraging new entrants and potentially strengthening smaller competitors. Moreover, it would allow Canadians to derive greater benefit from the many other regulatory changes that are under way in telecommunications and broadcasting markets. For example, it would work with, rather than against, the new spectrum auction policy to encourage new wireless entrants. Finally, and with specific regard to the cultural policy concerns associated with broadcasting, it would enable the federal government to focus its attention and resources on how to more effectively meet the challenge of strengthening a Canadian presence in an increasingly open system for the production and consumption of Canadian content.

The Panel recommends that:

11. **Consistent with the *Telecommunications Policy Review Panel Final Report 2006*, the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, the Minister of Industry should seek an amendment to the *Telecommunications Act* to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalized in a manner that is competitively neutral for telecommunications and broadcasting companies.**

Financial Services

A solvent, efficient and competitive financial services sector is vital to Canada's economic well-being. Canadians can justifiably be proud of our financial services sector, which is internationally held in high regard. In recent years, Canadian financial institutions have established a substantial presence in non-Canadian markets.

In keeping with all developed countries, the provision of financial services in Canada is highly regulated.

At issue for the Panel is the regulation of ownership and the state of competition in the financial services sector. Ownership regulations in the financial services sector differ from regulations in place governing the other sectors under consideration. Canada has progressively reduced foreign ownership controls in the financial sector. Today, there are no foreign ownership restrictions. As such, entry of foreign-controlled institutions is subject only to prudential approvals by the Office of the Superintendent of Financial Institutions and the Minister of Finance.

A "widely held" requirement exists for banks with equity of over $8 billion. This rule also applies to demutualized insurance companies with equity over $5 billion at the time of demutualization. No person can hold more than 20 percent of the voting shares or 30 percent of the non-voting shares.

The Canadian "widely held" rule is in place to reduce the risk of "self-dealing" and ensure sound governance practices. Self-dealing involves lending transactions between a financial institution and persons who are in positions of influence (e.g., a dominant shareholder) over the institution. Ultimately, self-dealing increases the risk of insolvency and the failure of a lending institution. While other jurisdictions do not impose explicit limits on shareholdings (e.g., Australia, France, Germany, the United Kingdom and US), the world's largest institutions tend to be widely held.[44]

The most commonly cited reason underlying calls for liberalizing ownership restrictions governing large financial institutions is that it would enhance competition. The Panel has heard a wide variety of views on the state of competition in the financial services sector. Larger businesses, particularly multinational enterprises often borrow abroad and generally have a larger choice of credit providers than smaller Canadian companies. Canadian financial institutions participate in international markets, where they face fierce competition from rivals, many of which are much larger. Scale is important for Canadian financial institutions and their Canadian customers doing business abroad.

Canada's largest financial institutions are often criticized for their small business lending practices. Other than late-stage venture capital, a market that needs to become more robust in Canada, the evidence before the Panel has not convinced us that competition is lacking in the supply of credit for small and medium-sized businesses. Beyond the six largest banks in Canada, there are many smaller Canadian and foreign banks, credit unions and other non-banks as well as several government-sponsored lending institutions in Canada. Competition has lowered the cost of banking services in Canada to the point where it is among the lowest-cost markets in the world.[45]

Canada has the potential for comparative advantage in financial services, which could be further exploited internationally. At the same time, allowing greater international competition as well as more competition between bank and non-bank lending institutions would benefit both the financial services sector and the public interest in competitive and efficient markets.[46] These should be considerations in the 2012 review of the *Bank Act* by the Minister of Finance.

Limits to both scale *and* competition can be problematic. Concerning scale, bigger institutions could position Canada and Canadian-based firms and financial institutions to compete more effectively in international markets. As noted in the submission of the Canadian Bankers Association, the average assets of Canada's five largest banks in 1985 totalled 38 percent of the average assets of the top 10 global banks. Today, the ratio is about 19.5 percent.[47] Canada's major banks are relatively small by global standards: the Royal Bank of Canada, Canada's largest bank, ranks as the 30th largest bank in the world according to the Fortune 500.[48]

Because Canada represents 3 percent of world capital markets, reaching the scale of the world's largest institutions will depend on how well Canadian banks fare in the contest to acquire foreign banks. At the same time, there may be benefits in terms of realizing efficiencies resulting from domestic mergers. In their submission to the Panel, the Canadian Bankers Association quotes former Bank of Canada Governor David Dodge:

> *…a flexible framework governing Canada's financial institutions that provides incentives for innovation and efficiency is needed. Bank [of Canada] research suggests that Canadian financial institutions may find efficiency gains through economies of scale — gains that could flow across the economy through lower-cost business and retail lending.*[49]

Much has changed since 1998 when a *de facto* prohibition on mergers between large financial institutions was announced by the Minister of Finance. Canadian financial institutions have become more international, have pursued divergent strategies and have succeeded or fallen back according to their respective strategies. Several of Canada's insurance companies have demutualized and grown to become some of the largest and most internationally competitive in the world. More foreign competitors and non-bank institutions compete with the big banks. Internet banking has grown and expanded the choices available for consumers. Financial institutions the world over have merged, creating larger, more powerful competitors. Yet the *de facto* ban on mergers between large Canadian financial institutions has been in place for a decade.

The Panel is of the view that appropriate prudential, competition and public interest standards and processes are in place in Canada to allow for an objective analysis of merger proposals involving financial institutions.

The Panel recommends that:

12. **The "widely held" rule applicable to large financial institutions should be retained.**

13. **The Minister of Finance should remove the *de facto* prohibition on bank, insurance and cross-pillar mergers of large financial institutions subject to regulatory safeguards, enforced and administered by the Office of the Superintendent of Financial Institutions and the Competition Bureau.**

The Competition Act

Effective competition laws and policies are key elements in ensuring the competitiveness and efficiency of the Canadian economy. In its core mandate, the Panel was asked to review policies affecting competition law, focusing on the *Competition Act* to ensure that it fosters competition in Canada.

Canadian competition policies and institutions are largely in keeping with those of other major countries. The *Competition Act* is recognized internationally as both modern and flexible and, in the Panel's view, it does not constitute an impediment to Canada's overall competitiveness. However, the Panel concludes that long-term improvements to Canada's productivity could be achieved by amending certain outmoded or ineffective provisions of Canada's competition laws. The adjustments required, though, are more in the nature of fine-tuning than a major overhaul.

In assessing the effectiveness of Canadian competition law and policy, the Panel believes that it is desirable to conform Canadian legal requirements with those of the US, where practicably feasible, with a view to minimizing unnecessary procedural or substantive differences, given the high level of integration of business operations in the two countries.

The 1985 MacDonald Commission Report set out the importance of international competition to Canada's overall competitiveness and productivity:

> *Commissioners maintain that competition policy should not be particularly concerned about mergers and amalgamations in those sectors of the economy where foreign competition exists. Such policy should focus instead only on those sectors of the economy that are not exposed to competition from abroad. The importance of liberalized trade as a guarantee of competition cannot be stressed too often. Given the discipline of international market prices, Canada can obtain the benefits of scale and of rationalization without suffering increases in domestic monopoly power.*[50]

The Panel believes that this reasoning is even more relevant today with higher levels of global trade and investment.

Issues in Canadian Competition Law

Despite substantial reforms effected in the mid-1970s and 1980s as well as more recent amendments, the oral and written submissions received by the Panel have persuaded us that a number of provisions of the *Competition Act* are either ineffective or obsolete. These deficiencies are particularly evident in respect of the conspiracy and pricing provisions. As a consequence, the legislation deviates in some respects from internationally accepted best practices.[51]

A recurring theme in Canadian competition policy is the need to balance the necessity for Canadian firms to achieve scale and specialization in order to compete in global markets against concerns about reduced competitive intensity in the Canadian market stemming from industry consolidation and concentration. As a small open economy, higher levels of industry concentration in Canada than in other modern economies such as the US are inevitable. As the MacDonald Commission concluded, concentration and vigorous competition are not necessarily incompatible where barriers to entry into the marketplace are not insurmountable by potential entrants.

The Panel is of the view that the primary focus of Canadian competition law and its administration and enforcement should be on anti-competitive conduct and outcomes more than on concerns about industry concentration.[52]

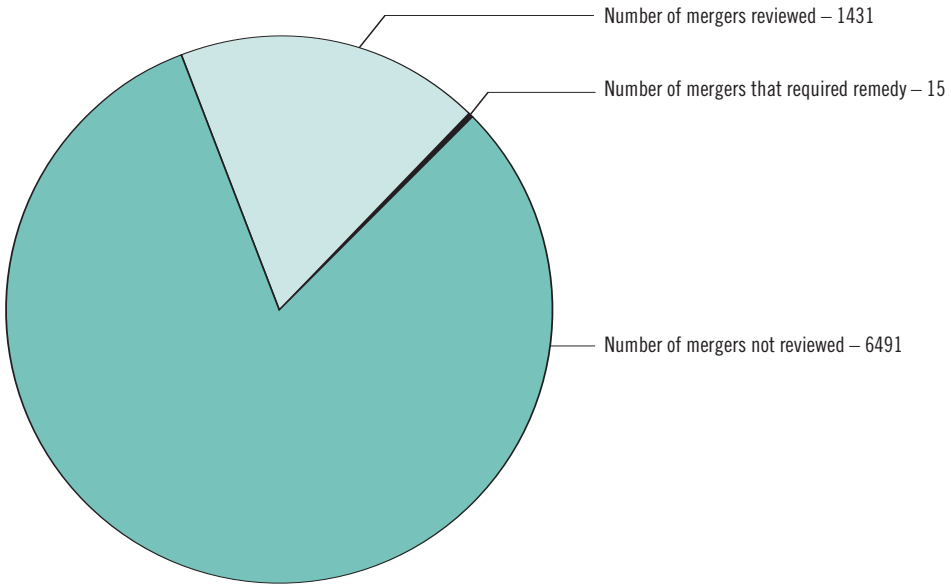
A number of the issues the Panel has considered were dealt with in legislative proposals introduced in Parliament in 2004 in Bill C-19. Essentially, the Bill proposed to decriminalize the pricing provisions of the *Competition Act* while strengthening the remedies available to the Competition Tribunal[53] for abuse of dominant position and deceptive marketing practices violations. Bill C-19 was not passed into law due to the 2005 federal election. The Panel commissioned research on recent proposals to amend the *Competition Act* and heard a great deal on this subject from competition policy experts and interested stakeholders.[54] Several of the proposals in Bill C-19 have merit and are relatively uncontroversial. However, the Bill did not address a number of the most important issues in Canadian competition policy that have economic importance.

Mergers

Merger review is a key activity conducted by the Competition Bureau that has a substantial impact on the competitiveness and scale of Canadian industry. Most transactions are reviewed on a timely basis as posing no competition concerns and very few transactions require merger remedies. From 2002 to December 2007, data indicate that there were 7937 mergers in Canada.[55] Of these, 1431 transactions were reviewed by the Competition Bureau and only 15 resulted in merger remedies, such as divestitures of assets or businesses.

Merger review is a feature of every modern economy. Increasingly, the most significant mergers are international in scope. It is important for Canada to have a voice along with the competition agencies of other countries that are engaged in the review of mergers affecting Canada's economic interests. Consequently, using an analytical approach and regulatory process that is convergent with our major trading partners should not only help the Competition Bureau conduct its work but also reassure international investors that Canadian competition laws in respect of mergers are modern and transparent.

Figure 10 — Mergers in Canada Reviewed by the Competition Bureau, 2002–2007



Source: Quarterly summaries of Canadian M&A activity from *Financial Post Crosbie: Mergers & Acquisitions in Canada*, and Competition Bureau statistics.

Overall, the Panel is satisfied that substantive merger provisions are generally modern, compatible with the laws of our major trading partners and appropriate for the Canadian economy. The Panel has heard much debate about the merger "efficiencies defence" but concludes that there is no compelling need to change it. Indeed, the Panel is of the view that the achievements of efficiencies through mergers is sufficiently important for the Canadian economy that the Competition Bureau should review mergers with this in mind from the outset, rather than limiting its assessment of efficiency considerations to cases where it has determined that the merger is likely to prevent or lessen competition substantially.[56]

During the course of the Panel's consultations, concerns were expressed about the time taken to review complex merger transactions and the use of formal investigative processes by the Competition Bureau, both of which can be time consuming and costly for the merging parties and other market participants.[57] Merger analysis needs to be conducted on a timely basis in the fast-paced world of modern business. At the same time, the Competition Bureau needs relevant information and a reasonable period of time to analyse transactions that raise complex issues. Seeking court orders to obtain more information or obtain an extension of the review period is unsatisfactory, for both the private and public sectors, because it diverts time and attention away from consideration of the substantive issues arising in connection with proposed merger transactions.

Given the identification of these issues and the importance of our merger review process being better harmonized with that of the US, the Panel is of the view that it would be beneficial to adjust our merger review process into a two-stage regime that would more closely align our procedures with those in the US. This change would separate merger cases into two categories: those cases that are concluded (and effectively cleared) within 30 days of the initial filing, and "second stage" cases that raise complex competition issues. So-called "second stage" cases would be subjected to an additional review period that would terminate 30 days following full compliance with a "second request" for information.

To ensure that the merger notification provisions of the *Competition Act* are up-to-date and do not impose regulatory obligations on parties to proposed mergers that are disproportional to their potential to raise substantive competition issues, there should be a narrowing of the scope of these provisions by increasing the financial thresholds that trigger the notification obligation. In particular, the "size of parties" threshold in section 109 of the *Competition Act* has remained at $400 million in Canadian assets or revenues since 1986. While the "size of transaction" threshold in section 110 was increased from $35 million to $50 million in 2002, a further increase is likely justified in light of the general appreciation of transaction values over the past five years. In addition to or in lieu of increasing financial thresholds, consideration should be given to creating more exemptions from merger notification for classes of merger transactions that do not raise competition concerns. Such changes can be effected relatively expeditiously by prescribing regulations under section 124 of the *Competition Act*.

One feature of the Canadian merger review that should be retained is the advance ruling certificate procedure that effectively provides a shortcut from the notification requirements in the *Competition Act* for merger transactions that do not raise significant competition issues. Indeed, the Panel believes that the interests of both the Competition Bureau and the business community would be served if the Bureau issued more guidance on the criteria the Commissioner of Competition applies in issuing advance ruling certificates.

Also in keeping with international norms, the Panel questions whether it is necessary for the Commissioner of Competition to have a three-year window to challenge a merger transaction after it is substantially completed.[58] A shorter period in which to challenge a transaction would provide more certainty for the Canadian business community and international investors. Moreover, the implications of a shorter time frame would engender very little change in practice, given that the Competition Bureau typically provides merging parties its views on whether the transaction raises substantive concerns in advance of the completion of the merger.[59]

Modernizing the Criminal Provisions of the Act

The *Competition Act* contains criminal provisions addressing conspiracies, bid rigging, certain pricing practices as well as false or misleading advertising and marketing practices.[60] A number of these provisions have been the subject of ongoing debate concerning their effectiveness, as well as various legislative reform efforts.

The Panel is of the view that the criminal law, with its attendant sanctions including fines and imprisonment, should be reserved for conduct that is unambiguously harmful to competition and where clear standards can be applied that are understandable to the business community. This is not the case with the price discrimination, promotional allowances and predatory pricing provisions. The Panel concludes that these practices should be addressed as civil matters reviewable by the Competition Tribunal.[61] This was proposed in Bill C-19, and there is a consensus that the abuse of dominant position provisions provides an appropriate civil mechanism to address these practices. Moreover, taking this action would, again, harmonize our laws in this regard with those in the US.

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.[62] 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.

There are strong arguments in favour of reforming the conspiracy provisions of the *Competition Act* that are out-of-step with similar laws of other developed countries and that have been the subject of international criticism. The conspiracy provisions are often described as the "cornerstone" of the *Competition Act* because they address cartel behaviour such as agreements between competitors to fix prices, allocate markets or customers, or limit production. These forms of illegal collaboration between competitors are particularly damaging to the competitive process because they reduce the normal economic incentives created by competitive markets to reduce costs and innovate, key factors that influence productivity.[63] This is particularly of concern, given that many cartels are international in scope, and substantive differences in the laws of the various countries that are affected by the same cartel can give rise to enforcement complications, particularly between Canada and the US.[64]

At the same time, criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the "hardcore" cartel category, such as restrictions on advertising or strategic alliances, but that may harm competition nonetheless. A more sophisticated economic approach to address the latter has been advocated by the Bureau and other experts to deal with this category of agreements between competitors.

Penalties

There are a number of different ways of strengthening the civil provisions of the Act by empowering the Competition Tribunal to impose sanctions or penalties for breaches of the Act besides its existing order-making powers. These include providing administrative monetary penalties (AMPs) and awards of damages. A related measure to strengthen the civil provisions might be to allow greater access to the Competition Tribunal for private parties to initiate proceedings.

With further decriminalization of the pricing provisions of the Act and a consequent greater reliance on civil remedies, adequate penalties should be put in place to address violations of the law and prevent the repetition of anti-competitive conduct. The Panel can see the utility, as a deterrent, in providing for the imposition by the Competition Tribunal of AMPs of a modest amount under the *Competition Act*'s abuse of dominant position provisions.

Amendments introduced in 2000 and 2002 provided for AMPs of up to $15 million and other interim order powers to address the emergence of Air Canada as a dominant domestic air carrier. It is clearly inappropriate to have a monetary penalty for a violation of a civil provision that exceeds the maximum fine available for a criminal offence under the key conspiracy provision. Finally, most experts agree that, to the extent possible, having the *Competition Act* contain rules of general application is preferable to having industry-specific rules and exemptions that reduce the transparency and predictability of the legislation.

The existing regime of private access to the Competition Tribunal, which allows for the adjudication of competition issues involving suppliers and customers, has not been extensively used. However, there is a concern that extending private access to the abuse of dominance or merger provisions would serve to promote unmeritorious litigation between competitors that would not enhance the competitiveness of Canadian industry or markets. The Panel is of the view that empowering the Competition Tribunal to award damages should not be pursued for similar reasons.

Competition Advocacy

Competition advocacy refers to assessing the impact of laws and regulation on competition and market efficiency as well as promoting greater reliance on the role of competitive market forces in the economy. It can also include examining private sector behaviour outside traditional competition law enforcement. The Competition Bureau takes on some of these activities, including participation in regulatory proceedings, which is part of its legislative mandate, as well as market studies, which are conducted on an informal basis without recourse to judicially authorized investigative powers.

The Panel has heard a great deal about competition advocacy and agrees with the many stakeholders who stated that the absence of a formal ongoing process to undertake this function beyond the limited role that Parliament has given to the Competition Bureau constitutes a significant gap in Canadian competition policy.[65] At the same time, there are concerns about expanding the role of the Competition Bureau to include additional formal competition advocacy responsibilities in terms of possibly overwhelming its limited resources or causing the Competition Bureau to lose its focus on, or creating a conflict with, its core enforcement responsibilities. In this connection, the Panel is of the view that it is preferable to vest the responsibility for undertaking market studies as well as similar competition advocacy activities in another specialized and independent institution.

The Panel is of the view that the core mandate of the Competition Bureau is, and ought to continue to be, to enforce and promote compliance with the *Competition Act.*

The Panel recommends that:

14. The Minister of Industry should introduce amendments to the *Competition Act* as follows:

a) align the merger notification process under the *Competition Act* more closely with the merger review process in the United States; the initial review period should be set at 30 days, and the Commissioner of Competition should be empowered, in its discretion, to initiate a "second stage" review that would extend the review period for an additional period ending 30 days following full compliance with a "second request" for information;

b) reduce to one year the three-year period within which the Commissioner of Competition currently may challenge a completed merger;

c) repeal the price discrimination, promotional allowances and predatory pricing provisions;

d) repeal the existing conspiracy provisions and replace them with a *per se*[66] criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects;

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;

f) grant the Competition Tribunal the power to order an administrative monetary penalty of up to $5 million for violations of the abuse of dominant position provisions; and

g) repeal the "Air Canada" amendments that created special abuse of dominant position rules and penalties for a dominant air passenger service.

15. The Minister of Industry should examine whether to increase the financial thresholds that trigger an obligation to notify a merger transaction as well as whether to create additional classes of transactions that are exempt from the merger notification provisions of the *Competition Act*.

16. The responsibility for competition advocacy should be vested in the proposed Canadian Competitiveness Council. The power to undertake interventions before regulatory boards and tribunals under sections 125 and 126 of the *Competition Act* should remain with the Commissioner of Competition, unless and until such powers are granted to the proposed Council.

17. The Competition Bureau should reinforce its commitment to giving timely decisions, strengthen its economic analysis capabilities, give appropriate weight to the realities of the global marketplace and, where possible, provide "advance rulings" and other less formal advice to parties concerning prospective transactions and other arrangements on a timely basis to ensure compliance with the *Competition Act*.

8. Competitiveness Agenda: Public Policy Priorities for Action

As noted earlier, our work has been directed at establishing a clear plan of action for enhancing Canadian competitiveness. While there is a significant role to be played by the private sector, it is equally crucial for Canadian government policies to be calibrated to facilitate our global competitiveness. Governments must provide a solid framework, and set the conditions for the private sector to succeed.

National competitiveness will be achieved only if governments ensure that, across the areas that serve as the foundation of the economy, policies are appropriate to deal with Canada's circumstances in the global economy. In carrying out our examination of Canadian competitiveness, our mandate includes not only the core legislative and policy areas discussed in the previous chapter, but also the range of factors that constitute the conditions for success in the global economy.

We wish to emphasize that competitiveness is a journey, not a destination. Periodic reforms will not get us to where we need to be. Unless we keep moving forward as soon as we catch up, we will begin to fall behind. Canada's policy improvement process must be ongoing and continuous. We believe that the Competitiveness Council proposed later in this report will play a key role in assuring that improvement is continuous.

In this chapter, we discuss those public policy areas where we see reform as being most critical to Canada's future competitiveness. In the submissions we received and in the consultations we conducted, we were told that action in these areas is of equal or greater importance to Canada's competitiveness than action on our core mandate. We agree. By drawing attention to these issues and offering our recommendations, the Panel seeks to ensure that all levels of government dedicate the focus and attention that will be necessary to achieve Canada's economic objectives.

Taxation

In the global economy, both capital and people are increasingly mobile. Other things being equal, capital and people move to jurisdictions that offer lower taxes and higher returns. High business taxes reduce the return on investment, which in turn reduces domestic and foreign investment in Canada and discourages innovation and entrepreneurship.

Statutory income tax rates applicable to individuals and businesses remain relatively high in Canada. Historically, tax revenue as a percentage of gross domestic product in Canada has exceeded the OECD average.[1]

The federal government has recognized the significance of reduced business taxes in improving Canada's international competitiveness. In its October 2007 Economic Statement, the federal government announced that it would reduce the federal corporate income tax rate to 15 percent by 2012.[2] The federal government's aim is to have the lowest statutory corporate tax rate in the G7. Likewise, several provinces have reduced their corporate tax rates and are eliminating capital taxes.

Income, Capital and Value-Added Consumption Taxes

Tax policy involves more than deciding how much revenue must be raised. An equally important policy issue is the design of a scheme of taxation and its impact on individual and corporate incentives and behaviour. For example, high corporate and personal income taxes discourage investment and work, whereas value-added taxes do not.

The superiority of value-added consumption taxes as a policy tool has been confirmed by research by the Institute for Competitiveness and Prosperity. Its study demonstrates that reducing corporate and personal income taxes would also benefit the average Canadian — more so than reductions in consumption taxes. Shifting taxation from business expenditure to consumption expenditure will increase the motivation for business investment, which in turn improves wages and job creation.[3]

Business investment in machinery and equipment, including advanced information and communications technology, has been shown to contribute to productivity and prosperity. In this regard, a study by economists from the Department of Finance suggests that a reduction of taxes on investment that results in a permanent and significant decline in the cost of capital will lead to a significant increase in investment.[4]

THE BENEFITS OF TAX HARMONIZATION

The most recent Ontario budget demonstrates the considerable tax savings that can be generated from tax harmonization between federal and provincial governments. As of April 2008, the Canada Revenue Agency began to collect and administer Ontario's Corporate Income Tax, Capital Tax, Corporate Minimum Tax and Special Additional Tax on life insurers.

As the 2008 Ontario Budget notes, "The single tax administration will reduce compliance costs for business and improve Ontario's competitiveness. Ontario businesses will save $90 million annually in Ontario Corporate Income Tax from a harmonized corporate income tax base and up to an additional $100 million annually in compliance costs from one tax return, one tax administration and one set of tax rules."[5]

While reduced consumption taxes also offer economic benefits, they do not specifically encourage investment and work. From the standpoint of Canada's competitiveness, an overwhelming majority of economists and submissions to the Panel which dealt with this matter argue that priority should be given to the reduction of income taxes over consumption taxes because they are more conducive to business investment, which in turn improves productivity, creates jobs and increases wages. The Panel accepts and agrees with these submissions.

In this regard, the federal goods and services tax (GST) is generally well conceived and superior to non-harmonized provincial sales taxes that tax capital investments. While several provinces have harmonized their retail sales tax regimes with the federal GST, Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island have not.[6] Beyond such retail sales taxes being a disincentive to capital investments, which enhance competition and productivity, in those provinces that have not harmonized their sales taxes, tax administration is also more complex and costly than it needs to be, making compliance for businesses and consumers more time-consuming and financially burdensome. Submissions made to the Panel highlighted instances in which the lack of harmonization and additional taxation on capital investment have affected investment decisions to the benefit of harmonized provinces.

Competitive Advantage

Unlike all other G7 countries, the federal government is in surplus and has been since 1997–98. This gives Canada a unique and historic opportunity to turn its fiscal advantage into a competitive advantage.

We believe that Canada must do more than try to "catch up" to other nations, particularly the US. With federal–provincial cooperation, Canada can and should move to secure a competitive edge. Given the rise in the Canadian dollar and US border impediments, Canada must use every means available to attract investment that might otherwise go to the US. Our fiscal strength is a source of competitive advantage in this regard. The Panel believes that it should be used.

The Panel recommends that:

18. **The federal, provincial and territorial governments should continue to reduce corporate tax rates to create a competitive advantage for Canada, particularly relative to the United States.**

19. **Provinces should expedite the phase-out of provincial capital taxes, and the provinces of Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island should move expeditiously to harmonize their provincial sales taxes with the goods and services tax.**

20. **The federal, provincial and territorial governments should give priority to reductions in personal income taxes, particularly for lower- and middle-income Canadians, and should provide incentives for investment and work by shifting a higher proportion of governments' revenue base to value-added consumption taxes.**

International Taxation

The Panel received submissions and heard presentations from a number of private sector tax advisers that Canada's tax system advantages foreign acquirers relative to Canadian acquirers in contests for Canadian assets, thereby undermining the competitiveness of Canadian-based companies and contributing to the acquisition of Canadian firms by foreign-owned companies.

Concerns were expressed to the Panel with respect to recent changes to Canadian tax legislation that will deprive Canadian companies making foreign acquisitions of some of the same advantages that foreign companies enjoy when making acquisitions in Canada. These measures will not enhance Canadian tax revenues but will disadvantage Canadian companies seeking to become global players. Our focus on Canadian competitiveness leads us to share the concerns we heard.

The Minister of Finance has announced an Advisory Panel on Canada's System of International Taxation to look at ways to make our international tax system more competitive and fair. The Panel is chaired by Peter Godsoe and is to report by December 1, 2008.[7] Our recommendations below with respect to international taxation are made solely within the context of our mandate, which is focused on enhancing Canada's competitiveness.

The Panel recommends that:

21. **The International Tax Panel should give particular attention to an assessment of tax provisions disadvantaging Canadian companies relative to non-Canadian companies in Canadian acquisitions, with the objective of recommending ways to allow Canadian-based companies to compete on an equal footing.**

22. **The International Tax Panel should assess the provisions of Canadian tax legislation limiting interest deductibility by Canadian companies in respect of foreign acquisitions to ensure that Canadian companies seeking to compete globally enjoy every advantage relative to their foreign competitors.**

Attracting and Developing Talent

Post-Secondary Education and Training

In recent years, the federal government set the goal of developing a knowledge advantage for Canada by creating the best educated, most skilled and most flexible workforce in the world. We believe that this is a critical goal: having a world-class education and training system should be a top priority for Canada.

In the knowledge-based economy, a skilled workforce is critical to attracting and retaining investment. For Canadians with strong education and training, the reward for meeting the economy's changing and rising labour market requirements is the opportunity to pursue good jobs and rewarding careers.

Fortunately, relative to most industrialized countries, Canada has high levels of human capital. Among OECD countries, Canada has the highest proportion of working-age adults with post-secondary education.[8] Canada also attracts a relatively high proportion of foreign students enrolled in post-secondary education.[9] This is an excellent foundation. However, to assure our future competitiveness, Canada needs to address emerging weaknesses. We need to produce more university graduates holding advanced degrees, particularly in math and science. We need to better match the abilities of Canadian workers with the changing skills needed in the economy. We also need to improve upon Canada's low levels of adult literacy and workplace training,[10] improve Canada's level of business education relative to the US,[11] and attract and retain more international students.

Education and training is a broad and complex subject, and a full treatment of it is beyond the Panel's capacity. However, we see four specific means by which Canada can improve its educational performance in order to enhance its competitiveness.

First, governments must continue to commit to and invest in education and training. There is no reason to suggest that governments are not already aware of the profound importance of high-quality education to Canada's economic and social goals. We simply underscore the fact that continued improvement to our educational performance will require continued investments by governments. This is particularly important in light of increasing post-secondary education enrolment in many jurisdictions and the attendant operating and capital cost pressures borne by institutions serving more students.

UNIVERSITY CO-OPS

"Experiential learning is the cornerstone of the University of Waterloo. UW is home to Canada's first and the world's largest post-secondary co-operative education program. UW co-op gives students up to two years of work experience in their future professions, enables them to apply their classroom-acquired knowledge in real-life situations, and exposes them to opportunities rarely encountered in typical student jobs."

David Johnston, President, University of Waterloo.

Second, our educational institutions must make choices in order to focus on achieving world-class expertise and pursuing excellence through greater specialization. To be competitive on the global scene, it is critical to aspire to be the best. Just as firms benefit from focus and economies of scale, so too can universities. Specialization and a continued drive to focus on excellence in chosen strategic areas is vitally important. Canada has some leading global institutions in specialized fields. We need more. The world's best students and professors can choose to go anywhere, and they typically choose the top universities in the world for their field of study. The attraction of top talent reinforces the excellence of these institutions.

Third, post-secondary education institutions must collaborate more closely with the business community. The model of the academy being withdrawn from the economy is outdated. Business–university collaboration is key to Canada's ability to be more competitive in the future. Business leaders can contribute to the governance, direction and financing of educational institutions. Close collaboration will help ensure that universities better prepare their graduates to capitalize on opportunities in the private sector by tailoring their programs to labour market needs. It is in Canada's best interest for programs taught on our campuses to be better aligned with our economic objectives.

Fourth, more use should be made, where appropriate, of post-secondary co-op programs, because they provide a vital link between the campus and the workplace. They help ensure that Canadians are equipped to meet future labour market needs and that students have a better understanding of business as they enter the labour market. Co-op programs also support Canada's commercialization performance by allowing students to complement their technical studies with real-world business experience.

The Panel recommends that:

23. **Governments should continue to invest in education in order to enhance quality and improve educational outcomes while gradually liberalizing provincial tuition policies offset by more student assistance based on income and merit.**

24. **Post-secondary education institutions should pursue global excellence through greater specialization, focusing on strategies to cultivate and attract top international talent, especially in the fields of math, science and business.**

25. **Governments should use all the mechanisms at their disposal to encourage post-secondary education institutions to collaborate more closely with the business community, cultivating partnerships and exchanges in order to enhance institutional governance, curriculum development and community engagement.**

26. **Federal and provincial governments should encourage the creation of additional post-secondary education co-op programs and internship opportunities in appropriate fields, to ensure that more Canadians are equipped to meet future labour market needs and that students gain experiences that help them make the transition into the workforce.**

27. **Governments should provide incentives and undertake measures to both attract more international students to Canada's post-secondary institutions and send more Canadian students on international study exchanges.**

28. **Governments should strive to increase Canada's global share of foreign students, and set a goal of doubling Canada's number of international students within a decade.**

29. **Governments, post-secondary education institutions and national post-secondary education associations should undertake regular evaluations, measure progress and report publicly on improvements in business–academic collaboration, participation in co-op programs, and the attraction and retention of international talent.**

Immigrant Selection and Integration

Seventy-five percent of Canada's workforce growth now comes from immigration, and this is expected to reach 100 percent before the decade ends.[12] At present, one in five Canadian workers are foreign born.[13] In many regions and sectors, Canada is experiencing acute skills shortages, which slows economic growth. As our population ages and labour force growth declines, attracting and retaining skilled workers will become even more important.

Recent studies indicate that our record on immigrant integration is deteriorating. While recent immigrants have high average levels of education, their incomes relative to their Canadian-born counterparts eroded over the past 25 years. In 1980, immigrant men who had some employment income earned 85 cents for each dollar received by Canadian-born men. By 2005, the ratio had dropped to 63 cents. The corresponding numbers for immigrant women were 85 cents and 56 cents, respectively.[14]

Efforts to improve Canada's competitiveness will require Canadian governments, professional and trade associations to expedite efforts to assess and recognize foreign credentials. In 2001 alone, more than 340 000 Canadians held unrecognized foreign credentials, mostly post-secondary degrees and diplomas.[15] Part of the answer is for employers to show greater openness to immigrants with foreign education and experience.[16] But systemic change is also required.

An impediment to progress has been Canada's backlog in processing immigrant applications. As of June 2007, the backlog of immigrant applications to Canada was 870 000 cases, of which 570 000 were in the skilled worker category.[17] Depending on the country, some wait more than five years to finalize their applications. This backlog has meant long waits for prospective Canadians and lost opportunities for a Canadian economy that requires their skills.[18]

In order to meet urgent employer needs, Canada has introduced a Temporary Foreign Worker Program. Budget 2007 announced changes to streamline this program to enable employers to bring in workers more quickly to address their immediate labour shortages. The federal government also introduced the Canadian Experience Class to expedite the process for skilled temporary foreign workers and foreign students with Canadian credentials and work experience to remain in Canada as permanent residents. Budget 2008 announced further action to help address the growing demand at Canadian missions abroad for temporary resident visas for students and skilled workers, and committed to improve service and speed up processing for student visas.[19]

IMMIGRATION ADVANTAGE

In July 2007, Microsoft announced the opening of a new Microsoft Canada Development Centre in the Greater Vancouver area. The location "allows the company to recruit and retain highly skilled people affected by immigration issues in the US" and to "attract the next generation of leading software developers from all parts of the world."[20]

Canada's immigration policy and attractiveness to highly educated and skilled immigrants can and should be used as a source of competitive advantage, particularly vis-à-vis the US.

Finally, the Panel heard that our immigration policies impact Canada's attractiveness to investment and, particularly, as a site for corporate and divisional head offices. Our policies should facilitate management interchanges to give Canadians global experience and allow diffusion of international capabilities, and to preclude restrictive and time-consuming immigration procedures from becoming an impediment to the timely approval of multi-year secondment of foreigners to Canadian sites. In this connection, consideration must be given to providing working status to accompanying spouses and children.

The Panel recommends that:

30. **Reforms to Canada's immigration system should place emphasis on immigration as an economic tool to meet our labour market needs, becoming more selective and responsive in addressing labour shortages across the skills spectrum.**

31. **Canada's immigration system should develop service standards related to applications for student visas and temporary foreign workers, and should be more responsive to private employers and student needs by fast-tracking processing and providing greater certainty regarding the length of time required to process applications.**

32. **In order to ensure that Canada is able to attract and retain top international talent, and respond more effectively to private employers, Canada's immigration system should fast-track processing of applications for permanent residency under the new Canadian Experience Class for skilled temporary foreign workers and foreign students with Canadian credentials and work experience.**

Head Offices and Cities

Head Offices

The head office of an enterprise is its "brain." It is the place where strategy and other critical decisions are made by its key management personnel. Very large multinational enterprises (MNEs) that operate in more than one line of business will sometimes establish a divisional head office to provide such functions to a particular business or geography within parameters determined by the corporate head office. When one company acquires another, the head office of the acquirer invariably becomes the head office of the combined enterprise.

While Canadian head offices tend to be small, employing on average fewer than 50 employees,[21] they are a significant source of high-skilled, high-paying jobs. In 2005, average salaries at head offices in Canada were $74 900, well above the overall average salary of $37 800.[22] In addition to their direct employment impacts, head offices make a significant indirect contribution by attracting high value business services — legal, accounting, consulting, information technologies, marketing and advertising — to the community. The communities in which head offices are located also benefit from philanthropic activities. These include corporate charitable contributions, support for specific community causes and initiatives to encourage volunteering by senior managers and employees, who often play leading roles in such organizations.

In light of the evident benefits of head office activity, the spate of Canadian merger and acquisition activity in recent years and the resulting loss or downgrading of head office functions at acquired firms have given rise to unease about the impact on Canada and its leading head office cities: Toronto, Calgary, Montreal and Vancouver. The statistics indicate that, while Calgary is gaining head offices and Montreal and Vancouver are losing them, in the aggregate Canada is not losing head offices.[23] This analysis and the lack of research quantifying the value of head offices have led some to conclude that public policy need not be concerned about the implications of the loss or downgrading of head office functions consequent on the sale of large Canadian companies. While the Panel does not dispute the statistics, we dispute that view. Our experience tells us that the head offices of large private companies and of public companies disproportionately provide the benefits that a head office provides to its host city and country. When a Canadian company is acquired by another Canadian company, Canada loses a head office but gains a stronger company. When the acquirer is foreign, Canada loses a head office and a company.

To ensure that Canada continues to benefit from head office presence, Canada needs to have public policies that nurture and develop Canadian-based MNEs (whose head offices will replace those of companies that are being acquired by foreigners). Canada also must ensure that its major cities have the attributes that will make them an attractive base for the divisional offices of non-Canadian MNEs. The United Nations Conference on Trade and Development[24] identifies eight key factors influencing the location of MNE head offices: excellent international accessibility, a skilled workforce especially with multilingual skills, high quality of life to attract international staff, low corporate and personal taxes, excellent information and communications technology infrastructure, well-developed business support services, low risk and proximity to customers. The study particularly emphasizes the importance of a highly skilled workforce.

The recommendations in this report, if heeded and implemented, will enhance Canada's competitiveness as a destination for capital and talent as well as the emergence of Canadian-based MNEs. As a consequence, they will enhance the quantity and quality of head offices located in Canada, and the associated benefits will accrue to Canadians.

Cities

In *The Rise of the Creative Class*, Richard Florida argues that successful cities attract the "creative class" by offering diverse job opportunities as well as social and cultural amenities. The creative class is a "fast-growing, highly educated and well-paid segment of the workforce on whose efforts corporate profits and economic growth increasingly depend."[25] The continued growth and success of our cities lie in their ability to attract and retain the best and the brightest.

Canada demonstrates Florida's thesis. More than 80 percent of Canadians live in urban areas, anchored by Toronto, Montreal, Vancouver, Ottawa–Gatineau, Edmonton and Calgary.[26] Canadians will continue to urbanize.

Our major urban areas are therefore the locus of talent. They attract the highly educated from within Canada, and they are also magnets for talent from abroad as the primary gateways for recent immigrants. Immigrants settle in large cities in pursuit of job prospects. In fact, 97 percent of recent immigrants settled in urban centres — fully 69 percent of these in Toronto, Montreal, and Vancouver[27] — bringing new cultural and linguistic diversity to Canada and a network of global connections. In short, our cities provide the critical mass of talent and productive capacity, underlie innovation, and attract investment and employment. It is no surprise, then, that our biggest and most competitive firms are located in our

six largest urban centres. Indeed, these six urban centres are the sites of 62 percent of all head offices in Canada.[28]

We have concluded that these large, dynamic urban centres have a national importance that transcends their significance to a region or province, in the same way that the national railways were recognized in the 1800s as having a national significance. Our largest urban centres have a role to play in assuring Canada's future prosperity that transcends their municipal and provincial boundaries.

Canadian cities continue to rely primarily on property taxes and user fees to finance municipal services. In the US, all cities levy a selective sales tax of some kind. For example, alcohol and beverage taxes are levied in Atlanta, Chicago, and Detroit, while tobacco taxes are levied in Chicago.[29] Many other cities employ user fees, cost recovery, and public–private partnerships to address funding issues. Most cities in other OECD countries have broader and more secure tax bases than Canadian cities.[30]

In addition to costs associated with a growing population, urban centres bear the burden of maintaining and building new infrastructure and integrating immigrants. As the Conference Board of Canada concludes, "The infrastructure of Canada's major cities is not keeping pace with the needs of the manufacturing and service businesses whose competitive advantage is tied to the existence of a modern, accessible and reliable network of roads, rail and air transport."[31] It is estimated that the cost of repairing or replacing civic infrastructure (public transit, roads, highways, bridges, and waterworks) to meet current requirements ranges from $50 billion to $125 billion.[32]

In recent years, governments have begun to address these funding issues. In 2007, the federal government announced *Building Canada*, a seven-year plan totalling $33 billion; part of this is earmarked to municipalities, including the GST rebate and Gas Tax Fund.[33] There are also notable new investments by the provinces of Quebec, Ontario and others.

During the Panel's consultations and in the submissions we received, there was recognition of the advantage to Canada of the effective functioning of large urban centres. There was also recognition that the lines of accountability, program and service responsibility, and revenue sources in Canada are misaligned with respect to urban centres. While the federal and provincial governments possess the key levers to raise revenue, municipal leaders are responsible for administering urban centres with inadequate access to secure revenues. This results in poor governance and declining quality of life in our urban centres, with negative knock-on effects on Canada's competitiveness.

Governments should establish a more adequate, stable and diversified revenue base to underpin Canada's urban centres. Canada's municipalities, particularly those anchoring our largest urban areas, need to be seen as key partners in executing Canada's Competitiveness Agenda, and to be given the tools to attract the business, investment and talent needed for the continued growth of our economy.

The Panel recommends that:

33. **Given the national importance of Canada's largest urban centres, the federal government should provide leadership to deal with critical urban issues, particularly those affecting infrastructure, immigration, and higher education and training.**

34. **In addressing urban issues, municipalities need a more stable, secure and growing revenue source. In particular, provincial governments should assess the feasibility of allowing any municipality to levy a 1 percent value-added tax within their jurisdiction, assessed on the harmonized goods and services tax base, which would be collected by the Canada Revenue Agency (or Revenue Quebec) on behalf of the municipality.**

35. **In dealing with these issues, municipal authorities that have not already done so should make greater use of financing mechanisms such as user fees, cost recovery programs, debt financing and public–private partnerships.**

Fostering Growth Businesses

Entrepreneurs are people who identify and capitalize on economic opportunities. They innovate, take risks, and develop new goods and services. They are responsible for the creation and expansion of businesses, and fuel overall economic expansion.

Small and medium-sized enterprises (SMEs) are an important part of the Canadian economy. In the dynamic global economy characterized by the forces of creative destruction, SMEs with the desire and capacity to grow are a key source of Canada's future prosperity.

SMEs represent over 99 percent of all firms in Canada, 48 percent of the total labour force in the private sector, and over 30 percent of all new jobs.[34] One study estimates that 22 percent of gross domestic product could be attributed to companies with fewer than 50 employees.[35] While SMEs are defined as firms with 500 employees or fewer, most Canadian SMEs have fewer than four employees.[36]

Productivity growth is affected by the birth and death of small firms. Only a small number of new business start-ups will survive and grow, and an even smaller number have the potential to grow to become high-performance firms that will drive innovation and performance and become Canada's future large enterprises.

Survival is the main preoccupation of small business: only 54 percent of businesses with fewer than 99 employees survive for two years, and closer to 20 percent survive for 10 years.[37] At the same time, not all small firms have the intention to grow. A survey conducted by the Business Development Bank of Canada confirms that not all business owners plan to expand their businesses.[38]

There is currently no overarching federal government policy covering SMEs or entrepreneurs, other than the 1994 declaration "Growing Small Businesses."[39] At the federal level alone, the government offers support to SMEs through at least 13 different departments. Many more programs and services are offered by provincial governments. As a result, some businesses have found it difficult to identify and access programs meeting their particular requirements, even when they exist.

While the keys to success are diverse, our consultations and submissions identified the critical importance of accessing financing. The principal deficiencies identified were venture capital available at the "angel" and late stage.

Budget 2008 announced $75 million for the Business Development Bank of Canada to support the creation of a new privately run venture capital fund.[40] Several provinces have also made similar commitments, such as the British Columbia Equity Capital programs and the Ontario Venture Capital Fund. The Panel acknowledges the governments' recognition of this issue. However, in our view, investors putting their own capital at risk should make capital allocation decisions, as market forces will better determine successful outcomes. The role of government is to enhance returns to the level necessary to attract sufficient capital to this activity through, for example, the tax system.

The Panel recommends that:

36. **Federal and provincial governments' small and medium-sized enterprise policies should focus on those firms that demonstrate the desire and capacity to grow to become large enterprises. Small and medium-sized enterprise policies and programs should be subjected to regular review in order to assess and measure whether this objective is being met.**

37. **The Minister of Finance and the Minister of Industry should develop and release a public report on options, including tax incentives, to facilitate the provision of more private venture capital, particularly at the "angel" and late stage, by June 2009.**

Strengthening the Role of Directors in Mergers and Acquisitions

The details of the regulatory and legal frameworks governing the exercise by public company directors of their fiduciary duties are of narrow professional interest. However, the market for corporate control affects not only public shareholders but also the career opportunities and community benefits associated with large Canadian publicly traded enterprises and their head offices. This is why the "hollowing out" debate is of broad significance to Canadians.

The Panel received a number of submissions to the effect that an important factor contributing to the perceived imbalance between the acquisition of Canadian companies by foreigners and the acquisition of foreign companies by Canadians is the limited tools available to directors of Canadian public companies when exercising their fiduciary duties in regard to an acquisition proposal, relative to directors of US public companies.

In examining this issue, the Panel sought advice from lawyers and investment bankers with deep experience on both sides of the border. The position of directors of a federally incorporated Canadian company was compared with that of the directors of a US company incorporated in the State of Delaware, on the basis that these are the benchmark jurisdictions of incorporation for public companies in each country. We asked how differences in the legal and regulatory framework in which the directors function would impact their margin for manoeuvre. This involved looking at the applicable corporate law, securities law and enforcement mechanisms, and roles played by the courts and securities regulators.

Except in rare cases, directors' duties imposed by corporate law do not give rise to material differences in the responsibilities or actions of the directors of Canadian relative to Delaware companies in deciding whether to engage in a process to sell a company in response to an unsolicited acquisition proposal. The relevant statutes provide that directors of Canadian companies owe their fiduciary duties to the "corporation" while Delaware directors owe their duties to the shareholders. However, where the choice between selling the company and remaining independent to pursue the company's business plan materially impacts only the value of the shareholders' investment, this difference in terminology is of no practical effect. Once a company is "in play" directors on both sides of the border have an obligation to maximize the value of the company. However, where the decision materially impacts the value of the investments of other stakeholders such as creditors, as a fiduciary matter, while directors of a Delaware company may focus only on the interests of shareholders in maximizing the value of the company through a sale, directors of Canadian companies are required to consider those other interests as well.[41]

Stock exchange rules in the two countries have very little impact on director response to an acquisition proposal. In fact, Toronto Stock Exchange policy (which the Panel has been advised is under review) with respect to the issuance of shares to facilitate acquisitions without shareholder approval is an important advantage for Canadian companies pursuing acquisitions.

The key difference in regulation on the leeway available to directors arises from the greater role played by Canadian securities regulators with respect to takeover defences. In the US, the securities regulator (the US Securities and Exchange Commission) has a very limited role respecting conduct of takeover defence. In Canada, the policies of Canadian provincial regulators and the active role they play in enforcing them place a "thumb on the scale." This arises from the way Canadian securities regulators deal with defensive tactics and, in particular, shareholder rights plans ("poison pills").

Unlike the US Securities and Exchange Commission, which leaves to the US courts the regulation of substantive decision making by directors, Canadian securities regulators are prepared to actively supervise the exercise by directors of their fiduciary duties in relation to change of control proposals. Established policy is reflected in National Policy 62-202 (Defensive Tactics). The policy essentially relegates the directors of a company in receipt of a credible acquisition proposal to the role of auctioneer. In keeping with this orientation, Canadian securities regulators have a well-established policy of requiring, in almost all cases, the termination of poison pills within 40 to 70 days from the commencement of a bid. Acquirers have come to rely on this time frame. This relatively short period, predictable outcome and policy stance provide almost no leverage to a board seeking to negotiate with a potential acquirer.

The posture of Canadian securities regulators was developed approximately 20 years ago in a market environment where there were no hedge funds and institutional shareholders were by and large passive investors. Corporate governance practices and the focus on directors' and management conduct were also very different from those of today. The regulator filled a void left by deferential Canadian courts. Since then, our courts have demonstrated a willingness and capacity to deal with directors' duties in a timely manner, and standards of corporate governance have improved in response to investor activism and the "Enron affair." Today's institutional shareholder routinely pursues and protects its interests in a more active and aggressive manner than when these policies and practices were developed.

In fact, the outcome of public acquisition proposals, whether hostile or not, is determined today by an efficient market in which shareholders of the target company can, and often do, sell immediately into a liquid market, which enables them to monetize the proposal at a discount even before the board of the target company has pronounced on it. Every share that moves into the hands of these arbitrageurs is a vote for the proposal and increases the likelihood that the target company will be sold. However, the tools available to the directors can affect the price and, in rare cases, lead to an unbridgeable price gap that causes the acquisition proposal to fail. The Panel concludes that the market for corporate control has matured to the point where it no longer requires the regulator's compensating "thumb on the scale" to achieve a competitive result.

The Panel concludes that the new global context in which mergers and acquisitions (M&As) occur requires that Canada update its regulatory framework to place the directors of Canadian companies on the same footing as their counterparts at Delaware companies. The changes required are straightforward.

Ontario is generally recognized as the leading jurisdiction in securities regulation of M&A. This is due to the fact that Toronto is home to more public company head offices than any other city, and that head office location is the basis for provincial securities commission jurisdiction in M&A matters.

The Panel recommends that:

38. **Securities commissions should repeal National Policy 62-202 (Defensive Tactics).**
39. **Securities commissions should cease to regulate conduct by boards in relation to shareholder rights plans ("poison pills").**
40. **Substantive oversight of directors' duties in mergers and acquisitions matters should be provided by the courts.**
41. **The Ontario Securities Commission should provide leadership to the Canadian Securities Administrators in making the above changes, and initiate action if collective action is not taken before the end of 2008.**

The Canadian Economic Union

One of Canada's defining characteristics is its regional diversity, as reflected in the Canadian federal system, with individual provinces and municipalities setting their own policies based on local priorities.

The division of powers in the Canadian constitution was developed in the context of an agrarian economy in which the speed and distance that goods could be moved was limited by the capacity of the "iron horse." This framework has not evolved to keep pace with Canada's changing economic context. The result is a misalignment of revenue sources with program responsibilities. More importantly in terms of Canada's competitiveness, powers and responsibilities are misaligned with the national challenges of a global knowledge-based economy.

The resulting internal barriers to the free movement of goods, services and people drive up costs and weaken Canada's competitiveness for talent and capital because of the resulting complexity and market fragmentation. Canada is a small market and, as a study by SECOR rightly concludes, "Country fragmentation makes a small economy smaller, and translates into a loss of business opportunities and additional costs for domestic players."[42]

The submissions received by the Panel and research conducted for the Panel make it clear that this failure to evolve our governance at a sufficient pace may be laid at the feet of all levels of government and the courts. While it is difficult to place a credible dollar cost to this issue, the Panel concludes that the negative impact justifies dramatic and immediate action.

Canadian governments need to work better together if we are to achieve our competitiveness objectives. Our courts need to take account of contemporary realities in defining the powers of the various levels of government under the existing constitutional arrangements. The various levels of government must cooperate in the national interest. Because the national interest is in play, the Panel calls on the federal government to show leadership by taking the initiative and employing all legal and financial tools available to it. We are encouraged by the federal government's signal in the most recent Throne Speech that it is prepared to do so.

To illustrate the problem, we discuss below three specific situations selected from the many that were brought to our attention in submissions and consultations.

Agreement on Internal Trade

In 1994, federal and provincial governments signed the Agreement on Internal Trade (AIT). It was intended to reduce or eliminate barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic Canadian market.[43] In the 14 years since the AIT was put in place, progress has been far too slow.

INTERPROVINCIAL BARRIERS

Anyone can be an accountant in Canada, but not anyone can provide independent audits. Since provinces individually regulate public accounting services, whichever professional body is recognized in a province gets to decide who can provide independent audits. Panels convened under the AIT in 2001 and 2005 found that Ontario and Quebec regulations were inconsistent with the AIT and impeded internal trade and labour mobility. Nevertheless, progress has been slow, since the AIT dispute resolution process has no mechanism to ensure rulings are implemented.[44]

The AIT suffers from many weaknesses. In particular, its scope is limited to specified sectors. It has an ineffective dispute settlement mechanism that is slow and unresponsive to the private sector. It relies wholly on moral suasion and good faith. While governments appear committed to strengthening the AIT, there has been more input than output.

The bilateral approach negotiated by British Columbia and Alberta in the Trade, Investment and Labour Mobility Agreement is promising but restricted to two jurisdictions, and its effects are not yet known. Bilateral discussions between Ontario and Quebec may also yield results, but a national effort is clearly preferable to bilateral progress.

Other federations find ways to address this. Australia, a federation not unlike Canada, enacted the *Mutual Recognition (Commonwealth) Act* 1992. The essence of this statute is that goods produced in one jurisdiction, which may be lawfully sold in that jurisdiction, may also lawfully be sold in other jurisdictions. They have also taken this step for the mutual recognition of occupational credentials. The European Union has in place a common market policy based on the free movement of goods, services, people and capital, and has achieved much progress.[45]

On April 1, 2008, a national coalition of ten business, industry and professional associations urged the federal and provincial governments to cooperate in finding ways to strengthen the economic union. The coalition called on Ottawa to take the lead in improving trade across Canada by legislating a set of open trade

principles and establishing a standing internal trade tribunal to ensure that all parties adhere to those principles:

> *"Across the country, governments have awakened to the fact that internal trade barriers hurt consumers, discourage investment and damage Canada's international reputation as a place to do business. The time has come for a bold new approach that strengthens the economic union and enhances Canada's prosperity and competitiveness."*[46]

We agree.

In particular, we encourage the Forum of Labour Market Ministers to achieve their stated goal of enabling any worker qualified for an occupation in one part of Canada to have access to employment opportunities within that occupation in any other province or territory by the April 1, 2009 deadline established under the AIT.[47] Other internal barriers to interprovincial movement of goods and services would benefit from a corresponding objective and a similar deadline.

The Panel recommends that:

42. The federal government should provide leadership in the elimination of all internal barriers between the provinces and territories that inhibit the free flow of goods, services and people by June 2011.

43. Federal and provincial governments should establish by June 2009 a work plan to achieve this goal and provide interim reports on progress every six months.

National Securities Regulation

Canada is the only OECD country that has not adopted an integrated national approach to securities regulation. Despite past and present efforts to harmonize, we currently have 13 securities regulators, with 13 sets of laws and 13 sets of fees.[48] The inefficiencies are obvious.

Canada clearly would benefit from a streamlined regulatory approach. The International Monetary Fund asserted earlier this year that more streamlined securities regulation would: allow Canada to respond more quickly to local and global developments, reduce costs for market participants, eliminate the inefficiencies created by the limited authority of individual provinces, and help simplify coordination with other enforcement agencies.[49]

The Panel is encouraged by the continued focus that is being dedicated to the issue of securities regulation in Canada. In February 2008, the federal government named an Expert Panel, chaired by Tom Hockin, to provide advice and recommendations by year end on securities regulation in Canada. We are particularly encouraged that that Panel has been asked to examine how Canadian regulations can minimize impediments to cross-border capital flows.[50]

The Panel recommends that:

44. The federal government should show leadership regarding national securities regulation and resolve this matter expeditiously.

Environmental Assessment

Canadians place great value on ensuring a healthy and sustainable environment for current and future generations. Responsible environmental stewardship will continue to be important to both our quality of life and the competitiveness of our economy.

At the federal level, environmental assessment is undertaken by departments, agencies, boards, commissions and Crown corporations. The Canadian Environmental Assessment Agency, which reports to the Minister of the Environment, provides coordination, advice and policy guidance. In 2005, the federal government issued a Cabinet Directive to all departments that indicated that it will conduct environmental assessments under the *Canadian Environmental Assessment Act* in such a way that "places a priority on the delivery of high-quality environmental assessments in a predictable, certain and timely manner."[51]

The Panel has heard that improving certainty and timeliness and reducing duplication between the federal and provincial processes for environmental assessment is key. Often a major project proposal will be subject to both provincial and federal environmental review. The difficulties lie in the differing timelines and potential duplication of efforts, which directly affect important investment decisions. The more complex assessments, including large-scale natural resource projects, have been lengthy, often extending up to several years at the federal level.

The British Columbia government has a good model of applying timelines to key parts of the process. Once a completed application is accepted, the British Columbia government commits to complete the review, prepare the assessment report and refer the application to ministers for a decision on the issuance of an environmental assessment certificate within a set 180-day time frame. Ministers are then obliged to make a decision within 45 days.[52]

The federal Major Projects Management Office is intended to bring a greater degree of oversight, transparency and predictability to the review of major natural resource projects, including developing and reporting on project agreements and time frames for regulatory review.[53] It is too early to evaluate its impact.

While the Canadian Environmental Assessment Agency has assumed new responsibilities for managing major resource projects, addressing many of the underlying issues related to diffuse accountability under the current *Canadian Environmental Assessment Act* will require legislative change. The Act will be reviewed by Parliament in 2010, and issues of accountability, cooperation and timeliness should be examined. We believe that the federal government should commit to establishing meaningful deadlines for completing its environmental assessments and respect the timelines of the relevant provincial jurisdiction.

The Panel recommends that:

45. **The federal government should more fully harmonize federal environmental assessment procedures with provincial processes.**

46. **Beginning January 2009, the federal government should abide by timelines that are not longer than the environmental assessment timelines set by the relevant provincial jurisdiction for a proposed project subject to assessment and incorporate such timelines as part of the broader national review required for 2010.**

Canada–US Economic Ties

NAFTA has been a success for Canada. It is vital to safeguard and augment its benefits. Canada and the US trade over $1 million worth of goods and services with each other every minute of every day of the year. In the wake of NAFTA, Canada restructured parts of its economy to better integrate with the US. We must make every effort to capitalize on this investment of time, capital and effort, recognizing that this is far and away Canada's most important near-term economic opportunity.

The common observation that over 70 percent of our trade is with the US belies the fact that the Canadian economy is more closely integrated than ever with that of our southern neighbour. Stephen Blank notes, "Ottawa and Washington talk about the world's largest bilateral trading relationship. But we really don't trade with each other, not in the classic sense of one independent company sending finished goods to another. Instead we make stuff together."[54]

This is epitomized by how new business models work. For example, an automobile may contain components that have crossed the border 18 times before the finished product reaches the car lot on either side of it. Two-way truck traffic volumes facilitating this trade means approximately 13 million cross-border journeys a year.[55] The majority of this trade is intra-firm; the remainder is within global value chains rather than traditional exports or imports.

Since September 11, 2001, the Canada–US border has "thickened," threatening the viability of the fully integrated NAFTA business model. The problem is that "for Americans the border is a security issue; for Canadians it is a vital business artery that has become clogged."[56] The Conference Board of Canada observes that document processing and other procedural delays at border crossings mean that "just-in-time" manufacturing (of supply chain inputs) is in danger of being replaced by much more costly and inefficient warehouses on either side of the border "just-in-case."[57] Because the US market is so much larger than the Canadian market, these concerns weigh against the establishment in Canada of business activity to serve the North American market.

SLOW STANDARDS HARMONIZATION

"… the continued presence of a heavily regulated border and of similar but differentiated regulatory regimes still undermines the ability of firms and individuals alike to reap the full benefits of deepening integration."*

A single market for automobiles in North America has been in the making since 1965. As of 2008, however, this process is still not complete.

* Source: Michael Hart, "Steer or Drift? Taking Charge of Canada–US Regulatory Convergence," C. D. Howe Institute Commentary no. 229, March 2006.

The chief mechanism to deal with Canada–US border issues, the Security and Prosperity Partnership (SPP), has yielded too little progress in improving cross-border flows. Indeed, Canada risks being side-swiped by the preoccupation the US has with its southern border.[58] The most recent SPP Summit confirms that little progress can be expected within a relevant time frame. In this context, the Panel believes that it is imperative to intensify our bilateral effort with the US, focusing on facilitating the flow of goods, services and people across the Canada–US border. If we are forced to choose between trilateral and bilateral efforts, the latter should be chosen. Enhanced public recognition of the benefits of the Canada–US trading relationship south of the border should also be part of this effort.

Recognizing the vital contribution of Canada–US trade to Canadian prosperity, a two-faceted approach is necessary. The first and most immediate priority is to deal with logistics and physical infrastructure logjams at the border, starting with Windsor–Detroit (the conduit for 30 percent of total Canada–US trade[59]), and then other crossings. The Canadian and US Chambers of Commerce have produced a joint study on reducing border costs that outlines a number of recommendations that would facilitate cross-border shipping and complement our broader recommendations.[60] The federal government must also lead on enhancing our transport infrastructure, beginning at the border.

The Panel recommends that:

47. **Addressing the thickening of the Canada–US border should be the number one trade priority for Canada, and requires heightened direct bilateral engagement at the highest political levels.**

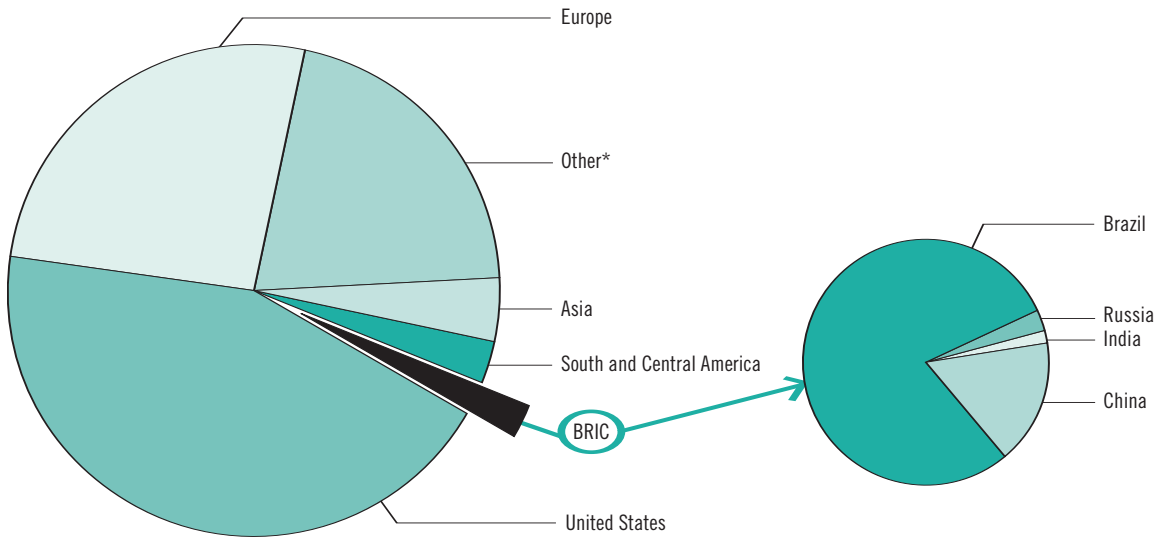
48. **Canada should act to create a more seamless US border crossing process, focusing on priorities jointly identified by the Canadian Chamber of Commerce and US Chamber of Commerce in their February 2008 report, while responding to legitimate US security needs, and funding and expediting vital border infrastructure.**

International Trade and Investment

Much of Canadian wealth and well-being is directly attributable to our success as a trading nation. Canada is the second most trade-intensive country in the G7, with total trade amounting to 70 percent of gross domestic product.[61] Complementing the increase in importance of trade in the Canadian economy, Canadian investment flows have also increased throughout the postwar period. Although Canada has always been an important destination for foreign direct investment, Canadian direct investment abroad has also increased as the Canadian economy has matured.[62]

While the US is Canada's biggest trading partner, new trading patterns and potential partners have emerged — in the European Union, South America, Asia and the growing BRIC countries. These are too numerous to tackle simultaneously, so priorities among them must be established.

Figure 11 — Geographic Distribution of Canadian Direct Investment Abroad, 2007



*Caribbean, Africa, Oceania and Mexico

Source: Statistics Canada, CANSIM Table 376-0051.

Too Little Engagement with Global Markets

While Canadian investment flows are more diversified than trade flows, too few Canadian companies have excelled at exploiting new economic opportunities beyond the US or in regions outside those where we have long-standing relationships. To be competitive, Canadian business must engage internationally, invest shrewdly, and marshal the skills and resources to add value and seize global opportunities. The government also has a role to play. As the Canadian Manufacturers and Exporters note, Canadian firms "require a world-class business environment in order to be world-class competitors. In turn, they depend on governments to take a strategic approach to policy making. …"[63]

The Panel notes that Canada has recently launched a Global Commerce Strategy (GCS). The GCS is a three-part strategy to increase Canadian participation in global investment and innovation networks beginning in North America, renew the Canadian international trade negotiations agenda, and better connect Canadian companies to global opportunities through realigned services to business.[64]

However we have heard through our consultations that, unlike the initiatives of other countries competing for markets on behalf of their companies, the GCS is lacking in profile and poorly understood, including by Canadian businesses.

Clear Plans and Priorities

Canada must ramp up its participation in new trading relationships and more aggressively pursue opportunities in the world economy, or risk being left behind. With poor prospects for a successful Doha Round of multilateral trade negotiations at the World Trade Organization (WTO), the onus is now on governments to focus on bilateral and regional arrangements through free trade agreements (FTAs) and foreign investment protection agreements (FIPAs).

The purpose of FTAs is to improve market access for trade in goods and services, either regionally or bilaterally. FTAs deliver commercial benefits by reducing tariffs, as well as discriminatory non-tariff barriers in areas such as standards or restrictions on services trade. These agreements have proliferated throughout the world. Since 2001, the US concluded 15 FTAs, and the EU has been similarly active. However, Canada has a poor record of concluding such deals and, despite an active negotiating agenda, has signed only three recent FTAs (with European Free Trade Association countries, Peru and Colombia).

One reason for this weak performance has been the difficulty in dealing with specific sectors in the Canadian economy. For example, the Panel understands that interests associated with the shipbuilding, textile and apparel, and agricultural sectors have at times actively opposed the conclusion of trade agreements that more broadly serve the goals of Canadian productivity and competitiveness domestically. This has served to deprive Canada of the benefits that accrue to the economy through greater competition. Insofar as the government liberalizes its investment restrictions generally and in specific sectors, it is more able to negotiate trade and investment agreements in Canada's economic interests.

Canada also has a poor track record at completing FIPAs or bilateral investment treaties (BITs). These agreements provide protection against expropriation without compensation and other mistreatment of investors.[65] Canada has been able to effectively conclude only one new agreement (with Peru) since 2001. The United Nations Conference on Trade and Development estimates that 600 BITs have been negotiated globally since 2001. Countries such as Switzerland, Germany and China have negotiated over 100 each.

Canada must negotiate and conclude more FTAs and FIPAs with our trading partners, beginning with those markets determined to have the greatest trade and investment flows or potential. More agreements mean enhanced market access and investment protection for Canadian firms as well as greater competitive intensity in Canada. Failure in this regard means that Canadian firms are put at competitive disadvantage relative to firms based in countries with more agreements. An example cited to the Panel concerned a manufacturer that located North American production facilities in Mexico in part because Mexico has a free trade agreement with the EU and Canada does not. Rigorous impact assessments concerning prospective trade agreements would help generate domestic support for these deals.

In the context of our foreign relations more broadly, Canada should articulate its international trade and investment objectives and then make foreign policy choices with these goals in mind. Negotiating partners must be chosen strategically — with a view to maximum commercial impact in a world of global value chains and changing trade patterns. Foreign policy goals should be formulated with the understanding that they are intimately related to commercial policy goals.

More Collaboration with Business on Trade and Investment Priorities

We have heard that government consultations on trade and investment negotiations and services to business, including inward and outward investment flows, are not sufficiently coordinated by different government departments and sometimes are undertaken after key decisions have been taken. The Canadian Chamber of Commerce summarizes, "What we would like to see is a more focussed international strategy behind these negotiations that is developed in concert with, and reflects the priorities of, Canadian business."[66] In Canada's case, enhancing consultations processes across government to facilitate *pro-competitive* business input on trade-related matters would assist in mobilizing support for crucially important trade and investment liberalization. A good starting point would be the prioritization of our FTA and FIPA initiatives. A stronger role for the Minister of International Trade in advancing the trade and investment agenda on behalf of the government would contribute to this.

The Panel recommends that:

49. The federal government should set an ambitious timeline for concluding priority trade and investment agreements, led by the Minister of International Trade who should pursue a flexible, results-based approach, beginning by simplifying Canada's model foreign investment protection agreements and streamlining our free trade agreements negotiating processes.

50. Beginning in 2009, on behalf of the federal government, the Minister of International Trade should report at least annually on Canada's trade and investment liberalization initiatives generally and in specific sectors.

51. Beginning immediately, the Minister of International Trade should build on the Global Commerce Strategy by developing and publicizing annual plans and priorities for enhanced trade and investment, and by identifying priority trading partners, economic impacts of prospective agreements and services to businesses. Comprehensive input from business should guide and inform Canada's approach across government.

Regulation

In many of the submissions to the Panel and through our consultations, we heard that federal, provincial and municipal regulatory processes constrain Canadian competitiveness.

Regulation is one means governments use to achieve public policy objectives, such as health, safety, environmental protection, and a fair and efficient marketplace for industry and consumers. However, regulations often unnecessarily or inadvertently constrain Canadian competitiveness because public policy initiatives are rarely designed to minimize their impact on competition.

An unintended consequence of regulation can be the anti-competitive effect of preventing the entry of new products into the Canadian market. As the C. D. Howe Institute notes in its submission to the Panel, "regulatory policy can improve Canada's attractiveness as a destination or home for business establishments."[67]

In this regard, the Panel believes that, building on our NAFTA positioning, competitiveness in Canada would benefit if the default position in the regulation-making process was to harmonize our product and professional standards with those of the US so that Canada and the US would represent a single market for those products or services.

Concerns about the impact that regulations have on competitiveness are not new. In fact the 2004 External Advisory Committee on Smart Regulation, chaired by Gaetan Lussier, got it right. The Committee heard, "the current regulatory system often acts as a constraint to innovation, competitiveness, investment and trade." Lussier concluded, "… I observed an increasingly profound disconnect between the regulatory system and 21st century reality. …Without rapid and significant change, Canada's ability to innovate and provide citizens with high levels of protection would be impaired."[68]

The Panel has been advised of the following steps taken by the federal government to address regulatory issues:

- In March 2005 under the Security and Prosperity Partnership of North America, Canada, the United States and Mexico agreed to work together to strengthen regulatory cooperation, streamline regulation and regulatory process, and encourage the compatibility of regulations.[69]

- The government has set the goal of simplifying compliance with regulations by reducing the number of information and administrative requirements imposed on business by 20 percent by November 2008.[70]
- A new Cabinet Directive requiring that all new regulations undergo greater scrutiny came into effect on April 1, 2007.[71]
- In 2007, the government established a Major Projects Management Office to provide overarching management of the federal regulatory system for major natural resource projects and to identify areas where the federal regulatory process can be improved, working with regulatory departments and agencies.[72]

We understand that there are more than 20 000 regulators in the federal government working in more than 20 different departments and agencies.[73] Regulatory departments and agencies are required to implement the Cabinet Directive while a central group, numbering about 30, is charged with providing policy leadership on federal regulatory policy as well as the review of new regulations. While a simple metric, these numbers make a powerful statement. Moreover, political responsibility seems to be dispersed among ministers and departments, and overall leadership appears problematic. Finally, none of these initiatives appears to be aimed squarely at confronting federal–provincial overlap or duplication, or a re-engineering of regulatory regimes, which is a principal source of complaint.

The 2004 Smart Regulation Report set out useful principles: effectiveness, cost efficiency, timeliness, transparency, accountability and performance. We accept these, placing competitiveness at the top of the list.

It is premature to judge the efficacy of the more recent initiatives to reduce the regulatory burden. The Panel believes that effective regulatory reform is vital and that the success of any reforms will require strong leadership, a comprehensive process focused on execution, meaningful milestones and deadlines, and rigorous evaluations.

The Panel recommends that:

52. **A senior federal economic minister should be mandated to lead and oversee progress on regulatory reforms, implementing a new regulatory screen by June 2009 that would subject all new regulations to a rigorous assessment of their impact on competitiveness.**

53. **Each major federal regulatory department and agency should reform its processes to increase transparency, reduce overlap and duplication, and set clear standards to yield time certain decisions, reporting annually, commencing in 2010, on outcomes and performance.**

54. **The foregoing recommendations for regulatory reform are equally applicable to provinces and territories.**

55. **Canada should harmonize its product and professional standards with those of the US, except in cases where, and then only to the extent that, it can be demonstrated that the impairment of the regulatory objective outweighs the competitiveness benefit that would arise from harmonizing.**

Innovation and Intellectual Property

Innovation

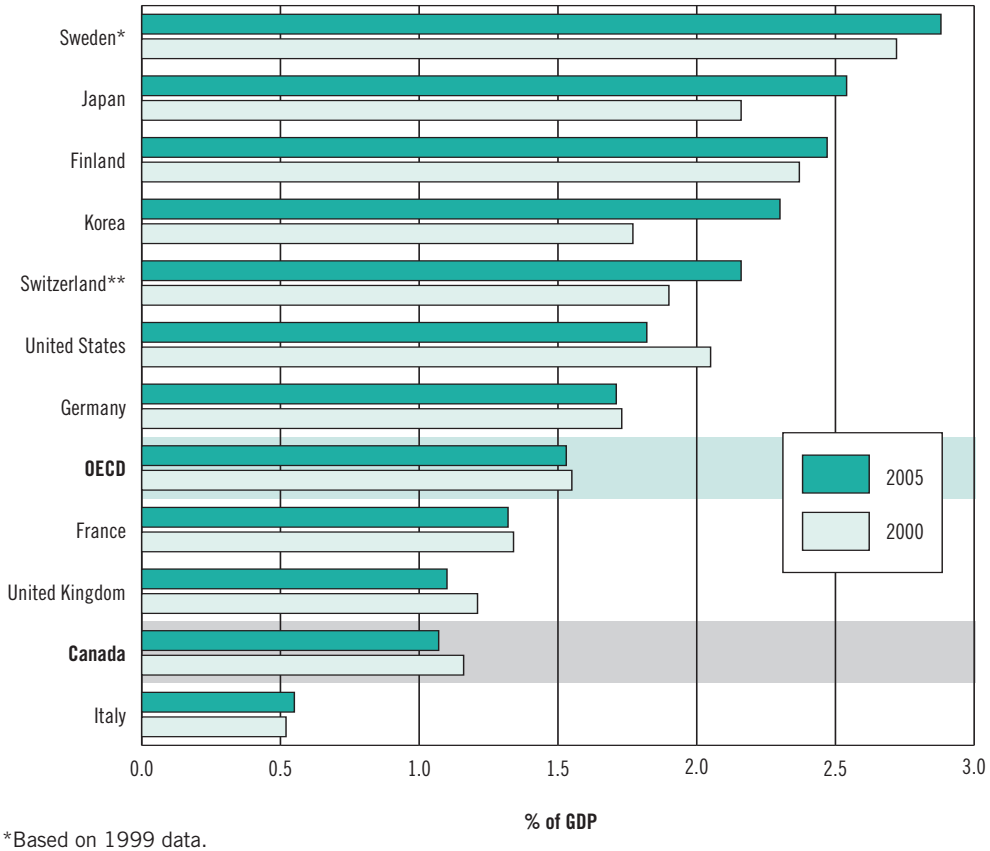
Innovation drives productivity and competitiveness in the 21st century. It underpins the fastest growing industries and high-wage jobs, provides the tools needed to compete in every business today, and drives growth in all major countries and in every sector. Innovation and technological leadership often mean the difference between success and failure in the global marketplace.

Innovation involves the successful interplay of four factors: public and private research and development (R&D), science and technology (S&T) policy, intellectual property rights, and the effective commercialization of technologically intensive goods and services.[74]

In addition, as we have seen, new business dynamics have combined to make the "innovation imperative" even more crucial for companies seeking to compete in the domestic and international economy. The Panel heard about all these factors in the course of its research and consultations.

Canada is near the top of the OECD in public research funding for R&D infrastructure.[75] But with respect to private investment in R&D, Canada ranks only 15th out of 30 OECD countries in terms of business expenditure on research and development (BERD), although the heavy weighting of resource industries in Canada's economy affects our ranking[76] (Figure 12). To increase competitiveness, Canadian business

Figure 12 — Business Expenditure on Research & Development (BERD) as a Percentage of Gross Domestic Product, 2000 and 2005



*Based on 1999 data.

**Based on 2004 data.

Source: OECD, *Main Science and Technology Indicators 2007/1* (Paris: May 2007).

needs to increase its expenditure on R&D in order to enhance its knowledge, know-how and technology to the level necessary to be globally competitive.[77]

In this regard, we acknowledge improvements to the scientific research and experimental development (SR&ED) tax credit in the most recent Budget. Notwithstanding the $4 billion in tax assistance in 2007 through SR&ED,[78] we believe that it is important to closely monitor the SR&ED program in line with the important policy goals of enhancing business investment in R&D and innovation in Canada.

More broadly, we believe that ambitious policies to promote competitive intensity, greater reliance on market forces, more openness to international trade and investment, and greater business investment including investment in R&D will enhance Canadian competitiveness and spur greater innovation.

Intellectual Property

Intellectual property (IP) rights are accorded to inventors and creators of new and/or original work. They are protected through domestic and international laws governing copyright (which typically also governs computer software), patents, trademarks, trade secret rights and industrial design rights. Internationally, intellectual property frameworks are governed by a number of agreements under the umbrella of the World Intellectual Property Organization (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works (copyright) and the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc.). In the trade domain, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement at the WTO seeks to protect these rights through the multilateral trading system, as do intellectual property chapters in many of our bilateral and regional trade agreements including NAFTA.

WATERLOO MAGIC

"Most North American universities retain ownership of intellectual property developed within their laboratories and classrooms. Not so at the University of Waterloo (UW). … Our professors and students own their creations and our creator-ownership policy encourages them to commercialize their research results. … Why? Because what goes around, comes around. The university has benefited immensely from the philanthropy of its graduates, who choose to support those who supported them. In the process, UW is becoming the best-supported university of its size per capita in the country. …"

David Johnston, President, University of Waterloo.

The Panel recognizes that intellectual property frameworks play a central role in rewarding and encouraging innovation by granting creators the rights that enable them to monetize the products of their innovation. This is particularly so for knowledge-based industries in the contemporary global economy. At the same time, the rights afforded by these frameworks should not be so all-encompassing as to impede further innovation by others and create barriers for new entrants. It is important for the federal government to get this balance right.

The ever-increasing importance of the Internet to all aspects of economic activity has brought new urgency to updating IP frameworks in Canada. We acknowledge the difficulties inherent in doing so, but believe that Canada has an opportunity to develop strong IP capacity and demonstrate to the world how competition and productivity can be furthered by a modern IP regime.

In this regard, any new copyright or patent legislation must take account of changes facilitated by the Internet as a platform for creating, selling or telecasting digital content, such as software, music, videos, and even literature. In this vein, the legislation should facilitate use of the Internet as a medium for research and education, cornerstones of Canada's ability to innovate and compete in a knowledge economy. There is no reason for Canada's patent and copyright frameworks not to be "state of the art" for the Internet age.

In addition, Canada must further strengthen its counterfeit laws. Commercial counterfeiting robs legitimate IP rights holders of their livelihoods and chills creative industries. OECD estimates for trade in counterfeit and pirated goods are up to $200 billion a year, and even this is likely an underestimate.[79]

Finally, complementing our views on enhanced business–university partnerships, we believe strongly in the benefits to Canada that can accrue from more effective commercialization of intellectual property. This has been acted upon effectively at the University of Waterloo, but this is not the only model for the effective transfer of technology from educational institutions to the marketplace.[80]

The Panel recommends that:

56. **The federal government should monitor the scientific research and experimental development tax credit program annually in order to ensure that business investment in research and development and innovation in Canada is effectively encouraged.**

57. **As a matter of priority, the federal government should ensure that new copyright legislation will both sufficiently reward creators while stimulating competition and innovation in the Internet age. Any prospective changes to Canada's patent law regime should also reflect this balance. The federal government should assess and modernize the Canadian patent and copyright system to support the international efforts of Canadian participants in the global economy in a timely and effective manner.**

58. **Before December 2009, the federal government should strengthen counterfeit and piracy laws to ensure that intellectual property rights are effectively protected.**

59. **Canada's post-secondary education institutions should expedite the transfer of intellectual property rights and the commercialization of university-generated intellectual property. One possible method to achieve this would be to move to an "innovator ownership" model to speed commercialization.**

9. Driving Change: A Canadian Competitiveness Council

By itself, competition law enforcement without supporting policies and institutions to promote competition is insufficient to realize the economic benefits of competitive markets or innovative and efficient businesses. The concept of competition, and the value it has for our society is not fully realized or widely appreciated by Canadians.

Improvements to our competitive performance will not be accomplished in a month or a year or solely by statutory reform. Sustained effort and focus are required in order to realize improvements. In research commissioned by the Panel and in views expressed in submissions and consultations, Canada has been identified as a country that does not place sufficient importance on competition in the conduct of its affairs.[1] The Panel agrees with this conclusion.

This theme is brought into greater relief by the Panel's belief that collaboration and progress in Canada between levels of government and the private and public sectors on competitiveness issues is sorely lacking.

AUSTRALIAN NATIONAL COMPETITION COUNCIL

In the early 1990s, in response to the decline in Australia's economic performance, the Government of Australia undertook a broad review of the country's economic and competition policies. Important findings from this review were that the country's competitiveness was not given sufficient priority in policy-making, and that the levels of government were not working well enough together to improve economic performance and opportunity for Australians.

In response, the Australian National Competition Council was established in 1995, reflecting an agreement among the federal, state and municipal governments that focused, coordinated action was needed if Australia was to address its economic challenges. While its mandate continues to evolve, its mission is to improve the well-being of all Australians through growth, innovation and rising productivity, and by promoting competition that is in the public interest.[2]

International Comparisons

The Panel consulted with Australian experts, including Fred Hilmer, who chaired a review of Australian competition policy in the early 1990s. The Australian review arose from that country's unique circumstances and challenges in the 1990s. Canada's situation in 2008 is obviously not the same as Australia's in the early 1990s. Yet there are useful lessons that can be drawn from Australia as well as other OECD countries that make competition a pillar of economic policy. We have been impressed by Australia's success in addressing complex competitiveness issues in the context of a federal state. A key factor was establishing a National Competition Council to spur productivity improvements.

Australia is unique in establishing an institution devoted solely to competition advocacy and has successfully broadened competition policy beyond traditional competition law enforcement. Other nations have used other institutional approaches to strengthen competition advocacy. In some countries, competition advocacy institutions foster market integration in a federal state, eliminate special rules and exemptions that blunt the impact of competition and promote greater adherence to competition values in regulatory decision making.

As examples:

- The Australian Competition and Consumer Commission, the US Federal Trade Commission and the Irish Competition Authority, among others, have powers to conduct studies of industry sectors and the interaction between government regulation and economic performance.
- Australia has two other institutions that participate in competitiveness matters, the previously mentioned National Competition Council and the Productivity Commission, which conducts in-depth studies of competitiveness issues.
- The Office of Fair Trading in the United Kingdom has responsibility to review all new regulations proposed by other government ministries and agencies to evaluate their impact on competition.
- In 2007, Sweden established The Globalization Council to promote a deeper knowledge of globalization issues, develop economic policy and broaden public dialogue to ensure that Sweden can compete successfully in a world marked by continued rapid globalization. This institution focuses largely on independent research but is also mandated to develop public policy recommendations for the Swedish government by 2010.
- The European Commission is responsible for enforcing rules on discriminatory state subsidies and liberalizing former state-regulated or controlled sectors such as transport, energy, postal services and telecommunications. It also undertakes market studies and approves new regulations following a competitive assessment process.

While these examples highlight the importance that other industrialized countries place on a dedicated focus on competition, the Panel does not recommend that Canada should directly mimic any single country's model. Other countries have benefited from the presence of a dedicated competition advocate or have given their competition law enforcement agencies, the equivalent of our Competition Bureau, additional competition advocacy powers.[3]

Giving Voice to Competition

Earlier in this report, we propose a change in the regulation-making process to ensure that the impact of proposed regulations on competition and Canadian competitiveness is given due weight in the regulatory process. However, an important contributor to the competitiveness issues which the Panel was established to address is the long-standing inaction with respect to these issues on the part of public policy-makers and regulators at all levels of government. The private sector bears at least equal responsibility with government in this regard.

The change in public and private sector mindset that will be required to elevate competitiveness to the priority needed to assure Canada's continuing prosperity will not be achieved easily or quickly. It will require a profound recalibration of Canadians' attitudes and understanding of the elements of national economic success. Accordingly, the Panel has concluded that the absence of a national institution independent of both government and the private sector with a focused mission to advocate for specific measures to improve the levels of competition and competitive performance in specific sectors of private and public endeavour in Canada based on rigorous expert analysis is the most significant gap in Canadian competition policy.[4] Such a body, staffed with the right people, has the potential for positive and lasting impact on the well-being of Canadians. Over time, the Panel believes that this will rival the impact of all the other measures discussed in this report.

Institutional Structure

International experience shows that there is no one "right" model for competition advocacy. Some countries place advocacy functions within the central government, others grant advocacy powers to the competition law enforcement agency, and a few have created an independent advocacy institution. Several countries distribute advocacy responsibilities across government institutions.

The Panel believes that a made-in-Canada approach, with the adoption of a specialized competition advocacy institution, is likely to provide the best prospects for sustained improvements in Canada's productivity. The increasing economic and legal complexity of competition law enforcement in Canada is a challenge for the Competition Bureau. Indeed, competition law enforcement is not restricted to the domestic arena; it has an increasingly complex international dimension where enforcers coordinate investigations. Providing the agency with additional advocacy responsibilities risks diluting the Competition Bureau's core enforcement effort.

We therefore recommend the separation of enforcement from the advocacy and review function. The administration and enforcement of competition law should remain exclusively with the Competition Bureau. These two sides of competition policy demand different skills and orientation. As Daniel Crane says:

> *The enforcement function may require primarily "tough-minded" prosecutorial personnel with expertise in legal processes whereas the advocacy function may require primarily policy-oriented personnel with expertise in political and regulatory processes.*[5]

Moreover, concerns were expressed in submissions to the Panel that housing both enforcement and advocacy functions in the same agency might impair the agency's credibility in both its enforcement and advocacy activities.

Similarly, the Panel does not believe that assigning competition advocacy functions to the federal government or to departments or agencies responsible for specific industry sectors is likely to be successful. Competition is likely to become just one of many factors considered in the calculus of government decision making. Moreover, ministers with sectoral responsibilities may be perceived to be motivated by sectoral interests unrelated to competition. Independence is critical. A council that is free to speak out without being constrained by the bureaucratic or political ramifications of its work will be the most effective way to advance an agenda for a more competitive Canada.

Finally, because all levels of government must engage in a national effort to make Canada more competitive, provincial and municipal representation should help to assure that competitiveness issues are addressed regardless of where they reside. As stated earlier, we believe that there needs to be greater recognition of the importance of urban centres to our economic prosperity.

Therefore, the Panel recommends that a Canadian Competitiveness Council should be structured along the following lines:

- The Council should be independent of government, but with a clear, annual reporting relationship to Parliament.
- It should be initially mandated for five years and have secure and sufficient funding so that the Council could carry out its mandate in an effective and responsible manner.
- The Council should be governed by a nine-member Board of Directors appointed by the Minister of Industry for a five-year term and made up of persons who are knowledgeable and experienced in matters of economics, business and government affairs pertaining to competition, industry, regulation and consumers.

- The Board of Directors should include a majority of representatives from outside government:
  – six non-government (i.e., business, labour, academic)
  – three representatives who bring the respective perspectives of the federal government, the provinces and cities.
- The Chair should be a person experienced in matters of business, appointed by the Minister of Industry.
- The Chief Executive Officer of the Council should be appointed by the Board and should sit as an *ex officio* Board member.
- The form in which the Council is established should allow it both to be established quickly and to be independent.

Mandate

The Council should serve as the primary Canadian advocate for competition. It should take a global perspective on competition issues in both the public and private sectors using evidence-based economic analysis. It should also have a small core staff who would conduct analysis and commission independent research.

The Council's mandate should not be restricted to examining government activities. A broad mandate is preferable to a narrow one. The Council should set its own agenda and not display a bias for or against government or the private sector.

Examples of the activities that the Panel envisages the Council might choose to undertake include:

- reviewing existing laws and regulations, regulatory agencies and processes that affect competitiveness, and issuing reports with actionable recommendations.
- reviewing private sector activity affecting competition, markets and productivity outside the realm of competition law enforcement, and issuing public reports with actionable recommendations addressing competition and productivity issues.
- reviewing progress toward the elimination of internal barriers to the free flow of goods, services, people and capital.
- conducting research on any other issues that the Council deems to have a material impact on Canada's competitiveness, and publicizing the results and recommendations.

The Council could choose to participate in and report on policy reviews at the invitation of a federal minister. The Council would be well positioned to review and report on sectoral regimes, in line with the five-year reviews the Panel recommends in this report. Provincial ministers and civic mayors should also be entitled to bring issues to the attention of the Council. In the Panel's view, the ability to partner with other non-government policy research organizations would also underscore the Council's independence and potential contribution to advancing Canada's competitiveness agenda.

At the same time, independence and effectiveness could be undermined by government requests to study issues that are unrelated or immaterial to competition. The ability of the Council to control its agenda and set its priorities will be essential to the Council's independence.

In addition to conducting research and issuing reports, a public voice is needed to foster national debate and dialogue on competitiveness issues. The Council should be free to comment on these issues in the media, interact with federal–provincial and municipal leaders and public officials as well as to participate in conferences and debates before the general public. In the same vein, reporting on activities and expenditures to assure public accountability would be achieved by requiring the Council to report annually to Parliament through the Minister of Industry.

Of course, political commitment is a necessary requirement for the Council to get off the ground and become successful. Resources and access to information and decision makers will be critical. Finally, it is also critical, in the Panel's view, for the Council to be given sufficient powers in its mandate to be seen and to act in an independent fashion. This is important not only in the day-to-day course of its work, but also for ensuring that the Council can attract and retain a Board of Directors, Chief Executive Officer and core staff of the necessary calibre to succeed.

The Panel recommends that:

60. The federal government should establish as expeditiously as possible an independent Canadian Competitiveness Council under the Minister of Industry. The Council should be staffed by a Chief Executive Officer and a small core staff, overseen by a Board of Directors.

61. The Council's mandate should be to examine and report on, advocate for measures to improve, and to ensure sustained progress on, Canadian competitiveness. The Council should not enforce laws and regulations but should have a public voice, including the power to publish and advocate for its findings.

62. The Council should set its own agenda, reviewing matters or conducting research on its own initiative as well as in response to the request of a federal or a provincial minister or a municipal mayor. Governments should not have the power to compel the Council to undertake or discontinue a review or study.

63. The Council should be required to report to Parliament on its activities on an annual basis through the Minister of Industry.

64. The Council's Board of Directors should consist of not more than nine persons, including the Chair, and should include a majority of non-governmental members, as well as members with experience representing the federal, provincial and municipal governments.

65. The Council should be mandated and fully funded in a manner that would allow the Council to operate in an effective and responsible manner for a five-year period. Prior to the end of the five-year period, the Minister of Industry should undertake a review to determine whether the Council's mandate should be renewed and, if so, on what terms.

10. Conclusion

In this report, we present a picture of the changing global economy and our view of Canada's place within it, as well as the dynamics that will shape our future. We try to make a compelling case for action, not just by governments, but by all Canadians.

By putting forward a national Competitiveness Agenda, we hope to seize the attention of Canadians from all walks of life and all regions. It is an agenda for everyone: from employees on the shop floor to managers in the corporate office, and from students in college and university classrooms to researchers in the most advanced lab.

The objective can be simply stated: to raise Canadians' standard of living by improving our economic performance. As we have noted throughout this report, we believe that the key will be to encourage more competition at home and more exposure to competition from abroad. Competition drives the productivity that ultimately sustains our incomes, jobs and quality of life. This is our central principle.

Our proposals to renew legal foundations and refine key public policies will increase competitive intensity in Canada. We also propose a powerful new Canadian advocate for competition.

Our Competitiveness Agenda does not ask Canadians to give up anything, nor to settle for less. On the contrary, we are asking Canadians to raise their sights, and to recognize the challenges and opportunities of economic globalization. We are asking Canadians to take a global perspective. We do not believe that Canadians have any other choice.

Governments must adopt this same perspective and evaluate policy, not in a domestic context, but in a global one. When examining legislation, setting policy and establishing regulations, governments need to consider how this positions Canada against our competitors and in the context of Canada's links to the US economy.

It also means establishing a process where we continually review and refine our policies to reflect a fast-evolving world and changing circumstances. Competitiveness begins at home, but it is measured internationally.

Business leaders too need to think big and grasp global opportunities. We have a small market, one that has compelled our businesses to look south of the border for growth opportunities. We have done just that, and should more fully integrate with the North American economy.

But our small domestic market should also compel us to look to the larger world as a source of opportunity. We call upon business leaders to become more global, to grow their enterprises and to seek opportunity. There are risks, but the successes of the many Canadian global champions serve as the example.

While we have many global success stories, Canada has also witnessed the loss of some of our most iconic firms. Our Panel was formed at a time when the debate over the hollowing out of Canada was at its peak. Indeed, we ourselves share the feelings of disappointment and loss when a notable Canadian firm is acquired by a foreign company.

In our consultation paper, we asked Canadians whether domestic control and ownership was important to Canada's economic prospects and our ability to create opportunity for Canadians.

For our part, we believe that competitive, Canadian-based firms **are** important.

We are steadfast in our belief that Canadian ownership of our firms is valuable. But we do not believe that the best way to ensure Canadian control is by legislating it or imposing other protections.

We believe that the best way to ensure we create and sustain new Canadian champions is by ensuring that our policies, laws and regulations are the right ones to facilitate growth. Given the right conditions, the dynamism, talent and ambition of Canadians will rise to the fore. We will have more Canadian firms competing globally. And winning globally.

Thus, our journey leads us to conclude that the main issue is **not** whether we are being hollowed out. The real issues are the economic environment in Canada and the mindset of Canadians in all walks of life. The questions are how we raise our productivity through greater openness to talent, capital and innovation, through vigorous competition, and through a more ambitious mindset.

This report is our best effort to set the agenda for sustained competitiveness. It is a national project, and we call on all Canadians to commit to making our country more competitive. It is a long-term project requiring a fundamental change in the mindset of Canadians.

It will not be quick or easy. But if we take on this challenge with the commitment and collective spirit that have enabled Canadians to overcome formidable obstacles and bring great national projects to fruition, the Panel has no doubt that we will continue building a Canada that we will be proud to bequeath to our children and grandchildren.

Endnotes

Chapter 1. Our Mandate and Approach

1 The Panel's mandate may be found at: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00004e.html

2 The full document is available at: http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00009e.html. Submissions to the Panel are also on this site.

Chapter 2. Creating Wealth: Competitiveness and Productivity

1 See, for example, Michael Porter, *The Competitive Advantage of Nations* (New York: The Free Press, 1990).

2 William W. Lewis, *The Power of Productivity* (Chicago: The University of Chicago Press, 2004).

3 *Ibid.*

Chapter 3. Globalization and the Pace of Change

1 These now account for 6.5 percent of the cost of inputs, down from 10.3 percent in 1963. Source: Aaron Sydor, "The Rise of Global Value Chains," *Canada's State of Trade: Trade and Investment Update – 2007* (Ottawa: Department of Foreign Affairs and International Trade, 2007), p. 69, available at: http://www.international.gc.ca/eet/trade/sot_2007/sot-2007-en.asp#vi

2 "Competition Intensity as Driver of Innovation and Productivity: A Synthesis of the Literature," CSLS Research Report 2008-03, June, prepared for the Competition Bureau (Ottawa: Centre for the Study of Living Standards); Penny Hope-Ross, "From the Vine to the Glass: Canada's Grape and Wine Industry," Ottawa: Statistics Canada, Cat. no. 11-621-MIE — No. 049, October 2006; available at: http://dsp-psd.pwgsc.gc.ca/Collection/Statcan/11-621-M/11-621-MIE2006049.pdf

3 Today, more than 20 percent of the population in developed countries is aged 60 years or over, and this proportion will grow. In less developed regions, seniors account today for just 8 percent of the population. Source: United Nations, *World Population Ageing 2007*, summary available at: http://www.un.org/esa/population/publications/WPA2007/wpp2007.htm

4 FDI increased from US$13.4 billion in 1970 to US$1.3 trillion in 2006. Source: Andrew Sharpe and Meghna Banerjee, *"Assessing Canada's Ability to Compete for Foreign Direct Investment,"* Centre for the Study of Living Standards, research paper prepared for the Competition Policy Review Panel, March 2008.

5 United Nations Conference on Trade and Development, *World Investment Report 2007.*

6 The total size of sovereign wealth funds has increased dramatically over the past 15 years. In 1990, sovereign funds held roughly $500 billion. However, the IMF estimates their current total is $2 to 3 trillion and will potentially reach $10 trillion by 2012. Source: Simon Johnson, "The Rise of Sovereign Wealth Funds," Finance and Development 44 (3), September 2007, available at: http://www.imf.org/external/pubs/ft/fandd/2007/09/straight.htm

7 Scotiabank Commodity Price Index, March 2008.

[8] PriceWaterhouseCoopers, *Mining Deals 2007 Annual Review*, available at: http://www.pwc.com/Extweb/pwcpublications.nsf/docid/0BEFE75E2B45FCF98525740F0053C0AA

[9] See Sydor, "The Rise of Global Value Chains," *op. cit.*

[10] The growth in intra-firm trade is a complementary phenomenon: multinational enterprises established in different international markets trade products that also comprise inputs produced in global value chains. As intra-firm trade between Ford Canada and Ford US has increased, so have the inputs of autopart firms from Canada, the US and around the globe into the traded products.

[11] Naomi R. Lamoreaux, Daniel M. G. Raff, and Peter Temin, "Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History," *American Historical Review* 108 (2): 404–433 (April 2003).

[12] "How Two European Giants Keep Up with the Global Race," *The Economist*, 13 February 2007.

[13] Claude Turcotte, "Investissement Québec rappelle « l'urgence » d'accroître la productivité," *Le Devoir*, March 13, 2008.

[14] The BRIC countries (Brazil, Russia, India and China) account for 40 percent of the world population with a market exceeding two billion people and 28 percent of the world economy, and growing.

[15] China now comprises 6.9 percent of the total world demand for oil, 18.6 percent for aluminum and 28.5 percent for steel. See Department of Foreign Affairs and International Trade Canada, "China's Appetite for Natural Resources Continues to Grow," April 5, 2006, available at: http://w01.international.gc.ca/CanadExport/view.aspx?isRedirect=True&id=383848&language=E)

[16] Information and communications technologies encompass a wide variety of products and services, including computers, software, communications equipment and networks, fibre optics, interactive video, satellite infrastructure and services, radio frequency identification technology, and a growing number of complementary devices for work, education, health and entertainment.

[17] International Telecommunication Union and the United Nations Conference on Trade and Development, *World Information Society Report 2007, Beyond WSIS*, June 2007, available at: http://www.itu.int/osg/spu/publications/worldinformationsociety/2007/WISR07_full-free.pdf

[18] Global System for Mobile Communication Association (GSMA) Press Release, April 16, 2008.

Chapter 4. What We Heard and What We Learned

[1] From 2001 to 2006, 455 Canadian companies, worth a total of US$137 billion were acquired. Source: Andrea Mandel-Campbell, *Foreign Investment Review Regimes: How Canada Stacks Up* (Ottawa: Conference Board of Canada, April 2008), available at: http://www.conferenceboard.ca/documents.asp?rnext=2531

[2] SECOR, "Positioning Canadian Firms in the Global Market for Corporate Control," February 2008.

[3] Research findings indicate almost no change since 2001 in the 27 percent share of assets in Canada's non-financial industries under foreign control. See Statistics Canada, "Foreign Control in the Canadian Economy," *The Daily*, Statistics Canada, June 14, 2007.

[4] *Globe & Mail Report on Business*, "Leaps of Faith," April 25, 2008; *CBC News*, "In Depth: Research In Motion," 24 October 2007; *Barron's*, "The World's Best CEO's," March 25, 2008; and *Canadian Business*, "Men in Motion," December 2004.

[5] The number of Canada's global leading firms rose from only 15 in 1985 to 40 in March 2008. See Institute for Competitiveness and Prosperity, *Report on Canada 2008: Setting our Sights on Canada's 2020 Prosperity Agenda*, p. 54, available at: http://www.competeprosper.ca/index.php/work/reports_canada/

[6] William Polushin, "Case Studies of Firm Improvements in Productivity and Competitiveness," research paper commissioned by Competition Policy Review Panel, Ottawa, 2008.

[7] This is discussed in Walid Hejazi, "Foreign Direct Investment and the Canadian Economy," research paper prepared for the Competition Policy Review Panel, April 2008.

[8] The US accounted for 79 percent of our exports in 2007. See Export Development Corporation, "Canada Country Overview," March 2008.

[9] It is estimated by Goldman Sachs that the gross domestic product of these four countries alone will be as much as half the G7 countries combined by 2025.

[10] Large firms are more export intensive than smaller firms. Small firms (fewer than 50 employees) account for 72 percent of exporting firms but only 26 percent of export value. See Sydor, "The Rise of Global Value Chains," *op. cit.*, p. 26.

[11] Philippe Mercure, "Doubler les Chinois par la qualité," *La Presse*, March 22, 2008.

[12] Bank of Canada, Noon Rate, historical data, available at: http://www.bankofcanada.ca/en/rates/exchange-look.html

[13] The Conference Board recently gave Canada a "D" on innovation, ranking Canada 14th out of 17 countries. See Conference Board of Canada, *How Canada Performs: A Report Card on Canada*, June 2007, p. 2, available at: http://www.conferenceboard.ca/documents.asp?rnext=2047

[14] Canada ranked 10th of 27 OECD countries on a broad composite measure of innovative performance. See OECD, "Benchmarking Innovation Policy and Innovation Framework Conditions," January 2004, available at: http://www.oecd.org/dataoecd/37/34/33705586.pdf

[15] Over the period 1981–2006, Canada placed 17th among the 20 OECD countries for which productivity data are available, and 6th among the G7 major industrial countries.

[16] Labour productivity is defined as gross domestic product per hour worked, based on purchasing power parity. The series are extrapolated based on 1999 benchmarking estimates of the Canada–US labour productivity gap, using labour productivity indexes from Statistics Canada and US Bureau of Labor Statistics.

[17] Statistics Canada, *Earning and Incomes of Canadians over the Past Quarter Century, 2006 Census*, May 2008, Statistics Canada Cat. no. 97-563-X, available at: http://www12.statcan.ca/english/census06/analysis/income/pdf/97-563-XIE2006001.pdf

[18] Over the period 2002–2006, Canada's standard of living (measured by real gross national income per capita) increased much faster (14.3 percent) than that in the US (8.1 percent). Source: Statistics Canada, *ibid*.

Chapter 5. How Well Is Canada Positioned to Compete to Win?

1 A study of ten industrialized countries over a ten-year period found Canada to be second only to Mexico in terms of the lowest after-tax costs of start-up and operations of a new business; see KPMG, *Competitive Alternatives: KPMG's Guide to International Business Location, 2008 Study,* March 27, 2008, available at: http://www.mmkconsulting.com/compalts/reports/2008_compalt_report_vol1_en.pdf
A global business environment assessment of the best place to conduct business ranked Canada fourth out of 82 countries based on macroeconomic stability, infrastructure, labour market flexibility, quality of the workforce and policy conduciveness for businesses; see *The Economist* Intelligence Unit, "Business Environment Rankings," October 25, 2007, available at: http://www.eiuresources.com/mediadir/default.asp?PR=2007102501
Canada was ranked 14th out of 17 countries in terms of innovation; see Conference Board, *How Canada Performs*, *op. cit.* Canada was ranked 10th out of 55 nations in terms of having an environment that can create and sustain the competitiveness of enterprises; see IMD, *World Competitiveness Yearbook*, 2007. Canada was ranked 21st in a survey of executives regarding where they planned to engage in direct investment in the coming year; see AT Kearney, *FDI Confidence Index*, 2005, available at: http://www.atkearney.ro/pdf/fdici_2005.pdf?PHPSESSID=938a70942d121ceb62138ca167d1aff3

2 In February 2008, the Scotiabank Commodity Price Index reached a record high. The Agricultural Index rose over 25 percent and wheat was valued at the highest price per bushel ever recorded. Potash surged 131 percent in value since 2004. Uranium spot prices are eight times higher than in 2000 and double their previous peak in 1979–80. See Scotiabank Commodity Price Index, March 2008.

3 See Major Projects Management Office at: www.mpmo-bggp.gc.ca/context-contexte-eng.php

4 Michael Hart, "Steer or Drift? Taking Charge of Canada–US Regulatory Convergence," *C. D. Howe Institute Commentary,* No. 229 (Toronto, March 2006), p. 3.

5 Industry Canada, *2007 Canada's Automotive Industry*, p. 5, available at: http://www.ic.gc.ca/epic/site/auto-auto.nsf/vwapj/2007_AutoStatisticsFlyer-ENG.pdf/$FILE/2007_AutoStatisticsFlyer-ENG.pdf

6 See Hart, "Steer or Drift?" *op. cit.*, p. 2.

7 SECOR, "Positioning Canadian Firms," *op. cit.*, p. 78.

8 See KPMG, *Competitive Alternatives: KPMG's Guide to International Business Location, 2008 Study*, *op. cit.*

9 Reuven Brenner and Gabrielle Brenner, "How to Attract, Groom and Retain Talent in Canada," research paper prepared for the Competition Policy Review Panel, March 2008.

Chapter 7. Competitiveness Agenda: The Legal Foundations

[1] The notification threshold for investors from World Trade Organization (WTO) member countries is inflation adjusted annually, and is currently set at $295 million. For non-WTO investors, the threshold is $5 million for a direct acquisition and $50 million for an indirect acquisition; the $5-million threshold will apply, however, for an indirect acquisition if the asset value of the Canadian business being acquired exceeds 50 percent of the asset value of the global transaction.

[2] In 1999, responsibility for the administration of the ICA in relation to cultural businesses (music recordings, film and video, books, periodicals, magazines and newspapers) was transferred to the Minister of Canadian Heritage. The Minister of Canadian Heritage also has the authority to review cultural investments below the $5-million threshold as well as the establishment of new cultural businesses by foreign investors.

[3] Of note, these disallowance rates do not reflect proposals withdrawn before a decision was rendered.

[4] OECD, *International Investment Perspectives 2007: Freedom of Investment in a Changing World.*

[5] United Nations Conference on Trade and Development, *World Investment Report 2007,* Annex Table B.3, available at: http://www.unctad.org/en/docs/wir2007_en.pdf

[6] See Mandel-Campbell, *How Canada Stacks Up*, *op. cit.* This study compares both stated policies and actual practices related to foreign direct investment screening in France, Germany, Italy, the United Kingdom, the US and Canada across nine strategic sectors, and finds that Canada ranks third most open, being no more restrictive than Germany, France and Italy.

[7] *Ibid*.

[8] Speech by the Honourable Jim Prentice, Minister of Industry, to the Vancouver Board of Trade, October 9, 2007.

[9] In the US, foreign investment is subject to the *Foreign Investment and National Security Act of 2007*. The Committee on Foreign Investment in the United States is made up of representatives from the Departments of Treasury, Defense, State, Homeland Security, Commerce, and Energy. The Attorney General, among others, is responsible for the administration and enforcement of this legislation.

[10] Industry Canada, "Guidelines — Investment by state-owned enterprises — Net benefit assessment," available at: http://strategis.ic.gc.ca/epic/internet/inica-lic.nsf/en/lk00064e.html#state-owned

[11] J. Timothy Kennish, "Evaluation of the Operation and Effectiveness of the *Investment Canada Act* and Recommendations for Changes to this Legislation," research paper prepared for the Competition Policy Review Panel, March 2008.

[12] Enterprise value is a measure used to evaluate the potential acquisition value of a business. It is equal to the sum of the price to be paid for the equity of an acquired business and the assumption of liabilities on its balance sheet minus its current cash assets.

[13] Foreign investment involving financial institutions regulated under the *Bank Act* and the *Insurance Companies Act* is exempt from review under the ICA. The Minister of Finance has responsibility for the review and disposition of foreign investment involving federally regulated financial institutions.

[14] Canada is signatory to a number of international trade and investment agreements under which it must ensure that foreign investors are treated equally and no less favourably than domestic investors. Under the WTO agreement and the NAFTA, Canada has taken reservations to preserve its ability to use the ICA to ensure that investments by non-Canadians provide net benefit to Canada.

[15] See OECD, *International Investment Perspectives*, *op. cit.*, pp. 19 and 20.

[16] Section 14.1 (6) of the ICA defines a "cultural business" as a Canadian business that carries on any of the following activities, namely,

a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,

b) the production, distribution, sale or exhibition of film or video recordings,

c) the production, distribution, sale or exhibition of audio or video music recordings,

d) the publication, distribution or sale of music in print or machine-readable form, or

e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

[17] For a full description of Canada's foreign investment policies for cultural businesses under the Department of Canadian Heritage, see http://www.canadianheritage.gc.ca/progs/ac-ca/progs/eiic-csir/index_e.cfm

[18] Submission of Torstar Corporation to the Competition Policy Review Panel, January 11, 2008.

[19] Examples of company-specific statutes relating to the privatization of former Crown corporations include *CN Commercialization Act*, *Petro-Canada Public Participation Act*, *Air Canada Public Participation Act*, *Eldorado Nuclear Limited Reorganization and Divestiture Authorization Act*, and the *Teleglobe Canada Reorganization and Divestiture Act.*

[20] *National Post*, "Where's Canada? Canada, with its small size, cannot be left out of open skies agreements between the US and Europe," April 9, 2008, p. FP17: interview with Pierre Jeanniot, former CEO of Air Canada and the International Air Transport Association.

[21] *Financial Post*, "No way to run airlines," April 5, 2008: interview with Giovanni Bisignani, Chief Executive, International Air Transport Association.

[22] D. G. McFetridge, "The Role of Sectoral Ownership Restrictions," research paper prepared for the Competition Policy Review Panel, March 15, 2008.

[23] Submissions of Air Transport Association of Canada; Air Line Pilots Association of Canada; Joint Submission of the Aéroports de Montréal, Greater Toronto Airports Authority, and Vancouver Airport Authority; and Transat.

[24] This argument was made in the submission of the Commissioner of Competition, as well as in research conducted on behalf of the Panel by McFetridge, "The Role of Sectoral Ownership Restrictions," *op. cit.*, and by David Gillen, "Foreign Ownership Restrictions in the Canadian Aviation Industry," research paper prepared for the Competition Policy Review Panel, March 2008.

[25] Areva SA participates in the Canadian industry on an exemption basis as well as in joint ventures with Cameco. Other foreign investors in Canada include Japanese, South Korean and other French interests.

[26] Governance of Cameco is subject to the *Eldorado Nuclear Limited Reorganization and Divestiture Authorization Act.*

[27] In 2000, legislation came into force, the *Nuclear Safety and Control Act*, replacing the former *Atomic Energy Control Act*, establishing the Canadian Nuclear Safety Commission.

[28] Dennis Browne, "Uranium: Controls on Foreign Ownership and National Security," research paper prepared for the Competition Policy Review Panel, March 2008, p. 15.

[29] Canadian-designed CANDU reactors do not require enriched uranium fuel, and the Canadian nuclear industry has developed the capacity to supply all fuel requirements for these reactors. However, 95 percent of the world's reactors, as well as the new Advanced CANDU Reactor, require enriched uranium fuel.

[30] These multilateral discussions take place in the context of the Nuclear Suppliers Group, which represents 45 countries involved in the development of export control guidelines for nuclear material, equipment and technology.

[31] Telecommunications carriers are regulated under the *Telecommunications Act* and largely through the Canadian Radio-television and Telecommunications Commission (CRTC). Companies that distribute or broadcast programming to Canadians through cable, satellite or other specified means (but not the Internet) are regulated under the *Broadcasting Act.* They obtain from the CRTC a licence to undertake activities that are known as Broadcasting Distribution Undertakings or BDUs. BDUs include cable services, direct-to-home (DTH) satellite services and multi-point distribution systems.

[32] *Telecommunications Act* (1993, c. 38) subsection 7(d).

[33] *Broadcasting Act* (1991, c. 11) subsection 3(a).

[34] Hank Intven and Stephen Rawson, *CRTC approves Sale of BCE*, March 27, 2008, available at: http://www.mccarthy.ca/article_detail.aspx?id=3946. Intven and Rawson also note that voting rights cannot be cumulated between two companies to total more than 46.7 percent.

[35] See, for example, Steven Globerman, *"Implications of Foreign Ownership Restrictions for the Canadian Economy: A Sectoral Analysis"* (Ottawa: Industry Canada, 1999), pp. 3–4.

[36] McFetridge, "The Role of Sectoral Ownership Restrictions," *op. cit.*

[37] For example, Rogers Communications Inc. stated in its submission that current foreign investment rules remain appropriate and have not had negative impacts on Canada's competitiveness and productivity; see submission of Rogers Communications Inc. to the Competition Policy Review Panel, January 11, 2008, p. 5. TELUS supported the elimination of current foreign investment rules on both telecommunications and broadcasting in part because they limit the formation of joint venture initiatives with foreign firms and impede technology transfers and other unique partnerships, mechanisms through which domestic firms become more innovative and competitive internationally; see submission of TELUS to the Competition Policy Review Panel, January 18, 2008, p. 8.

[38] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355; *Canada Gazette*, Vol. 140, No. 26, December 27, 2006.

[39] *Government Opts for More Competition in the Wireless Sector*, Industry Canada News Release, November 28, 2007. In June 2007, the Minister of Industry announced a new Spectrum Policy Framework for Canada, concluding that "Market forces should be relied upon to the maximum extent feasible." See *Canada Gazette* Notice DGTP-001-07 — New Spectrum Policy Framework for Canada, June 2007.

[40] The Telecommunications Policy Review Panel was appointed by the Ministry of Industry in April 2005 and issued its Final Report in March 2006. Panel members were Gerri Sinclair (chair), Hank Intven and André Tremblay. The *Telecommunications Policy Review Panel Final Report 2006* is available at: http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/Home

[41] TPRP, *Final Report*, *op. cit.*, p.14.

[42] *Ibid.*, Afterword, p. 11–26.

[43] Broadcasting distribution undertakings or BDUs generally encompass cable television, satellite television services, and multi-point distribution systems.

[44] Memo provided to the Competition Policy Review Panel by the Department of Finance, March 17, 2008.

[45] The submission of the Canadian Bankers Association to the Competition Policy Review Panel at p. 4 cites World Economic Forum Global Competitiveness Reports 1997–2007 among other reports. See also Jason Allen and Walter Engert, "Efficiency and Competition in Canadian Banking," *Bank of Canada Review*, Summer 2007, pp. 33–45, available at: http://www.bankofcanada.ca/en/review/summer07/allen-engert.pdf. The authors conclude that the Canadian banking industry is competitive.

[46] John F. Chant, "Foreign Direct Investment in Canadian Banking: Is There a Case for Special Treatment?" paper presented at the Carleton University Centre for Trade Policy and Law Conference on *Canada's Foreign Investment Policies — A Time for Review?* Ottawa, December 6, 2007.

[47] Submission of the Canadian Bankers Association to the Competition Policy Review Panel, p. 20.

[48] *Fortune* 500 Companies Global Edition 2007, World's Largest Companies, available at: http://money.cnn.com/magazines/fortune/global500/2007/

[49] Canadian Bankers Association, *loc. cit.*

[50] Royal Commission on the Economic Union and Development Prospects for Canada, *Summary of Conclusions and Recommendations*, Ottawa, p. 19.

[51] For example, see Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, April 2002, and OECD, *Canada — Report on Competition Law and Institutions*, 2004.

[52] This view has been expressed since the Economic Council's *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969). See also, for example, Michal S. Gal, "Market Conditions under a Magnifying Glass: General Prescriptions for Optimal Competition Policy for Small Market Economies," New York University Centre for Law and Business, Working Paper no. 01-004, available at: http://papers.ssrn.com/paper.ta?abstract_id=267070

[53] The Competition Tribunal is a quasi-judicial tribunal made up of judges appointed from the Federal Court and lay members. It adjudicates civil matters under the *Competition Act*. Prosecutions of criminal *Competition Act* matters are undertaken by the Director of Public Prosecutions before the courts.

[54] Commissioner of Competition, Competition Bureau, "A Synthesis and Review of Recent Reform Proposals Regarding Canada's *Competition Act*," research paper prepared for the Competition Policy Review Panel, March 31, 2008.

[55] *Financial Post Crosbie: Mergers & Acquisitions in Canada* is the database of record for M&A transactions in Canada. Quarterly reports are available at: http://www.crosbieco.com/ma/index.html

[56] The utility of this approach has been illustrated in the recent clearance by the US Department of Justice of the XM Satellite and Sirius merger, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Radio Satellite Holdings Inc.'s Merger with Sirius Satellite Radio Inc.*, available at: http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm

[57] On March 3, 2008, the Minister of Justice appointed Brian Gover as an expert to review the Competition Bureau's use of court orders to obtain documents, testimony and written returns of information and to report to the Commissioner of Competition and the Deputy Minister of Justice with recommendations within three months. See Competition Bureau, Information Notice, "Expert Appointed to Advise on Section 11 Process," available at: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02587e.html

[58] The US law and practice pertaining to merging parties legally closing a merger transaction following the expiration of the relevant waiting period is not markedly different from its Canadian counterparts. But, while the jurisdiction to challenge a transaction is not barred beyond a specific time period in the US, in practice, the federal US competition authorities endeavour to inform merging parties with respect to competition concerns prior to the end of the waiting period and almost never concern themselves further about a merger, once its review process is completed without challenging the transaction. EU law under Council Regulation (EC) No 139/2004, Article 6(1)(c) is more definitive in terms of requiring the European Commission to decide on the legality of a merger at the end of their review process.

[59] In more than 20 years of formal merger review, Competition Bureau has never challenged a merger transaction within the existing three-year time period following an initial determination that the transaction did not raise competition concerns.

[60] The Panel did not consider the false and misleading advertising and marketing practices provision of the *Competition Act*.

[61] In addition to the Panel's consultations, where many stakeholders recommended decriminalization of these provisions, there have been a number of other reports recommending decriminalization of some or all of the pricing provisions, including: *Consultative Panel Report on Amendments to the Competition Act* in 1996; Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices under the Competition Act, Theory, Law and Practice* (1999) and again in the 2002 Standing Committee on Industry, Science and Technology Report, *A Plan to Modernize Canada's Competition Regime.*

[62] The Supreme Court of the United States recently rejected the *per se* illegality of resale price maintenance in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

[63] A number of experts have noted the large number of guilty pleas and significant fines the government has secured over the past decade under the existing conspiracy provisions as an argument for retaining the existing law. Statistics compiled by the Competition Bureau have shown that in 23 contested proceedings under this section conducted since 1980, the Crown has failed to secure a conviction in all but three cases. Moreover, in the period between 1993 and 2001, 88 percent of the fines imposed under the conspiracy provision received were as a result of guilty pleas in international cartel cases where the Canadian resolution was preceded by or contemporary with resolutions in other jurisdictions.

[64] These complications arise largely from the requirement under Canadian law to establish that an agreement prevents or lessens competition *unduly* before it can be considered a criminal offence. It is the combination of market power and behaviour likely to injure competition that makes a lessening of competition undue. The determinants of market power include such factors as market shares, the number of competitors and the concentration of competition, barriers to entry, geographical distribution of buyers and sellers, product differentiation, and countervailing power on the part of customers, among other factors. This tends to increase the quantity and quality of evidence required to establish an offence to the criminal standard of proof, thereby resulting in longer, more complex investigations and prosecutions in Canada compared with other industrialized countries.

[65] See, for example, the submissions to the Competition Policy Review Panel of the American Bar Association, Bell Canada, Canadian Bar Association, Canadian Chamber of Commerce, Canadian Manufacturers and Exporters, Competition Bureau, Insurance Bureau of Canada and Lang Michner LLP.

[66] The legal term *per se*, in the context of a conspiracy, means that the act of a defined anti-competitive agreement is presumed to be illegal without the necessity of proving its effect on a market.

Chapter 8. Competitiveness Agenda: Public Policy Priorities for Action

[1] OECD data cited in Andrew Sharpe, "Assessing Canada's Ability to Compete for Foreign Direct Investment," research paper prepared for the Competition Policy Review Panel, March 31, 2008.

[2] Finance Canada, "Strong Leadership. A Better Canada," Economic Statement, October 30, 2007, p. 10, available at: http://www.fin.gc.ca/ec2007/pdf/EconomicStatement2007_E.pdf

[3] Institute for Competitiveness and Prosperity, *Report on Canada 2008*, *op. cit.*, p. 43.

[4] Aled ab Iowerth and Jeff Danforth, "Is Investment Not Sensitive to Its User Cost: The Macro Evidence Revisited," Department of Finance, Working Paper 2004-05.

[5] 2008 Ontario Budget, *Growing a Stronger Ontario*, p. 141, available at: http://ontariobudget.ca/english/pdf/papers_all.pdf

[6] Finance Canada, *Advantage Canada: Building a Strong Economy for Canadians*, November 23, 2006, p. 76, available at: http://www.fin.gc.ca/ec2006/pdf/plane.pdf Quebec and three Atlantic provinces have harmonized their retail sales tax regimes with the federal GST. All other provinces continue to impose a separate sales tax at the retail level only, with the exception of Alberta, which does not have a provincial sales tax. The three territories of Canada (Yukon, Northwest Territories and Nunavut) do not have territorial sales taxes. The Government of Quebec administers both the federal GST and the provincial Quebec Sales Tax.

[7] Department of Finance, "Finance Minister Finalizes Advisory Panel on Canada's System of International Taxation," News Release, December 11, 2007. The Advisory Panel on Canada's System of International Taxation's consultation paper was released on April 25, 2008, and is available at: http://www.apcsit-gcrcfi.ca/05/cnpdcn-eng.html

[8] OECD, *Education at a Glance*, 2007, Table A1.3a, available at: http://www.oecd.org/dataoecd/4/55/39313286.pdf

[9] *Ibid.*, Chart C3.3. Canada had the eighth-highest share of international tertiary enrolled students among OECD and partner economies.

[10] See *Ibid.* and Canadian Council on Learning, "Raising the Score: Promoting Adult Literacy in Canada," September 29, 2005, available at: http://www.ccl-cca.ca/CCL/Reports/LessonsInLearning/LiL-29Sep2005.htm OECD Table C5.1a indicates that, in 2003, only 25 percent of Canadians undertook non-formal, job-related continuous education and training, compared with 40 percent of Swedes, 39 percent of Danes, 37 percent of Americans and 36 percent of Finns.

[11] Institute for Competitiveness and Prosperity, *Report on Canada 2008*, *op. cit.*, pp. 48–49.

[12] Foreign Credentials Referral Office, "Frequently Asked Questions," available at: http://www.credentials.gc.ca/faq/index.asp#Employers_5

[13] See Statistics Canada, *Immigration in Canada: A Portrait of the Foreign-born Population, 2006 Census*, Catalogue no. 97-557-XIE, especially the section on "Immigration: Driver of population growth," p. 7, available at: http://www12.statcan.ca/english/census06/analysis/immcit/pdf/97-557-XIE2006001.pdf

[14] Statistics Canada, "2006 Census: Earnings, Income and Shelter Costs," *The Daily,* May 1, 2008, available at: http://www.statcan.ca/Daily/English/080501/d080501a.htm

[15] Michael Bloom and Michael Grant, *Brain Gain: The Economic Benefits of Recognizing Learning and Learning Credentials in Canada* (Ottawa: Conference Board of Canada, 2001), available at: www.conferenceboard.ca/press/documents/323-01mb.pdf

[16] See Naomi Alboim and Elizabeth MacIsaac, "Making the Connections: Ottawa's Role in Immigrant Employment," *IRPP Choices* 13 (3), May 2007, available at: www.irpp.org/choices/archive/vol13no3.pdf. See also initiatives by the Toronto Region Immigrant Employment Council (TRIEC) to profile Canadian organizations that excel at integrating immigrants into their workforces.

[17] Citizenship and Immigration Canada, "True or False?" available at: http://www.cic.gc.ca/English/department/media/facts/times.asp

[18] Citizenship and Immigration Canada, "Statistical Information: Applications Processed at Canadian Visa Offices," available at: http://www.cic.gc.ca/english/information/times/international/01-all.asp and http://www.cic.gc.ca/english/information/times/international/02a-skilled-fed.asp

[19] Finance Canada, *Budget Plan 2008*, *op. cit.*, pp. 116–117.

[20] Microsoft News Release, "Microsoft Expanding Canadian Operations in Greater Vancouver Area," July 5, 2007, available at: http://www.microsoft.com/presspass/press/2007/jul07/07-05MSExpandVancouverPR.mspx

[21] Based on data from Statistics Canada's Business Register.

[22] Institute for Competitiveness and Prosperity, "Assessing the Economic Impact of Head Offices in City Region," research paper prepared for the Competition Policy Review Panel, March 2008.

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[41] As the report went to press, the fiduciary duties of directors of a *Canada Business Corporations Act* corporation in relation to the sale of a corporation by way of plan of arrangement were under consideration by the Supreme Court of Canada, which had agreed to hear, but had not yet disposed of, an appeal from the May 21, 2008, decision of the Quebec Court of Appeal in litigation arising from the proposed leveraged buyout of BCE Inc.

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[57] Danielle Goldfarb, "Is Just-In-Case Replacing Just-In-Time? How Cross-Border Trading Behaviour Has Changed Since 9/11," *Conference Board of Canada Briefing*, June 2007, available at: http://www.conferenceboard.ca/documents.asp?rnext=2050

[58] The SPP was launched by Canada, the US and Mexico in March 2005. The SPP facilitates dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of all North Americans. It addresses issues such as border facilitation, the environment, food and product safety, and improving North American competitiveness. In Canada, the Minister of Industry leads SPP initiatives, and also oversees work on priorities identified under the "Prosperity" pillar of the SPP. The Minister works closely with the Minister of Public Safety (responsible for leading the agenda of the "Security" pillar), the Minister of Foreign Affairs, as well as ministers of other departments who lead on specific initiatives. See Security and Prosperity Partnership of North America website at: http://www.spp-psp.gc.ca/overview/about-en.aspx

[59] Transport Canada, *National Policy Framework for Strategic Gateways and Trade Corridors*, 2007, p. 7, available at: http://www.tc.gc.ca/GatewayConnects/docs/NationalPolicyFramework.pdf

[60] Canadian Chamber of Commerce and US Chamber of Commerce, *Finding the Balance: Reducing Border Costs While Strengthening Security,* February 2008, available at: www.chamber.ca/cmslib/general/0802FindingTheBalance20083393251.pdf

[61] Department of Foreign Affairs and International Trade, *Canada's State of Trade, Trade and Investment Update*, 2007, available at: http://www.international.gc.ca/eet/pdf/07-1989-DFAIT-en.pdf

[62] Indeed CDIA flows were greater than FDI flows by 1995. Diversification is considerable.

[63] Submission of the Canadian Manufacturers and Exporters to the Competition Policy Review Panel, pp. 4–5.

[64] See Foreign Affairs and International Affairs Canada, "A Global Commerce Strategy for Securing Canada's Growth and Prosperity," at: http://www.international.gc.ca/commerce/strategy-strategie/details.aspx

[65] FIPAs and BITs are international treaties, usually negotiated bilaterally, based on standard FTA provisions such as national treatment and most favoured nation status. Canada's FIPA "model" is based on NAFTA's Chapter 11, as is that of the US.

[66] Submission of the Canadian Chamber of Commerce to the Competition Policy Review Panel, p. 11.

[67] Submission of the C. D. Howe Institute to the Competition Policy Review Panel, January 11, 2008.

[68] External Advisory Committee on Smart Regulation, *Smart Regulation: A Regulatory Strategy for Canada: Executive Summary*, Report to the Government of Canada, September 2004.

[69] See the Security and Prosperity Partnership of North America website at: http://www.spp.gov

[70] See Industry Canada, "2008 Progress Report on the Paperwork Burden Reduction Initiative," available at: http://www.reducingpaperburden.gc.ca/epic/site/pbri-iafp.nsf/en/sx00120e.html

[71] Under the new *Cabinet Directive on Streamlining Regulation* departments and agencies are to evaluate regulatory programs against the following criteria: inputs (e.g., resources, mandate and enabling authorities), activities, effectiveness, ultimate outcomes of the regulatory program, and the extent to which the program contributed to the achievement of reported results; value for money (e.g., relevance, efficiency and cost-effectiveness); and governance, decision making and accountability processes, service standards, and service delivery mechanisms. Regulatory frameworks are to be examined with a focus on the effectiveness of the current regulation in meeting the policy objective, the current instrument selection, level of intervention and degree of prescriptiveness; clarity and accessibility of the regulation to users; and the overall impact on competitiveness, including trade, investment and innovation. See "Regulatory Analysis" at: http://www.regulation.gc.ca/directive/directive01-eng.asp#_Toc162687226

[72] The Major Projects Management Office became operational on February 26, 2008. It should be noted that the Office initiative does not apply to projects north of the 60th parallel. See Major Projects Management Office website at: http://www.mpmo-bggp.gc.ca/index-eng.php

[73] See Community of Federal Regulators, *Business Plan 2007–2010*, April 10, 2007, available at: http://ricommunity.gc.ca/cfr-crf/plan/2007-2010/CFR_Business_Plan_2007-2010_e.pdf

[74] An Expert Panel on Commercialization reported to the federal government on April 24, 2006. The report compiled a series of recommendations with a view to enhancing the transformation of knowledge and technology into new goods, processes or services to satisfy market demands. See *People and Excellence: The Heart of Successful Commercialization*, report to the Government of the Expert Panel on Commercialization, Joseph L. Rotman (chair), at: http://www.ic.gc.ca/epic/site/epc-gdc.nsf/en/tq00068e.html

[75] Canada also stands top in the G7 in federal spending on higher education expenditures on research and development (HERD).

[76] Canada also ranked 15 out of 30 on BERD as a percentage of value-added by industry. On this measure, Canada's score has declined from 1.76 percent in 2001 to 1.39 percent in 2005. The OECD average is between 2.15 percent and 2.21 percent in this period. The US figure is between 2.66 percent and 2.83 percent in this period.

[77] See Andrea Bassanini and Stefano Scarpetta, "The Driving Forces of Economic Growth: Panel Data Evidence for the OECD Countries," *OECD Economic Studies* (Paris, OECD, 2001), No. 33, 2001/II, available at: http://www.oecd.org/dataoecd/26/2/18450995.pdf; and Dominique Guellec and Bruno van Pottelsberghe de la Potterie, "The Impact of Public R&D Expenditure on Business R&D," *Economics of Innovation and New Technology* 12 (3): 225–243, January 2003.

[78] SR&ED provided over $4 billion in tax assistance in 2007; see Finance Canada, *Budget Plan 2008*, *op. cit.*, chapter 3.

[79] "This estimate does not tell the whole story. The figure does not include counterfeit and pirated products consumed domestically, nor does it include the significant volume of pirated digital products that are being distributed via the Internet. If these items were added, the total magnitude could well be several hundred billion dollars higher." OECD, "The Economic Impact of Counterfeiting and Piracy: Results of Phase I," 2007, available at: http://www.oecd.org/document/40/0,3343,en_2649_34173_39542888_1_1_1_1,00.html

[80] See, for example, the links between Cégeps and SMEs encouraged through "centre collégiaux de transfert technologique des cégeps du Québec" (CCTT). See the CCTT mandate at: http://www.mels.gouv.qc.ca/ens-sup/ens-coll/cctt/cctt-mandat.asp
See also Denis Lord, "La recherché et le développement au service des PME," *Le Devoir*, January 26, 2008.

Chapter 9. Driving Change: A Canadian Competitiveness Council

[1] Daniel A. Crane, "Report on Best Competition Advocacy Practices," research paper prepared for the Competition Policy Review Panel, March 7, 2008.

[2] National Competition Council website at: http://www.ncc.gov.au/.

[3] The Competition Bureau's formal advocacy powers are limited. Section 125 of the *Competition Act* empowers the Commissioner of Competition to appear before federal boards, commissions and tribunals to make submissions in respect of competition. The Commissioner requires the permission of provincial boards, commissions and tribunals to engage in the same type of advocacy activity under section 126 of the Act. Our view is that the Commissioner of Competition should continue to exercise the powers under sections 125 and 126, unless and until such powers are fully exercised by the proposed Council. As mentioned elsewhere, the Competition Bureau has conducted market studies on an informal basis where it relies upon the cooperation of market participants and public sources for information.

[4] Crane, *op. cit.*, p. 20, writes: "There is considerable value in having an external public advocate focusing solely on competition policy. History has shown that competition values are often sacrificed to other well-intentioned policies if competition lacks a single-minded and independent champion."

[5] *Ibid.*, p. 22.

List of Panel Recommendations

Competitiveness Agenda: The Legal Foundations

The Investment Canada Act

1. **The Minister of Industry should introduce amendments to the *Investment Canada Act* as follows:**

   a) **raise the review threshold to $1 billion, replace gross assets as the standard of measurement with enterprise value of the acquired business, and continue to index this threshold for inflation in accordance with the current NAFTA formula;**

   b) **raise the threshold for the review of foreign investment in the transportation sector (including pipelines), non-federally regulated financial services and uranium mining from $5 million to the $1-billion threshold recommended above;**

   c) **change the applicable review standard and reverse the onus within the ICA, which currently requires applicants to demonstrate "net benefit to Canada," to require the relevant minister to be satisfied that consummation of the proposed transaction would be contrary to Canada's national interest, before disallowing the transaction;**

   d) **remove the obligation under the ICA to notify Industry Canada with regard to an acquisition that falls below the threshold for review or for the establishment of any new business;**

   e) **state that neither recommendation 1.a, 1.b nor 1.d would apply to the administration or enforcement of the ICA as they relate to cultural businesses; and**

   f) **revise the ICA's purpose clause (section 2) to remove Industry Canada's responsibilities to promote foreign investment in Canada.**

2. **The Minister of Industry and the Minister of Canadian Heritage should increase the use of guidelines and other advisory materials to provide information to the public concerning the review process, the basis for making decisions under the ICA, and interpretations by Industry Canada and the Department of Canadian Heritage regarding the application of the ICA. Additionally, amendments to the ICA should require the Ministers to:**

   a) **report publicly on the disallowance of any individual transaction under the ICA, giving reasons for such action being taken; and**

   b) **table an annual report to Parliament on the operation of the ICA.**

3. **The Minister of Canadian Heritage should establish and make public a *de minimis* exemption clarifying that the acquisition of a business with cultural business activities that are ancillary to its core business would not be considered a separate cultural business nor be subject to mandatory review by the Department of Canadian Heritage. For the purpose of applying this exemption, the cultural business activities would be considered *de minimis* if the revenues from cultural business activities are less than the lesser of $10 million or 10 percent of gross revenues of the overall business.**

4. **Consistent with recommendations for other sectors, the Minister of Canadian Heritage, with advice from stakeholders and other interested parties, should conduct a review every five years of cultural industry policies, including foreign investment restrictions. The first such review should be launched in 2008. As a matter of priority, the first review should consider:**

   a) **increasing and revising the threshold for the review of acquisitions of cultural businesses; and**

   b) **the desirability of the Minister of Canadian Heritage continuing to have the right to require the review and approval under the ICA of any new cultural business establishments by foreign investors.**

5. **In administering the ICA, the ministers of Industry and Canadian Heritage should act expeditiously and give appropriate weight to the realities of the global marketplace and, in appropriate cases, the ministers should provide binding opinions and other less formal advice to parties concerning prospective transactions on a timely basis to ensure compliance with the ICA.**

Sectoral Regimes

6. Individual ministers responsible for the sectors addressed in this report should be required to conduct a periodic review of the sectoral regulatory regime with a view to minimizing impediments to competition as well as updating and adapting the regulatory regime to reflect the changing circumstances, needs and goals of Canada. This review should be modelled on the *Bank Act* process and should occur on a five-year cycle. Ownership restrictions should be reviewed on the basis of:

   a) a statement of policy goals that reflect the current Canadian reality;

   b) an understanding that limitations on competition and investment may be required to address a market failure, a paramount social policy or a security objective;

   c) an understanding of the costs and benefits of any such restriction on competitive intensity; and

   d) an evaluation of whether existing restrictions — or alternative approaches — are the optimal means of achieving the stated policy goals.

Air Transport

7. The Minister of Transport should increase the limit on foreign ownership of air carriers to 49 percent of voting equity on a reciprocal basis through bilateral negotiation.

8. The Minister of Transport should complete Open Skies negotiations with the European Union as quickly as possible.

9. The Minister of Transport, on the basis of public consultations, should issue a policy statement by December 2009 on whether foreign investors should be permitted to establish separate Canadian-incorporated domestic air carriers using Canadian facilities and labour.

Uranium Mining

10. The Minister of Natural Resources should issue a policy directive to liberalize the non-resident ownership policy on uranium mining, subject to new national security legislation coming into force and Canada securing commensurate market access benefits allowing for Canadian participation in the development of uranium resources outside Canada or access to uranium processing technologies used for the production of nuclear fuel for nuclear power plants.

Telecommunications and Broadcasting

11. Consistent with the *Telecommunications Policy Review Panel Final Report 2006*, the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, the Minister of Industry should seek an amendment to the *Telecommunications Act* to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalized in a manner that is competitively neutral for telecommunications and broadcasting companies.

Financial Services

12. The "widely held" rule applicable to large financial institutions should be retained.

13. The Minister of Finance should remove the de facto prohibition on bank, insurance and cross-pillar mergers of large financial institutions subject to regulatory safeguards, enforced and administered by the Office of the Superintendent of Financial Institutions and the Competition Bureau.

The Competition Act

14. The Minister of Industry should introduce amendments to the *Competition Act* as follows:

    a) align the merger notification process under the *Competition Act* more closely with the merger review process in the United States; the initial review period should be set at 30 days, and the Commissioner of Competition should be empowered, in its discretion, to initiate a "second stage" review that would extend the review period for an additional period ending 30 days following full compliance with a "second request" for information;

    b) reduce to one year the three-year period within which the Commissioner of Competition currently may challenge a completed merger;

    c) repeal the price discrimination, promotional allowances and predatory pricing provisions;

d) **repeal the existing conspiracy provisions and replace them with a *per se* criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects;**

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;**

f) **grant the Competition Tribunal the power to order an administrative monetary penalty of up to $5 million for violations of the abuse of dominant position provisions; and**

g) **repeal the "Air Canada" amendments that created special abuse of dominant position rules and penalties for a dominant air passenger service.**

15. **The Minister of Industry should examine whether to increase the financial thresholds that trigger an obligation to notify a merger transaction as well as whether to create additional classes of transactions that are exempt from the merger notification provisions of the *Competition Act*.**

16. **The responsibility for competition advocacy should be vested in the proposed Canadian Competitiveness Council. The power to undertake interventions before regulatory boards and tribunals under sections 125 and 126 of the *Competition Act* should remain with the Commissioner of Competition, unless and until such powers are granted to the proposed Council.**

17. **The Competition Bureau should reinforce its commitment to giving timely decisions, strengthen its economic analysis capabilities, give appropriate weight to the realities of the global marketplace and, where possible, provide "advance rulings" and other less formal advice to parties concerning prospective transactions and other arrangements on a timely basis to ensure compliance with the *Competition Act.***

Competitiveness Agenda: Public Policy Priorities for Action

Taxation

18. The federal, provincial and territorial governments should continue to reduce corporate tax rates to create a competitive advantage for Canada, particularly relative to the United States.

19. Provinces should expedite the phase-out of provincial capital taxes, and the provinces of Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island should move expeditiously to harmonize their provincial sales taxes with the goods and services tax.

20. The federal, provincial and territorial governments should give priority to reductions in personal income taxes, particularly for lower- and middle-income Canadians, and should provide incentives for investment and work by shifting a higher proportion of governments' revenue base to value-added consumption taxes.

21. The International Tax Panel should give particular attention to an assessment of tax provisions disadvantaging Canadian companies relative to non-Canadian companies in Canadian acquisitions, with the objective of recommending ways to allow Canadian-based companies to compete on an equal footing.

22. The International Tax Panel should assess the provisions of Canadian tax legislation limiting interest deductibility by Canadian companies in respect of foreign acquisitions to ensure that Canadian companies seeking to compete globally enjoy every advantage relative to their foreign competitors.

Attracting and Developing Talent

23. Governments should continue to invest in education in order to enhance quality and improve educational outcomes while gradually liberalizing provincial tuition policies offset by more student assistance based on income and merit.

24. Post-secondary education institutions should pursue global excellence through greater specialization, focusing on strategies to cultivate and attract top international talent, especially in the fields of math, science and business.

25. **Governments should use all the mechanisms at their disposal to encourage post-secondary education institutions to collaborate more closely with the business community, cultivating partnerships and exchanges in order to enhance institutional governance, curriculum development and community engagement.**

26. **Federal and provincial governments should encourage the creation of additional post-secondary education co-op programs and internship opportunities in appropriate fields, to ensure that more Canadians are equipped to meet future labour market needs and that students gain experiences that help them make the transition into the workforce.**

27. **Governments should provide incentives and undertake measures to both attract more international students to Canada's post-secondary institutions and send more Canadian students on international study exchanges.**

28. **Governments should strive to increase Canada's global share of foreign students, and set a goal of doubling Canada's number of international students within a decade.**

29. **Governments, post-secondary education institutions and national post-secondary education associations should undertake regular evaluations, measure progress and report publicly on improvements in business–academic collaboration, participation in co-op programs, and the attraction and retention of international talent.**

30. **Reforms to Canada's immigration system should place emphasis on immigration as an economic tool to meet our labour market needs, becoming more selective and responsive in addressing labour shortages across the skills spectrum.**

31. **Canada's immigration system should develop service standards related to applications for student visas and temporary foreign workers, and should be more responsive to private employers and student needs by fast-tracking processing and providing greater certainty regarding the length of time required to process applications.**

32. **In order to ensure that Canada is able to attract and retain top international talent, and respond more effectively to private employers, Canada's immigration system should fast-track processing of applications for permanent residency under the new Canadian Experience Class for skilled temporary foreign workers and foreign students with Canadian credentials and work experience.**

Head Offices and Cities

33. Given the national importance of Canada's largest urban centres, the federal government should provide leadership to deal with critical urban issues, particularly those affecting infrastructure, immigration, and higher education and training.

34. In addressing urban issues, municipalities need a more stable, secure and growing revenue source. In particular, provincial governments should assess the feasibility of allowing any municipality to levy a 1 percent value-added tax within their jurisdiction, assessed on the harmonized goods and services tax base, which would be collected by the Canada Revenue Agency (or Revenue Quebec) on behalf of the municipality.

35. In dealing with these issues, municipal authorities that have not already done so should make greater use of financing mechanisms such as user fees, cost recovery programs, debt financing and public–private partnerships.

Fostering Growth Businesses

36. Federal and provincial governments' small and medium-sized enterprise policies should focus on those firms that demonstrate the desire and capacity to grow to become large enterprises. Small and medium-sized enterprise policies and programs should be subjected to regular review in order to assess and measure whether this objective is being met.

37. The Minister of Finance and the Minister of Industry should develop and release a public report on options, including tax incentives, to facilitate the provision of more private venture capital, particularly at the "angel" and late stage, by June 2009.

Strengthening the Role of Directors in Mergers and Acquisitions

38. Securities commissions should repeal National Policy 62-202 (Defensive Tactics).

39. Securities commissions should cease to regulate conduct by boards in relation to shareholder rights plans ("poison pills").

40. Substantive oversight of directors' duties in mergers and acquisitions matters should be provided by the courts.

41. The Ontario Securities Commission should provide leadership to the Canadian Securities Administrators in making the above changes, and initiate action if collective action is not taken before the end of 2008.

The Canadian Economic Union

42. The federal government should provide leadership in the elimination of all internal barriers between the provinces and territories that inhibit the free flow of goods, services and people by June 2011.

43. Federal and provincial governments should establish by June 2009 a work plan to achieve this goal and provide interim reports on progress every six months.

44. The federal government should show leadership regarding national securities regulation and resolve this matter expeditiously.

45. The federal government should more fully harmonize federal environmental assessment procedures with provincial processes.

46. Beginning January 2009, the federal government should abide by timelines that are not longer than the environmental assessment timelines set by the relevant provincial jurisdiction for a proposed project subject to assessment and incorporate such timelines as part of the broader national review required for 2010.

Canada–US Economic Ties

47. Addressing the thickening of the Canada–US border should be the number one trade priority for Canada, and requires heightened direct bilateral engagement at the highest political levels.

48. Canada should act to create a more seamless US border crossing process, focusing on priorities jointly identified by the Canadian Chamber of Commerce and US Chamber of Commerce in their February 2008 report, while responding to legitimate US security needs, and funding and expediting vital border infrastructure.

International Trade and Investment

49. The federal government should set an ambitious timeline for concluding priority trade and investment agreements, led by the Minister of International Trade who should pursue a flexible, results-based approach, beginning by simplifying Canada's model foreign investment protection agreements and streamlining our free trade agreements negotiating processes.

50. Beginning in 2009, on behalf of the federal government, the Minister of International Trade should report at least annually on Canada's trade and investment liberalization initiatives generally and in specific sectors.

51. Beginning immediately, the Minister of International Trade should build on the Global Commerce Strategy by developing and publicizing annual plans and priorities for enhanced trade and investment, and by identifying priority trading partners, economic impacts of prospective agreements and services to businesses. Comprehensive input from business should guide and inform Canada's approach across government.

Regulation

52. A senior federal economic minister should be mandated to lead and oversee progress on regulatory reforms, implementing a new regulatory screen by June 2009 that would subject all new regulations to a rigorous assessment of their impact on competitiveness.

53. Each major federal regulatory department and agency should reform its processes to increase transparency, reduce overlap and duplication, and set clear standards to yield time certain decisions, reporting annually, commencing in 2010, on outcomes and performance.

54. The foregoing recommendations for regulatory reform are equally applicable to provinces and territories.

55. Canada should harmonize its product and professional standards with those of the US, except in cases where, and then only to the extent that, it can be demonstrated that the impairment of the regulatory objective outweighs the competitiveness benefit that would arise from harmonizing.

Innovation and Intellectual Property

56. The federal government should monitor the scientific research and experimental development tax credit program annually in order to ensure that business investment in research and development and innovation in Canada is effectively encouraged.

57. As a matter of priority, the federal government should ensure that new copyright legislation will both sufficiently reward creators while stimulating competition and innovation in the Internet age. Any prospective changes to Canada's patent law regime should also reflect this balance. The federal government should assess and modernize the Canadian patent and copyright system to support the international efforts of Canadian participants in the global economy in a timely and effective manner.

58. Before December 2009, the federal government should strengthen counterfeit and piracy laws to ensure that intellectual property rights are effectively protected.

59. Canada's post-secondary education institutions should expedite the transfer of intellectual property rights and the commercialization of university-generated intellectual property. One possible method to achieve this would be to move to an "innovator ownership" model to speed commercialization.

Driving Change: A Canadian Competitiveness Council

60. The federal government should establish as expeditiously as possible an independent Canadian Competitiveness Council under the Minister of Industry. The Council should be staffed by a Chief Executive Officer and a small core staff, overseen by a Board of Directors.

61. The Council's mandate should be to examine and report on, advocate for measures to improve, and to ensure sustained progress on, Canadian competitiveness. The Council should not enforce laws and regulations but should have a public voice, including the power to publish and advocate for its findings.

62. **The Council should set its own agenda, reviewing matters or conducting research on its own initiative as well as in response to the request of a federal or a provincial minister or a municipal mayor. Governments should not have the power to compel the Council to undertake or discontinue a review or study.**

63. **The Council should be required to report to Parliament on its activities on an annual basis through the Minister of Industry.**

64. **The Council's Board of Directors should consist of not more than nine persons, including the Chair, and should include a majority of non-governmental members, as well as members with experience representing the federal, provincial and municipal governments.**

65. **The Council should be mandated and fully funded in a manner that would allow the Council to operate in an effective and responsible manner for a five-year period. Prior to the end of the five-year period, the Minister of Industry should undertake a review to determine whether the Council's mandate should be renewed and, if so, on what terms.**

HOUSE OF COMMONS
CANADA

A Plan to Modernize Canada's Competition Regime

Report of the Standing Committee on Industry, Science and Technology

Walt Lastewka, M.P.
Chair

April 2002

Also available on the Parliamentary Internet Parlementaire: http://www.parl.gc.ca

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THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

has the honour to present its

EIGHTH REPORT

Pursuant to Standing Order 108(2), the Committee proceeded to a study of Canada's competition policy and framework, including the *Competition Act*. After hearing evidence, the Committee agreed to report to the House as follows:

TABLE OF CONTENTS

CHAIR'S FOREWORD

In June 2000, the House of Commons Standing Committee on Industry, as the current Committee was then known, produced an *Interim Report on the Competition Act*. This report followed an independent review of the anticompetitive pricing provisions of the *Competition Act* and the Competition Bureau's enforcement record, as was requested by the Bureau at the insistence of The Honourable John Manley, Minister of Industry. Professors J. Anthony VanDuzer and Gilles Paquet, both of the University of Ottawa, conducted this in-depth study dealing with predatory pricing, price discrimination and price maintenance. Their work, entitled *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, and subsequently known as the VanDuzer Report, was completed and presented to the Committee in October 1999.

After receiving this report and while the Committee was conducting its hearings process, the Bureau engaged the Public Policy Forum (PPF) — a non-profit, non-partisan organization dedicated to improving the quality of government in Canada — to consult the Canadian public widely on changes to the *Competition Act* and the *Competition Tribunal Act*. The changes contemplated in its consultations were those proposed in four Private Member's bills: Bill C-402, Bill C-438, Bill C-471 and Bill C-472. Two of these bills covered much the same policy ground as the Committee's study. Because the Committee did not want to prejudice this consultative process, it decided not to provide an opinion on any of the specifics of these bills and to make its report an interim one. The Committee would weigh in on these matters only after these consultations were complete and a report issued.

In December 2000, the PPF published its report, entitled *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations*, which summarized both the written submissions it had received and the discussions at the roundtables it had held. The Government of Canada then decided to wrap some of the contents of the four Private Member's bills into a government bill. The government chose the parts where a consensus could be obtained, including selected inputs from both this Committee's *Interim Report* and the PPF's report. All these efforts culminated in Bill C-23: *An Act to Amend the Competition Act and the Competition Tribunal Act*, which was assigned to this Committee for study after First Reading in the House of Commons. This course of action, rather than the traditional procedure of assigning the bill to a parliamentary committee only after Second Reading, permitted a more thorough review of the bill and the Acts that it sought to modify. This procedural route also allowed the Committee to study more deeply the changes contemplated and, if necessary, to recommend additional changes.

The bill dealt with four issues: (1) creating a new offence for "deceptive prize notices," including "scratch and win cards"; (2) facilitating cooperation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws; (3) streamlining the administrative processes of the Competition Tribunal by

providing for cost awards, summary dispositions and references; and (4) broadening the scope under which the Tribunal may issue temporary orders. After extensive consultation with competition law experts and selected business interests, the Committee subsequently amended the bill in two important ways. The bill, if it receives Royal Assent as amended, will permit private parties to have access to the Tribunal for resolving disputes on a limited number of business practices that are considered civilly reviewable by the Acts. The Tribunal will also now be able to impose an administrative penalty of as much as $15 million if an air carrier is found guilty of abuse of dominance (sections 78 and 79 of the *Competition Act*, which would include acts of predatory behaviour).

The Committee believes that Bill C-23 amendments to the two competition Acts provide a good start, but more amendments are needed to address contemporary antitrust concerns. In some cases, the *Competition Act* captures too many business practices, which leads to a "chilling effect" on perfectly legitimate, pro-competitive behaviour on the part of Canada's most productive firms. At the same time, and in other cases, both competition Acts fail to capture and properly address many business practices that at least appear to be anticompetitive and may even constitute egregious anti-social behaviour. Therefore, more change is necessary, and the Committee agrees with the government's multi-stage approach to reform. Looking beyond the immediate horizon, the Committee undertook four roundtables that included more than 20 eminent competition law experts, as well as formal and informal meetings with the Bureau and members of the Tribunal, respectively, to suggest options and a timetable for reform.

Although interesting and varied opinions exist amongst competition policy experts on a number of business practices and their current legal status, as well as the way in which they should be reviewed and pursued by the Bureau and Tribunal, these views were not so diverse as to prevent a consensus. The Committee believes this consensus is captured in this report. However, the first-time reader of this Committee's reports is encouraged to read our *Interim Report* before tackling this one; a better understanding and appreciation will be gained on the necessary trade-offs in objectives presented by competition issues.

At this time, I would like to thank those who participated in our extensive hearings process and who shared their insights with us. I am confident that the public will agree that this report reflects both their concerns and common Canadian values and priorities in the domain of competition policy, law and enforcement. Finally, on behalf of the whole Committee, I wish to express our appreciation for the dedicated efforts of Ms. Susan Whelan, the former Chair of the Committee, and to acknowledge her important role in the creation of this report.

PREFACE

Competition legislation, or antitrust legislation as it is sometimes called, has existed in Canada for more than 100 years. While the name or title of the governing Act has changed several times over the years,[1] each revision has refined it and made it a more effective instrument of the public interest. These revisions were necessary to fill major breaches in the Act because serious limitations in its enforceability became obvious almost immediately from the law's earliest contested cases. Canada was the first industrial country out of the gate to adopt an antitrust law in 1889 but, from a practical sense, Canada fell well behind most major industrialized nations fairly early on in the realm of competition matters. In the intervening years between the original Act of 1889 and the current Act of 1986, Canada's competition law could hardly have been touted as being on the vanguard of competition policy; much more work had to be done, and on a limited number of important issues still remains to be done, to realize such a lofty status.

The primary goal of the legislation — from the first to the latest — remains the same: the quashing of conspiracies and monopoly-making restraints of trade (except those created by federal and provincial legislation). The Committee's *Interim Report on the Competition Act* (hereinafter the "*Interim Report*") provides some limited chronology of the revisions taken to date. In this report, the Committee wants to limit the amount of rehashing of this history. Our point of departure will be the adoption of the *Competition Act* and the *Competition Tribunal Act* in 1986; in the interest of brevity, we will revisit only the most significant amendments to these Acts and the economic conditions that spawned them.

At the outset, the Committee observes five relatively recent economic trends that are becoming pervasive in today's society — trends that, in all probability, cannot be divorced from the knowledge-based economy that we are building. These economic phenomena include: (1) a shift in corporate strategies that seek a competitive advantage through the attainment of economies of scale and scope and towards innovation; (2) the organizational drive to delayer many large corporate hierarchies through spinning off non-core activities to separate businesses and the forging of strategic allies or, alternatively put, the development of business networks in the hopes of raising productivity; (3) the adoption of new technologies, particularly digital technologies, that require substantial up-front investments with low or next-to-zero incremental unit costs that may lead to very aggressive pricing policies in economic downturns; (4) the adoption of products, most notably software programs such as Microsoft Windows, that may eventually develop into an industry standard, which will often be accompanied by network

[1] The original Act was called *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* in 1889, which was repealed and replaced by the *Anti-Combines Act* of 1915. This new Act was repealed and replaced by two Acts: the *Board of Commerce Act* and the *Combines and Fair Price Act* in 1919, which were later ruled *ultra vires*. These Acts were then replaced by the *Combines Investigation Act* of 1923, which was in turn repealed, thoroughly reworked and replaced by the *Competition Act* of 1986.

effects[2] and may consequently lead to unusually high levels of market concentration (including near-monopolization); and (5) the internationalization of commerce — trade and investment — in the wake of new transportation and communications technologies, with their attendant lower costs, and government policy favouring the removal of significant tariff barriers to trade around the globe. Each of these new developments has been a catalyst for changes to the *Competition Act* and the *Competition Tribunal Act*.

These economic phenomena and the competition concerns that they raise can be seen as the main causes of a flurry of government and Private Member's bills that have made it to the *Order Paper* of the House of Commons. Indeed, one of the best barometers a democratic country has for measuring the public's dissatisfaction with what is going on in the marketplace may be found in the number of bills or amendments for change. In the case of amendments to the *Competition Act* and the *Competition Tribunal Act*, nine Private Member's bills and two government-sponsored bills (Bill C-26 of the 36th Parliament and Bill C-23 of 37th Parliament) have arisen in the last two years alone.

The Committee suggests that the almost simultaneous appearance of these bills and the above-cited economic trends are no accident; there is a causal relationship flowing from economic trend to *Competition Act* amendment. For example, the local telephone network is the perennial case of a "network economy or externality." Cable television, rail freight services, electrical power and natural gas distribution also belong to this special industrial species, as is the recently deregulated airline industry. Some of the technologies used by airline companies also display very low incremental unit costs relative to total costs. The traditional way of handling these cases of near or "natural monopoly" has been to regulate them. Since the late 1980s, however, airline, rail freight, long distance telephone and international telecommunications services have been partially deregulated because technology developments suggest that they no longer harbour the natural monopoly characteristic. Only the deregulation of the airline industry has proven controversial. Here, the relatively small Canadian market and the federal government's maintenance of foreign ownership restrictions on the operation of air carrier services have conspired to produce a highly concentrated market, frustrating both the travelling public and would-be start-ups in the industry. Bill C-26, an amendment passed in the 36th Parliament in 2000, was an attempt to address this problem subsequent to the imminent failure of Canadian Airlines International Inc. and its merger with Air Canada Inc. The failure of many smaller airline companies in the past few years (Royal Airlines, Greyhound Airlines, Canjet, Canada 3000) and the sheer dominance of Air Canada in the Canadian market were the stimulus for an amendment to Bill C-23. This amendment would give the Competition Tribunal the power to assess an administrative penalty of as much as $15 million if an air carrier is found guilty of abuse of dominance. As such, the

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[2] A "network effect," or as it is sometimes called a "network economy," refers to an enhanced value an individual already subscribing to a business network would assign to the service with the addition of more customers. Using the local telephone network as an example, the larger the number of telephone subscribers to the local network, the greater the willingness to pay for service on the part of each subscriber. Such a "network economy" is also often referred to as a "network externality" because it is a value that is external to the firm but internal to the industry. Regulatory agencies across the world have been notorious in capturing and exploiting this externality through mandatory and implicit cross-subsidy pricing regulations.

government is departing from the traditional approach of arming the industry's regulator with the necessary powers to directly control these aspects of competitive behaviour. The government has instead taken a "special rules for special industries" approach, which calls into question the claim that the *Competition Act* is framework legislation, justifying it on the grounds that this industry comes under federal regulatory jurisdiction.

Bill C-23 addresses the increasing internationalization of commerce in two important ways. First, this bill would facilitate cooperation between the Competition Bureau and foreign competition authorities for the enforcement of civil competition matters now that monopolization practices can transcend country boundaries. Second, the Committee amended this bill to give private parties access to the Competition Tribunal for resolving disputes on a limited number of business practices that are considered civilly reviewable by the Acts. This amendment should comfort many small- and medium-sized businesses that may have to combat large multinational enterprises which attempt to abuse their dominant position.

Finally, increased innovation across most sectors of the economy demands quicker resolution of disagreements between private parties and the Bureau on controversial competition issues. Bill C-23 responds to such demands by proposing to streamline the Tribunal's administrative processes through the provision of cost awards, summary dispositions and references.

Bill C-23 will provide a good first step to strengthening the *Competition Act*. More steps, however, must be taken. Industry and competition experts complain that the law is over-inclusive in some areas of antitrust, but under-inclusive in other areas. The typical example of over-inclusiveness has been the law's inability to properly distinguish between a strategic alliance and a conspiracy to raise prices to the detriment of the public, which has a "chilling" effect on some profitable and competitively benign opportunities that the business sector would otherwise undertake (despite the development of the Bureau's bulletin: *Strategic Alliances Under the Competition Act*). Conventional thinking suggests that a strategic alliance is preferred to a full-blown merger as a means of gaining cooperative behaviour between rival companies with distinct core competencies. The perennial example of the law's under-inclusiveness is found in the term "unduly" in section 45 of the Act — again dealing with a conspiracy — which makes it hard to obtain a conviction in a contested case; this is true even when the case is, for all intents and purposes, a "naked hard-core cartel" with no redeeming social value.

Furthermore, a growing number of stakeholders believe that the *Criminal Code* is not well suited to distinguish between anticompetitive conduct and perfectly legitimate pro-competitive conduct when it comes to price discrimination, predatory pricing and vertical price maintenance practices. Shifting these pricing provisions over to the civilly reviewable side of the Act deserves further consideration. Competition Bureau resource issues, including the thresholds for merger review, are also a cause for concern and so are the processes and powers of the Competition Tribunal. Resolution of these issues is the task of this report.

LIST OF RECOMMENDATIONS

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of crime detection with a view to improving its existing record of success.**

2. **That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.**

3. **That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.**

4. **That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).**

5. **That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.**

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to the proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

7. **That the Competition Tribunal, in consultation with the Tribunal-Bar Liaison Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that**

will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.

8. **That the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79).**

9. **That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part VII.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.**

10. **That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.**

11. **That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.**

12. **That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.**

13. **That the Government of Canada repeal the term "unduly" from the conspiracy provision (section 45) of the *Competition Act*.**

14. **That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a**

broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the "beyond a reasonable doubt" standard, for such an exception would be placed on the proponents of the agreement.

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under subsection 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections of the *Competition Act* covering essentially the same conduct.

16. That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the same treatment as the merger review provisions (sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

17. That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.

18. That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.

19. That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the Act. That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition,

failing which the applicant is deemed to have been granted a certificate.

20. That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.

21. That the Government of Canada repeal paragraphs 50(1)(*b*) and 50(1)(*c*) of the *Competition Act* and amend the Act to include predatory pricing as an anticompetitive act within the abuse of dominant position provision (section 79).

22. 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).

23. That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(*a*) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.

24. That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(*a*).

25. That the Competition Bureau revise its *Enforcement Guidelines on the Abuse of Dominance Provisions* in order to be consistent with the addition of the anticompetitive pricing practices (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) to section 79 of the *Competition Act*.

26. That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or

share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.

27. That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.

28. That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act,* and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.

29. That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

INTRODUCTION

Canada's original competition law was born out of the public's dislike for some of the business combinations that were being formed just prior to the turn of the 20th century. However, as history would later show, the large-scale businesses that were fashioned from key mergers and acquisitions in related activities at that time were, for the most part, an organizational response to innovation in products and processes that resulted in vast economies of scale. These scale economies dictated new business strategies based on massive investments in physical capital as well as a commitment to building integrated operations extending backward into core raw materials and forward into marketing and distribution networks. Furthermore, these strategies could only just then be implemented with the opening up of more distant markets as integrated railway and telegraph networks were developed.

I … encourage the Committee to rise to the challenge and provide a more ambitious blueprint for the modernization of our Act … It's my hope that this blueprint will form the basis of a government white paper that will … launch the next round of amendments. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

Unfortunately, this good came with the bad. The unprecedented cost advantages bestowed upon large-scale operators led to the elimination of many small-scale merchants. So the world's first antitrust law — Canada's *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* — was enacted in an attempt to assure the public on two grounds: first, this industrial transformation would occur in an orderly way, only the inefficient would be driven out of business and not efficient small-scale operators through predatory means; and second, in the end, the ultimate beneficiaries of technological and organizational change would be consumers. The original antitrust legislation, as well as the three Acts that would replace it, had three targets: conspiracies to raise prices; mergers and acquisitions that would monopolize markets; and a dominant firm's abusive business practices and predator policies that would injure, rein in or drive out its smaller rivals.

[Y]ou … need amendments … to make the Act more effective in addressing anti-competitive conduct and … to reduce the chilling effect the Act … has on a broad range of pro-competitive conduct, whether it's these pricing practices …, or horizontal cooperation, which … in the vast majority of circumstances is pro-competitive once you get outside this limited category of hard-core criminal cartel conduct. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:45]

The modern version of the original antitrust Act, now known as the *Competition Act*, is a well-crafted economic instrument designed to preserve and enhance the process of competition. It is a law of general application; it applies to

I think the proposals for the two tracks, criminal versus civil in section 45, is something that will have to be done … it's the sensible thing to do. [Jeffrey Church, University of Calgary, 59:10:55]

all industries in equal measure (except those provided an exemption by federal or provincial legislation) and puts the interest of no one competitor or class of competitor ahead of those of any other. Canada's *Competition Act*, the Competition Bureau and the Competition Tribunal have supplemented the competitive process in producing an economic environment in which non-compliance with the law is more the exception than the rule. This has been accomplished by:

- establishing a broad competition framework, thereby setting "the rules of the game";
- making the guidelines of the enforcement agency — the Competition Bureau — widely available to the business community;
- having the Bureau fulfil its advocacy role at many regulatory hearings and other public events, thereby making the rules known to all players; and
- judiciously enforcing the many provisions of the Act under the watchful eye of the referee — the Competition Tribunal — so that the game is called according to the rules.

The difficulty with the reform of section 45 is not … that there's any disagreement around the evil of hard-core cartels. The difficulty is whether you can … write … a law that is not massively over-inclusive. [Neil Campbell, McMillan Binch, 59:12:55]

At the turn of the 21st century, a similar set of circumstances to that of the turn of the 20th century appears to be unfolding. The source of change is again innovation, but this time it has less to do with cost advantages of scale and scope associated with new physical capital and more to do with creative advantages associated with "human capital." Rather than exploiting the size and scope of a firm, or more succinctly, the efficiencies obtained through central direction of an industrial hierarchy, the business corporation is focusing on being lean and nimble. Many modern corporations are, therefore, spinning off non-core competency activities, while weaving ever-larger webs of business networks. This organizational structure — which relies on independent, highly specialized, interdisciplinary work teams — provides focus to the firm at a time when the currency of the so-called "Information Age" is the creative talents of the workforce. The business sector is thus banking on increased productivity through a strategy of creative competitive advantage. When one combines these corporate developments with innovations (such as containerization in transportation and digitalized broadband in wired and wireless telecommunications) and policy shifts

[W]hy do we not have a Microsoft case in Canada? Seventeen states in the U.S., the federal government in the U.S., and Europe have all looked at that. There's no argument that the impact in Canada … is any different. … [T]he answer: We don't have the funding to take that abuse case in Canada. [Robert Russell, Borden, Ladner & Gervais, 59:09:50]

to more liberalized trade and deregulated industries, the business landscape is increasingly becoming global rather than national.

My own reading of what the Bureau has … in the merger area is that … they are probably pretty well funded … The user fees have provided a cashflow to assist in that. [Neil Campbell, McMillan Binch, 59:12:35]

Firms using today's newest business models, such as "just-in-time" production and "Big Box" retailing, are exerting tremendous pressure on small and medium-sized businesses that are not adjusting. As a result, new stresses and fracture points in the competition policy framework are appearing once again. Although the *Competition Act* is a modern piece of legislation that reflects contemporary economic thinking and provides a balanced approach to enforcement, there are signs that it can be made more effective in certain areas and, where it is already effective, can be made more efficient. Amendments to selected provisions of the *Competition Act* and to the administrative processes of the Competition Tribunal are the order of the day.

The Committee began answering the call for a modern and effective competition law regime in its *Interim Report*. We broached, amongst other issues, the private right of action in respect of some civilly reviewable matters, such as refusal to deal (section 75), exclusive dealing, tied selling, and market restriction (section 77) and delivered pricing (section 80). With the Public Policy Forum's subsequent finding of a favourable consensus (provided that adequate safeguards against vexatious and frivolous suits were put in place), the Committee amended Bill C-23 in favour of such rights (excluding section 80). Consequential amendments were also necessary. The Committee further amended section 75 to ensure that an "adverse effects on competition" test was added, which would eliminate any incentive for frivolous commercial disputes, given that the Commissioner would no longer be the gatekeeper of these sections.[1]

In terms of … enforcement … there are really three things that can be dealt with … There is this question of funding … the question of alternative enforcement mechanisms like private access, which … for civil cases would help the Bureau a great deal by taking some of the workload away from them. The other area on the agenda … is … reform of the Tribunal process. [Margaret Sanderson, Charles River Associates, 59:11:20]

[1] Typically, the "competitive effects test" used in the Act is that of a "substantial lessening of competition." Section 75 will, however, use an "adverse effects on competition" test. The meaning of "substantial lessening of competition" has been refined to a degree by judicial interpretation and the meaning of "adverse effect on competition" will have to be similarly clarified. The use of the "adverse effects" test in section 75 is to permit small and medium-sized enterprises the opportunity to have their cases heard in the new private access regime. In the case of a firm with a small market share, a refusal to deal might not "substantially lessen" but still "adversely affect" competition. The requirement to show a "substantial lessening of competition" in a market would be likely to exclude private action in all but the largest cases.

The Committee's actions will not stop there; we intend this report to become a blueprint for a government White Paper that will launch the next round of amendments to the *Competition Act* and the *Competition Tribunal Act*. The report will identify both the relevant sections of the two Acts needing reform and the pertinent issues related to the options under consideration. Once these options for reform are clarified, the Committee will weigh them, look for consensus amongst the various stakeholders, and recommend a course of action; where warranted, a timetable for reform may also be provided. The reasoning for the Committee's preferences will be spelled out in detail where possible, as the Committee finds transparency an essential ingredient to the reform of complex issues involving competition policy and its many varied stakeholders.

[T]here's been a tendency to describe private action as … a … way of helping the Commissioner out, … putting more resources into his pocket and doing some of his work … but I don't see it that way … [O]ne has to think much more broadly about private action … [as] a way of … enlarging the scope of competition cases. … [W]e should get a much richer case law and a much richer body of decisions from which to draw. [Roger Ware, Queen's University, 59:11:35]

Although the Committee is not under the illusion that only one combination of reforms is possible or desirable, we do caution both the reader and policy-maker that the recommendations offered here are a package of reforms that are not easily cherry-picked due to the *Competition Act*'s complex set of interrelationships within its different sections. Attempts to select among these recommendations to craft a different competition framework or different strategy are not without consequences.

[T]here's a theme percolating that jurisprudence is just inherently good and we should have lots of it. I'm concerned about that, because it's a very costly way to create law, relative to legislation that's fleshed out by regulations or guidelines, which have their imperfections but can also play a much more efficient and faster role in many areas. The real question … is how do we ensure that we get good, economically sound competition law enforcement …? [Neil Campbell, McMillan Binch, 59:12:15]

The plan of this report is as follows. In Chapter 1, the Committee picks up the discussion on the historical background of competition law and policy and the key economic developments that are challenging Canada's competition framework today, as set out in this introduction, by placing it in three settings. We first venture into the proper role of competition law given our understanding of the workings of the process of competition and the impacts of other complementary government policies. Gaining an appreciation for the interplay of these influential factors, we are able to establish a suitable role for competition law in Canada. In the second setting, a comparative analysis of different competition law provisions, involving both criminal and civil matters, is undertaken; this analysis suggests an optimal enforcement strategy for a mid-sized, open-trading economy — the Canadian circumstance. Finally, the merits of framework law versus "special provisions for special

industries" approach are debated, concluding in favour of a return to a framework law, but one that is bolstered by more general enforcement powers than in the past.

In Chapter 2, the Committee reports on the state of competition in Canada and the state of enforcement. In analyzing the latter's contribution to the former, we distinguish between the Bureau's array of enforcement instruments, enforcement guidelines and resources, and its Commissioner's independence and accountability structure. We also evaluate the role of the Tribunal and the courts, the deterrence incentive structure of fines and jail time, as well as the enforcement potential that private rights of action are likely to provide. In Chapter 3, the Committee discusses the role of the Competition Tribunal and its decision-making procedures.

Innovation is a lot faster. Transactions are taking place in nanoseconds, as opposed to quill pens on parchment. The pace of market behaviour is so fast today that it really imposes a very difficult challenge on an enforcement agency. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

In chapters 4, 5, 6 and 7, the Committee addresses the important provisions of the *Competition Act*: conspiracy; the anticompetitive pricing practices; acts constituting abuse of dominance; and merger review. In each chapter, we assess the economic content of the law, the merits and appropriateness of whether the relevant practices should be placed in the criminal or civil part of the Act, the substantive elements of each provision and the Bureau's administration. The contentious issues will be identified, sorted out and thoroughly assessed in light of modern economic exigencies. The Committee will advance reforms where a consensus can be reached; where it cannot, further study is recommended.

[I]t would be very helpful if your final report provided a strong endorsement of the principle that competition law as framework legislation ought not to be expanded to include a hodgepodge of industry-specific amendments. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

In Chapter 8, the Committee considers a narrow but important issue dealing with the application of the refusal to deal provision (section 75) in gasoline retailing. That industry presents particular competition concerns because independent retailers must necessarily depend on large, vertically integrated producers who both supply and compete with them. Could a large, vertically integrated producer restrict competition by withholding supply to a competing independent retailer in the case of a general supply shortage? And, if so, how would the *Competition Act* respond? Answers to these questions are necessary because there may be competition implications for other

sectors of the Canadian economy where vertical integration is also a structural characteristic. Finally, in the Conclusion, the Committee summarizes its recommendations for improvement of the competition policy framework.

CHAPTER 1: CANADA'S COMPETITION REGIME IN CONTEXT

Competition and Competition Policy Interplay

The interplay between the process of competition and competition policy and law is an interesting one. Competition is a means to an end, not an end in itself. We have competition so the business sector can deliver the best combination of products at the best prices to consumers. The best deal a consumer can receive comes from a free and open market, one with as few barriers to entry by new competitors and as few exit barriers,[2] including government-imposed barriers such as product, investment or trade regulations.[3] Indeed, certain government policies other than competition policy deliberately or inadvertently restrict competition, and competition policy (although sometimes controversial) is required to restore some sort of balance. However, even in the absence of government-imposed barriers, unfettered competition alone may not be enough. A complementary competition law is required in circumstances where, owing to technological barriers, competition will not automatically and immediately flourish.

[T]here's a need for something to be said about competition policy being broader than simply the competition law. There's a need to extend our competition policy to address the broader range of federal, provincial, and municipal government restraints to competition. In aggregate, these have a far greater adverse impact on consumers, small businesses, and large businesses in Canada than all private restraints combined. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:20]

I think the theme or principle behind the Competition Act*, which is that competition as a process is going to generate tremendous benefits, is a valid one that applies across industry segments.* [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

This interdependence of the process of competition and competition policy also runs in the opposite direction when governments adopt policies that, deliberately or inadvertently, foster competition. For example, trade liberalization provided by the Canada-United States Free Trade Agreement (FTA), followed by the North American Free Trade Agreement (NAFTA), was not only good trade policy, but also good competition policy. The deregulation and privatization of key industrial sectors of the economy,

[T]he Competition Act *is intended to and should protect the competitive process, and it is intended to ensure market conditions where a good company … can survive and do well … it should not be protecting any individual company.* [Donald McFetridge, Carleton University, 59:10:00]

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2 This last condition is particularly relevant in recent years to the retail sector with the move to the "Big Box" sales format, and, in particular, gasoline retailing given the exit barriers presented by environmental laws governing the decommissioning of underground gas tanks.

3 Government policies — such as CRTC telecom and cable and satellite television regulations, the dairy and poultry quota systems, airline ownership and cabotage services restrictions, Ontario's beer and liquor distribution system, first-class postal mail and interprovincial trade restrictions — represent a number of such barriers.

[A]n open international trade policy is in many ways a better way of creating competition than through a legal enforcement of one's own competition laws and, I should add, open foreign investment policy. [Roger Ware, Queen's University, 59:13:05]

while proving controversial as an industrial policy, has in general been good competition policy.

Regulated markets, or deregulated markets where the proper institutions for fostering competitive entry are not put in place in the transition period, can also distort a competition policy regime. Indeed, twisting the competition law to accommodate an anticompetitive regulatory environment is likely to compromise and even corrupt competition law. In the 1980s, Canadians witnessed the intervention of their competition authorities in what otherwise might have been an efficiency-enhancing merger of dairies (*Palm Dairies Ltd*.) because of production quotas and interprovincial trade barriers that limited competition in the downstream sector. In the 1990s, Canadians again witnessed their competition authorities intervening in book retailing (the merger of SmithBooks and Coles Book Stores Ltd. in 1995 to form Chapters Inc. and in 2000 with the merger of Chapters and Indigo) because of entry barriers that were built by government-imposed ownership restrictions. Today, Canadians are witnessing the enactment of "special rules for a special industry" — the air carrier services industry — into a framework law, as a result of the absence of a suitable deregulatory framework.

There are at least two cases that have preoccupied the resources of the Competition Bureau and the Competition Tribunal in the last five years that might not have even been there had we had a more open, continent-wide approach to these industries. I'm referring, of course, to airlines and book retailing. [Roger Ware, Queen's University, 59:11:35]

In general, we have this problem that when we move from regulation to deregulation, the regulator is involved, and it takes an active role in making sure that the right policies are in place to facilitate competition. We haven't had that in airlines. I don't think you should be looking for the Commissioner to save Canadian consumers … You should be looking at … Transport Canada. [Jeffrey Church, University of Calgary, 59:10:30]

An Optimized Competition Framework

Any competition framework, if it is to improve consumer welfare and economic efficiency, must incorporate the most up-to-date economic analysis. There is, nevertheless, considerable room to manoeuvre in the choice of framework. Competition law usually reflects the country's culture, business customs, legal history, political philosophies, as well as its geographic size and demographic makeup.

The statute is still … an economically sophisticated law, and is recognized as such around the world. [Lawson Hunter, Stikeman Elliott, 59:10:50]

For example, the United States antitrust agency — the U.S. Federal Trade Commission — begins to get tough on mergers at much lower levels of industrial concentration than does Canada's Competition Bureau. This approach is taken because in the much larger

U.S. economy, there is much less risk that firms will not achieve the necessary economies of scale and scope to be efficient. Furthermore, Canada's competition legislation is unique in that it provides an efficiencies defence which explicitly requires that the review of a merger balance the anticompetitive effects against the "gains in efficiency." Whichever of the two impacts is greater determines the merger proposal's acceptability or unacceptability.[4] This provision appears to be more lenient than in the United States, where the efficiency gains must be so great that prices will not rise as a result of the merger. However, the Committee heard evidence to suggest that even Canada's consideration of efficiencies is not adequate.

I don't think the system is irreparably broken. I think it is a system we can continuously improve … We should be doing that on an ongoing basis. [George Addy, Osler, Hoskin & Harcourt, 59:12:55]

Although the much smaller Canadian economy dictates a less vigilant merger enforcement framework than exists in the United States, it could be argued that Canada ought to have a more vigilant conspiracy enforcement framework than the United States to achieve similar levels of enforcement. This view follows from two realities: Canada is a smaller market that is more susceptible to technological barriers to competition; and its economy is subject to more government-imposed regulatory barriers to competition. As such, leniencies found in Canada's merger review process can be made up elsewhere, for example, by having a more stringent provisions on: conspiracy, anticompetitive pricing practices, market restriction, tying and abuse of dominance. A careful balancing of factors is required to produce an optimal competition policy mix.

Certainly in 1986 we were able to hold up the Competition Act *at that time in a very proud manner and point to a number of aspects of the legislation that really did bring it to the attention of other jurisdictions. But one of the ongoing deficiencies continues to be section 45 … it is out of kilter in relation to hard-core, naked cartels. It's out of kilter with other jurisdictions …* [Calvin Goldman, Davies, Ward & Beck, 59:09:40]

Indeed, the needed balance can be a subtle one, particularly at the enforcement stage. For example, one witness appearing before the Committee in early 2000, a former Director of Investigation and Research at the Bureau of Competition Policy (as the title and the agency were known prior to the mid-1990s) said that not enough attention was paid to the significance of the consolidation going on in the refining sector in the oil industry in the 1980s. The Bureau allowed the consolidation to take place, and this development explains, in part, why we are today experiencing many problems in the downstream petroleum

[4] This interpretation has been put into doubt due to recent events, i.e., the Federal Court's ruling on appeal of the *Superior Propane* case.

products sector.[5] If this view is indeed correct, then the organizational structure of the oil industry may present an almost unsolvable competition problem, far too complex for the anticompetitive pricing provisions of the *Competition Act*. Yet, at the same time, the Committee recognizes that the government has and continues to work on improving this situation. In any event, this hypothesis, whether correct or not, confirms the importance of correctly crafting the competition framework — one that fits Canada's unique economic circumstances.

You could give the Bureau as many resources as you wanted, and that wouldn't address the basic point that it's very difficult to establish beyond a reasonable doubt that any competitive predatory pricing has occurred. It wouldn't address the point that if someone chose to contest a section 45 case — we're talking about hard-core criminal behaviour … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:50]

According to many competition policy and law experts, the above problem is more widespread than is generally perceived. Some witnesses immediately pointed to the newspaper and grocery retailing industries as examples. Whether right or wrong, these comments suggest that Canada may indeed have a less-than-optimal competition enforcement strategy than what is required by a small, regulated or mixed economy.

When you're running an operation like that [Competition Bureau], you're constantly worried about two things. You're worried about … the "type one" errors, where you haven't taken enforcement action when you should have. You're also worried about the "type two" errors, where you have taken enforcement action in a benign case that may have caused narrow damage to those parties or a chilling effect on the marketplace. Dealing with those challenges in the environment we face in today's business climate is very, very difficult. [George Addy, Osler, Hoskin & Harcourt, 59:13:00]

Many competition law experts have three perennial criticisms of the *Competition Act*. First, Canada's conspiracy law, relative to other countries, is ineffective due principally to overly restrictive wording found in the provision (section 45). Consequently, the Commissioner of Competition has a poor record in contested conspiracy cases relative to the competition authorities in other jurisdictions. Second, Canada's conspiracy provision is both over-inclusive of some business arrangements in some circumstances and under-inclusive in others. In other words, the conspiracy provision is a very blunt instrument (see Chapter 4).

5 However, these events may themselves be inadvertent consequences of federal government regulations imposed on product formulas related to environmental emissions and export controls on crude petroleum in the 1980s that forced Canadian refiners to rely more heavily on the more costly heavy crude oil feedstock. The ensuing lower productivity levels may thus have meant that greater efficiencies through rationalization were needed to remain competitive with U.S. producers in what is a North American market for petroleum products.

Third, the Competition Bureau focuses its resources too heavily on merger review and too little on conspiracy enforcement.[6]

With respect to the second inference — the right mix of enforcement priorities — one would think that a small economy such as Canada would have a less vigilant merger enforcement regime than a large country such as the United States, relatively speaking and holding overall competition objectives the same, for the reasons already stated; and exactly the opposite situation in terms of conspiracy enforcement. Yet if the above complaints are true, Canada either has an inappropriate mix of competition law enforcement for its particular circumstance, or it is simply more lax on competition matters than are other major industrialized countries. This position further suggests that those who heralded the *Competition Act* as a watershed advancement over that of the *Combines Investigation Act* were much more critical of the predecessor Act than is commonly understood. In any event, consensus opinion appears to support that Canada moved from having a relatively ineffective competition statute prior to 1986, due principally to the higher burden of proof associated with the Act's criminal rather than civilly reviewable approach, to having one that, although more up to date in its economic content and legal treatment, is still somewhat misguided in a strategic sense. The Committee's report will, therefore, devote its efforts to correcting this defect. We will propose reform to the conspiracy provision that will make it more effective. Upon such change, we want the Bureau to aggressively pursue conspiracies against the public. The Committee, therefore, recommends:

[T]he Bureau's approach to merger review over-commits it in this area. If you examine statistical data, as compared with the U.S. experience with Hart-Scott, we're spending longer on cases, there are more cases, and they're getting extended reviews. This is absorbing a tremendous amount of time. I think we need to recognize that a very small proportion of them really do raise any significant issues. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:55]

I think a lot of the resource emphasis within the Bureau has been placed on merger review. Part of that is understandable. … From an enforcement perspective, I would like to see increasing attention paid to other provisions of the Act … [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of**

[6] However, if the first two complaints are indeed correct, then the third may not be correct.

crime detection with a view to improving its existing record of success.

Framework Legislation and Special Provisions

[A]s has been stated many times, the Competition Act *is a statutory general application. I'm not sure it's still true, with specific provisions now dealing with travel agents and so on, but I think it should be.* [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

The *Competition Act* is framework legislation; it applies to all industries in equal measure (except those monopolies created by the federal or provincial legislations). There are both good economic and legal reasons for this. The economic reasons are the long-standing belief that, by and large, free and open markets provide the best combination of products and services at the best prices to consumers. Except on occasion, when the *Competition Act* or some other (usually industry-specific) statute is needed, the process of competition disciplines suppliers in their decision making and thereby induces them to fulfil the needs of consumers in the most efficient manner. In the cut and thrust of competition, efficient firms survive and prosper, and inefficient firms fail and withdraw. The outcome of this dynamic is that only the interests of consumers and efficient suppliers are protected. The legal reasons are simply that, for constitutional reasons, most industries fall under provincial jurisdiction.

Generally speaking, the *Competition Act* only operates when: (1) the marketplace fails to deliver on the above expectations; and (2) compliance with the Act would produce a better outcome. Such situations arise only occasionally when, owing to technological and/or regulatory barriers, the pre-conditions for healthy competition are not present. In such cases, the Commissioner of Competition does not regulate the outcome, but instead lays the groundwork for a more competitive outcome.

There are industries that warrant special treatment. To the extent that they are regulated, there is a principle of regulated conduct, which is somewhat uncertain in its operation. I think it would be helpful if there were clarification of its operation, but to the extent that an industry is regulated, it is withdrawn from the coverage of the Act. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

Firms in special industries requiring special dispensation from selected provisions of the Act and/or from competition itself are not ordinarily provided refuge through special rules in the Act. Rather, specific statutes and regulatory regimes, which are usually industry- or firm-specific, are permitted to override the *Competition Act*

This is how the regulated conduct defence was born; although the boundaries of the defence are not clear. More jurisprudence will, perhaps, provide greater clarity in time.

At least this was the case for 111 years of antitrust law in Canada. In 2000, however, the Government of Canada departed from this principle and adopted special provisions that armed the Commissioner with the extraordinary power to issue an interim injunction (section 104.1), or an interim cease and desist order as it is often called, against any air service provider, as defined in the *Canada Transportation Act*, to prevent any anticompetitive behaviour (predatory pricing, paragraph 50(1)(*c*), and abuse of dominant position, section 79). Bill C-23 would extend the duration of this order (beyond a maximum of 80 days if all renewals are put into effect) to allow for good faith, but belated information exchanges between the contesting parties; the bill would also subject an airline company guilty of such offences to an administrative penalty of up to $15 million. The government justifies these measures on the grounds of the current crisis in the competitive structure of the airline industry in Canada.

[T]he government felt that there was a need to add some definition in terms of the airline industries is because of the special characteristic of the airline which is somewhat unique. You've got an industry where you have an overwhelming dominance by a carrier, you've got some restrictions in terms of the amount of foreign ownership that you can have in the industry, you've got assets that can be moved fairly rapidly which could be targeted at new entrance. [André Lafond, Competition Bureau, 64:09:40]

Specialists in competition policy and law are not convinced by the government's arguments. They claim many reasons why special airline provisions are not credible: (1) the crisis is partly of the government's own making, the foreign ownership restrictions prevent competitive entry that would discipline Air Canada's pricing behaviour, moreover, the government also failed to provide the proper institutional framework during the industry's deregulatory transition period; (2) although the cost and pricing structures of airline services are prone to seasonal and other forms of price cutting to equilibrate demand and supply, possibly (but only rarely) leading to predatory price cutting, so are most other transportation services — rail, bus, cruise liners — that are conveniently handled by Canada's transportation regulator, the Canada Transportation Agency; (3) the sheer dominance of Air Canada, with a market share exceeding 80%, is not out of line with that of incumbent local telephone and cable television companies that are currently being deregulated under supervision from the Canadian Radio-television and Telecommunications Commission (CRTC); and (4) the precedent these measures set for other industries seeking

Although every industry … is unique in some way, by and large the kinds of competition problems are fairly generic. You have problems of price fixing and you have problems of abuse of strong market position. You worry about mergers in any kind of industry, so in principle these problems come up or could come up in any industry. [Tom Ross, University of British Columbia, 59:10:15]

special treatment, namely the grocery and newspaper industries, is a slippery slope. These very compelling objections are not exhaustive.

[C]ompetition legislation as it exists in many parts of the world is designed to be a protector of free markets — a referee, so to speak — not a regulator. Regulation is done in industry-specific statutes, and when you mix the two you risk creating not only a hodgepodge but also a series of matrices that may not be effective in accomplishing either generic goal. [Calvin Goldman, Davies, Ward & Beck, 59:10:35]

In its *Interim Report*, the Committee sided against special provisions for the newspaper industry and suggested an alternative approach modelled on the special banking and financial services provider statutes. The Committee also suggested other ways of realizing the government's stated objectives in providing the Commissioner with special interim cease and desist powers with respect to the airline industry — and with respect to all other industries, for that matter — through expanding Competition Tribunal powers under section 100 to cover abuse of dominance and predatory pricing provisions. This option would at least preserve the Act's general application.

I think this is very dangerous … turning this from framework legislation into a regulatory regime put in the hands of somebody who not only doesn't have the resources but who, frankly, is very ill-equipped to deal with it. [Stanley Wong, Davis and Company, 59:11:30]

Although the government has not responded to the Committee's *Interim Report*, its decision not to revoke section 104.1, when Bill C-23 would generalize this power in the hands of the Competition Tribunal, suggests that other policy considerations are at work. For example, although the time required for the Commissioner to seek an interim order from the Tribunal may be quite short, this delay could, in some circumstances, be critical. In any event, the government appears adamant to any return to direct regulation of air services and fares or to unilateral free trade in air carrier services, and is steadfast in its decision to attempt to correct structural problems within the industry through the *Competition Act*.

We have a scenario where we're not quite at the framework model and we're not into regulation, and we're asking the Commissioner, in exercising his powers, to straddle the fence. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

At this time, the Committee acknowledges that the special provisions related to the airline industry are temporary measures that will be removed when healthy competition is realized within the industry. At the same time, the Committee is deeply concerned that this expectation will be long in coming, as even the United States (with about ten times the population of Canada) appears to be able to sustain only five or six nationally hubbed airline companies. Without the removal of the ownership and cabotage services restrictions, the industry may be destined to dominance by Air Canada for a protracted period. As such, the Committee is apprehensive about the government's move from a law of general application to one that includes special provisions for a specific industry when other equally effective options may be available through forward-looking reform. Moreover,

[Y]ou either have to go in and regulate the business — and if you're going to regulate it, you shouldn't be regulating just Air Canada — or you're going to have to stand back and say "This is a dynamic business … and the chips will fall where they may." Unfortunately, at the moment we're in this really untenable halfway house ... [Lawson Hunter, Stikeman Elliott, 59:10:30]

the government's current policy course is possibly undermining the credibility of Canada's competition regime. Many competition specialists — including international organizations such as the Organisation for Economic Co-operation and Development (OECD) — are beginning to question the Competition Bureau's independence from Parliament and government. The Committee will broach this issue in some detail in the next chapter.

In this report, the Committee will be proposing changes in the abuse of dominant position and predatory pricing provisions (respectively, section 79 and paragraph 50(1)(*c*)) that should satisfy the government, competition lawyers and economists, while providing balanced competition enforcement to the business community and the consuming public. These changes will permit the return of the *Competition Act* to law of general application, with no "special provisions for special industries."

[W]hat I would actually urge the Committee to consider is to look at the airline-specific regulations we have, and look at them for general application. It just happens to be that crisis precipitates change. That's happened before with the Competition Act*, and it's now happening again. But we shouldn't leave it like that. It shouldn't be that Air Canada is bound by special rules, but the Act should be able to deal with any conduct we need to deal with in a partially deregulated industry.* [Robert Russell, Borden, Ladner & Gervais, 59:10:35]

CHAPTER 2: COMPETITION LAW ENFORCEMENT

The State of Competition

At the outset of this report, and in the *Interim Report* as well, the Committee asserted that Canada's economic environment could be characterized as one in which non-compliance with the law is more the exception than the rule. We paid tribute to the *Competition Act*, the Competition Bureau and the Competition Tribunal for this state of affairs. To this list, we could have added the litany of competition lawyers and economists who keep these government institutions abreast of developing trends in the marketplace and the newest analytical techniques used to judge economic behaviour.

I think right now in Canada, when you look at our position … in the world and the economy we're in today, we should be proud of the fact that we have a productive and efficient economy. I think that our Act has served us well in trying to get there. [Robert Russell, Borden, Ladner & Gervais, 65:10:30]

This belief is supported by: the testimony from economists who tell us that, in the main, the *Competition Act* uses modern economic analysis; the Competition Bureau's staff of economists who are well qualified and competent to the task at hand; and the Competition Tribunal's unique expertise in this complicated field. Competition lawyers tell us that, by and large, the *Competition Act*, the Bureau and the Tribunal provide us with as close to an optimal level of due process and economic justice as one could expect. Adding all of these inputs to competition policy and enforcement to the fact that Canada is a relatively open marketplace, we are confident that competition reigns in Canada.

At the same time, the Committee would be remiss in its obligation to the public if it were to conclude that all is well in the competition regime. In fact, the Committee's study of competition policy over the past three years has demonstrated deficiencies and that the regime can be made to work better. But before addressing these systemic issues and making suggestions for improvement, it is worth reviewing the statistical data on enforcement for clues on where our efforts for reform would best be applied.

It may be that in a number of areas we simply don't have that many meritorious cases. [Neil Campbell, McMillan Binch, 59:12:15]

The Enforcement Record

Evaluating the enforcement record of the Competition Bureau requires understanding of both what is being asked of it and, in particular, what market behaviour it can pursue from a practical sense. We are asking the Bureau to pursue all four objectives listed in the purposes section of the *Competition Act*, as well as to uphold the spirit of this Act. Section 1.1 states that the purpose of the *Competition Act* is to maintain and encourage competition in Canada in order to:

- promote the efficiency and adaptability of the Canadian economy;
- expand opportunities for Canadian participation in world markets and recognize the role of foreign competition in Canada;
- ensure that small and medium-sized enterprises have equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.

It was my experience that one or two litigated cases by the Bureau, especially if they're large cases, could pretty much wipe out the litigation enforcement budget … This means the Bureau has to be extremely selective in terms of the kind of cases it can actually take on, especially if they're likely to be cases that get complex in a hurry. [Douglas West, University of Alberta, 59:10:10]

These objectives are mostly qualitative in nature and are not amenable to objective measurement; only subjective evaluations are possible. This is why we ask the Commissioner of Competition to report annually on his agency's enforcement and advocacy activities, rather than on his effectiveness in realizing the objectives of the Act. People are then left to form their own opinions on the Bureau's effectiveness in enforcing the Act and realizing its purpose.

In the Committee's view, an evaluation of the Competition Bureau's enforcement record cannot be divorced from the costs of litigation. The Committee was told on several occasions that the Bureau incurs enforcement costs, on average, of approximately $1 million per litigated case.[7] This cost presumably varies according to the type of case, whether a criminal or civilly reviewable practice, a merger or an abuse of dominant position case, an

[7] These comments were confirmed in a recent study commissioned by the Competition Bureau, entitled *Study of the Historical Cost of Proceedings Before The Competition Tribunal (1999),* which involved section 75 and 77 cases.

anticompetitive pricing practice or a conspiracy case, etc. More importantly, however, this large enforcement cost drives a huge wedge between the goal of complete compliance with the law and the economic behaviour we observe in the marketplace; so this cost must, among other factors, figure into the Bureau's enforcement strategy.

I would like to … talk about the generic necessity of ensuring … that the Bureau's resources and institutional framework are indeed as strong as they should be, so the mandate can be carried out in an efficient and effective manner. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

We must clarify what we are asking of the Bureau. The Committee is not asking the Commissioner and his staff to pursue every case with a positive net economic benefit; nor should the Commissioner strictly engage in profit maximizing law enforcement. Rather, the Commissioner should pursue those meritorious complaints with a substantial economic impact. This will deter egregious anticompetitive behaviour given the resources the government is able to allocate.

There are good reasons to take the last of these three approaches. The first approach would require the Commissioner to pursue all cases that would generate fines in excess of the public enforcement costs. This could require unlimited resources, which taxpayers would be reluctant to pay given the limited benefit each would receive. The second approach, which involves fines reflecting, not their deterrence value, but their profit-making potential, would undermine the public good, which the government and Parliament are entrusted to promote. Canada wants no part in such a litigious society. The Committee is not willing to sacrifice economic justice, nor is it prepared to live with the "chilling effect" on economic activity, which such an unwavering approach implies.

I want to commend the Committee … in setting the scene — the market context within which this market behaviour is being assessed, enforcement decisions are having to be made, and discretion exercised by the Commissioner. [George Addy, Osler, Hoskin & Harcourt, 59:12:55]

In the realm of law and economics, optimizing the benefits of competition requires a balanced enforcement approach, where balance refers to the appropriate measure of pursuit of compliance with the Act. Such an approach recognizes that neither the threat of prosecution nor the education and voluntary compliance measures are by themselves the most effective enforcement strategy. The Committee is convinced that the Competition Bureau is appropriately armed with the array of enforcement instruments needed to ensure compliance with the Act. These instruments range from education through publications, communications and advocacy to voluntary compliance through monitoring, advisory opinions, advance ruling certificates to concerted action through negotiated

settlements, consent orders and prosecution. However, such a balanced approach will be very subjective; outsiders will find it difficult to distinguish good judgment from bad judgment — precisely because the law and economics of market behaviour is not an exact science; and, even if it were, there are numerous other pitfalls in collecting evidence in support of any position on any questionable activity. For all these reasons, the Committee will draw only cautious or the most obvious conclusions from the current enforcement record.

[T]he enforcement of the law would benefit from more resources … Underlying that question is a bigger question — namely, what is the role of the Commissioner, the role people are seeking to have funded? Obviously, there's always the overriding question … that amongst all the other competing public policy priorities, how much do we as Canadians want to invest in the enforcement of competition law? [George Addy, Osler, Hoskin & Harcourt, 59:12:40]

Table 2.1
Competition Bureau Enforcement Record
By Selected Provision in the *Competition Act*

Provision	Complaints	Disposition of Complaints		
		Investigations or Inquiries	Alternative Case Resolution	Formal Enforcement Proceedings
s. 50(1)(*a*)	88	5	4	0
s. 50(1)(*c*)	382	7	9	0
s. 61	461	7	77	3
s. 75	304	27	4	1
s. 77	214	28	7	0
Total	**1,449**	**74**	**101**	**4**

Note: Data on the pricing provisions (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) cover the five-year period commencing 1 April 1994 and ending 31 March 1999. Data on refusal to deal (section 75) and tied selling, exclusive dealing and market restriction (section 77) cover the four-year period commencing 1 April 1997 and ending 31 March 2001.

Sources: J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, 1999; Competition Bureau, undated letter to the Committee in response to hearings on Bill C-23.

Table 2.1 provides a partial statement of the Bureau's enforcement record over the past few years by selected provision in the Act. The Committee is aware that many conclusions can be drawn from data, including diametrically opposing conclusions. For example, based on the number of complaints, one might conclude that more vigilant enforcement should be directed against price maintenance violations than any other anticompetitive practice (i.e., refusal to deal, and tied selling, exclusive dealing and market restriction). However, one might just as reasonably conclude that, based on the number of investigations relative to the number of complaints, the Bureau is relatively lax, and possibly too lax, on predatory pricing, refusal to deal, and tied selling, exclusive dealing and market restriction

complaints. Both views are possible given the lack of critical and pertinent facts to each case.

Obviously, the Committee is in no position to quantify the economic fallout of each case. Neither can we assess the relative merits of cases according to the different provisions in the Act; and nor can we gauge the exact legal or economic inadequacies of each provision in the Act. We do understand that different marketing and pricing practices spark different public reactions, and thus lead to different levels of reporting; but there is no way of knowing the exact correlation between the outrage and the number of complaints for a meaningful evaluation. Is the ratio of investigations to complaints with each provision in the law related more to the cost of litigation, merit, economic impact or the clarity of terminology used in the Act?

If we have a lot of behaviour that is offside … it can be reined in by litigated cases or it can be reined in when the Commissioner gets somebody to stop their behaviour because that party knows the alternative is to face litigation. You see the Commissioner settling cases with alternative case resolutions all the time, and that's highly, highly cost-effective for all of us. [Neil Campbell, McMillan Binch, 59:12:15]

The VanDuzer Report broached these very issues in terms of the anticompetitive pricing provisions, and we see no reason to second-guess its main conclusions. The report assessed the Bureau's case selection criteria. There are four, not equally weighted, criteria to which points are assigned to each complaint based on the facts. The criteria are: (1) economic impact; (2) enforcement policy; (3) strength of the case; and (4) management considerations. The Committee highlights the following excerpts from the VanDuzer Report:

> The statistics show that few cases have been pursued to resolution, except through ACR's [alternative case resolution] in price maintenance complaints. The relative absence of formal enforcement proceedings raises several concerns regarding the certainty and, ultimately, the effectiveness of the law. More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it. More cases would also expose the weaknesses in the law which would, in turn, be an important catalyst for law reform. One might hope and expect that increasing certainty brought about by greater formal enforcement activity by the Bureau would encourage greater interest in private actions under

What has obviously happened is that the Bureau has essentially built into its internal case prioritization the principle that cartels are viewed as quite a problem, and price maintenance and price discrimination laws, for example, are viewed as laws that are not economically sound, that are overreaching, and that should not be enforcement priorities. [Neil Campbell, McMillan Binch, 59:11:25]

> section 36. To date the possibility of civil actions alleging violation of the criminal provisions has been little used.[8]

> A disjunction is created between the expectations of people complaining to the Bureau about pricing practices and what the Bureau is prepared to deliver. This is most serious, in relation to price discrimination and predatory pricing, where the complete absence of formal enforcement actions opens the Bureau to the charge that it is choosing not to enforce the Act. This suggests either that the case selection criteria be revised so as to minimize impediments to bringing pricing cases and that the Guidelines be revised to more closely follow the Act or that the provisions be reformed to provide clearer direction for bureau enforcement policy. Either way, the result would be closer coincidence between what the law says and the Bureau's enforcement policy.[9]

I believe they can and do win conspiracy cases in both big and small settings, particularly in the modern environment, with their current immunity program, which allows them to approve the agreements they used to have so much difficulty approving in the 1980s. The pre-1992 statistics really aren't relevant in helping you decide whether you need to do something in that area. [Jack Quinn, Blake, Castles & Graydon, 59:12:40]

More generally, the Committee would like to report that, given the rather steady and holding trend in both the number of all complaints and investigations in the four- and five-year periods considered in Table 2.1, at a time when economic activity was buoyant and growing steadily, the business community has been relatively more compliant with the law. However, we cannot because even the number of complaints is dependent on people's knowledge of what an offence is under the law and their perceptions of the attention the Bureau will give their complaint. Because these important factors are not known nor recorded, we cannot adjust the data accordingly.

In terms of … enforcement issues, there are really three things that can be dealt with … There is this question of funding … There's also the question of alternative enforcement mechanisms like private access … The other area on the agenda … is we need to radically reform the Tribunal process. [Margaret Sanderson, Charles River Associates, 59:11:20]

The record level of fines collected by the federal treasury as a result of the Bureau's recent intensive pursuit of conspiracies could be interpreted as a sign of greater vigilance that will soon pay off in a more robust economic activity based on more efficient firms and the adoption of aggressive, competitive pricing policies. But even here most of these fines can be attributed to convictions made from international conspiracies. The Bureau might be just riding on the coattails of competition authorities of other jurisdictions. Furthermore, guilty pleas in conspiracy cases are just as likely to reflect the high cost of litigation and the potential for private information to be transferred to the public domain in other jurisdictions such as the United States where rivals may seek treble damage awards. These

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8 J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act*: *Theory, Law and Practice*, p. 70.

9 Ibid., p. 71.

facts suggest guilty pleas are more likely to reflect the cost benefit of going to trial in Canada than actual guilt or the deterrent effectiveness of the law.

Given the foregoing analysis, the Committee will concentrate its efforts on reforms that will directly lower the cost of enforcement, without unduly compromising legal rights, and thus reduce the wedge between the goal of complete compliance with the law and the economic behaviour we observe in the marketplace. First on everyone's list as a means of reducing enforcement costs is the Tribunal's current processes; these will be discussed in the next chapter. The development of jurisprudence and the Bureau's enforcement guidelines also have a direct bearing on enforcement and litigation costs; their examination will immediately follow this section.

It's even more expensive to deal with a criminal proceeding because of the criminal standards. So decriminalization, in some respects, and going to a per se approach should cut the cost down, because overall it's a cost to society. [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

The Committee will also examine indirect impacts on the cost of enforcement. We will review the most contentious provisions of the Act to ensure their legal treatment appropriately reflects their economic motivations and consequences. As such, any shift of important provisions from the criminal to reviewable section of the Act, quite apart from a reduced chilling effect on economic activity such a move might have, may reduce the overall cost of enforcement (see chapters 4 and 5). Furthermore, such changes would undoubtedly shift the burden of enforcement from the Attorney General of Canada to the Commissioner of Competition, and this may, in turn, have consequential budgetary and resource impacts on both these government agencies. In terms of enforcement tactics and formal powers, the Committee will evaluate the merits of a cease and desist order relative to an award of damages and fines as means for deterring anticompetitive conduct, in particular predatory behaviour. Finally, the Committee will examine the impact of granting private rights of action on a limited number of practices covered under the Act's civil section as set out in Bill C-23. The Committee will, at the same time, review the adequacy of resources provided to the Bureau for enforcement of the Act.

Part of the debate … around splitting section 45 into both a per se and a civil offence … [is] … that, it will be more costly for the Commissioner to prosecute a civil offence. Under the criminal model now, responsibility is split between two departments, so there are two budget funds to address the cost of prosecution. The Commissioner's office acts as an investigator, and the Department of Justice acts as the prosecutor. To the extent the role of the Commissioner is revisited, part and parcel of … that should always include the resource implications … to the Bureau. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

Jurisprudence and Enforcement Guidelines

[T]he way the law evolves is decision after decision … it gets fine-tuned that way. What seems to happen in Canada is a decision that leaves a fair amount of uncertainty, and then nothing happens for eight or ten years. [Donald McFetridge, Carleton University, 59:10:50]

The enforcement of any law, including that of competition, cannot be conducted in a vacuum. Anchors upon which behaviour is assessed are essential; moreover, clear markers distinguishing acceptable from unacceptable market behaviour are required. The economic content of the written law is simply insufficient. Jurisprudence and enforcement guidelines are required to flesh out the sometime abstract economic thinking on which the law is based. Indeed, when jurisprudence and enforcement guidelines properly reflect economic theory, they serve to guide the business sector in voluntarily complying with the law and the Bureau in enforcing it.

I think we need far more testing of the interpretations of the Act made by the Commissioner … not just more powers for the Commissioner. [Stanley Wong, Davis & Company, 59:11:30]

Competition law experts appearing before the Committee reached virtual unanimity on this score. In their opinion, there is simply insufficient jurisprudence to properly guide market participants. Uncertainties in the law and its application abound. Where these competition law experts begin to differ, however, is in terms of the principal cause. Some suggest a weak law is the culprit, while others suggest a risk-averse Competition Bureau is to blame. The rift widens when it comes to the proposed solution of providing greater financial incentives to develop the needed jurisprudence. Some maintain that it would be worthwhile to do so, yet others believe this is an expensive way of realizing greater certainty in the law, preferring instead more clarity in the Bureau's enforcement guidelines. For its part, the Committee will come down the middle on both these issues. We believe that more jurisprudence is needed and this might be partially realized with the implementation of private rights of action, as prescribed in the amended version of Bill C-23. In addition, the Committee recognizes that refinements in the enforcement guidelines are needed.

First, nobody really wants to have to go to court or before the Tribunal for the sheer sake of providing jurisprudence for others. That's kind of a public service that perhaps nobody necessarily wants to provide. [Donald McFetridge, Carleton University, 59:10:50]

The Bureau's enforcement guidelines are meant to fill the cracks in the public's understanding of the law left by insufficient jurisprudence. As the VanDuzer Report, in terms of the anticompetitive pricing provisions, put it:

> Through its Price Discrimination Enforcement Guidelines and Predatory Pricing Enforcement Guidelines the Bureau has attempted to provide, for enforcement purposes, a coherent rationale for enforcing the criminal provisions dealing with price discrimination and predatory pricing. … [F]or the most part, this has been a very effective approach to enforcement. Guidelines are significantly more cost effective than litigation for the purposes of clarifying interpretive uncertainty relating to the provisions of the *Competition Act*. As well, they can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law and the analysis may be tied to the facts of each case. Guidelines increase the likelihood of consistent and accurate decision making by commerce officers who make the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACR's and, more generally, will ease the compliance burden for business.[10]

[I]f there had been more cases, we would not … have so many guidelines. We would not … consider, for example, in section 78, all the illustrative anti-competitive acts or abusive acts that a dominant firm can do. This could have been explored before the Tribunal, and we would see that in the jurisprudence. [Donald McFetridge, Carleton University, 59:10:50]

From the business community's perspective, the guidelines are not reassuring. The guidelines have never been binding on courts, the Competition Tribunal or the Bureau. It was reported to the Committee that the Tribunal routinely ignores the guidelines; recently, the Competition Bureau abandoned its own merger enforcement guidelines in the *Superior Propane* case. The Committee finds this disconcerting; we can only conclude that the enforcement guidelines need to be revised. The VanDuzer Report made a number of specific recommendations on the Bureau's enforcement guidelines, which, in general, we support; however, the Committee will sort out each in later chapters. The Committee also agrees with the VanDuzer Report's recommendation 16 that deals with the enforcement guidelines in a general sense. This recommendation follows from the recognition of a general shift from an industrial economy to a knowledge-based economy characterized by innovation and industrial structures in which market dominance, when it occurs, is likely to be relatively short-lived. The Committee, therefore, recommends:

I think the elements are in the Act. I think the interpretations are very poor. I don't think you need separate rules for separate industries. But I do think you need clear and consistent application of clear guidelines. [John Scott, Canadian Federation of Independent Grocers, 59:09:45]

[10] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 86.

Our experience is that the guidelines are … ignored when it comes to a specific case. We have the example recently of the Competition Bureau abandoning its merger enforcement guidelines when it came to arguing the Superior Propane case. We have other cases in which the Tribunal has taken no notice of guidelines. … But to think that guidelines … will necessarily result in less uncertainty … I think only jurisprudence can do that, and we don't have a heck of a lot of it. [Donald McFetridge, Carleton University, 59:10:05]

2. That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.

Once these revisions are completed, we expect the Commissioner of Competition to keep to the enforcement guidelines. Major deviations from them are not acceptable. If further changes are required, the enforcement guidelines should first be amended then enforced, not the other way around.

"Time is of the Essence" Enforcement Tools

If you were on the inside and if you saw the difficulty and extent to which they have tried to comply with this law, I think you would come to the conclusion that the answer is, yes, it is effective, the Commissioner is very vigilant, and Air Canada has struggled daily with trying to understand what they can and can't do under the current regime. [Lawson Hunter, Stikeman Elliott, 59:09:45]

On a number of occasions before the Committee, the Commissioner of Competition has argued for amendments to the law granting him new powers to issue cease and desist orders of his own right, without allowing the affected party a right to be heard prior to the making of the order, and without any authorization from the Competition Tribunal. Such a power was granted under section 104.1 of the *Competition Act* in respect of any domestic air service, as defined in the *Canada Transportation Act*, in terms of any anticompetitive behaviour (predatory pricing, paragraph 50(1)(*c*), and abuse of dominant position, section 79). Bill C-23 would extend the duration of this order (beyond a maximum of 80 days if all renewals are put into effect) to allow for good faith, but belated information exchanges between the contesting parties. Bill C-23 would provide this same power (adding a new provision, subsection 103.3(2)) to the Competition Tribunal in respect to all industries and all civilly reviewable conduct in the Act.

A new subsection 103.3(2) in the Act specifies the circumstance in which the Tribunal may make an interim order. The order may issue if:

- An injury to competition will occur that cannot be adequately protected by the Tribunal.
- A person is likely to be eliminated as a competitor.
- A person is likely to suffer: a significant loss of market share; a significant loss of revenue; or other harm that cannot be adequately remedied by the Tribunal.

Critics mention that the *ex parte* procedure — without notice to any other party — presents, as a *fait accompli*, an order that has the same force as a court order and a breach of which is punishable by fine or imprisonment. Once the order is made, the party may bring an application to set the order aside. In normal litigation practice, motions and applications made *ex parte* are the exception rather than the rule. Moreover, the test that is asked of the Tribunal in granting the order, particularly that of a significant loss of market share or a significant loss of revenue, is so low a hurdle that it treads on having the Commissioner cross over the boundary of protecting the process of competition to protecting individual competitors. This concern is supported widely across the economics field because of the strongly held belief that competition by its very nature means that there will be winners and losers in terms of revenues and market share. Thus, the *Competition Act* now risks interfering with the competitive process. As an alternative, these critics argue in favour of an award of damages and possibly fines as the appropriate method of deterring anticompetitive behaviour.

For his part, the Commissioner believes that these extraordinary powers are necessary owing to the inadequacy of the procedures and/or the remedies currently available to the Bureau to use against the threat of price predation and other anticompetitive conduct in a timely fashion. The *ex parte* procedure is adopted because the alternative of providing notice of the proceedings would impose a process that would involve the Commissioner in time-consuming litigation before the Tribunal in support of the interim order, which would significantly reduce the "time

I just want to distinguish between two ways of dealing with predatory pricing. One is the cease-and-desist type of power the Commissioner has and is maybe trying to have enhanced … to a "Don't even think about it" power, which would be issuing orders in advance of the incumbent firm even doing anything. That's one way to go, and it can have the virtue of appearing to protect a specific competitor and make sure they don't get hurt in the short run. I think it's definitely the wrong way to go, whether it's airlines or any other industry. [Donald McFetridge, Carleton University, 59:10:40]

I think the way to deal with predatory pricing is to wait and look at the offence. I think where we have a problem in this country is that it doesn't do much good after finding that an offence has been committed if we take the civil branch and abuse of dominance and say, "Well, don't do it again", and then issue an injunction. That type of remedy is simply insufficient. I think what we really want … is to use the civil branch and use fines. And ultimately, perhaps … damage awards. [Donald McFetridge, Carleton University, 59:10:40]

is of the essence" aspect for which the power is being sought.

There's the predatory pricing. Clearly, you need a remedy besides cease and desist. A remedy based on damages and fines seems to be a sensible deterrent. [Jeffrey Church, University of Calgary, 59:10:55]

In wrestling with these arguments, the Committee recognizes that, in a perfect world where all predatory and other anticompetitive behaviour could be easily detected and there would be no uncertainty in the application of the law, there could not be any predation or anticompetitive behaviour. The cease and desist order would stop this anticompetitive behaviour the minute it started and an award of damages and fines from the Tribunal would remove any incentive to engage in such anticompetitive conduct in the first place. Both enforcement methods — an interim cease and desist order and an award of damages and fines — have a similar impact in such an environment. However, in our imperfect world, enforcement methods are not equivalent; each has a different impact. In a world where "Type 2 errors" are possible (where an enforcement action is taken but should not have been), the interim cease and desist order will impair the process of competition and impose losses on consumers by forcing them to pay higher prices for the period of the order. On the other hand, in a world of uncertain application of the law or a flaw in the design of the law, damage awards and fines may chill rivals from engaging in aggressive but pro-competitive pricing strategies. Clearly, these impacts are not the same.

[T]here's a fallacy in … saying … that the cease-and-desist powers … because they act very quickly, are necessarily desirable. … It is perfectly possible to have an enforcement provision against predatory pricing through the Act, working through the normal process with the Tribunal, not using any injunctive relief. Provided one introduces fines and makes the disincentives for a conviction high enough … [Roger Ware, Queen's University, 59:12:15]

In assessing the pros and cons of these "time is of the essence" enforcement tools, the Committee looks to the data, which clearly show that predation is often alleged but seldom occurs. Between 1994 and 1999, there were 382 cases of alleged predatory behaviour, but the Bureau found only 7 deserved investigation. Nine were solved by alternative case resolution (ACR) and none justified prosecution. Although the high incidence of allegation would favour the damages award and fines enforcement method, the Bureau's decision to investigate only seven cases brings somewhat back into balance the choice of either method (assuming that we are willing to live with prosecutorial discretion to achieve this balance, rather than a systemic basis for balance). At the same time, the Committee is unaware of any incidences of the "chilling" pro-competitive behaviour that the current competition regime has had on the business sector, let alone what incidences of chilling

might arise from a deterrence system based on an award of damages and fines.

Although lack of information does not permit the Committee to judge which of the two enforcement tools would be better, other considerations suggest that this debate need not be framed in an either-or context. Adopting both enforcement methods has a number of advantages: (1) a cease and desist order would help mitigate damages in egregious predatory cases; (2) an award of damages and fines would rebalance the incentive structure to better deter such behaviour when anticompetitive opportunities present themselves (in turn reducing the opportunities for the exercise of prosecutorial discretion); and (3) the special airline industry provisions would become redundant and thus could be repealed. This third advantage is particularly appealing to the Committee, as it would hasten the return of the *Competition Act* to a law of general application. With the adoption of other reforms, as laid out in this report, the Committee is convinced that more jurisprudence would reduce both any uncertainty in the law and its chilling effect on aggressive but pro-competitive pricing practices. For all these reasons, the Committee recommends:

You need to create that type of penalty in the abuse-of-dominance provisions of the Act to retain the deterrence effect of the law. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:20]

3. That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.

These changes will permit the return of the *Competition Act* to law of general application, with no "special provisions for special industries." For this reason, the Committee recommends:

What we have right now is a Commissioner of Competition who by statute is independent and reports to the Minister of Industry but who takes no direction from the Minister of Industry other than for the purposes of starting an inquiry. [Stanley Wong, Davis & Company, 59:11:30]

4. That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).

Commissioner Independence and Accountability

What we have now is really decision-making in the hands of a single individual who is really unaccountable. Every time we see an unsuccessful case, there is immediate pressure to amend the Act. [Stanley Wong, Davis & Company, 59:11:30]

A particularly surprising (and disturbing) issue — that of the Commissioner's independence from government — surfaced around the time of the Committee's first set of hearings in 2000. This issue continued to percolate and has since boiled over to include questions of accountability. Doubts on the Commissioner's independence first arose when the Commissioner conducted a review of his own merger enforcement guidelines, as they would apply to the banking sector at the request of the Minister of Finance, suggesting that he too had reservations on their general application. The questions began to multiply as the Commissioner acquiesced to the government a second time when he sought extraordinary cease and desist powers to deal with potential predatory behaviour on the part of Air Canada — once again putting into doubt the Act's general application. More recently, in the *Superior Propane* case the Commissioner abandoned the very merger enforcement guidelines that he confirmed as fit to the Minister of Finance.

Essentially what's happened in … cases, where speed is of the essence, such as predatory pricing … the Commissioner has been concerned that the process doesn't work expeditiously enough; therefore he's sought additional powers, turning his own office into an investigator and an adjudicator. As soon as a single body is performing both of those functions, concerns are going to be raised about independence. So if we can solve the adjudication model, if we can have the Tribunal play a more active, effective role as an independent check, and procedurally allow it to balance these concerns … its very important that there be … an expeditious process and … a full due process for the various parties. [Margaret Sanderson, Charles River Associates, 59:11:55]

However, the Committee does not share all these views and believes that it is important to distinguish perception from reality. In terms of independence, a consensus within the competition law community appears to have formed on the belief that the Commissioner is indeed independent from government in terms of case selection, administration and disposition. The Commissioner is not independent from government in terms of his budget and reporting obligations.

On the matter of enforcement direction, no one could point to any case where the government intervened in the Commissioner's enforcement decision making. On the matter of the Competition Bureau's organization within government, the Committee understands that the Commissioner is subordinate to the Minister of Industry and Cabinet so that, at the end of the day, the government can be held to account to the people for the actions of the Commissioner, one of the most influential public servants in Canada. For example, from time to time, competition experts have judged the Commissioner's enforcement record based on what they call Type 1 and Type 2 errors. A Type 1 error is defined as not taking an enforcement action when there should have been (the market behaviour in question was

anticompetitive). A Type 2 error, on the other hand, is defined as taking an enforcement action when one should not have occurred (the market behaviour was benign from a competition perspective). However, there is also a Type 3 error. The Committee will define this error as wasting the taxpayer's money through inefficient enforcement action. After accounting for deficiencies in the law, at the Competition Tribunal and in his budget, for which the government may be held accountable, any remaining deficiencies in enforcement may be attributable to the Commissioner and his administration of the Competition Bureau. This error can only be corrected by executive decisions and thus institutional independence from government is not advised.

There are really two important things about enforcement policy … One is independence and the other is accountability. The Commissioner needs to be independent, needs to have the resources required to do the job, but needs to be accountable, too. That means we have to be able to go to Tribunal and test the Commissioner's decision. That's one way of keeping him accountable. [Jack Quinn, Blake, Castles & Graydon, 59:11:45]

On the matter of accountability, competition law experts identified a number of ways the Commissioner might be held to account for his enforcement actions. We have already mentioned his accountability to the people through the government of the day. He is also accountable to the people through Parliament — and specifically by way of appearance before this Committee. Beyond bureaucratic means, the Commissioner is accountable for his enforcement decisions to the Competition Tribunal, which can rescind or vary all civilly reviewable decisions he makes, as well as judge his request for a cease and desist remedy.

The Commissioner is independent today in exercising enforcement direction. He is not independent from an institutional perspective. The deputy minister owns his people, so the staff and organization budgeting is all subject to the Department of Industry's priorities. … [W]e should ensure he has both institutional and enforcement independence. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

If there is weakness in the accountability regime, it has been in decisions not to take an enforcement action with respect to civilly reviewable matters. However, the Committee is confident that forthcoming private rights of action — with the adoption of Bill C-23 — will partially address accountability with respect to sections 75 and 77. In terms of mergers — that is, on the release of private information relating to a merger proposal where no enforcement action is taken — the Commissioner must perform a careful balancing act. He must weigh the merger participants' privacy rights with that of the public's right to know. According to the competition law experts appearing before this Committee, there is little issue here, but they do note that both U.S. and European competition authorities are more forthcoming in providing information than Canada's Competition Bureau. However, the Committee must reiterate the point that Canada, as a small market, is and should be more lenient on mergers relative to larger

The Commissioner … is one of the most highly accountable officials in the Government of Canada, and that comes in part from his oath under the Act and it comes in part from … your ability to take him to court on a judicial review. It comes in addition from the fact that any six residents can force him to conduct an inquiry and can go to the Minister of Industry and ask … to reopen an inquiry that's been discontinued. [Neil Campbell, McMillan Binch, 59:11:55]

Another very important part of his accountability comes from this committee, which has put the Commissioner under a spotlight for the last three years. We've had numerous studies and we have the Commissioner appearing and taking questions and justifying what he does and does not do on a literally monthly basis … You play a very significant role, and you should be continuing to ask him how he's performing with respect to policy and the general administration of the Act. [Neil Campbell, McMillan Binch, 59:11:55]

jurisdictions, including on issues of information disclosure. At the margin, strategic market information released to the public is of less value in larger and less concentrated markets. Finally, this leaves only section 79, the abuse of dominant position provision; here, the public itself has been most vocal, and parliamentarians have heard them loud and clear and this has spurred many amendments for reform.

Private Rights of Action

A limited private right of action currently exists in respect of criminal matters, but such action has been rarely initiated. Under section 36 of the *Competition Act*, a person may bring an action for damages (and costs) if the person has suffered loss or damage as a result of either: (1) conduct contrary to Part VI ("Offences in Relation to Competition"); or (2) the failure of a person to comply with an order of the Competition Tribunal or of another court under the Act. Accordingly, a right of private action for damages may arise in three circumstances:

[W]e do have a leverage problem in the context of a merger or in the context of an abuse-of-dominance inquiry, where the Commissioner's say-so often governs, particularly for parties who are in a small market and have difficulty looking at the current costs and time of a Tribunal proceeding. That is why it's important to streamline the Tribunal process. [Neil Campbell, McMillan Binch, 59:11:55]

1. The Department of Justice successfully prosecutes a violation of a criminal provision under Part VI (conspiracy, bid rigging, price discrimination, price predation, false advertising, deceptive telemarketing, double ticketing, pyramid selling, or price maintenance).
2. After the Commissioner and a party have entered into a consent order, a court has issued the order, and the party fails to comply with it.
3. If an aggrieved party succeeds in a private prosecution.

Under current law, the Commissioner of Competition is the only party with standing to make an application for civil review before the Competition Tribunal. But this is about to change. After considerable study, the Committee amended Bill C-23 to allow private parties to have access to the Tribunal for resolving disputes on a limited number of civilly reviewable business practices: refusal to deal (section 75); and tied selling, exclusive dealing and market restriction (section 77).

One other way to bring more resources into enforcement and to get more jurisprudence is the issue of private actions and allowing standing for private actions before the Tribunal. [Donald McFetridge, Carleton University, 59:10:55]

Witnesses appearing before the Committee on Bill C-23 were generally supportive of amendments leading in this direction. The main argument against private access

was the potential for abuse in the form of "strategic litigation" that is, legal action commenced not for the purpose of seeking a remedy to anticompetitive behaviour, but rather to gain an advantage over a competitor. The Committee, however, is satisfied that the safeguards included in Bill C-23 adequately address these concerns.

Throughout the Committee's hearings on the *Competition Act* there was broad agreement on the principle of granting private access to the Tribunal; there was less consensus on the relief that should be available. Many witnesses did support a right to claim for damages, yet others did not. The Committee therefore ran with the consensus it did obtain, proposing to limit the plaintiff to injunctive relief. As previously stated, the primary reason for denying claims for damages would be to discourage strategic litigation. In the longer term, however, we believe damages and maybe even fines will be necessary to realize effective enforcement.

I'd just point out that the costs for a plaintiff to bring a case to a conclusion are very substantial, and that is all the more an issue for small and medium-sized enterprises. So they most definitely will need to continue to use the Commissioner as the point of first contact on competition cases. I don't think private actions will be a solution to the resource issue, or indeed really to the accountability issue. [Neil Campbell, McMillan Binch, 59:11:55]

The expected benefits of private enforcement differ slightly based on whom you believe. Some argue it will bring a litany of cases which the Bureau does not have the mandate or resources to pursue. Private enforcement will complement public enforcement and, perhaps, generate savings that will stretch the Bureau's current enforcement budget. Yet others believe it will bring only a very limited number of cases; however, these will be pivotal cases that will enrich our body of jurisprudence; bring more certainty into the law; and discourage anticompetitive behaviour that might otherwise slip between the cracks of law and practice.

The Committee believes that, with only injunctive relief as the carrot, private parties in most cases may only be exchanging the costs associated with the alleged anticompetitive conduct for litigation costs (hopefully less than $1 million per case on average with reforms in Tribunal processes). Indeed, if this scenario does in fact unfold over the next few years, it will very quickly become common knowledge across the business sector and Canada will be no further ahead. Rights with no value attached to them are but window dressing — something that, as many observers have described, has adorned Canada's antitrust Acts for too long.

Competition Bureau Resources

A number of witnesses suggested that the enforcement problems in competition policy being encountered by Canada are not solely the result of inadequate legislation, but also stem from a lack of sufficient enforcement resources allocated to the Bureau. Moreover, some witnesses claimed that the Bureau has staff retention problems due principally to low salaries compared to what some of its veteran staff could earn in the private sector doing similar work, or following other pursuits. In fact, these commentators identified a number of reorganization models to get around this recruitment and retention problem, but they failed to provide an assessment on any weaknesses from which these models are likely to suffer. The VanDuzer Report further pinpointed a shortage of, and consequently the need to acquire and develop, industry-specific expertise to complement enforcement officers and ensure that they can make accurate assessments in a timely manner. In these witnesses' opinion, learning on the job is not always efficient.

[W]hen the mandate itself was unfolding — and the mandate was not as broad as it is todal — I can assure you the challenges that face one individual at the top of the Competition Bureau are such that … they warrant consideration of a three-person body. [Calvin Goldman, Davies, Ward & Beck, 59:09:15]

However, the Committee is also aware that part of the enforcement problem over the past decade was the result of uncontrollable factors such as the deregulation and liberalization of transportation, telecommunications and energy sectors. Increased funding in this period did not match the increased responsibility that these developments imposed on the Bureau. A second uncontrollable factor was the unforeseeable merger wave, which, as a number of witnesses remarked, seems to be abating and is mostly behind us now. The Committee believes the Competition Bureau does need additional enforcement resources to fulfill its mandate in an effective manner and, therefore, recommends:

I would suggest that the Bureau cannot be effective … without adequate resources in trying to administer a law of general application in an environment that is increasingly deregulated. They need the resources to act in a properly informed manner. That doesn't necessarily mean bringing many more cases. [Calvin Goldman, Davies, Ward & Beck, 59:10:50]

5. That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.

Deterrence: Crimes, Fines and Jail

Probably the single most important enforcement instrument in Canada's competition policy toolbox is the

court fine. Unlike cease and desist orders that prohibit future use of a practice, fines levied by the Court have the dual purpose of punishing the assailant and deterring others considering the same anticompetitive activity. Jail time — which is also an important deterrence weapon — has played a relatively minor role. Together these enforcement instruments are used only in the most egregious criminal cases.

When we've had $150 million worth of fines under this section in the last few years, you need to be careful about saying that the law doesn't have sufficient strength. [Lawson Hunter, Stikeman Elliott, 59:09:20]

In Canada, corporations or individuals found in contravention of the general conspiracy provision (section 45) may receive fines of up to $10 million per offence, and individuals can face up to a five-year jail term. These fines are among the most severe found in the world. Fines for bid rigging (section 47) are set at the discretion of the Court, which is not constrained by a maximum monetary penalty. On the other hand, an historical examination of actual fines assessed by the Court shows that they had not even come close to the maximum permitted; however, the most recent past is marked by a sharp increase.

In 1990, the Manitoba Court of Appeal held that the earnings of the accused are relevant in assessing a fine and promptly raised the initial fine from $100,000 to $200,000 in a case involving price maintenance (paragraph 61(*a*)) and gasoline distribution. In terms of bid rigging, eight flour milling companies were assessed fines totalling $3.4 million in 1990. Furthermore, the largest conspiracy case in Canadian history — an international cartel to fix prices of bulk vitamins — netted the government $91.5 million in 1999-2000. Finally, the aggregate data indicate that, since 1980, convictions in 32 cases under the conspiracy provision (section 45) yielded fines totalling $158 million; $14 million in penalties was levied under the foreign directives provision (section 46); and a further $8.8 million was levied under bid rigging (section 47). More than 80% of these fines were collected in the past two years alone as a result of guilty pleas by large multinational corporations engaged in global conspiracies.

When you think about the biggest multinational companies in the world coming and paying attention very closely, after the United States, to Canada, paying huge fines and having individuals pleading guilty to crimes in Canada, that is fairly remarkable. I think the Bureau is a very credible enforcer on the world stage on cartels. It has also done perfectly well on local cartel activity in Canada. It has sent people to jail. It has obtained convictions. [Neil Campbell, McMillan Binch, 59:12:55]

The Committee is pleased with Canada's recent enforcement record. Although we remain concerned that some conspiracies could possibly earn more than the $10 million maximum fine they would be subject to pay if

caught, the Bureau contends that the business community does not take these fines as a “licence fee” or as simply another cost of doing business.

CHAPTER 3: COMPETITION TRIBUNAL

Tribunal Organization and Composition

The Competition Tribunal was created in 1986 as part of the major reform of Canada's competition law that saw the *Combines Investigation Act* replaced with the *Competition Act*. The Tribunal is a specialized court combining expertise in economics and law that hears and decides all applications made under Parts VII.1 and VIII of the *Competition Act* (including merger review, abuse of dominance and other reviewable trade practices). It is an adjudicative body, operating independently of any government department, and is composed of not more than four judicial members and not more than eight lay members. Judicial members are appointed from among the judges of the Federal Court, Trial Division, while lay members are appointed by the Governor in Council on the recommendation of the Minister of Industry.

You should look going forward at opening up the system to allow participants more access to the Tribunal. I find it hugely ironic that in an act devoted to competition the Commissioner has a monopoly or near monopoly on access [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Tribunal deliberates on complex questions of economics and law, and makes decisions affecting not only the rights and economic well-being of the parties, but having implications for businesses and consumers in Canada and abroad. In order to be able to adjudicate on these matters, the Tribunal is given the same powers found in a superior court of record, including the power to hear evidence, summon witnesses, order production and inspection of documents, enforce orders, and generally to do whatever is necessary to exercise its jurisdiction. Ultimately, these procedures serve one aim: to ensure that the Tribunal is able to gather the evidence it needs to make a just and correct decision on the facts of the dispute. The Tribunal does not gather evidence or facts; rather, it relies on the parties themselves (or more commonly, their lawyers) to collect and present the evidence it needs to make a decision. Parties adduce their evidence, each trying to prove their case. Parties are also given the opportunity to "test" their opponent's evidence in cross-examination. This system — known as the "adversarial" model — is used commonly by Canadian courts as well as by other adjudicative bodies.

By and large, most and virtually all of the experience of the Tribunal is on the part VIII side, in particular mergers. Remember, in the 1986 amendments mergers were decriminalized, put into the non-criminal section, and given into the exclusive jurisdiction of the Competition Tribunal. [Stanley Wong, Davis & Company, 65:09:10]

[T]he Tribunal doesn't have a lot of experience. This body was created in 1986 and really started operating in 1987. The first contested case of mergers went in 1990. Now, we've not had that many cases. If you look at the experience of the United States or even the European Union, we don't have a lot of cases, so the significance of every case is magnified. [Stanley Wong, Davis & Company, 65:09:10]

In the "adversarial" tribunal system, the Commissioner of Competition is one of the parties, initiating cases by making an application to the Tribunal. Therefore, the Tribunal and Bureau operate in a manner wholly independent and separate from each other. There is no sharing of resources or consultation on proceedings outside of the formal dispute resolution process. Indeed, this strict separation of functions is considered essential to preserve the integrity of the decision-making process. The Committee is aware that other jurisdictions (notably the European Union) employ a different model, one that fuses the role of investigator and adjudicator. The Committee is of the view that our current model is correct and appropriate, having regard both to the operational dynamics of our system of law, and to the requirements of the Canadian Charter of Rights and Freedoms. Moreover, the separation of functions in the adversarial system produces consistently good and just results. However, the system can be quite slow and procedurally intense. The proceedings are also frequently made more complex by the presence of multiple parties and interveners, as well as the need to consider interlocutory motions on issues of procedure. Contested proceedings often involve very complex issues of economics, i.e., determining market definition, market power, barriers to entry, etc. Parties will frequently retain many experts to address every facet of the economic debate. These experts may produce reports and may give evidence before the Tribunal that will be subject to cross-examination. At least in some measure, the high cost of proceedings before the Tribunal is attributable to what appears to be an increasing trend towards hiring more and more experts. Some witnesses, however, remarked on an increasing tendency of expert witnesses to advocate on behalf of their client, i.e., asserting conclusions of law, rather than limiting themselves to their proper role of assisting the Tribunal in arriving at correct findings of fact.

[W]hen we talk about truncating the procedures or having special procedures for the Tribunal, we should not forget that what we're dealing with is commercial litigation within a certain sphere. We have a lot of history in our courts, if not in our Tribunal, on how to manage those things, and we have various models, not only in Canada, but in other jurisdictions like the U.S., where they have started to manage commercial litigation more effectively and more efficiently. [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

In a lot of the thinking about what sort of process we want to have in the Tribunal, there is typically an attempt to impose a full-blown traditional trial model. That kind of enforcement activity is not appropriate in a public law enforcement context. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

The Committee is particularly aware that the high cost of Tribunal proceedings may discourage small and medium-sized enterprises from bringing meritorious cases to the Tribunal. The Committee heard little evidence on costs awards, but the Tribunal appears to have broad discretion in this regard; in fact, the Tribunal need not award any costs in

a proceeding. Perhaps, the public would benefit from an expressed policy on costs awards. Accordingly, the Committee recommends:

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to the proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

I have perhaps been a lone voice in suggesting that this is a tribunal where judges have not played a helpful role in the sense that they have formalized and judicialized it. I would prefer to see a tribunal that really is administrative and that could make decisions more quickly on an expert basis. [Neil Campbell, McMillan Binch, 59:11:25]

Many of the witnesses appearing before the Committee, both in the context of the study in June 2000 leading to the *Interim Report* and during our most recent roundtable meetings, expressed a measure of dissatisfaction with the Tribunal adjudicative process. At the same time, however, witnesses were quick to point out that the system is, on balance, a very good one, and not in need of major reform. The timeliness of interim relief as well as the time required to reach decisions were two problems identified. Furthermore, the costs of bringing a case to the Tribunal appear to many to be excessive, owing in some part, it seems, both to an overly procedural discovery process, as well as to the lengthy lists of expert witnesses the parties are permitted to call to give evidence.

Timeliness

With respect to the criticism that the Tribunal fails to provide interim relief in a timely way, the Committee anticipates that this problem will be addressed in great measure by the new powers conferred on the Tribunal in section 103.3 of the Act by Bill C-23. The new powers will permit the Tribunal to make an interim order to prevent certain anticompetitive practices. The legal test for the granting of the order is quite low — the Commissioner is not required to show that competition will be irremediably harmed, but merely that a person is likely to be eliminated as a competitor, or that a person is likely to suffer a significant loss of market share, revenue or other irremediable harm.

[O]ur ability to get good enforcement in the sense of formal proceedings does depend in part on streamlining and improving the Competition Tribunal proceedings without undermining the ability of people to make a defence for the particular activity they have. … [A]n administrative tribunal, an expert tribunal, would be a much more useful structure. [Neil Campbell, McMillan Binch, 59:11:25]

The Committee believes that granting any manner of relief — interim or final — merely on the grounds that a

[T]he Tribunal decisions have taken far too long. … The most recent consent case, which was done with agreed statements of facts and a high degree of collegiality among counsel on both sides, took something like 18 months on a consent basis. It took 18 to 20 months on a merger. [Stanley Wong, Davis & Company, 59:11:30]

competitor is losing revenue (something which happens all the time, and which is not, in itself, evidence of any anticompetitive activity) represents a serious departure from the well-established and important principle that competition law aims at protecting competition, not competitors. However, the relief contemplated here is *temporary* and is meant to allow the Commissioner to prevent a competitor from suffering immediate and irreparable harm, i.e., being forced out of the market. So, although the interim order may, on occasion, result in inefficiency by protecting an uncompetitive competitor, this impact will, in any case, be temporary. The Commissioner or applicant will still be required ultimately to prove the substantive elements of the relevant section in order to get an order in the final result.

The Tribunal process needs to be streamlined and improved quite dramatically. … There have been four contested mergers before the Competition Tribunal. The average time the Bureau has dealt with those transactions has been about eight and a half months … [and] the average was 19 months from the start until the remedy. [Margaret Sanderson, Charles River Associates, 59:11:20]

Still, the Committee is concerned that setting the bar for interim relief so low may prompt the Commissioner to seek interim relief in cases of questionable merit, with perverse results on competition. In a normal civil proceeding, this would be less likely to occur because the party who applies for the injunction does so subject to an undertaking that, if he loses the case in the final result, he will have to pay the damages accruing to the other person as a result of the injunction. This rule is designed to prompt the party seeking the injunction to take a hard look at the merits of the application. However, this important disincentive does not appear to exist in the *Competition Act*. Moreover, even if such a rule were implemented, it would not necessarily have the desired effect, since the damages payable by the Commissioner to the injured party would be payable out of government revenues, not out of the Commissioner's own pocket (as would be the case with a private litigant in normal civil proceedings). As such, the Commissioner has very little "downside" to seeking an interim order and there is little to make the Commissioner accountable for his decision to seek interim relief.

By having a rules committee, you don't have to have a wholesale set of rules drafted, which may take five years to do, because this is a complex area. You have an incremental process to move the rules along with the change in the law, with the change in procedures, with the change in technology that allows us to adapt to that. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

In addition to the issue of the timeliness of *interim* relief, there is also the issue of the timeliness of *final* relief, the Tribunal's final order. In the case currently before the Tribunal involving the Commissioner's allegation of abuse of dominance by Air Canada, we see that interim relief was swift. The final resolution of the matter, however, appears to be a long way off. The Commissioner issued a section 104.1 order on 12 October 2000 and extended it for a further 30 days on 31 October 2000. The Tribunal

subsequently extended the order to 31 December 2000. The Committee is disturbed to learn that the hearing is not scheduled to commence until fall 2002. Justice delayed is justice denied. We believe that the resolution of this matter is important for all Canadians.

What has fuelled a lot of the acrimony in litigation before the Tribunal is the sense that there is an imbalance of information and power between the Commissioner … and respondents … This concern is very pointed at the moment, or will become so by virtue of the amendments to Bill C-23, because Parliament has seen fit to give the Commissioner the power to seek an interim order on very limited grounds, ex parte ... [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

Procedural Fairness

Owing to its "high stakes" proceedings, the Tribunal aims to ensure that the procedures it implements are sufficient so that litigants receive the appropriate degree of procedural fairness. "Procedural fairness" refers to the rights and obligations that flow from a party's right to have "due process" (as it is called in the United States) in an quasi-judicial adjudicative setting. Procedural fairness, at a minimum, usually involves the right of a party to tell his story to an impartial (i.e., unbiased) decision-maker; and the right to expect that the decision-maker will act in accordance with applicable laws. If the decision-maker does not act according to his legal authority, then the party would have a right to apply to a court for judicial review (reconsideration of the issue by a court).

The lawyers always argue for more protections, more safeguards, more hearings, and more redeterminations. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

The essential question of procedural fairness is: how far does it go? Does it permit the rule maker (in this case, the Tribunal) to make rules limiting the scope of examination for discovery, or the time to complete it? What about time limits on presenting one's case? Or limits on the number of expert witnesses one can call to give evidence? Indeed, can "corners be cut" at all without prejudice to the rights of parties?

By providing the appropriate degree of procedural fairness, the Tribunal aims to ensure that parties appearing before it are able to present their case adequately. Traditionally, each party has the right to determine how best to present its case; courts are generally reluctant to intervene unless it is absolutely necessary.

Whichever side of a case we're on, we can be unhappy. We always do that in the courts, but nobody has ever suggested we abolish the courts or limit the powers of the courts in their area of jurisdiction. We seem to have a tendency every time somebody doesn't like a decision of the Tribunal to immediately say, gee, now shouldn't they do something less? [Stanley Wong, Davis & Company, 65:09:15]

When it comes to the question of procedural protection, there cannot be said to be any definitive answer to the question: "how much is enough"? As a general rule, the "higher the stakes" for the parties, the higher the degree of procedural protection to which they should be entitled.

For example, proceedings which could lead to jail time would attract the highest degree of procedural fairness (that of a criminal court, with the criminal procedures, rules of evidence and a "beyond a reasonable doubt" burden of proof). At the other end of the continuum, small civil matters (such as licensing decisions) would warrant a lesser degree of procedural protection. However, "small stakes" for a large firm may, in fact, be very "large stakes" for a small firm. For that reason, procedural protections must also address the concerns of small business.

The Tribunal, like any court, should have the flexibility to manage its docket as it sees fit. That is what the Tribunal has at this point, albeit there seems to be an ever-increasing desire to put fixed time limits around various activities in the pre-litigation phase. But that discretion to determine the appropriate balance between expedition and fairness should be left with the Tribunal going forward. [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

Questions of "how much fairness is enough?" seldom admit easy answers. As an example, it would seem reasonable to suggest that a person is entitled to be put on notice if a legal proceeding is commenced against him. It offends our sense of justice to think that a court proceeding could take place — and an order made against a person — without that person having any notice or chance to respond. Indeed, the right to notice is an important principle often reiterated by civil courts. For that reason, courts generally permit applications without notice (*ex parte*) only in exceptional circumstances.

But when we pursue the idea of the "right to notice" a little further, it becomes less clear. First, giving "notice" of a proceeding is meaningless if the person being put on notice (the respondent) can do nothing to influence the outcome of the proceeding. For the notice right to have any kind of meaning or purpose, there must at least be some opportunity to affect the outcome of the proceeding. This is done by permitting the respondent to challenge the evidence upon which the applicant seeks to rely. But to do that, the defendant will need to have some way of "discovering" the applicant's case, and so the discovery process becomes necessary. And what will be done if one party refuses to disclose the information the other requests? There must be some way to compel the parties to disclose their documentary evidence. Also, there must be a procedure in place to allow the parties to settle disputes over the proper procedures to apply in a proceeding. This is done by way of motions. Each of these motions must be properly resolved on their merits. Furthermore, the respondent should be given the opportunity to present evidence on his own behalf, and this will likely involve hiring expert witnesses. In this way, the simple right to notice may develop into an extensive set of procedural and substantive entitlements. The adversarial

The difficulty is if we insist too much on this full due process system, which takes tremendous time, and for which we have this judicial model … [S]ometimes you wonder, is this process really designed to get to the truth? If we could solve that side of things, that would go a long way to dealing with questions of independence and so forth. [Margaret Sanderson, Charles River Associates 59:12:00]

process produces results that are consistently fair and just, but frequently at very high cost.

Out of consideration for principles of procedural fairness, the Tribunal aims to provide more, rather than fewer, procedural protections. This means that parties are generally given the time they need to complete the proceeding "in the fullness of time," without strong direction from the Tribunal. As well, parties will often agree to timetables for dealing with cases, production of documents, etc., and these time frames may be quite lengthy in complicated cases.

Case management also means limiting witnesses. You might be interested to know that in the Microsoft case … they had only 24 witnesses and the decision was 46 pages long. The Superior Propane case that you've heard about a lot had 91 witnesses and a 109-page decision. I think, frankly, that's reflective of something short of aggressive case management. [George Addy, Osler, Hoskin & Harcourt, 59:11:35]

Case Management

The Committee shares the concerns of those who complain that Tribunal proceedings are long and expensive. Commentators focused on several areas where procedures could be improved:

- the time in which the steps in the proceeding must be completed;
- the time allocated for, and the scope of, examinations for discovery; and/or
- the amount of expert evidence the parties may adduce.

The Tribunal currently has authority, under section 16 of the *Competition Tribunal Act*, to make general rules (subject to the approval of the Governor in Council) regulating the Tribunal's practice and procedure. Those rules currently exist in the *Competition Tribunal Rules*,[11] which set out a complete code of procedure for the adjudication of disputes before the Tribunal, including the substantive steps the parties must complete and the time within which the steps must be completed. The steps in the proceeding include the exchange of pleadings, discovery, the pre-hearing conference, granting of interim relief, applications by interveners, interlocutory motions and the hearing itself.

Frankly, many of my colleagues … fought tooth and nail, saying, "Well, that's not justice. Justice means you can have as many witnesses as you want, you can plead as long as you want, and you can get whatever adjournments you want." I think the hesitancy on the part of the Tribunal to do more is because there's this view of a private bar to say the model is like court. [Stanley Wong, Davis & Company, 59:12:20]

11 SOR/94-290 as amended SOR/96-307; SOR/2000-198.

The tendency is always to say, well, let's tinker with the Tribunal process rules, and hopefully that will solve the problem. That's not always the case. That can help, but there also has to be aggressive case management on the part of the Tribunal as well. By way of example, a recent case, one of the many involving Air Canada, was adjourned for six months without any reasons being given. [George Addy, Osler, Hoskin & Harcourt, 59:11:30

The Tribunal is aware of these criticisms and has made, and continues to make, constructive efforts to address them. Most notably, the Tribunal established a Tribunal-Bar Liaison Committee in 1997 comprised of Tribunal members, members of the Competition Law Section of the Canadian Bar Association and the General Counsel of the Department of Justice's Competition Law (who represents the Commissioner of Competition). The Liaison Committee reviews Tribunal procedures to determine how they might be refined and improved. At the time of drafting of this report, a number of procedural improvements are anticipated. One set of procedures will replace The current discovery process — traditionally the part of the process that takes the most time and results in the most interlocutory litigation — will be replaced with the following set of procedures:

- a reciprocal obligation upon the parties to deliver a disclosure statement setting out a list of the records upon which they intend to rely at the hearing;
- "will say" statements of non-expert witnesses who will be appearing at the hearing;
- a concise statement of the economic theory in support of the application.

Moreover, the new procedures will permit certain information provided by the respondent to be read into evidence rather than having the witness testify.

I would urge that the Tribunal continue to maintain a broad and flexible discretion to manage cases in both the parties' and the public interest. I am concerned about the attempt by the rules and by members of the Tribunal to think that this can be done by fixed rules, which mostly relate to the timing of when things should be filed and the like. In my judgment that is simply tinkering at the edges of substance. [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

Equally important, the new procedures will depart from the traditional model of permitting each party to adduce all of its expert evidence in turn. Instead, the Tribunal will group experts on a particular issue together in panels. Each expert will make a statement setting out his opinion, which will then be subject to cross-examination by the other experts, rather than by their lawyers. Counsel will still have the right to question experts in a limited manner. Apparently, this approach has been used in Australia with some success reported.

The Committee is also aware that the Tribunal-Bar Liaison Committee is preparing a discussion paper to explore the possibility of creating similar rules with respect to mergers. These amendments would relate to electronic filing and hearing, attempting to limit the number of witnesses to

be called at the hearing, and the introduction of time limits (four months or less from the date of filing of the notice of application) for the issuance of reasons and orders by the Tribunal. The new procedures are aimed not only at reducing the time for the matter to be resolved, but also to bring a greater degree of certainty to the proceedings, which will ultimately benefit the parties in conducting their affairs.

In my judgment, the Competition Tribunal is now managing its caseload very effectively, and recent litigation before the Tribunal evidences that. That's not to say that there won't be long cases in the future; indeed there will be. If there are, I don't believe this committee should engage in hand-wringing over that process. It's in the nature of litigation. [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee commends the Tribunal for its timely and thoughtful reforms, and encourages it to continue the process. However, the Committee cautions that any contemplated limits on the right of a party to present its case fully and fairly must always be approached with special consideration for established principles of fairness and justice. Restricting the number of witnesses that a party may call, for example, or the amount of time within which the party must complete their submissions, always runs the risk of creating the reality or appearance of injustice.

The Committee has assessed several possible options to address the issue of perceived shortcomings in Tribunal proceedings. We could, for example, recommend that the government amend the *Competition Tribunal Act* to impose procedural limits on Tribunal proceedings; or we could recommend that the government amend the Act in order to require the Tribunal itself to change its rules to create limits on its proceedings.

[Y]ou have to be able to say to the parties, "I want experts on this issue and this issue, and you'd better file experts in this area," instead of saying, "You do what you want, you do what you want, and then you can reply and you can reply." That is not case management in this area. This is one where you have to be extremely aggressive, running the case from the first day it comes into the Tribunal. The Tribunal can do that without amendment to the process. Every time you have amendment, it leads to more jurisprudence about what it really means. The framework is good enough for the Tribunal to make these changes. [Stanley Wong, Davis & Company, 59:12:20]

The Committee, however, believes the first option is problematic for several reasons. The Committee has no direct experience with, and no particular expertise in, the conduct of Tribunal proceedings. Furthermore, the *Competition Tribunal Act* clearly anticipates that Parliament originally intended for the Tribunal to determine its own procedures, and it appears to be actively engaged in doing so. For these reasons, the Committee does not find that there is a compelling reason to depart from this model.

The second option would impose an obligation on the Tribunal to make rule changes, but would leave the consideration of how exactly to do so in the hands of the Tribunal. Again, however, it is clear that the Tribunal already has the necessary authority under its statute to

impose case management procedure, and is actively considering ways of doing so.

[A]s we strengthen the Tribunal process and improve the adjudication mechanism through the Tribunal, we should not at the same time give the Commissioner powers to avoid the Tribunal. I think the interim injunction provisions that have been granted to the Commissioner in the context of airlines are a special case, but if one wants to have separation of investigation and adjudication, one should have a revitalized Tribunal. It doesn't help to give, at the same time, the Commissioner powers whereby he can avoid the Tribunal. [Margaret Sanderson, Charles River Associates, 59:12:30]

Ultimately, the Committee believes that the Tribunal is in the best position to enunciate the rules governing its procedures. For that reason, the Committee recommends:

7. That the Competition Tribunal, in consultation with the Tribunal-Bar Liaison Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.

Balancing the Incentives: Damages, Court Costs and Fines

I believe that administrative penalties and damages are something that are necessary to make our Act effective. Currently, abuse of dominance is a provision that can be read this way: do it until you're told not to. And what's the cost of that? The advice we have to give is that it's not unlawful until the tribunal says so. Of course, the clients can potentially read into that, do it until they say no. [Robert Russell, Borden, Ladner & Gervais, 65:09:35]

The relief available to a prospective applicant is a critical factor in determining whether to proceed with a case to the Tribunal. Although, with the adoption of Bill C-23, the right to bring a private action before the Tribunal will exist in a limited sense, the incentives contained in Bill C-23 are clearly designed more to discourage than to encourage the applicant to commence private proceedings. The absence of any remedy of damages is the most obvious incentive against litigating cases. Denying the plaintiff what would be, in most civil cases, the most important available remedy might reasonably be expected to have an impact on the decision of whether or not to start an application, i.e., is the remedy (an order) worth the time, effort and expense? The possibility of damages awards is also an important deterrent to anticompetitive behaviour. Currently, the only relief available to the applicant is a cease and desist order of the Tribunal, or in some cases, an order for divestiture. But there is no right to sue for damages.

The right to sue for damages is a fundamental right accorded to plaintiffs in civil proceedings throughout the world. It is an injustice that applicants in Tribunal proceedings should be denied the same fundamental right as any other litigant to claim restitution for the losses they have sustained as a result of another person's anticompetitive conduct. The ostensible reason for the policy is that providing a damages remedy would lead to a rash of litigation, as has been the case in the United States and that this, in turn, would cause business to leave Canada, oppressed by the high cost of defending vexatious lawsuits.

But unless we have significant penalties, we have no teeth in these provisions. We simply litigate, and litigation can be a tool in itself to draw things out until the damage is done, until the competitor disappears from the landscape. Only with the threat of significant penalties with these sorts of provisions will we have true deterrents in our economy. [Robert Russell, Borden, Ladner & Gervais, 65:09:35]

The Committee is fully aware of the many differences that exist between the Canadian and U.S. approaches to antitrust enforcement, and we are of the view that the differences are so fundamental that no meaningful comparison can be drawn between the two. In addition to permitting treble damages to the successful plaintiff, the U.S. approach also contains other incentives to encourage litigation including, for example, civil jury trials and costs awards that overwhelmingly favour the plaintiff. For that reason, the Committee is firmly of the view that there is no merit to the argument that creating a right of damages in Tribunal proceedings would have an adverse impact on the business environment. In fact, quite the opposite could occur. Creating a fair system in which all persons and enterprises are able to protect their rights and economic interests would tend to attract investment, not drive it away. This conclusion is supported by the United States experience where, despite having the most litigious antitrust regime in the world, investment still flocks to the business environment of the United States ahead of any other in the world.

[A]dministrative penalties and damages to parties that are harmed. Without that, we don't have teeth in this legislation for important reviewable matters. If you put a company out of business today, all that will be said to you is, you shouldn't have done it. That's not a good enough deterrent. If you're going to abuse your dominant position in this country, you should be called to pay for damages to the party, costs for the proceedings, and penalties because the public interest has been affected. We need those teeth. [Robert Russell, Borden, Ladner & Gervais, 65:10:45]

Moreover, the argument is not borne out by the experience of ordinary civil courts in Canada. Our courts routinely assess and awards damages in civil cases, and there is absolutely nothing to suggest that the availability of the remedy has led to a rash of strategic litigation in those venues. For the same reason, there is nothing to support the position that permitting applicants to claim for damages before the Tribunal would result in a significant increase in litigation, particularly if the relief is limited to "single damages," i.e., the actual provable loss. The threat of strategic litigation would also be kept in check by the

Tribunal's new cost rules, as well as its power of summary dismissal and to refuse leave to commence an application.

As we note from the area of hard-core cartels, even a $10 million fine may not suffice. I know when I was at the Competition Bureau, when we were looking at a particular case, we calculated the overcharge to be hundreds of millions of dollars, so even a $10 million fine in that particular case, had it gone forward, would have been a mere fraction of the profits. If you're going to introduce an administrative monetary penalty for abusive dominance, I think you really want to give the Tribunal the greatest flexibility by allowing it to impose a penalty at its discretion. That will enable it to set the penalty at any level. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:55]

The Tribunal is composed of very experienced members of the judiciary and experts in economics, who certainly have the necessary expertise to assess damages. The Committee does not recommend under any circumstances the consideration of treble damages, such as are available to litigants in the United States, and which is said to have led to the growth of a massive antitrust litigation industry in that country.

Until claims for damages are permitted under the *Competition Act*, it is likely that the balance of litigation incentives in the Act will remain less than optimal. Some good cases likely will not be brought given no possibility of recovering damages. These would-be applicants will simply decide that the limited injunctive relief available from the Tribunal is just not worth the high cost of pursuing a case to hearing. Accordingly, from the perspective of the applicant, there is a good argument to be made for creating a right to sue for damages.

Historically, Canada's antitrust legislation has been principally concerned with the public interest in competition as opposed to the private interests of individual competitors. If you amended the legislation … to afford a litigant the right to damages, I think the implications would be quite profound … I think inevitably where you would end up is that the Tribunal would become a court like any other, only it would be a specialized court. So a lot of thought has to be given on whether it is in the public interest to migrate the legislation in that direction. [John Rook, Osler, Hoskin & Harcourt, 65:10:55]

Moreover, damages would provide excellent deterrence. The possibility of being liable for damages would certainly provide additional incentive for dominant firms to refrain from anticompetitive practices by raising the potential cost of embarking on such a course. Increasing compliance with the Act would, of course, also relieve the Canadian taxpayer of some of the expense of having the Bureau solely responsible for enforcing the Act. Currently, there is little disincentive to a dominant player from abusing its market power. The abusive firm knows that the worst that will happen is that, at the end of the proceeding, it will be ordered merely to cease and desist the anticompetitive behaviour, and perhaps to pay a portion of the applicant's legal costs. It will not be required to pay damages, no matter how much its victim or victims may have lost. Compare this, on the other hand, to the enormous profits that the abusive firm may realize while the case is before the Tribunal. The absence of damages creates a very strong incentive for the abusive firm to prolong the litigation; doing so will, of course, raise its legal costs somewhat, but it will not increase its exposure in the much larger area of damages. In the meantime, the victim of the conduct will continue to suffer losses (and will thus be under increasing pressure to settle

the case), while the abusive firm will continue to realize its ill-gotten gains, without any concern of ultimately having to pay damages to its victim.

With the adoption of Bill C-23, the Tribunal will now have the authority to award court costs to a successful litigant. This is also expected to have an impact on the prospective applicant's decision of whether to take a case to the Tribunal, although it cannot be said to be a strong incentive either way. The spectre of having to pay a successful defendant's cost would tend to deter an applicant not strongly convinced of the merits of his case, certainly as much as the prospect of recovering costs would tend to encourage it. Furthermore, at least some cases, it is anticipated, will not obtain the leave of the Tribunal required to bring an application under sections 75 and 77, which is another possible disincentive to commencing an application.

The Committee also found considerable support among witnesses for giving the Tribunal the authority to levy administrative monetary fines as a further deterrent to egregious anticompetitive conduct. Although the threat of damages is certainly an effective deterrent, fines would be a useful additional remedy in situations where: (1) an award of damages would not, in itself, be a sufficient deterrent; (2) the victims of the conduct could not be easily ascertained, for example, where the loss has been shared by a large number of consumers; or (3) where the losses of each is too minimal to make a damages award a practical remedy.

Administrative penalties, in order to have any effect, would have to be large enough to deter anticompetitive behaviour. In fact, to deter the conduct in the future, the penalty must be greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct. For that reason, there should be no ceiling placed on the size of the potential fine that the Tribunal might levy. The size of the fine should be left to the discretion of the Tribunal, having regards to the profits realized by the abusive party and such other factors as it considers correct in the circumstances of the case.

I think some real benefit can be derived from looking at other case management models where a judge is assigned not only to schedule, but to manage what issues are coming forward before theTribunal. We have, I believe, a very good example in the commercial list in Toronto....There are judges, typically six at a time, who are assigned to the list — three fairly permanent members, and three members who are rotated in every six months. It has a specific protocol in dealing with commercial litigation, and a very tight case management system, where a judge not only manages all of the pre-trial hearings, if you will, but also enforces that the parties go through methods of mediation, typically before they get to a trial. ... Effective case management by a judge *... is something that would, I believe, definitely assist our procedures in terms of the Tribunal.* [Robert Russell, Borden, Ladner & Gervais, 65:09:25]

I think there is a need to review the whole scheme as to what we're trying to do … [I]n Bill C-23 there's now a penalty of $15 million in the airline situation. I think that's too hasty. I appreciate there are all sorts of political considerations, but … you need to look more generally at what principles you want enshrined in the act to deal with reviewable matters. … [I]t's not a question of what we can do to stop the big business. When you have these penalties in place, they will apply equally to smaller businesses. [Stanley Wong, Davis & Company, 65:10:15]

When … we take a holistic approach and think about the institutional structures and the incentives that are put in place … that will go a long way towards dealing with some of these cost concerns. [Margaret Sanderson, Charles River Associates, 59:11:25]

Accordingly, the Act must provide the optimum mix of incentives to promote compliance with the Act and to encourage meritorious cases to come forward. The Committee was presented with two options:

1. That the Government amend the *Competition Act* to permit the Tribunal, in addition to the other remedies available to it in civil proceedings, to order the compensation to a party in the form of a damages award, and to levy administrative monetary penalties under section 79 as a deterrent to anticompetitive behaviour and the just and expeditious resolution of Tribunal proceedings.

Parliament should ask itself, how much of the public resources we have to allocate amongst many valuable objectives can we afford to put into this kind of adjudication? [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

2. To wait and see the impact of Bill C-23 reforms (i.e., private access, hearing of references) on the operation of the Tribunal and its procedures.

It is not clear whether the creation of the new right of private access, as well as the Bureau's new procedures to hear references and to summarily dismiss applications, will actually achieve the desired objective of encouraging positive litigation. The Committee is not convinced that these narrow reforms will, in themselves, strike the right balance. For this reason, the Committee recommends:

We just have to open up to the possibility of allowing private actions, possibly including damages or at least cost awards for some of these other offences. [Tom Ross, University of British Columbia, 59:12:45]

8. That the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79).

Jurisprudence — Bringing Cases

[W]e should be focused on … what are the right, economically sound designs of the law, and the jurisprudence should follow. [Neil Campbell, McMillan Binch 59:12:15]

There was a broad consensus among witnesses that simply not enough cases are being brought to the Tribunal. This is not to suggest that litigating disputes is to be encouraged for its own sake; however, bringing cases to the Tribunal will lead, over time, to the development of judicial interpretation that will ultimately serve to clarify the meaning of, as well as improve compliance with and enforcement of, the Act. The challenge for lawmakers is to create a system in which good cases (i.e., cases with merit) may be brought.

At the same time, we must be careful that we do not encourage frivolous, vexatious or strategic litigation.

Why would one bring an application to the Tribunal as a private litigant if you can convince the Commissioner to make an ex parte *application to stop your competitor from doing what it is doing in the marketplace? Why spend your money when you can spend the money of the public …?* [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

The Committee is satisfied that the new Tribunal powers created by Bill C-23 are well designed to discourage frivolous litigation. However, whether the reforms will function to encourage good cases to come forward is far from clear.

Many disputes will undoubtedly be resolved by the Tribunal's new power to hear references.[12] At the same time, it is reasonable to anticipate that some cases will be dealt with summarily under the Tribunal's new powers of summary judgment. Cases obviously devoid of merit will be "stopped at the gate" by the Tribunal's right to deny leave to commence the application.

Parliament has surrounded this right of public access with a number of fences … and it remains to be seen whether it's practicable and will be used. … [I] don't see the incentives there particularly for a private litigant to proceed … [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee expects that the new right of private access to adjudicate disputes under sections 75 and 77, created by Bill C-23, will add to the Tribunal's caseload, as private individuals look to the Tribunal for protection from anticompetitive business practices. However, owing to the non-availability of any remedy in damages, the Committee does not anticipate the flood of litigation that some opponents of private access have predicted. Still it is anticipated — indeed, hoped — that stakeholders will use the legislation in good faith to assert their rights before the Tribunal and protect their civil rights and, more generally, to protect healthy competition.

We all benefit from having a reasoned decision. Not only will the complainant benefit, members of the public will benefit by understanding the way the Bureau is applying the law in a particular situation. You get an accountability benefit from seeing what the Bureau has done or has not done. [Neil Campbell, McMillan Binch 59:11:25]

On the subject of references, the Committee heard several criticisms of Bill C-23. That bill contemplates that the Commissioner alone, or both parties if they agree, may direct a reference to the Tribunal on a question of law, mixed law and fact, jurisdiction, practice or procedure. The Commissioner may, of his own accord, refer these matters (except for a question of mixed law and fact), but a responding party may not. The Committee does not find

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12 The Tribunal will be able to hear references on questions of law, mixed law and fact, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 (*Deceptive Marketing Practices*) or Part VIII (*Matters Reviewable by the Tribunal*), whether or not an application has been made under those sections. Similarly, the Commissioner may, of his own accord, refer a question of law, jurisdiction, practice or procedure (but not of mixed law and fact) in relation to the application or interpretation of Part VII.1, VIII or IX (notifiable transactions, i.e., mergers).

In private litigation, the parties have the freedom to spend as much money on their cases as they think their interests bear, so there's a natural competition in spending money on cases. Part of the resistance to the bureau bringing more cases has been the amount of money they consume. This is simply saying that the process becomes a kind of pearl without price. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

any compelling policy justification for this apparent inequity and the Committee, therefore, recommends:

9. That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part VII.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.

Tribunal Resources

I think there is a general support for the idea that Tribunal proceedings should start and finish in six months, including a four-month period for adjudication and two months to write the decision. My sense is that the Tribunal itself is predisposed to pursue that and obviously requires the cooperation of the parties as well as sufficient resources. I understand one of the problems with delay in the past has been that there have been insufficient judicial resources. [Stanley Wong, Davis & Company, 65:09:25]

The Committee heard little evidence on the adequacy of the Tribunal's resources. However, some witnesses did point to a shortage of economist members in some cases, and this has reportedly resulted in occasional delays in cases proceeding in a timely fashion. We anticipate that the Tribunal's current budget may need to be increased in order to deal with cases brought by private parties after the adoption of Bill C-23. How many new cases will result remains to be seen. At the same time, it is possible that the power to grant summary judgment and to hear references may result in a greater number of cases being resolved short of a full-blown hearing, and this may result in some saving of resources.

I do not think just throwing more money there will solve the problem. If we kept the model we have today … you can have a situation such as the Superior Propane case where the Commissioner can lead ten economists as experts. … I think we have to change this process, or the quantity of resources that will have to be devoted to it … [W]hat the general taxpayer would view is a reasonable allocation, given competing and highly desirable goals for government policy. [Margaret Sanderson, Charles River Associates, 59:12:35]

In any case, the Committee is of the view that the Tribunal itself is in the best position to determine its resource requirements and that the current budgetary process provides the means to address this issue. For this reason, the Committee does not feel the necessity to comment on the adequacy of the Tribunal's current budget. The Committee intends to monitor the operation of the Tribunal as part of our oversight of the operation of Canada's competition law framework.

The *Competition Tribunal Act*

The Committee heard that subsection 12(1) of the Act, as it is written, does not reflect current Tribunal practice. That section states that questions of law shall be determined

only by the judicial members, while questions of fact or mixed law and fact shall be determined by both judicial and lay members.

Distinguishing questions of law from questions of fact or mixed fact and law often presents difficulties, particularly in a statutory regime that is driven by market forces. The Tribunal, in its practice, does not preclude lay members from expressing opinions on questions of law. In one case, in fact, the appeal court affirmed the dissenting opinion of a lay member on an issue of the Tribunal's jurisdiction.

One area that in my judgment would add a lot of accountability, particularly in merger cases, is if a merger is before the Tribunal the reference power that exists in Bill C-23 should be amended to permit the respondent to bring an application to the Tribunal for a ruling on a summary point … If the respondent … had the power to go to the Tribunal and say, "this is wrong, this is outside the mandate of the Commissioner in these circumstances, and you ought to do something about it", that would have a very healthy disciplinary effect on the exercise of discretion … [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee believes that there is no compelling reason to maintain the artificial and somewhat unwieldy distinction between questions of fact and question of law or mixed fact and law in Tribunal proceedings. Accordingly, the Committee recommends:

10. That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.

Automatic Right of Appeal

Section 13 of the *Competition Tribunal Act* creates an automatic right of appeal[13] from any decision or order of the Tribunal, including interim (temporary) orders.[14] One exception exists to this automatic right of appeal: an appeal on a question of fact alone may only be brought with leave (permission) of the Court. This approach reflects a principle known as judicial deference. It is based on the notion that the Tribunal, with its specialized expertise and full hearing of the evidence, is in a better position than the appeal court to determine evidence-based findings of fact. But should the idea of deference extend to questions of law as well?

Judicial members have the exclusive right to decide on questions of law and then all other questions decided by the entire panel. … [I]t's a bit awkward for the Tribunal to operate in that way … in reality the Tribunal members probably look at everything together [Stanley Wong, Davis & Company, 65:09:15]

13 To the Federal Court of Appeal.

14 However, section 103.3 interim orders (created by Bill C-23) would not be reviewable.

Right now there is an automatic right of leave to appeal except on questions of fact. I know of no skillful lawyer who can't at least make a question of mixed fact and law to launch an appeal. This, I think, unnecessarily delays the adjudicative process, given that the purpose of the Tribunal is to be a specialized Tribunal. [Stanley Wong, Davis & Company, 65:09:15]

Judicial members of the Tribunal are judges of the Federal Court. It is evident to the Committee that, with such a depth of legal knowledge and experience, the Tribunal warrants a very high degree of deference on matters of law. Moreover, it has been clearly shown that lay members of the Tribunal can, and do, comment meaningfully on issues of law in Tribunal decisions. For this reason, the Committee believes that the principle of deference should extend to the Tribunal not only in questions of fact alone, but equally in questions of law of general application and laws specific to competition proceedings.

It is important to be clear that requiring a party to obtain leave to appeal does not deprive the party of its right to appeal. It simply requires that the appellant first convince the Court of Appeal that there is sufficient merit to the appeal to warrant a hearing. The Court of Appeal might, if it finds no merit in the appeal, summarily dismiss it without the necessity of going through a full appeal proceeding. In this way, many proceedings might be abbreviated without sacrificing principles of procedural fairness. Accordingly, the Committee recommends:

It is not good for the system to have a very prolonged period for adjudication of appeal and subsequent appeal because, certainly in the merger context, very few mergers will be held up. That is, mergers that were not completed would not wait. [Stanley Wong, Davis & Company, 65:09:15]

11. That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.

CHAPTER 4: CONSPIRACIES AND OTHER HORIZONTAL AGREEMENTS

The Organizational Continuum

Cooperation among competitors is a double-edged sword. On one hand, it may offer prospects of economic benefits; on the other hand, it may bear the costs of dulled competitive performance. The economic benefits develop from the synergistic effects when individuals and organizations with different competencies and resources are brought together. More specifically, such collaboration may: (1) result in new and less costly production processes; (2) facilitate the attainment of scale and scope economies; and/or (3) lead to a more efficient allocation of resources or improved product quality. A typical example in today's knowledge-based economy would be the combining of research, development and marketing resources of two or more firms to reduce the time needed — as well as risk exposure — to develop and bring new products to market. An additional social benefit would be the elimination or mitigation of duplicative work and facilities. Unfortunately, sometimes these benefits accrue, in part, to a market sharing or a coordinated pricing agreement needed to make such cooperation profitable. This may lead to, in varying measure, restricted supply, higher prices, less product selection and/or less-than-optimal product quality. Hence, an intricate weighing of economic factors is required to offer a definitive conclusion on the ultimate impact of such cooperation.

In many cases, a strategic alliance is just a contractual joint arrangement similar to a merger. It may be dictated by tax considerations rather than any particular overriding purpose in having a contractual arrangement. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

At the outset, one should be aware that such cooperation could take several organizational forms. It can be purely contractual, purely combinational, or it can be located anywhere between these polar opposites. The Committee will, for simplicity, include the diverse set of business relationships on this organizational continuum

It's also reasonable to think about these arrangements between firms that fall short of mergers but are not hard-core cartel behaviour, like many strategic alliances and joint ventures. There's … [the] example of a joint venture to develop a vaccine. A lot of these arrangements are wonderfully efficient on the one hand, but pose some certain competition challenges on the other. They need a more sensitive, nuanced evaluation of the sort we give to mergers. [Tom Ross, University of British Columbia, 59:09:30]

under the term "strategic alliance."[15] This integration can be contrasted with that of a merger or acquisition of assets or capabilities.

There are many agreements that incidentally affect prices or incidentally affect customers but are not in essence price-fixing agreements. If you stick to prohibiting agreements to fix prices, i.e., agreements the object of which is to fix prices, as opposed to agreements that simply affect prices as an ancillary matter, you'll get much closer to truly hard-core criminal behaviour. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

Public concern over cooperation among competitors, when it is simply a veil for a cartel, begins to rise not only because it potentially redistributes income (from buyers to sellers) in a covert way that is tantamount to fraud, but it may also reduce economic efficiency as resources are misallocated in the economy. Indeed, such monopolization results in lower economic welfare and is, therefore, deemed to be a crime against society. However, a thorough competitive effects review would ensure that both types of cooperation, whether a merger or strategic alliance, receive similar treatment because neither can a priori be categorized as pro-competitive or anticompetitive.

Theoretically, a strategic alliance that is not what competition specialists call a "naked hard-core cartel" may be afforded criminal or civil treatment under Canada's *Competition Act*, even though it may be strictly pro-competitive and restrict competition only in an ancillary way. Law enforcement may proceed by way of a criminal trial under the conspiracy provision (section 45) or by way of a civil review under either joint dominance (section 79) or a merger (section 92). Uncertainty abounds on the possible course to be taken, but a strategic alliance would meet the public policy ideal of a "level playing field" with respect to that of a merger only if it received a section 92 through 96 review. Unfortunately, as many witnesses told the Committee, a strategic alliance may be inadvertently swept into section-45 treatment, where criminal law is not well suited to judge it. Specific court deficiencies in a section 45 case are:

It's somewhat odd that if two firms or competitors get together in a merger, they get a civil review where they get to talk about efficiencies, and there's a kind of cost-benefit evaluation of the proposal, yet if they do something less than a merger, they're subject only to criminal law, and people can go to jail and pay fines. [Tom Ross, University of British Columbia, 59:09:25]

- the absence of specialized expertise in the criminal courts;
- the tendency of structural considerations (market share or concentration) to dominate the very limited analysis;

15 In the past few decades, the business sector has preferred the strategic alliance, which usually takes the form of a joint venture, to that of a full-blown merger because this form involves fewer financial trappings associated with increasing integration. These horizontal agreements typically provide for formal supply arrangements, access to technologies and specialized expertise, distributional channels and customers (particularly in foreign markets where there are trade barriers), capital funding, risk sharing, and/or collaboration on research and development.

- the lack of consideration given efficiencies or innovation; and
- the limitation of sanctions to fines, in the absence of behavioural solutions.

I don't think the strategic alliance bulletin provided the comfort the business community was looking for, because it was very evident that there is an overlapping potential application of not only the merger provisions but also the criminal provisions of section 45 … and even joint dominance provisions. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:20]

A "chilling effect" on pro-competitive strategic alliances results, and the Committee intends to provide a solution to this design flaw. However, before doing so, the Committee will review and address the circumstances that have led to the over-inclusiveness and under-inclusiveness of the conspiracy provision.

History of the Legal Treatment of Conspiracies

The prohibition against horizontal agreements (i.e., between competitors in the same product market) to fix prices, allocate markets and/or restrict the entry of competitors has been a central feature of Canada's antitrust Act since 1889. However, for most of the original Act's history, the prohibition was ineffective due to the presence of the word "unlawful" and the lack of a permanent investigative and enforcement body. Between the *Combines Investigation Act* of 1923 and the enactment of the *Competition Act* in 1986, the enforcement of the prohibition varied according to the legal interpretation given to the term "unduly" in the provision's reference to "prevent or lessen competition unduly" when assessing the agreement's economic effects. In this period, several unsuccessful attempts were made to rid the Act of this word in order to strengthen the prohibition. After the Supreme Court decisions in *Aetna Insurance* (1977) and *Atlantic Sugar* (1980), the Crown had to prove that the alleged conspirators both intended to enter into the agreement and intended to lessen competition "unduly." The double intent proved hard to establish, as can be seen by the drop in the Crown's success rate from 90% to 55%.[16]

We have not had great success with this provision. Particularly because of some of the burdens and the wording of the section, it's made it much more difficult to use it against hard-core cartels … [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

However, the enactment of the *Competition Act* de facto reversed these court decisions. Section 45 of the *Competition Act* provides that "everyone who conspires, combines, agrees or arranges" to lessen or prevent competition "unduly" is guilty of a criminal offence and is

[T]he $150 million in fines recently collected is the coattail argument. We have collected $150 million in fines in Canada after other jurisdictions have enforced against those international cartels. We've done very well at getting guilty pleas on them, but I don't consider that to be a success of our statute. [Robert Russell, Borden, Ladner & Gervais, 59:09:40]

16 William Stanbury, "The New Competition Act and Competition Tribunal Act: Not With A Bang, But A Whimper," *Canadian Business Law Journal*, Vol. 12, 1986/87, p. 20.

liable to fines and/or imprisonment. This provision incorporates a defence for horizontal agreements between competitors for:

[W]hen we analysed the cases back in the early 1980s, … we found that the government lost as many if not more of the cases because they couldn't prove agreement. It wasn't that they couldn't prove undueness; they couldn't prove there was actually an agreement. That is the cornerstone of a conspiracy section. [Lawson Hunter, Stikeman Elliott, 59:09:25]

- the exchange of statistics, defining product standards, or the sizes or shapes of product containers and packaging;
- the exchange of credit information, research and development, placing restrictions on advertising, promotion or measures to protect the environment; and
- the adoption of the metric system of weights and measures.

There are also specific defences for export consortia and specialized agreements.

The Act's most significant changes, however, were introduced in subsections 45(2.1) and 45(2.2). These provisions permit the Court to infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence; and while it is necessary to prove that the parties intended to and did enter into the agreement, it is not necessary to prove that the agreement was intended to have the effect of lessening competition "unduly." Subsequent jurisprudence has been consistent with this interpretation.

The question of whether to strike unduly from section 45 rather than go to a two-track approach has been raised before. The simple response to why we wouldn't do it is because it would make the section too inclusive. It would trap many agreements, which are innocent. For example, agreements between a franchise and a franchisee might be captured by section 45 if it simply said that any agreement that restricts competition, supply, production and so on. … [R.W. McCrone, Competition Bureau, 64:09:15]

The Supreme Court further provided the more controversial interpretation on the meaning and implications of the word "unduly" when it handed down its decision in the *Nova Scotia Pharmaceutical Association* case, which is commonly referred to as the *PANS* case. The courts are now required to conduct a two-part test on price-fixing arrangements before condemning them as lessening competition "unduly." The first part would be a market power test, while the second would be a test to establish injurious behaviour to competition that would qualify as "undue." This legal framework in fact establishes a partial rule of reason because agreements are neither treated as per se illegal, even those that are patently "naked hard-core cartels" with no redeeming benefits to society, nor treated under a "rule of reason," whereby the economic advantages and disadvantages of the agreement would be weighed. A strategic alliance that

restricts price competition only in an ancillary way would then be subject to less than a thorough review to determine its ultimate economic impact.

As it currently stands, the Crown must establish four elements beyond a reasonable doubt when bringing forth a section 45 case:

1. The existence of a conspiracy, combination, agreement or arrangement to which the accused is a party.

2. The conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly (i.e., it does not have to be implemented);

3. The accused had the subjective intent of the first two elements; and

4. The accused was aware, or ought to have been aware, that the effect of the agreement would prevent or lessen competition *unduly*.

A review of the enforceability of the law on conspiracies is revealing.

I participated in a special council for the Attorney General of Canada in the Nova Scotia pharmaceutical proceedings, where we tried to bring clarification in the submissions to the Supreme Court of Canada in the early 1990s to the meaning of "undueness" in order to give broader certainty to the public and to the Bureau. And my own view today is that despite all those good intentions, section 45 really does warrant priority consideration. The reasons are … [i]t is both under- and over-inclusive. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

[Canada is] the only jurisdiction in the world that requires the level of analysis in order to prove a conviction under section 45. Most jurisdictions, … Europe, the United States, Australia, New Zealand, South Africa, … have adopted a per se approach to hard-core cartel behaviour, while providing for a civil track approach … to deal with strategic alliances … [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

The Enforceability of Section 45

Competition law experts believe, almost unanimously, that section 45, as currently written, is hard to enforce in a contested trial setting, even when applied to a "naked hard-core cartel." They also believe the two-step "market structure-behaviour" tests provide too much room for litigating irrelevant economic matters in the case of a "naked hard-core cartel." Public enforcement costs are therefore excessive. Given that these views are so widely held, the Committee sees no reason for going to great lengths to validate them. The Committee will exclusively rely on Bureau data, analyses and conclusions.[17]

It's recognized that our standard of undueness is a partial rule of reason, but it doesn't embrace any recognition of efficiencies. Efficiencies are one of the objectives of competition law, and are something that ought to be considered in determining whether or not some action or arrangement ought to be condemned. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

[17] Harry Chandler and Robert Jackson, *Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act*, Competition Bureau, http://strategis.ic.gc.ca/SSG/ct01767e.html, May 2000. The Committee relies on the authors' assertion that none of the 51 cases constituted a pro-competitive strategic alliance.

[O]f the 22 contested cases, three were successful. Is every Department of Justice lawyer or those retained from the outside incompetent? No. The provision is a criminal standard. It requires, beyond a reasonable doubt, the proving of all the elements. That standard should be maintained. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

The Competition Bureau reports that 51 cases have been prosecuted under section 45 or its predecessor between 1980 and 2000. Almost 60% of these cases (29 of 51) resulted in a guilty plea. The conviction rate in contested trials was exceptionally low, somewhere between 10% and 15% (3 of 22). The Bureau estimates that slightly more than 35% of cases (6 of 17) were acquitted at trial or discharged at a preliminary hearing because of insufficient evidence of an agreement — the first element described above. Almost 65% of cases (11 of 17) were acquitted or discharged because of insufficient evidence of an undue lessening of competition (the second element) or of the parties' intent that the agreement would have that effect (the third and fourth elements). These data and analyses indicate that the burden of proof "beyond a reasonable doubt" is a formidable one, but the "undueness" element poses the greatest obstacle to a successful conviction under section 45.

The Two-Track Proposal: Criminal and Civil

[T]he Bureau contracted three independent studies [on the issue horizontal agreements amongst competitors]. … [T]hey all agree that hard-core cartel behaviour, such as price fixing, market sharing and output restrictions, should be a criminal offence without a competition test. [Gaston Jorré, Competition Bureau, 64:09:10]

At this point, the Committee must remind the reader that the object of competition policy is not about winning or losing litigated cases; it is about prescribing a framework for an efficient business sector that delivers products and services at competitive prices. We strongly believe that section 45 is meant to only apply to certain types of agreements, and the current law does not give fair warning of what type of agreement constitutes a serious indictable offence. Furthermore, although the Committee understands that writing law with so much precision as to preclude uncertainty is unattainable — watertight compartments are not possible — the law should not, at the same time, be written so loosely as to capture all horizontal agreements between competitors in achieving its objective.

There have certainly been prominent examples where the problem was evaluating the undueness of the lessening of competition. Clarifying this is the way to go, by breaking the law into two pieces — a criminal part without the word "undue" for naked price-fixing, hard-core cartels, and then a civil branch for the more complicated arrangements. [Tom Ross, University of British Columbia, 59:09:25]

As it currently stands, section 45 excessively relies on prosecutorial discretion, which can be exercised differently by different individuals, rather than on a law crafted to properly discriminate between the two forms of cooperation — an anticompetitive cartel arrangement and a competitively benign or pro-competitive strategic alliance. By the same token, the Committee does not think it is appropriate for criminal liability, which may involve fines and jail terms, to depend on a court's assessment of complex economic factors — such as the cross-price elasticity of

demand, the height of barriers to entry in the industry, the extent of sunk costs, the strength of other competitors or potential competitors, market power, etc. — that a court is not well suited to judge.

I don't see any basis for treating one type of horizontal arrangement, such as a merger, analytically differently from another type … such as strategic alliance. … So outside what would be the new criminal track under a revised two-track approach to conspiracies … you would … have … the same efficiency provision … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Advocates for change have successfully persuaded this Committee to accept this view; in all respects, change is long overdue. The conspiracy provision of the *Competition Act* must be reformed to reflect modern business tendencies to form strategic alliances and joint ventures, circumstances in which the current Act is unnecessarily restrictive, while at the same time being under-restrictive in clearly anticompetitive cases. The Committee, therefore, recommends:

[Y]our interim report suggested if we go the two-track approach, the hard-core criminal per se provision might be limited to price-fixing and output restrictions. I would encourage you to expand that list to include market allocation — and by that I mean geographic market allocation and customer allocation — as well as certain types of group boycotts, such as group boycotts in support of price-fixing or keeping new entrants out of the market. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:45]

12. That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.

The Criminal Track

When we're going to go after hard-core cartel behaviour the standard should be met, but we shouldn't have to go into the economic effects. That's what every other regime in the world has done. Per se simply means if I engage in a price-fixing arrangement, you don't have to look to see whether it has an anti-competitive effect, with the huge cost of litigation that goes to that issue, because that is the main issue. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

The necessary elements in a contested section 45 case must accurately reflect contemporary economic thinking on conspiracies; they should not require excessive labouring on irrelevant economic factors coincidental to the agreement or to the industry under scrutiny. We believe that a conspiracy should be a per se criminal offence and should be guided by the simple and pertinent facts of the case at hand. The Committee, therefore, recommends:

I strongly favour reform of section 45, to narrow its criminal law focus to hard-core cartel behaviour activity, such as price fixing, customer and territorial allocations, and production curtailment. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

13. That the Government of Canada repeal the term "unduly" from the conspiracy provision (section 45) of the *Competition Act*.

A per se criminal offence without a provision for exceptions would cast a wide net — too wide a net. Horizontal agreements other than that of a cartel would be captured by a strict per se offence. Therefore, a provision for exceptions is necessary. Although recognizing that a long list may have to be drawn to sufficiently reduce the uncertainty surrounding such a specific prohibition, the Committee believes the best approach for an exception would be based, rather than a so-called laundry list of items, on guiding principles. These guiding principles would be premised on known characteristics of a pro-competitive horizontal agreement, such as the existence of economic factors, other than the restraint in question, incorporated into the agreement. Other economic factors would include efficiencies (whether technical or organizational) and innovation. The Committee, therefore, recommends:

[Y]ou need to be careful. The United States, as we all know, has a per se offence, but it is judge-interpreted. It is not statutorily defined. I think you also need to watch that the exemptions don't overwhelm what you're catching. [Lawson Hunter, Stikeman Elliott, 59:09:20]

14. That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the "beyond a reasonable doubt" standard, for such an exception would be placed on the proponents of the agreement.

[C]reating that sort of bifurcated approach puts an incredible amount of discretion and authority into the hands of the Commissioner. … If you think of a situation where there is a conspiracy that could go one way or the other … the Commissioner would have incredible authority to say, for instance, if you don't do what I like, then I will throw you on the criminal side. [Lawson Hunter, Stikeman Elliott, 59:09:20]

The Committee further recognizes that the two-track approach of pursuing horizontal agreements between competitors provides considerable prosecutorial discretion — although less than provided under the current law. To limit this discretion, the Committee recommends:

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under subsection 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections

of the *Competition Act* covering essentially the same conduct.

[I]t may be that two pharmaceutical companies need to collaborate in the development of the vaccine and need to fix the price for some short period of time to recoup the development costs. That sort of activity would be examined as a strategic alliance and may be exempt. [Robert Russell, Borden, Ladner & Gervais, 59:09:15]

The Civil Track

In its *Interim Report*, the Committee suggested that the government consider modifying the abuse of dominant position provision (section 79) to allow for a civil review of horizontal agreements between competitors. This suggestion may have been premature. Although section 79 deals with joint dominance cases and could in some way be modified to accommodate horizontal agreements that fall under the joint dominance category, we believe that such modifications should not be made. The nature of these horizontal agreements is fundamentally different and incompatible with practices that would be considered potentially abusive behaviour. In other words, a proposed agreement between competitors that may restrict competition only in an ancillary way is an agreement between allies; it is not about an abuser-victim relationship. Consequently, modifications to section 79 to accommodate horizontal agreements that may or may not be anticompetitive may not be the most effective way of pursuing these agreements, and, at the same time, such an approach may risk a loss in effectiveness in pursuing abuse of dominance cases. Indeed, two instruments designed to target two different types of behaviour would be the prudent approach to take.

It strikes me that it will be better if … we can look at these arrangements the same way we look at mergers, with the full panoply of economic analysis ... [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

The Committee is also reluctant to propose that these agreements be afforded a section 92 through 96 merger review. A horizontal agreement may not easily meet the definition given a merger under section 91 and there is no compelling reason dictating that we modify one to accommodate the other when unforeseen consequences may inadvertently arise. Nevertheless, a strategic alliance should be afforded a similar review to that of a merger. The Committee, therefore, recommends:

Our proposal was to focus on the question of whether the agreement was … in … substance price-fixing … or price-fixing element only ancillary to some larger agreement that itself would not be found in violation of section 45. If it were just ancillary to a larger agreement, then the whole agreement would go down the civil track and be reviewed, very much like a merger. [Tom Ross, University of British Columbia, 59:09:30]

16. **That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the**

same treatment as the merger review provisions (sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

[In the] merger provisions of the Act, we have a considerable degree of turmoil now in understanding what the objective … is in terms of recognizing economic efficiency … it's rather premature to try to extend the notion of efficiency to other sections of the Act … until we know … what the view of Parliament is on the role of efficiency in competition law. [Roger Ware, Queen's University, 59:12:15]

The Committee intends that this new section only apply to horizontal agreements between competitors, whether suppliers or buyers, and not to vertical agreements, i.e., agreements between a seller and many buyers or between a buyer and many sellers. The Committee, therefore, recommends:

17. That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.

In addition to the prospect of a fine or incarceration for committing a criminal offence under the Act, would-be offenders must also consider that (if they are convicted) they may also be ordered to pay monetary damages to any person suffering loss as a result of their criminal conduct. The Committee is aware that moving a practice from criminal treatment and subjecting it to civil review will remove the availability of damages awards under section 36 of the Act. This could have an adverse impact on deterrence and compliance, since it lowers the potential "cost" to the offender of engaging in the conduct. This would not be the case, of course, if the government amends the Act to permit the Tribunal to award damages (as set out in recommendation 8).

[O]utside what would be the new criminal track under a revised two-track approach to conspiracies … you would want to have basically the same efficiency provision … But the nature of that efficiency provision would have to be different from the one we have today in section 96, which never worked for almost 10 years … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

At the same time, however, it does not appear to be the case that damages are commonly awarded as a result of a criminal conviction, and for that reason we do not wish to overstate their value as a deterrent. The Committee believes that, for the same reasons that it is inappropriate to treat certain pricing practices under criminal law, it is equally

inappropriate to permit a remedy of damages to attach to such conduct. If we were to permit damages awards with respect to only a few select practices, but not to other civilly reviewable matters, inconsistency would result in the Act. This underscores the importance of extending the right to claim damages under all civil practices, including those for which transfer into the civil steam is recommended.

When you go down that road and look at that bifurcated model for section 45, … I would alert you to the fact that as the law is currently cast, all activity within the criminal part of the Act can be the basis for a claim for damages. To the extent you remove any part of that activity and put it into the civil part of the Act, it will no longer be subject to a possible claim for damages. It's something you might want to factor into your deliberations. [George Addy, Osler, Hoskin & Harcourt, 59:12:30]

Given the numerous changes we are recommending, the Competition Bureau's Strategic Alliance Bulletin will have to be thoroughly reworked and upgraded to the status of enforcement guidelines. The business community, in the absence of jurisprudence, will need ample guidance from the Commissioner on how the Bureau will treat horizontal agreements between competitors. The Committee, therefore, recommends:

18. That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.

Strategic Alliances and a Pre-Clearance Process

As stated above, the Committee accepts the general proposition that no conspiracy law can be written with perfect precision; a number of pro-competitive horizontal agreements will be inadvertently caught by any per se provision, no matter how carefully it is written. The above exception provides some measure of certainty for some contemplated pro-competitive horizontal agreements, yet more is needed to reduce the uncertainty and "chilling effect" that arises in some of the more controversial or borderline agreements. A systematic way of reducing or eliminating a horizontal agreement's prospective liability to criminal sanctions prior to being consummated is required. On this point, there have been two suggestions: a notification process and a pre-clearance process.

Others have suggested approaches based on whether the agreement itself is public. If it were a public agreement, it would get the civil review, whereas secretive agreements would be viewed as per se, illegal, and there are other approaches as well. [Tom Ross, University of British Columbia, 59:09:35]

The notification system would prohibit all secret or covert conspiracies to directly or indirectly fix prices, but would provide an exemption from subsection 45(1) to all

overt horizontal agreements provided that their proponents notify the Bureau before the agreement takes effect. Major deviations from the original agreement would be subject to criminal prosecution. The notification of such an agreement would be optional; there would be no obligation to disclose the facts of any agreement. The Commissioner would also be entitled to request additional information in order to determine whether the agreement should be opposed or altered under a civil proceedings or, as others have coined it, the civil track.

The pre-clearance system would operate much like the advance ruling certificate for mergers pursuant to section 102 of the *Competition Act*. This would be a voluntary reporting system, with a limited cost-recovery fee assessed in return for providing an advance ruling. Under such a system, the Commissioner of Competition would be authorized to issue a clearance certificate if he is satisfied that the agreement, as proposed and implemented, does not substantially lessen competition or poses a threat under section 45 or under the newly proposed civil track. The certificate might or might not grant a time-limited exception from criminal liability and, like the notification system, major deviations from the original agreement would be subject to criminal prosecution.

[T]here have been a number of suggestions that the salvation for some trade-restraining agreements would be the public notification of those agreements that would enable the parties to them to be assured that they wouldn't be challenged. As a policy matter, I think it's undesirable to have agreements that are in contradiction to our general principles simply on the theory — a naive one, I think — that public disclosure of them will deter people from dealing with people who have entered into these kinds of restrictive arrangements. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:20]

The Committee is of the opinion that both systems have their advantages and disadvantages; however, for a number of reasons, we favour a pre-clearance system. Such a system provides more assurance that contrived or "dressed up" cartel agreements will not slip through the cracks. The Committee, therefore, recommends:

19. That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the Act. That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition, failing

which the applicant is deemed to have been granted a certificate.

In the case where the Commissioner does not grant a pre-clearance certificate, the applicant should be given fair hearing before the Tribunal. The Committee, therefore, recommends:

The experience in other jurisdictions will evidence the fact that lawyers are very clever in the way they write up these arrangements, and describe them using obfuscation and confusing legal documents or burying the filings with the appropriate agency such that people really don't have a good understanding of what in fact is being disclosed. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:25]

20. That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.

CHAPTER 5: THE ANTICOMPETITIVE PRICING PROVISIONS

Predatory Pricing

Predatory behaviour occurs when a firm temporarily lowers its prices or expands output or capacity in an attempt to deter new competitors from entering the market or to drive out or discipline competitors who are already there. In all three cases, the predator incurs temporary losses in the expectation of, at the very least, recouping them by raising prices later and from an increased market share. Prior to the 1980s, most economists regarded predation as extremely rare because the barriers to entry in most markets were thought to be low. Consequently, it was believed that the subsequent high prices required to recoup the losses suffered in the predatory period would not be sustainable in the face of new entrants. Moreover, predation would be very expensive; the "prey" would be aware that the period of lower prices would be costly for the predator and might hold on in the hope of eventual profits (in the case of efficient capital markets), or to see the predator attempt to buy it out. Only in the extremely rare event that the predator had greater and better access to external capital would a predatory campaign pay off; although even a takeover or merger would generally be a more successful way of monopolizing the market.

I also would like to commend the Committee for its initiative in taking on reforms … to sections 50, 61, and 75, which have needed attention for a long time. [Donald McFetridge, Carleton University, 59:10:00]

In section 50, where we have the vague wording "at prices unreasonably low", we don't have much jurisprudence … to give an interpretation of it. [Douglas West, University of Alberta, 59:10:40]

Recent economic research, however, challenges this long-held position on the grounds that predation may be a more frequent occurrence than previously thought. Some believe the practice, although still infrequent, is not rare.

Predatory pricing is a criminal offence under paragraph 50(1)(*c*) of the *Competition Act*. Several elements must be established before an offence is proven. The alleged predator must be engaged in a business and have adopted a policy of selling products at prices that are unreasonably low. Both the "policy" requirement and the "unreasonably low" price requirement have raised difficult

[W]ith predatory pricing … [E]very case in Canada has failed because cost isn't properly defined. [Robert Russell, Borden, Ladner & Gervais, 59:10:35]

issues of interpretation. With respect to a policy, one of the following four requirements must be met:

1. It must have the effect or tendency of substantially lessening competition.

2. It must have the effect or tendency of eliminating a competitor.

3. It must be designed to substantially lessen competition.

4. It must be designed to eliminate a competitor.

[T]he Tribunal is dealing with the generic question about avoidable cost: what is avoidable cost, timing issues related to avoidable cost, when the cost became avoidable, and what revenues to consider as part of the test. [Douglas West, University of Alberta, 59:11:40]

The Committee was told that, as simple as the above definition seems, predatory pricing and behaviour are much more complicated to establish in practice. The firm's broad scope in pricing its services (in the case where its marginal cost can approach zero) makes it extremely difficult to distinguish predatory pricing from aggressive price competition. In the case of perishable goods, whose marginal cost is often as close to zero as you can get, selling below cost is a perfectly legitimate business practice.

Indeed, modern thinking even questions whether the hard-to-define marginal cost concept is the appropriate test of predatory pricing. The Committee was told to consider the case of Amazon.com; founded in 1995, the firm has yet to price above cost. Amazon.com is pricing less than its cost, but it is not engaged in predatory pricing. Through low prices, it is investing in a future market share as a new innovator. So there is a temporal aspect to pricing that may not be properly accounted for in the current cost test of predatory pricing.

[W]e create penalties, and the whole point of enforcement is to discourage people from doing bad things. … So a few successful cases on predatory pricing, no matter how long they take, might create the right kinds of incentives to get … the right enforcement stance on predatory pricing. We don't need regulatory powers from the Commissioner to do that. [Roger Ware, Queen's University, 59:12:15]

This example of below-cost pricing which is not predatory pricing was further extended to apply to simple goods such as a razor and razor blades or a number of other complementary products. Apparently, pricing razors below their accounting measures of cost makes good economic sense when it leads to greater sales of razor blades and ultimately greater profit. In this case, what should be compared to today's price is the following: today's average variable cost minus the present value of the firm's expected increased gross margin per unit in the future that is attributable to the low pricing policy. Needless to say, when the investigator has gathered this last bit of information, the

"prey" will have given up the struggle. Clearly, economic theory, as a practical guide to enforcement of predatory pricing, leaves something to be desired.

The VanDuzer Report was sceptical of both the legal framework and its economic underpinnings:

> Designing rules to deal effectively with predation is the thorniest problem related to anticompetitive pricing practices. The effects can be devastating but are extremely difficult to distinguish from the effects of aggressive competition, even with the expenditure of substantial resources. One thing seems clear, the existing criminal provision, suffers from some serious defects as an instrument to provide relief in circumstances where predation exists.[18]

A consensus of competition law experts supports the VanDuzer Report's proposed solution:

> Dealing with predation under section 79 is one solution to these problems. As prescribed by economic analysis … section 79 imposes market power as a threshold for obtaining relief. The abuse provision offers the lower civil burden of proof which may be important given the inherently contestable nature of claims regarding predation.[19]

I [do] not favour the high-penalty deterrence process, because unlike a cartel situation, where it's inherently bad conduct, aggressive price competition is usually good. You're on a sounder path … where you look at moving into a more refined treatment of predation in the context of the abuse-of-dominance provisions in the Act, because it really is a species of that area of monopolization. [Neil Campbell, McMillan Binch, 59:12:15]

The VanDuzer Report suggests other advantages of shifting the prohibition under section 79:

> As well, it requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal could sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices.
>
> The abuse provision would also permit account to be taken of the particular conditions in the marketplace, including the factors discussed in relation to the new economy ... Where a market was characterized by high levels of

[18] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 75.

[19] Ibid., p. 75.

> innovation, declining costs and network effects, low pricing which eliminated a competitor might nevertheless be found to be pro-competitive, where the pricing was part of a strategy to introduce a new and better technology and any dominance which resulted was unlikely to be sustained in the face of future innovation.[20]

However, the Commissioner of Competition, the Canadian Bar Association and a number of other stakeholders oppose this suggested change because they believe the criminal status best deters egregious anticompetitive conduct; they favour more enforcement resources, believing the double layer of protection (paragraph 50(1)(*c*) and section 79) against predatory pricing is more appropriate at this time.

[T]his notion of trying to make some changes to the predatory pricing provisions and to bring them over to the civil side … I think it's important to consider the possibility of creating a new section that deals with predatory pricing, but not necessarily under the existing wording of the abuse-of-dominance provision. [Douglas West, University of Alberta, 59:12:40]

The Committee has reservations about this last position, because there is simply insufficient case law to validate the deterrent effect of paragraph 50(1)(*c*). The Committee cannot just ignore the predatory pricing provision's inactive and ineffectual history, which includes only two contested cases (both of which are more than two decades old). Moreover, the Committee is unsure about a court being the right venue for the intricate economic analysis needed to discern between predatory and aggressive, pro-competitive pricing; the Competition Tribunal appears better able to judge this behaviour. In any event, a consensus has formed on the use of the abuse of dominant position provision as a vehicle for bringing a predatory pricing case before the legal authorities — a provision that requires that the alleged predator has "market power" and that the practice in question would "prevent or lessen competition substantially." For these reasons, the Committee recommends:

21. That the Government of Canada repeal paragraphs 50(1)(*b*) and 50(1)(*c*) of the *Competition Act* and amend the Act to include predatory pricing as an anticompetitive act within the abuse of dominant position provision (section 79).

20 Ibid., p. 75.

Price Maintenance

Price maintenance is the practice whereby a firm attempts to either set or influence upward the minimum price at which another firm further down the manufacturer-wholesaler-retailer distribution chain can sell its product. Although resale price maintenance is not a pervasive practice throughout the business sector, it is one of the most common pricing restraints found in the marketplace. It may take place either vertically, for example between a wholesale supplier and a retailer that resells the supplier's products, or horizontally, for example between competitors who agree to impose resale price maintenance on those who resell their products.

In terms of vertical price maintenance, typically the example given would be ... Say, for example in the electronics industry, … You can sit down, you can go into a sound room, and you can listen to a whole bunch of different types of speakers. You can listen to a bunch of different types of CD players. You can get a real feel for the quality differences. But it costs … a lot of money to put that sound room in place. If somebody else could come along and free ride off that by locating down the street or a few blocks away, selling exactly the same products but at a substantially reduced price, … [the service providing store] wouldn't be able to continue to provide the consumer with the benefit of that. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

Since 1951, following the recommendations of the MacQuarrie Commission, price maintenance has been a criminal offence under section 61 of the Act. Thus, it is illegal for any person engaged in a business to try to "influence upward or discourage the reduction" of the price at which someone else engaged in a business sells the product by "any agreement, threat, promise or like means." In 1960, the law was amended to add the current defences to the related offence of refusing to supply a customer because of the customer's low pricing policy. These defences are listed in subsection 61(10) as:

- using products supplied as loss leaders (the "*Loss Leader Defence"*);
- using products supplied not for the purpose of selling them for a profit but to attract customers to buy a rival's products (the "*Bait and Switch Defence*");
- engaging in misleading advertising in respect of the products supplied; and
- not providing the level of service that purchasers of the products might reasonably expect (the "*Service Defence*").

So the pro-competitive aspect of it, of resale price maintenance is it provide dealers with a margin to invest in providing services, to expand the demand for the product. … when you expand the demand for the product, you increase aggregate wealth in the economy. So it's pro-competitive in that sense. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

On the other hand, requests, discussions, moral suasion, or suggestions to this end are considered to be much the same as setting a suggested list price and are permissible (subsection 61(3)). Similarly, under subsection 61(4), if the suggested price appears in an advertisement, it must be expressed in such a way that it is clear to any

person who looks at the advertisement that the product may be sold at a lower price; otherwise the supplier will be found to have attempted to influence the price upward.

In any vertical relationship, let's say between a manufacturer and a distributor, suppose the manufacturer owned the distributor? Then they could decide whatever terms and conditions they wanted that product to be sold under, including price, the quality of the sales personnel, their qualifications. The manufacturer could determine everything down to the lighting in the store. And we wouldn't consider that to be anti-competitive. So why would we consider it to be anti-competitive if Sony tried to do some of those things at arm's length? [Roger Ware, Queen's University, 65:12:30]

The Committee is more easily convinced of the economic rationale for prohibiting horizontal price maintenance. Where suppliers agree among themselves to set the resale price of their products, price competition among downstream competitors is precluded. Where the resale price is the more visible of the two, the maintenance of that price may facilitate collusion among suppliers. By subtracting the retailer and wholesaler profit margins from the minimum fixed retail price, manufacturers in effect fix their own prices of the product. The Committee was also made aware that resale price maintenance could facilitate the work of a retailer cartel. History suggests that this had long been the case of pharmaceutical retailers whereby drug stores pressured manufacturers of the products they carried to impose resale price maintenance.

You take price maintenance. We have a very strict law here. There's no necessity for an agreement to be in place … The necessity for agreement in U.S. law allows the so called Colgate doctrine, which means: they can unilaterally sell, you won't sell my product for less than, you just can't have an agreement. … So price maintenance that would be unlawful in Canada occurs in the U.S. all the time. That's a cross-border legal issue that I have to deal with monthly … [because] the law is different here. [Robert Russell, Borden, Ladner & Gervais, 65:11:15]

Vertical price maintenance is less obviously an anticompetitive act. The classical example of such price maintenance is where a supplier requires someone to whom it sells, perhaps a retailer but also a wholesaler, to maintain prices at a particular level as a way of encouraging that retailer or wholesaler to engage in competition on something other than price. A higher retail margin thus encouraged the retailer to engage in providing a high level of service to clients or to ensure that the brand image associated with the product is maintained and not sullied in any way.

[P]rice maintenance provision which deals with these vertical pricing arrangements you're talking about is a very effective section for us. [R.W. McCrone, Competition Bureau, 64:09:40]

From the consumer's perspective, vertical price maintenance results in more services, which we would regard as good, but higher prices, which we would view as bad. The Committee was told that, on balance, the decision of how to market a product and how to design a distribution system should be left up to the manufacturer. Prohibiting resale price maintenance under the per se rule is effectively regulating the manufacturer's decisions on how best to maximize the sale of his products. By way of an analogy, we do not prohibit by law high levels of advertising even when such advertising raises prices; for the same reason we should not prohibit vertical price maintenance under a per se rule. So to the extent that there are efficiency justifications

for price maintenance, the per se criminal prohibition in the Act is over-inclusive.

I just don't agree that criminal prohibition is warranted, especially where there is no requirement for demonstrating adverse effects on competition. They have to be presumed and … there are many potential circumstances in which there are pro-competitive benefits that come from it. In the vertical situation we're not talking about controlling the price of a product amongst all the competitors, we're talking about controlling perhaps the pricing and positioning of the product from one supplier which is going to be disciplined by other parties in the marketplace if in fact they're not dominant. [Tim Kennish, Osler, Hoskin & Harcourt, 65:12:35]

All witnesses, except Bureau officials, who commented on price maintenance had a recurring theme: vertical price maintenance should be decriminalized and horizontal price maintenance should be moved to the conspiracy provision. The Bureau, the lone dissenter, could only offer a higher success rate when prosecuting under a per se offence as its reason for departing from expert opinion. The Committee, however, must remind everyone that competition policy is not about winning and losing cases; it is about designing a framework whereby an efficient business sector can deliver products and services at competitive prices. Moreover, the Committee sees no social benefit in risking convictions of, and a "chilling effect" on, pro-competitive vertical price maintenance under the criminal section of the Act, when the civil section offers a more reasonable approach and a better result. In decriminalizing vertical price maintenance, competition experts suggested that shifting this act under the abuse of dominant position provision (section 79) would be the preferred route. In this way, the treatment of vertical price maintenance under the law will better conform to contemporary economic thinking.

[I]n the area of pricing practices … [y]ou've had the benefit of Professor VanDuzer's detailed report, which has examined the fact that some of those laws are economically no longer really very modern. [Neil Campbell, McMillan Binch, 59:11:25]

The Committee understands that a section 79 review has two advantages: the practice would receive a full hearing on its likely economic effects and would also be subject to a lower burden of proof (from "beyond a reasonable doubt" to "on the balance of probabilities"). Another difference, which could be an advantage or a disadvantage depending on one's perspective, is that section 79 will require an assessment of the market power of the individual firm engaging in price maintenance. According to the VanDuzer Report, the market power test is an advantage because economic factors can easily be identified for discerning anticompetitive from pro-competitive cases. Indeed, the VanDuzer Report suggests three economic indicators of anticompetitive vertical price maintenance:

I would encourage you … to look at the decriminalization of the pricing practices … those laws are out of date and out of sync with good economics. [Neil Campbell, McMillan Binch, 59:12:40]

1. The person implementing price maintenance (the "Supplier") has market power, which suggests that customers may have limited opportunities to switch suppliers.

2. The Supplier does not have an efficiency-based justification, such as the desire to increase service or prevent brand-impairing practices, which would include "loss leadering" or misleading advertising.

3. The Supplier was induced to implement price maintenance in relation to one customer by another customer who competes with the first.[21]

[There] is the need to reform the arcane criminal provisions in the Act — not just section 45, but many of the provisions relating to the pricing practices, including predatory pricing, price discrimination, and price maintenance. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

At the same time, the VanDuzer Report is unsure if the section 79 market power test is appropriate for vertical price maintenance cases.

The Committee accepts all of the above reasoning. We believe that where the law can be modernized to better reflect conventional economic thinking, which in this case is able to properly distinguish between anticompetitive and pro-competitive incidences of vertical price maintenance, we should change the law. Given the recommended changes of section 79 (Chapter 6), reducing the bluntness of the Act in terms of vertical price maintenance should lessen the "chilling effect" on pro-competitive instances. The Committee, therefore, recommends:

22. 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).

When it comes to horizontal price maintenance, that ought to be dealt with under a new section 45. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

21 Ibid., p. 44.

Price Discrimination

Price discrimination is a marketing practice whereby a supplier of goods or services charges different prices to different customers (whether other businesses or final consumers) and these price differentials do not accurately reflect differences in costs of serving the different customers. To be found discriminating on the basis of price, a firm has to meet the following conditions: (1) the firm must have market power to set prices (otherwise, consumers can choose to purchase from a competing supplier); (2) the firm must be able to identify classes of consumers with different price sensitivities; and (3) consumers have only a limited opportunity to resell to each other (otherwise, consumers would arbitrage these prices to the lower price offered).

If I were to come to you and say "I'll … come and pick the product up at your door, or I'll warehouse the product, or I'll perform some other function for you and save you money, if you give me a deal," it's arguable … whether you could give me a discount in recognition of that pro-competitive initiative. It may be that I'm just a better negotiator. That maybe I'm going to do something for you in a different market. Buy more goods on a different market from you if you give me a better discount. What [the criminal offence] does is it just chills the negotiation process ... It would be a criminal offence for you to give me a better discount. So the whole competitive process that one would normally see between supplier and customer is chilled. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

Price discrimination is a criminal act that extends only to "sales" of "articles" under paragraph 50(1)(*a*) of the Act and to promotional allowances under section 51. These provisions were introduced in 1935 in response to concerns of unfairness to small business, particularly in the grocery subsector, with the emergence of large retail discount and chain stores and following the *Report of the Royal Commission on Price Spreads*. Because paragraph 50(1)(*a*) only applies to "sales" of "articles," leases and services are not covered. If the purchasers do not carry on business in the same market, such as the case where one is a final consumer and the other is a business, there is no offence. Volume or quantity discounts are exempted. There must be knowledge of each element of the offence. The supplier must have knowledge that the sale is discriminatory. Section 51 makes discrimination other than on the basis of price (i.e., differential access to promotional allowances) a criminal offence in some circumstances.

On price discrimination, we're really weak in Canada compared to the U.S. because in the U.S. you can discriminate in price on the basis of volume. So you can, as a store for example, buy a product for less if you buy 100 than if you buy two. It's completely arbitrary in our law. You can make a differentiation between one and two, or one and 5,000 — whatever you want — and set your price on that level. That's the law in Canada. You don't have to justify it on the basis of cost as a manufacturer. In the U.S. what you have to do is you can't discriminate unless you can justify it. [Robert Russell, Borden, Ladner & Gervais, 65:11:15]

Although price discrimination by definition means treating individuals or groups of consumers differently and may create an "unlevel playing field" when the product is an input into another product, it is not an inherently anticompetitive practice. It is often pro-competitive to charge different prices to different consumers when there are different costs attached to serving them (in the same way as volume and quantity discounts imply different costs and are not anticompetitive in and of themselves). Price

discrimination may also result in additional sales, for example, to children and seniors who would not otherwise purchase the product. To the extent that the consumption of the good or service increases as a result, economic efficiency is being promoted.

Price discrimination is commonplace. For instance, a bank that offers students no-fee banking services in order to gain their loyalty later on in their lives is practising price discrimination. Many non-price techniques with similar aims to price discrimination could also be implemented to discriminate between consumers. Two classic examples are tied sales and multi-part pricing policies. The VanDuzer Report explains the tied selling technique:

There are questions as to whether the sections on predation and price discrimination, for example, should be decriminalized. People have been trying to address this for many years, and there are questions about the proper ambit of the abuse-of-dominance provision, among others. [Calvin Goldman, Davies, Ward & Beck, 59:10:50]

> At one time, IBM had a monopoly on certain types of tabulating equipment. Different customers valued IBM's equipment quite differently based on the amount that they used the equipment. However, instead of using price discrimination to get the maximum price that each customer was willing to pay, IBM forced customers to buy tabulating cards from the company, and by charging a price for tabulating cards in excess of their cost, IBM was able to discriminate among its customers according to the intensity of their use of the equipment. Block booking and commodity bundling are other examples of non-price requirements imposed by sellers that succeed in enforcing effective price discrimination.[22]

Examples of multi-part pricing techniques of executing price discrimination are: (1) cab fares that include a lump-sum fee upon engagement and charges per unit of distance and/or time; (2) newspaper, magazine, radio and television pricing with two revenue streams — one from advertisers and one from subscribers; (3) fairground entry fees and ride tolls; (4) cover charges at bars and night clubs that are in addition to prices for drinks; (5) automobile licence fees and automotive gasoline taxes; and (6) slotting fees or slotting allowances charged by retailers on top of the retail price mark-up.[23]

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22 Ibid., p. 6.

23 Most multi-part pricing policies are two-part, as they include only two sources of revenue.

The VanDuzer Report concludes that:

> There is no question that the current criminal price discrimination provision is not adequate to address anticompetitive price discrimination. The economic analysis … concludes that price discrimination is not anticompetitive in many circumstances. Whether there is any possibility that price discrimination will have an anticompetitive effect will depend on the facts of each case. The current provision does not require the discriminating supplier to have market power, a prerequisite to true discrimination, nor does it require any assessment of the effect of discrimination on competition. To this extent the provision is over-inclusive. At the same time, by failing to include discrimination in services and discrimination in forms of transactions other than sales, the provision excludes important areas of economic activity in the contemporary marketplace. In its present form, the criminal price discrimination provision is not an accurate tool for addressing anticompetitive behaviour and imposes excessive compliance and monitoring costs on business. Because price discrimination is a criminal offence, this chilling effect is exacerbated.[24]

[T]he best and most effective way to deal with predatory pricing, as well as geographic price discrimination and vertical price maintenance, is to repeal the current provisions and deal with this conduct under reinforced abuse-of-dominance provisions. By "reinforced" I mean you need to create an administrative penalty of the type you currently have in the deceptive marketing practices provisions of the Act. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

The VanDuzer Report makes a very compelling case for decriminalizing price discrimination cases, and a consensus among competition experts has followed. The Committee, therefore, recommends:

23. That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(*a*) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.

[24] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 72.

CHAPTER 6: ABUSE OF DOMINANCE

Substantive Elements

Sections 78 and 79 together form the so-called "abuse of dominance" provisions, constituting a key element of Part VIII of the *Competition Act* dealing with "reviewable practices." These sections were enacted in 1986 and replaced the previous criminal offence of being party to, or to the formation of, a monopoly.

Section 79 permits the Commissioner to apply for, and the Tribunal to make, an order prohibiting a person or persons from engaging in anticompetitive acts. Section 78 provides a list of some of these so-called "anticompetitive" acts for the purposes of invoking section 79; the list in section 78 is not exhaustive and so does not narrow the application of section 79 to only the practices specifically listed in section 78. In fact, the Tribunal has ventured outside this list on a number of occasions.

I think the Tribunal, when it has articulated the need for a market power test in the abuse-of-dominance provisions, has never gone further and told us what degree of market power you need. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Some of the anticompetitive acts contemplated in Part VIII may also be addressed, in the alternative, in criminal proceedings under section 45 or 61, or paragraph 50(1)(*c*) of the Act. The Act requires that either one approach or the other be adopted, but not both.

To get an order under section 79, the Commissioner must convince the Tribunal, on the "balance of probabilities" (the standard of proof in civil law), of three elements:

1. That one or more persons *substantially or completely controls,* throughout Canada or any area of Canada, a class or species of business.
2. That the person or persons have engaged in or are engaging in a *practice* of uncompetitive acts.
3. That the practice has had, is having, or is likely to have, the effect of *preventing* or *lessening competition substantially* in a market.

Where these three elements are present, the Tribunal may make a cease and desist order. In addition to ordering the cessation of the anticompetitive activity, the Tribunal may also, to the extent that it is reasonable and necessary to overcome the effects of the activity, make an order requiring any person to take certain action, including the divestiture of assets or shares. The order must be only for the purpose of restoring competition in the relevant market and may not be for the purpose of imposing punitive measures.

The phrase "substantial or complete control" in the first element is the same wording used in the criminal monopoly section that preceded the current abuse of dominance rules.[25] But what degree of control is "substantial"? The case law interpreting the predecessor criminal provision suggests that control must approach 100% of the relevant geographic and product market, but subsequent cases have refined this analysis considerably.

Predatory pricing can be captured under section 79.… And also we had a panel of experts who suggested that price discrimination could already be dealt with under section 79 of the civil provisions also. [R.W. McCrone, Competition Bureau, 64:09:40]

The Tribunal must, as the first step to determining whether abuse of dominance exists, define the "relevant market." Market definition has two aspects: the product market and the geographic market. Determining the relevant market for a product is a complicated undertaking, involving consideration of such factors as direct and indirect evidence of substitutability and functional interchangeability of products, trade views on what constitutes the same product, and the costs of switching from one product to another.

In addition to defining the relevant product market, the Tribunal must also define the relevant geographic market. It does so by reference to the boundaries within which competitors must be located if they are to compete with each other and where prices either tend toward uniformity or change in response to each other. The Tribunal has recognized that the relevant market (so defined) will have a significant impact on any conclusion regarding the effect of the dominant firm's behaviour on competition. In general, however, the more broadly the market is defined, the less likely it is that the firm will possess market power and that its behaviour will be found to substantially lessen competition.

25 In section 2 of the *Combines Investigation Act*.

Once the market is defined, the Tribunal will address whether there exists "substantial or complete control" over that market. The Tribunal has equated this rather ambiguous phrase to mean market power. "Market power" may be understood to be the case of a dominant player that has the ability to raise its prices (or reduce product quality) in a non-transitory way (the longer term, usually defined as two years) without suffering a loss in profit.

With respect to market power, high market share alone will not give rise to a presumption of dominance. In *Laidlaw*,[26] the Tribunal held that dominance would not be presumed where market share is below 50%. The Tribunal has yet to deal with a contested claim of dominance where the allegedly dominant firm has a market share of less than 85%. Interestingly, the 50% threshold enunciated in *Laidlaw* is higher than the 35% threshold set in the Bureau's *Merger Enforcement Guidelines* and the *Predatory Pricing Enforcement Guidelines*. More jurisprudence on this issue would be helpful.

[I]n terms of pricing provisions … The current provisions under the abuse of dominance might cover that kind of conduct, but it's a bit of a grey area because the firm that's entering the new market may not in fact be dominant in that market. The abuse-of-dominance provisions refer to a firm having substantial or complete control of a class or species of business. Now, you could try to sandwich the conduct under the abuse-of-dominance provision. It's not clear that this is what it was intended for …
[Douglas West, University of Alberta, 59:12:40]

Barriers to the entry of new competition also constitute an important factor. In determining the existence of a barrier to entry, the Tribunal will examine factors such as sunk costs[27] and economies of scale, as well as technical and regulatory barriers. Sunk costs or economies of scale on their own are unlikely to be regarded as sufficient. The Tribunal must also consider the number of competitors, their relative market shares, and whether there is excess capacity in the market. Notwithstanding the guidance provided by the Tribunal in past cases, predicting when the Tribunal will find dominance will often be difficult.

The second element to be considered in section 79 is whether the practice has the effect of lessening competition substantially (this is more commonly referred to as an "SLC" test). Determining whether a practice will result, or has resulted, in an SLC is a difficult determination. What meaning is to be given to the term "substantial"? In *Nutrasweet*, approximately 90% of the market was controlled by the leading aspartame company. Although a

26 Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992), 20 C.P.R. (3d) 289.

27 The costs that the new entrant will not recoup if he subsequently exits the market. Advertising is the most common example of a sunk cost.

high market share may suggest dominance, such a high level may not be necessary to prove dominance. The Committee anticipates that the meaning of the term will in time become clear through jurisprudence.

[Y]ou have the right … idea … with respect to modernizing and decriminalizing … the pricing provisions in the Act and moving them into … the abuse-of-dominance regime. This will provide a … coherent and single place in which you can think about those types of behaviour … where there is a competition concern as opposed to the many situations where there is not. [Neil Campbell, McMillan Binch, 59:11:25]

The final element that must be demonstrated under section 79 is a "practice of anticompetitive acts." Although "practice" was not defined in *Nutrasweet*, the Tribunal appears to have set the bar quite low, stating that a practice may exist "where there is more than an isolated act or acts." Moreover, a number of different isolated anticompetitive acts might constitute a practice when taken together.

Anticompetitive Pricing Practices: The Civil Approach

As discussed in the previous chapter, the Committee believes that the current approach of treating the practices in sections 50, 51 and 61 as criminal offences is inappropriate in the modern business environment. These provisions — owing to their possible efficiency-enhancing or pro-competitive effects — would be more effectively addressed as reviewable trade practices under Part VIII of the Act, and more specifically under the abuse of dominance rules. At the same time, as the VanDuzer Report and other commentators have suggested, there are certain conceptual difficulties in treating the pricing practices under section 79.

The first objection is that removing these practices from criminal treatment to civil review may undermine the deterrence value of treating them as criminal offences. However, the Committee believes that this same deterrence could be accomplished by empowering the Tribunal to levy monetary penalties under section 79. Furthermore, the criminal law treatment could remain in place for practices, such as hard-core cartel activity, that are without redeeming social value.

A remedy based on damages and fines seems to be a sensible deterrent. You can move that into the civil side without having the problems on the criminal side. [Jeffrey Church, University of Calgary, 59:10:55]

The second objection is not as simply understood. It requires the enunciation of a single legal test to unify under the abuse of dominant position provisions the different legal tests which the Crown, or the Commissioner as the case may be, must meet to succeed before the Court or Tribunal. In addition to the different legal tests existing under the criminal pricing sections and section 79, the different

standard of proof in the criminal provisions (i.e., "beyond a reasonable doubt") must be addressed.

To obtain a conviction under paragraphs 50(1)(*b*) or 50(1)(*c*), the Crown is merely required to show that the policy has, or is designed to have, the effect of lessening competition *or* eliminating a competitor. Paragraph 50(1)(*a*) and sections 51 and 61 require only that the practice itself be proven (the per se approach) in order to secure a conviction, that is there is no need to show that a lessening of competition has occurred. In both cases, the Crown must prove the offence according to the criminal standard of proof, that is, "beyond a reasonable doubt." By removing or shifting those provisions from criminal prosecution to section 79, the Tribunal would consider the competitive effects or the efficiencies resulting from the practice, and would make its determination accordingly. The result, in the Committee's view, would be a better approach for dealing with these practices, one that is more consistent with sound economic analysis. However, if we are going to treat these practices as civil matters, it is necessary to enunciate the single test that will apply to any application brought under section 79.

[I]f you put a civil administrative penalty power into the abuse-of-dominance provisions, you would retain that deterrence effect of the law. And if you further amended the abuse-of-dominance provisions to eliminate the words "substantially or completely control", then the anti-competitive test would simply be substantial lessening of competition, which is the same test that you have right now in the predatory pricing provisions. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

The obstacles to creating a single test under section 79 to permit both criminal and civil practices to be addressed may, in fact, not be as significant in practice as the legislation suggests. With respect to paragraph 50(1)(*a*) and sections 51 and 61, the Committee has already stated that those practices should be subject to an SLC test. Moving them to section 79 would have this effect. For its part, the Bureau does not appear to have pursued conduct that does not prevent or lessen competition substantially; this suggests that such an amendment would be in line with current enforcement practice.

The thing that comes with criminal sanctions is the possibility of prison terms in some cases, so you wouldn't replace that on the civil side. Also, just the stigma of a criminal record has a deterrent effect that you wouldn't get on the civil side. I don't think, really, that fines on the criminal side and administrative penalties on the civil side are really comparable. One is clearly designed to penalize for criminal behaviour, and the other I think is more designed to encourage compliance with orders of the Tribunal. [R.W. McCrone, Competition Bureau, 64:10:30]

Furthermore, the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* seem (the "Abuse Guidelines") to suggest that the Bureau does not consider there to be any significant difference between the thresholds. This inference is drawn from the same 35% single-firm "safe harbour" found in the criminal *Predatory Pricing Enforcement Guidelines* and the civil *Merger Enforcement Guidelines*. So this suggests that the

amendment would only clarify the law and enhance its enforceability, without altering it in substance.

So the abuse-of-dominance provisions basically would have a similar anti-competitive threshold and similar deterrence power in the form of an administrative fine that the criminal provision today has, except you wouldn't have to deal with the criminal burden of proof. That's … the most effective way of dealing with not only predatory pricing but also price discrimination and the other pricing practices. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

With respect to the "eliminating a competitor" test in paragraphs 50(1)(*b*) and 50(1)(*c*), the Committee believes that this offends the overriding spirit of the *Competition Act*, which is to preserve the process of competition and not competitors specifically. Moreover, the Bureau's *Predatory Pricing Enforcement Guideline*s and the Abuse Guidelines, make it quite clear that the focus of the Bureau's analysis is upon the likely impact of conduct on competition, not on individual competitors. Moving these practices to section 79 would make them subject to the SLC test and to the civil standard of proof. This would remove the chilling effect that currently results from treating these practices as criminal offences. Instead, the practices would be subject to a more appropriate treatment, i.e., one that takes into consideration possible efficiency gains.

For all these reasons, the Committee recommends:

24. That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(*a*).

In fact, the Supreme Court of Canada told us we need a greater degree of market power because of the presence of those words "substantially or completely controlled." So if we get rid of those words, we simply have the general market power requirement we have with respect to all of the other provisions of the Act that have this substantial lessening of competition test, which is a lower anti-competitive threshold, and the same one that you currently have in the predatory pricing provision. So you wouldn't be losing anything by shifting over to the abuse-of-dominance provisions. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

This amendment would bring the wording of section 79 into closer conformity with the concept of market power as it has evolved through judicial interpretation.

Finally, a word on guidelines. The Committee recognizes that the Bureau's current Abuse Guidelines may need to be revised and expanded in order to accommodate the expanded scope of section 79. Many issues may need to be addressed including, for example, a minimum market share for assessing market control, the best analytical framework for assessing when price discrimination and vertical price maintenance are anticompetitive acts, as well as appropriate approaches to dealing with so-called price predation in the civil context. The Committee, therefore, recommends:

25. That the Competition Bureau revise its *Enforcement Guidelines on the Abuse of Dominance Provisions* in order to be consistent with the addition of the anticompetitive pricing practices (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) to section 79 of the *Competition Act*.

I think we have a very good abuse-of-dominance framework that applies to most industries ... The abuse guidelines that have just been issued are very well done. They're exceptional. The Bureau is to be commended for that perspective. [Jeffrey Church, University of Calgary, 59:10:15]

CHAPTER 7: MERGER REVIEW

Merger Review Process

The *Competition Act* provides for the civil review of mergers (sections 91 through 96) by the Competition Tribunal. On application by the Commissioner of Competition, the Tribunal may issue a prohibition or divestiture order with respect to a merger that is deemed to prevent or lessen competition substantially. However, before such orders are granted, varied or denied by the Tribunal, a well-established review process must take place. As a starting point, the Committee will provide a simple sketch of this merger review process, which will provide the necessary background to comment on the operations and enforcement of the merger provisions in the Act.

On the other issue, from an enforcement perspective, there's a lot of discussion in the business about how few cases there are and how much guidance is available to the public at large and the business and consumer legal communities about how decisions are made. This issue has been debated probably longer than private access, but I think it's time we institute some form of formal decision publication process. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

Section 91 of the *Competition Act* sets forth the definition of a "merger," which is deemed to occur when direct or indirect control over, or significant interest in, the whole or a part of a business of another person is acquired or established. The principal issue in this section is the interpretation of the words "significant interest," which is considered to occur when a person acquires or establishes the ability to materially influence the economic behaviour of the business of a second person (i.e., block Director resolutions or make executive decisions relating to pricing, purchasing, distribution, marketing or investment). In general, a direct or indirect holding of less than a 10% voting interest in another entity will not be considered a significant interest. However, a significant interest may be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving incorporated or non-incorporated entities.

The EU has a process where, even though a transaction isn't challenged, a decision is released describing how the agency went through its review, what its findings were, and what it considered important or not important. I think that would serve as a very useful public information service for the Bureau to adopt. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

In general, a merger will be found to be likely to prevent or lessen competition substantially when the parties to the merger would more likely be in a position to exercise a materially greater degree of market power in a substantial part of a market for two years or more. Market power can be exercised unilaterally or interdependently with other

competitors and its ascertainment will be determined according to the following Bureau screening processes:

1. The Bureau will define the relevant markets, each of which consists of determining substitute products and services of rivals of the merging parties, both from a product and a geographic dimension. This will include all products and services that customers would likely turn to in response to a small but significant, non-transitory increase in prices or a reduction in quality and variety of the products or services offered by the merging parties (the "hypothetical monopolist" test of a 5% price increase for up to two years). The geographic dimension of the market would be determined similarly; therefore, it is likely that different products will have different geographic dimensions.

The Bureau does publish, in each merger case, aspects of its decision. What people are saying is there's not enough core analysis necessarily there for us to judge the next case. The contest, however, is how much can you disclose of the confidential information that gives rise to the analysis? [Robert Russell, Borden, Ladner & Gervais, 59:12:05]

2. The Bureau will then calculate and analyze market share and concentration thresholds to distinguish markets that are unlikely to be anticompetitive. The markets that do not surpass the requisite thresholds (so-called "safe harbours") will be screened out. The unilateral exercise of market power threshold is 35% of the post-merger pro-forma market share of the merging parties (sales volume or production capacity). The interdependent exercise of market power threshold incorporates a 65% market share held by the four largest firms in a post-merger market and a 10% market share held by either of the merging parties.[28]

[W]hen you're sitting in the room negotiating the resolution, you also talk about what should be published, and it can interfere with some of the remedy. If you're having to divest of a core asset, if you put too much out there, it becomes a fire sale, which makes it more difficult to resolve. If you're going to give me a penny for my asset or $100 million for my asset, you're going to have a different negotiation coming up with a resolution. [Robert Russell, Borden, Ladner & Gervais, 59:12:10]

3. Given that the Act requires that the Tribunal shall not find that a proposed merger prevents or lessens competition substantially solely on the basis of evidence of concentration or market share, a complete competitive effects analysis will then be performed on those markets where the shares of the merging parties' sales or production surpassed the "safe harbour" thresholds. The Bureau will evaluate many relevant factors, as listed in section 93, such as: foreign competition, availability of acceptable substitutes, barriers to entry, absolute cost advantages, sunk or irrecoverable costs, the time it would take a potential competitor to become an effective competitor, effective

[28] There is no economic rationale for these thresholds over that of others. Simply put, an effective merger review process demands market share anchors, but why these thresholds were chosen over others has never been made clear.

remaining competition, the removal of a vigorous and effective competitor, change and innovation, business failure and exit, and other criteria.

4. The Act recognizes that changes in regulations, developments in new technologies, and the sweeping forces of globalization will have implications on the structure of industry. If the elements of the efficiency exception (section 96) are met (these are cost savings to the economy and are not merely purchasing power savings due to any enhanced ability to squeeze better prices out of a supplier, and that these efficiencies could not be attained if the merger did not proceed), where they would "offset" or are "greater than" the anticompetitive concerns, the Bureau would not pursue the merger any further. The onus of proof of this exception before the Tribunal is put on the merging parties.

[U]nder a total surplus approach, the Competition Tribunal would be prohibited from issuing an order in respect of an anti-competitive merger if it found that the overall effect of the merger on the economy likely would be positive. In other words, if the gain to producers resulting from the cost savings and other efficiency gains likely to be brought about by the merger were greater than the loss to society attributed to the anti-competitive effects, the Tribunal would not … issue an order in respect of the merger. In this very complicated analysis, wealth transfers from consumers to producers are treated as neutral, because they have no bearing on the aggregate level of wealth in the economy. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:11:55]

Merger Review Workload and Service Standards

Virtually every witness appearing before the Committee admitted that the Bureau has faced an unprecedented number of merger reviews over the past several years, which has, and continues to put, extraordinary pressure on its Mergers Branch staff. Table 7.1 provides the data to back up the first part of this claim. Excluding asset securitizations (which, since 1999, have been exempted from filing), merger filings have hovered about 340 per annum in the past four years, which is up more than 70% from the average of about 200 filings per year recorded in the first half of the 1990s. So the trend is definitely up over the past decade, but it is also up over the past five years, with 373 mergers being filed in 2000-2001, the highest ever.

I have submitted for consideration a one-month initial review followed by a four-month timeframe. If, after the first month, the Bureau does not go into a full-scale investigative mode, the merger is cleared. If they do go into that mode, then there is a fixed period … of four months … to complete the Bureau's investigation. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

I recommended earlier that in the area of merger review consideration be given to trying to define the time periods with statutory certainty so that business persons engaged in transactions, third parties interested in transactions and making submissions to the Bureau, … know there are fixed time periods, as opposed to the current service standard guidelines …This would promote certainty. [Calvin Goldman, Davies, Ward & Beck, 59:09:15]

Table 7.1
Number of Transactions (%) — 1995-2001

Business Line	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001
Pre-merger Notification Filing	57	58	84	109	92	73
Advance Ruling Certificate Request	117	181	219	174	209	255
Other Examinations	17	23	17	26	60	45
Sub-total	**191**	**262**	**320**	**309**	**361**	**373**
Securitization	36	52	72	52	64	0
Total	**227**	**314**	**392**	**361**	**425**	**373**

Source: Competition Bureau Merger Branch, *Merger Review Performance Report June 2001*, 2001.

Data submitted to the Committee provides evidence of the second part of the claim. The Mergers Branch at the Bureau averaged 38 full-time equivalent person-years in the early 1990s, but has gradually increased to 57 in 2000-2001. Therefore, the Bureau's Mergers Branch has grown by just less than 50% over the employment levels of the early 1990s, which is significantly below the merger filings growth rate of more than 85% in the same period.[29] Moreover, Table 7.2 indicates that the complexity of mergers that the Bureau has had to review is also increasing. Complex mergers and very complex mergers, which are increasingly resource intensive, have augmented their respective shares in the past four years by 4% each. Although non-complex mergers make up the vast majority of cases under review (between 80-90%), their share of total reviews undertaken by the Bureau has declined substantially in the past four years. This trend, the Bureau claims, is due largely to globalization and the inherent complexities associated with multi-jurisdictional cases.

It will be interesting, now that this merger wave is sort of down, to see how resources are reallocated. As a result of that, it is certainly true that the other areas of the organization, such as the civil reviewable practices areas and conspiracy, are not nearly as well funded relative to other international comparisons. [Margaret Sanderson, Charles River Associates, 59:11:20]

29 Competition Bureau Merger Branch, *Merger Review Performance Report June 2001*, 2001.

Table 7.2
Number of Cases by Level of Complexity (%)
1997-2001

Complexity	1997-1998	1998-1999	1999-2000	2000-2001
Non-complex	68 (89%)	212 (77%)	232 (80%)	282 (81%)
Complex	8 (11%)	56 (20%)	49 (17%)	53 (15%)
Very Complex	0 (0%)	6 (2%)	8 (3%)	14 (4%)
Total	**76 (100%)**	**274 (100%)**	**289 (100%)**	**349 (100%)**

Source: Competition Bureau Mergers Branch, *Merger Review Performance Report June 2001*, 2001.

The revenue generated from fees related to merger review has been a significant but not a fully compensatory help to the Bureau's budget constraint. The Bureau estimates that revenues from pre-merger notification, advance ruling certificates and advisory opinions will be in excess of $8.4 million in 2000-2001, $7.5 million of which will be available to the Bureau. Any fees the Bureau receives in excess of $7.5 million will be credited to the government's Consolidated Revenue Fund. Given that the direct costs of merger review is estimated to be $9.5 million for 2000-2001, merger review revenues clearly fall short of cost recovery.

[T]he Bureau's workload over the past few years has greatly increased. Unfortunately, our resources have not kept pace ... In a recent survey involving five comparable competition authorities, our Bureau had the second-lowest level of funding on a per-capita basis. Our demands continue to grow, largely due to globalization and our increased mandate. Ten years ago, the great majority of cases examined by the Bureau were domestic in nature. Today, not only are there more cases, but a very large number of them have an international dimension. This is demonstrated by the increasing number of multi-jurisdictional mergers and international cartels. [Gaston Jorré, Competition Bureau, 64:09:10]

In 1997, along with fees for certain services, the Bureau established and committed itself to meet a series of service standards when reviewing mergers. These standards are: non-complex mergers, 14 days; complex mergers, 10 weeks; and very complex, 5 months. Although the Bureau has, in a given year, met these targets 100% of the time, its performance level has varied without trend since 1997. In fiscal year 2000-2001, the Bureau met the three targets 95.7%, 92.5% and 100% of the time, respectively. The average and median turnaround times for merger review have at all times been shorter than the established standard. However, in every year since 1997, a relatively small number of merger reviews has fallen well outside the target date. These poor performances appear to be isolated cases that are not the result of systemic failures, but are more likely owing to human error — errors probably committed on the part of Bureau staff and merging parties. This performance and the targeted standards, the Committee finds, are reasonable. Although

there were complaints about the merger review process made to the Committee, stakeholders had not complained about this aspect.

The Committee believes that the routine merger review procedures of the Bureau are not the cause of selected protracted merger reviews of which people complain. These reviews bog down only when the Commissioner has unresolved issues with the merger (as proposed) and intense negotiation begins for restructuring the merger proposal or when seeking a consent order, or where a contested Tribunal proceeding is going to be launched. As a consequence, the Committee sees no benefit in enshrining strict deadlines for merger review in the Act, as some commentators have suggested. Indeed, the Committee sees more harm than good coming from such Act-imposed deadlines. Given an inviolable deadline, the Bureau would be forced to work more intensively on cases that are likely to run into difficulty and breach the deadline, sacrificing resources in other reviews and therefore delaying less problematic mergers. In effect, strict or Act-imposed deadlines will compress the time distribution of completed reviews, but only at the expense of higher average turnaround times.

From the Competition Bureau's perspective, it has limited resources … the Bureau is in fact fairly strapped when it comes to resources, so it has to make responsible decisions as to how it deploys those resources. It currently has case-screening criteria that would bias its decisions in favour of bringing cases that have a broader economic impact. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:10]

Merger Enforcement Record

The combination of an unexpected and uncontrollable merger review workload, growing at rates in excess of that of staffing, with that of quick turnaround times provided by the Bureau is a situation that lends itself to the perception that vigorous enforcement of the Act may have been sacrificed. The Committee will investigate.

Table 7.3 provides the Bureau's statistical record of merger enforcement under the *Competition Act*.[30] The Bureau's entire enforcement record over the 1986-2000 timeframe is included, but the data is broken down into three four-year periods to look for trends in the statistics while overcoming a small numbers problem from which the data suffers. What is clear from the statistical record is that the past four years has involved almost as many merger

30 Data from fiscal year 2000-2001 does not include asset securitizations and is, therefore, not directly comparable.

examinations by the Bureau than that of the previous two four-year periods. Very little else can be discerned with such a high degree of confidence.

Table 7.3
Merger Enforcement Activity Under the *Competition Act* 1986-2000

Fiscal Years	1988-1992	1992-1996	1996-2000	1996-2000
Examinations Commenced	798	816	1,492	3,292
Examinations Concluded:				
As Posing No Threat Under the Act	736	776	1,443	3,094
With Monitoring	38	8	3	61
With Pre-closing Restructuring	1	-	3	6
With Post-closing Restructuring/Undertakings	6	-	10	19
With Consent Orders	3	-	5	8
Through Contested Proceedings	1	3	2	6
Abandoned by Parties as a Result of Director/Commissioner Concerns	6	12	4	27
Mergers Posing an Issue/ Examinations Concluded	6.9%	2.9%	1.8%	3.9%
Mergers Posing an Issue (Excluding Monitoring)/ Examinations Concluded	2.1%	1.9%	1.6%	2.0%
Merger Abandonment/ Mergers Posing a Threat	0.82%	1.55%	0.28%	0.87%

Source: Competition Bureau, *Annual Report of the Commissioner of Competition*, various years.

The Committee will begin its investigation by considering the perennial complaint that a contested case at the Tribunal is expensive and becoming more so. As such, one would think that the Bureau and the parties to a merger proposal would both shy away from contested proceedings and seek alternative solutions with greater frequency as the cost of a contested case rises. Although the Committee recognizes that there may be other explanations for a trend to fewer contested merger cases — particularly when we introduce qualitative information into the analysis — the data, while limited, tends to (indirectly) confirm this complaint. Four contested cases of 1,614 merger examinations were taken to the Tribunal for resolution in the two four-year periods starting in 1988 and ending in 1996. Given 1,492 merger investigations and similar vigorous enforcement, one would have expected four contested cases would have gone to the Tribunal in the 1996-2000 period; however, there were only two such cases. Therefore, the behaviours of the Commissioner and prospective merging parties suggest

that contested Tribunal cases are becoming more expensive.

Virtually all the cases that have been brought in the 15-year period since the Tribunal was created and the merger provisions were decriminalized have involved mergers that had already been consummated. At that point the merging parties had every incentive to hunker down and fight. By contrast, business people invariably have no appetite whatsoever to become involved in contested proceedings where their transaction has not yet been consummated. [Paul Crampton, Davies, Ward, Phillips & Vineberg 65:09:55]

The vast majority of mergers pose no threat, or raises no issue, under the *Competition Act*. Donald G. McFetridge reports that about 1.6% of all publicly reported mergers (7.5% of those examined) between 1986 and 1994 raised an issue under the Act.[31] According to the data in Table 7.3, the number of issues raised in merger cases has further declined in the latter half of the 1990s. When one subtracts mergers in which monitoring was the chosen enforcement response by the Commissioner — because they were never later challenged or brought back under investigation — the number of mergers that raised an issue under the Act has average only 2% of examinations undertaken by the Bureau.

The Committee finds it rather curious that, except for contested proceedings, all enforcement responses fell out of favour with the Commissioner (then the Director) in the mid-1990s. However, except for monitoring, all other enforcement responses, such as pre- and post-closing restructuring/undertakings and consent orders, have come back into favour. Moreover, what the Committee finds disturbing is that the number of mergers abandoned by their proponents as a result of the position taken by the Commissioner has declined substantially over the late 1990s. For example, 18 merger proposals were abandoned by their proponents of 1,614 merger examinations undertaken by the Bureau in the two four-year periods starting in 1988 and ending in 1996. Given 1,492 merger investigations and similar vigorous enforcement by the Commissioner, one would have expected about the same number of abandonments, 18, in the 1996-2000 period; however, there were only 4 such abandonments; less than one-quarter of what would reasonably be expected.

[W]e can review any merger, no matter what the size. Where size comes in is whether you have to notify us. … And I guess … it's a trade-off … if the world were cost-free, it would be nice to look at every merger and have notification. But given the costs imposed, there has to be some level before you create a notification process, and that's why there is a threshold for notification. [Gaston Jorré, Competition Bureau, 64:09:30]

To the Committee the data suggest one of three explanations: (1) mergers have become less problematic from a competition perspective; (2) the business community at large has in the past five years come to realize that the Commissioner is a vigorous enforcer of his Act and has increasingly acquiesced to other restrictive undertakings

31 Donald G. McFetridge, *Competition Policy Issues*, Research Paper Prepared for the Task Force on the Future of the Canadian Financial Services Sector, September 1998, p. 11.

imposed by him/her as a means of realizing their mergers; or (3) the business community has in the past five years come to realize that the Commissioner's budget is insufficient to vigorously enforce his Act and that he must acquiesce to the merging parties by seeking other non-vigorous merger enforcement methods than that of contesting them under a costly Tribunal proceedings.

It's not just the filing fee. When you notify, you have to retain counsel, you have to provide the information. You need a good adviser. [Gaston Jorré, Competition Bureau, 64:09:30]

Without qualitative information on these mergers, the Committee cannot draw definitive conclusions. However, the Committee fears that the third explanation is more likely correct and, at least in part, explains the fewer merger proposal abandonments. Somewhat paradoxically, the lack of information published on mergers that the Commissioner did not oppose as a means of protecting private and strategic market information from being made public may be providing more protection, in terms of accountability, to the Commissioner — a state of affairs that the competition law community has long complained about.

In any event, vigorous enforcement of the merger review provisions can be accomplished by providing the Bureau with adequate resources and allowing it to exercise greater selectivity in the review of mergers that are likely to pose a competition issue — recommendations that this Committee advocates.

[I]f parties to smaller transactions — mergers, for example — want to proceed with their transaction without notifying the Competition Bureau and try to fly below the radar screen, they have to take the risk that the Competition Bureau isn't going to find out about the transaction for three years, because if the Bureau does, it can bring an application to the Tribunal for up to three years and force divestiture. That's a huge risk, and business people typically do not want to assume that risk without comfort. So I find myself frequently, at any given time, having several matters on the go that involve transactions that are not above the notification thresholds, but the parties nevertheless want comfort from the Competition Bureau in the form of a no-action letter or an advance ruling certificate before they put their money on the table and proceed with the transaction. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:10]

Review Thresholds

The claim that the Bureau receives insufficient funding for optimal enforcement of the Act, in particular mergers, is not new. In fact, the competition law community has made the Committee aware of this fact since it undertook its study of the *Competition Act* and its publishing of the *Interim Report*. The desire for a more complete evaluation that would consider other consequential impacts on enforcement has held the Committee from venturing beyond the call for more resources to be allocated to the Bureau. Given the concern raised in the preceding section, the Committee is now prepared to evaluate specific proposals to raise the merger review thresholds as a way of focusing scarce resources on the larger merger reviews and the enforcement of other aspects of the Act.

Since the adoption of the *Competition Act* in 1986, the parties to any significant merger — that is, a merger of a certain size as set out in the Act — are required to notify the Commissioner before closing the transaction. Although all proposed mergers may be reviewed by the Commissioner, only those mergers (i.e., asset or share acquisitions) involving more than $35 million in gross revenue from sales per annum in or from Canada, or involving more than $400 million in combined assets or sales (including affiliates) in Canada, must notify the Commissioner of the proposed transaction. The transactions threshold for amalgamations is $70 million. Both the gross sales and combined asset thresholds have remained unchanged since 1986.

One thing that would help … is the elevation of the thresholds to align them with the economic value of the threshold as it was when it first came in, in 1988. In 1988 a $35 million threshold on the transaction size was put in place. … In the meantime, the value of the dollar has eroded by more than a third, and if we were to make that adjustment today, I think it would release from the system, from the review, maybe 40% of the cases they now deal with, and would enable more people to be freed up to do other things. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

Between 1986 and 2001, inflation of more than 40% (as measured by the consumer price index or CPI) has occurred. Consequently, the $35 million and $400 million thresholds have captured many more mergers than Parliament had intended when the Act was adopted. Indeed, the possible over-inclusiveness of mergers that must automatically undergo review may have been a constraint on optimal enforcement of the Act — the Bureau suggests that the gross-revenue-from-sales threshold of $35 million has been particularly binding. In other words, some resources currently devoted to merger review may be more effectively allocated to other activities, either to the review of larger mergers or to the enforcement of other provisions of the Act.

From an enforcement perspective, I would like to see increasing attention paid to other provisions of the Act, perhaps becoming a little less risk-averse from an enforcement perspective in dealing with mergers. We also heard this morning about the possibility of increasing thresholds. That might help too. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

The Bureau performed a special request for the Committee that indicates that approximately one in ten mergers examined by its Mergers Branch in the past year fell within the $35 to $50 million transactions range. This statistic, one in ten, suggests that raising the transactions threshold to $50 million would reduce the total number of merger filings by about 40 per year. Unfortunately, we were unable to find out how many of these one-in-ten mergers posed an issue under the Act. Nevertheless, given the deficiency in filing revenues to cover the direct costs of merger review and the Committee's belief that there are more pressing needs for enforcement of other activities, we believe that it is best to raise the $35 million transactions threshold to $50 million. The Committee, therefore, recommends:

26. That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.

There are two thresholds. There's the transaction size and there's the party size. And we think it would be appropriate to increase the transaction size threshold, which currently is $35 million. The party-size threshold, which is $400 million, is much higher and we see increasing the first, but not the latter, roughly in line with inflation for the period since the Act came in, which takes you to about $50 million. [Gaston Jorré, Competition Bureau, 64:09:30]

Furthermore, the Committee believes there is merit in formalizing such considerations and, therefore, recommends:

27. That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.

But in looking at it historically, in countries that have had strong competition laws, like the U.S., and countries that had very weak competition laws, like Japan, they found that they didn't end up with very productive and efficient economies when they didn't foster competition and make sure those efficiencies, that productivity and efficiency, were there. So when the cases are looked at, it's not just on the basis of the consumer or the small business alone, but the Canadian economy and what benefits consumers as a whole. [Robert Russell, Borden, Ladner & Gervais, 65:10:15]

Mergers and Efficiencies

Section 96 of the *Competition Act* sets Canada's competition legislation apart from those of other countries. This section states that: "The Tribunal shall not make an order if the merger brings about gains in efficiencies that are greater than, and will offset, the effects of any prevention or lessening of competition"; this has been interpreted by some as being consistent with what is known as the "total surplus standard."

The Act also goes to considerable lengths to explain both what should and should not be included as a gain in efficiency. For example, the Act states that "the gains in efficiency" to be considered are those that "would not likely be attained if an order were made in respect of the merger"; that is, they must be merger specific. This implies that if the efficiencies could be realized in a manner that generates less anticompetitive harm than that created by the merger, then the efficiencies would not be ascribed to the merger. For example, efficiencies that could occur through internal growth or unilateral rationalization would not be ascribed to the merger. Alternatively, there may exist other cooperative means of achieving the efficiencies, such as joint ventures or a restructured merger, which would create lesser anticompetitive effects. Additionally, the efficiencies must

The analysis of efficiencies in competition law in this country is in a state of disarray, to say the least. We've had 15 years or more of toing and froing on it, and still don't know if we have anything we can work with. So if you're going to go for the section 45 reform … [focus on] what constitutes the civil test. [Donald McFetridge, Carleton University, 59:10:05]

be real and not just pecuniary; that is, the merger must bring about a real savings in resources and must not stem from greater bargaining or purchasing power that is essentially redistributive among members of society.

Canada is the only country known to have a competition legislation that requires the efficiencies likely to be produced by a merger to be weighed against the likely anticompetitive effects of the merger. This approach occupies the middle ground between the European Union approach, whereby the merging parties are invited to make claim to efficiencies that the Merger Task Force will consider (which introduces lobbying into the mix), and the U.S. approach, which requires efficiency gains to be so great that prices will not rise as a result of the proposed merger (the so-called "price standard"). In retrospect, this is not an unreasonable approach and, in fact, may be a strategically sound one given Canada's relatively smaller and open market economy.

Although this legislative defence is unique among the industrialized countries of the world, its 15-year history has not been very hospitable to merger proponents. The Commissioner has not even once found the efficiency gains to a merger proposal sufficient to offset any lessening of substantial competition. This behaviour contrasts sharply with the Commissioner's findings of efficiency gains on many occasions pertaining to exclusive dealing and tied selling cases. Furthermore, in this same 15-year period, the Tribunal has only once decided (*Superior Propane*) and twice commented on efficiency gains (*Imperial Oil* and *Hillsdown*). The elucidations, however, have been confusing to say the least. Just when the Tribunal has come to agree with the Bureau's guidelines on the treatment of efficiencies according to the "total surplus standard" (*Superior Propane*), the Bureau abandoned its guidelines. To further confuse the issue, the Federal Court weighed in and partially overturned the Tribunal's decision in favour of expanding the strictly quantitative analysis of the "total surplus standard" to include redistributional and other qualitative effects of the merger, while neither advocating the "consumer surplus standard" or the American "price standard" approach. This Court direction had the consequence of opening the door to the Commissioner, as well as to the lone dissenting Trial judge sitting on the *Superior Propane* case, to advocate the

Within the merger review guidelines there's a part … about efficiencies which was written many years ago before Superior Propane. We have, in effect, withdrawn it. We've said that they've now been superseded by the Court of Appeal on Superior Propane and at some point once the Superior Propane case is finished we're going to have to re-write them because clearly they're not, after this litigation, a reliable guide. [Gaston Jorré, Competition Bureau, 64:10:00]

[T]he efficiency defence on the merger guidelines. I think it would be an appropriate time for the committee to readdress section 96 and have a look at what it means, at how it should be applied, and provide, perhaps, some guidance from Parliament's perspective in terms of what the efficiency test is supposed to be *in a merger context.* [Jeffrey Church, University of Calgary, 59:10:20]

[W]hether the efficiencies outweigh and offset the anti-competitive effect and really, in principle, that includes everything. It includes all the anti-competitive effects and some of those are measured quantitatively but … [t]hen you have other factors which are more qualitative and you can't really measure. To give you a very simple example, how do you weigh the impact of loss of choice. If you go from having two people you can buy something from to just having one, you've clearly lost something, apart from price and it's not something you can really value but it's certainly something that has to be weighed in. [Gaston Jorré, Competition Bureau, 64, 10:00]

"consumer surplus standard."[32] Sensing that the latter standard would render section 96 virtually ineffective, the majority opinion of the Tribunal panel chose to supplement the "total surplus standard" with a calculation of what is described as the "adverse social effects" of the merger, i.e., the wealth redistributed from "poor" Canadian consumers to the shareholders of the merging parties.

The Tribunal's decision in *Superior Propane* may or may not be satisfactory; it is not clear if such precise calculations of the wealth redistributed from "poor" consumers to the shareholders of producers will be possible in future cases. Moreover, so many different interpretations of Parliament's intentions when it stated that the "*effects* of a merger that would prevent or lessen competition" must be weighed against the "gains in efficiency" suggest that more expert study is required.[33] Accordingly, the Committee recommends:

28. That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act,* and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.

In my view, the guidance given by that Federal Court of Appeal decision is not adequate to this task. … broadly speaking it says the Tribunal, in considering weight given to efficiencies, should apply a flexible approach, not restricted to … a total surplus approach … It takes account of diverse factors, such as the effects on small business, the possibility of creating monopolies, and perhaps income-distribution effects. [T]his Federal Court of Appeal decision is quite flawed in some respects. I also think it doesn't, whether flawed or not, give a good guide to the future conduct of competition policy. I also believe there's a danger that Canada could move from a position of being more supportive of efficiency claims in merger review than the United States … to a position where we could be less supportive of efficiency claims than the Americans. [Roger Ware, Queen's University, 65:11:30]

32 The "consumer surplus standard" weighs the gains in efficiencies against the so-called "deadweight loss" arising from the merger, as does the "total surplus standard," as well as the wealth transferred from consumers to the shareholders of the merging companies. So the "consumer surplus standard" is a more restrictive test than is the "total surplus standard."

33 In *Superior Propane*, the Tribunal also heard testimony in favour of the "price standard," the "U.S.-modified price standard," and Professor Townley's" balancing weights approach."

CHAPTER 8: REFUSAL TO DEAL

The Committee listened with concern to the testimony of the Association Québécoise des Indépendants du Pétrole (AQUIP) as it described the experience of some of their members in the Quebec petroleum market. At the outset, it is important to understand the industry is unique in that it is comprised of a handful of large companies engaged in exploration, manufacturing, wholesaling and retailing. These vertically integrated companies compete at the retail level with many small independents. This unique market structure obliges independent retailers to negotiate directly with their competitors for the supply of their main product. The *Competition Act* must, therefore, consider this state of affairs, which is peculiar to the oil sector and ensure that all companies have access to supply without discrimination.

There were shortages, and they had to set an 80% quota. We are convinced that during the 80% cut, the major company retailers were still working at full capacity, without suffering from these cuts. At those times, we had to reduce our clients' inventories. We were fortunate that these were only brief periods of a week or two in the two cases I mentioned. In the first case, the problem was caused by cold weather on the St. Lawrence River. In the second case, it was the January 1997 ice storm in Quebec. I do not know if you are aware of this, but in January 1997, there was an ice storm and supplies had to be rationed. In both cases, our supply was reduced, but we are sure that the multinationals were still running their heating oil and gas station retail networks at full capacity. [Pierre Crevier, Association Québécoise des Indépendants du Pétrole 40:16:20]

The facts presented to the Committee at its Bill C-23 hearings, if true, suggest that AQUIP might have been the victim of an anticompetitive refusal to deal.[34] Of more immediate concern to the Committee, however, was the suggestion that section 75 would not apply to prohibit this manner of conduct. AQUIP suggested that a supplier could rely on the fact that "trade terms" (market conditions) were not "usual" and the section would not apply. The Tribunal would not be able to make an order, since it could only make an order for supply on "usual" trade terms.

> We put it to you that suppliers of petroleum products would only have to illustrate that they cannot supply products because of abnormal trade conditions to stall access to the Tribunal.[35]

The Committee has carefully considered this analysis of section 75 and, with all due respect, we cannot agree with the interpretation. Reading the section as a whole, it is clear that the section was enacted not to provide a defence to unscrupulous suppliers, but rather to enable a customer to get necessary supply on the same terms as a

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34 The Committee, of course, is not a court of law. Accordingly, we do not presume to offer any conclusions on questions of fact or the application of the Act in an individual case. These are matters for the Tribunal.

35 AQUIP, Brief to the Committee.

supplier's other customers. Moreover, for reasons set out below, we would suggest that "rationing" imposed by the supplier in response to supply shortages would fall within the definition of "terms of trade" in subsection 75(3). For that reasons, section 75 would appear to apply to ensure that a customer can get supply on the same terms as other customers, even in limited supply market conditions.

The fundamental difficulty with the AQUIP analysis is that it appears to treat the ideas "trade terms" and "market conditions" as synonyms. But as subsection 75(3) makes clear, the two ideas are quite distinct. It is a *condition* of the *market* that petroleum is in short supply, or that demand is unusually high. The terms of trade are the conditions of the *transaction*. The "terms of trade" in a transaction (such as a supply contract) may change in response to changing market conditions, that is, prices may go up or the quantities that suppliers are able to deliver might have to be reduced. Trade terms may be affected by market conditions, which necessarily implies that they are distinct concepts. AQUIP suggests that a supplier could plead "unusual *market conditions*" as a defence to section 75. But if we accept this interpretation, we would have to accept that section 75 would be of no effect in abnormal market conditions. This conclusion leads us to think that the interpretation may be incorrect.

By contrast, the Committee's interpretation finds strong support in subsection 75(3). That subsection defines "trade terms" as "terms in respect of payment, unit of purchase and reasonable technical and servicing requirements." The effect of subsection 75(3) is twofold. First, it limits the trade terms that the supplier may *impose* on the transaction. This ensures that suppliers cannot impose "unusual" trade terms (for example, rationing) as a pretext to withhold supply. Secondly, the section ensures that the customer is able to *receive* supply on the same terms as the suppliers' other customers, without being subject to any "unusual trade terms." So if other customers are receiving 100% of their orders, then all customers would be so entitled. Imposing a 20% cut on one customer, while not doing so to others would clearly be imposing an "unusual" term of trade on that customer, as the term is

contemplated in subsection 75(3). As a result, section 75 would apply and allow the Tribunal to order the resumption of supply on the same terms enjoyed by other customers.

AQUIP suggested that the phrase “usual trade terms” be deleted from section 75. This would presumably “untie the hands” of the Tribunal and give it flexibility to order supply on terms *other* than “usual” trade terms, i.e., order the supplier to accept a customer on *unusual* trade terms, e.g., pro rata shares of available supply. But again, the distinction betweens *market conditions* and *terms of trade* must be kept in mind. What AQUIP is really asking for is that the Tribunal order the supplier to continue to supply during *unusual market conditions* (e.g., supply shortages) but on the *same trade terms* (80% of usual supply using the previous example) as other customers, without discrimination.

Although the Committee does not concur that the phrase “usual trade terms” in section 75 undermines the effectiveness of the section, we do recognize that there exists another plausible interpretation of section 75, one that would lead us to the opposite conclusion, meaning that the section would *not* apply to prohibit discriminatory rationing of the type described by the AQUIP (the integrated producers supply its own retail outlets on terms more favourable than independent retailers).

Paragraph 75(1)(*d*) requires that, for the section to apply, the product must be in “ample supply.” On a plain reading, this would suggest that the section is meant to apply only in market conditions where supply is “ample,” that is at least sufficient to satisfy current demand. If this interpretation is correct, the section would not apply during periods of limited supply, and a supplier could choose to fill one customer’s order in full, while refusing another customer wholly or in part, using *discriminatory* rationing as a means of disciplining a non-integrated independent retailer.

This second interpretation is also consistent with the wording of subsection 75(3). To an ordinary observer, the term “units of purchase” might describe the manner in which the product is packaged for sale and delivery, such as in *litre* units, or in *shipping container* units, etc. In fact,

this interpretation might be more plausible than the other. Had Parliament, in drafting the legislation, wished to specify that “quantity” be included among the “terms of trade” set out in subsection 75(3), it could have drafted the legislation to that effect. Instead, Parliament used the phrase “units of purchase,” a phrase that does not clearly mean the same thing as “quantity.”

If this interpretation is correct, we would have to accept that section 75 was not meant to, and would not, apply in a market characterized by supply shortages. As such, an unscrupulous and dominant supplier could profit by the shortage to promote his own retail network and discipline independent retailers by selectively rationing their supply in a discriminatory manner. The current wording of the section might suggest that Parliament simply did not anticipate selective rationing being used in this way; or perhaps it was aware that such a practice might occur, but that it could be better addressed under the abuse of dominance provisions in section 79.

Rationing should not result in non-renewal of supply contracts on the pretext that the market situation is abnormal. On the contrary, we must ensure that abnormal market situations do not cause the elimination of efficient oil and gasoline businesses by depriving them of supply. We therefore propose that the words “on usual trade terms” be withdrawn from the bill. In this way, the new provisions would also be applicable in ordinary circumstances, where they could be particularly useful. [Pierre Crevier, Association Québécoise des Indépendants du Pétrole, 40:15:45]

The Committee is aware that the ambiguity could be resolved by simply deleting paragraph 75(1)(*d*). However, no witness raised this point and we have had no debate or analysis concerning the economic and legal implications of implementing such a change. For that reason, the Committee is reluctant to make such a recommendation. For the reasons we have set out, we believe that the more reasonable interpretation is that the section would apply in all market conditions, including markets characterized by supply shortages. Ultimately, however, the uncertainty can only be resolved in one of three ways: (1) a government amendment to clarify the application of the section; (2) the Tribunal’s judicial interpretation in the context of an application on these, or similar facts; or (3) an interpretation guideline from the Bureau.

Clearly, the preferred option is to be proactive now to clarify the application of section 75. Moreover, it is neither fair nor just that we should ask the AQUIP, or anyone else for that matter, to bear the brunt of what might turn out to be protracted and expensive litigation simply in order to clarify the law, when such a clarification is clearly

for the benefit of all. The Committee commends the AQUIP for bringing this important issue to our attention and recommends:

29. **That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.**

CONCLUSION

Canadian competition policy, as embodied in the *Competition Act* and as carried out by the Competition Bureau and the Competition Tribunal, is a modern framework for dealing with contemporary antitrust issues. The *Competition Act* generally reflects modern economic analysis, though minor modifications might be desirable. The Competition Bureau's enforcement guidelines can claim to be clear and transparent, though some fine-tuning would be helpful. The Bureau manages its current caseload well, though more resources would enable it to be a more vigilant enforcer. The Competition Tribunal has provided clear and thoughtful jurisprudence that properly embodies economic principles, though its procedures could be adjusted in order to expedite its workload and make room for more activity as a result of the granting of carefully thought out rights of private action. These were the views, and indeed the exact words, of the Committee expressed in its *Interim Report*. The Committee maintains these findings and, in this final report, has been more specific.

The Committee believes that Canada's business landscape would be served best by making conspiracies one of its highest priorities. The Committee recognizes that the Bureau has well-developed strategies and tactics already in place for detecting and pursuing both domestic and international conspiracies, but is hampered by an ineffective law — a law that is under-inclusive in its treatment of naked hard-core cartels and over-inclusive of pro-competitive strategic alliances. The Committee has, therefore, recommended that the *Competition Act* be modified to create a two-track conspiracy law, where cartels are pursued more vigorously under a stricter criminal track and strategic alliances are pursued more sensibly under a civil track through a new section. Under the existing criminal provision, the term "unduly" would be dropped to eliminate the need to litigate wasteful and irrelevant economic factors. At the same time, specific defences for efficiencies will be created, thereby reversing the onus of proof, to ensure the two tracks are kept separate. Additionally, a voluntary pre-clearance system for strategic alliances would be organized to provide guidance to the business sector seeking assurances that they will not be subject to criminal

sanctions, and thus reduce any residual “chilling effect” the law creates.

In support of realigning the enforcement priorities away from smaller mergers and back towards conspiracies, as Parliament originally intended in 1986, the Committee has recommended that more resources be allocated to the Competition Bureau and that the merger transactions notification threshold be raised from $35 million to $50 million. The Committee further recommends amending the *Competition Act* to provide automatic parliamentary reassessments of all merger notification thresholds every five years. Furthermore, the Committee recommends extending a private right of action to include abuse of dominance and expanding relief to those who have been prejudiced by reviewable conduct under exclusive dealing, tied selling, market restriction, refusal to deal, and abuse of dominance to include awards of damages and fines in order to bolster private enforcement, as a complement to public enforcement, of the Act.

The Committee makes a number of recommendations to streamline Competition Tribunal processes for disposing of cases, most notably empowering it to assess and impose damage awards and monetary penalties on those found guilty of abuse of dominance. These unbounded penalties would provide a better balance of incentives to deter abusive conduct and hopefully reduce the caseloads of the Bureau and the Tribunal. They, along with the Tribunal’s forthcoming general power to issue interim cease and desist orders in an expeditious way, as would be granted under Bill C-23, would make the existing provisions that are specific to the airline industry redundant. The airline industry-specific provisions could then be abolished to permit the return of the *Competition Act* to its traditional status as a law of general application.

The Committee further recommends the deletion of the condition of “substantial or complete control” in the abuse of dominance section of the Act. This would bring the abuse of dominance provision closer to conformity with the concept of market power as it has evolved through judicial interpretation and other sections of the Act. This amendment, along with the Competition Tribunal’s new power to assess monetary penalties under abuse of dominance, would support the decriminalization of the

anticompetitive pricing provisions — predatory pricing, vertical price maintenance, and price discrimination — as reflected in contemporary economic thinking. Criminal-like deterrence could be maintained when such behaviour constitutes an abuse of dominance, while reducing, if not eliminating, the chilling effect on pro-competitive applications of these pricing practices.

In regards to the process of merger review, the Committee recommends the establishment of an independent task force of experts for the study of the role efficiencies should play in all civilly reviewable sections of the *Competition Act*. In terms of refusal to deal, the Committee recommends that the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

In light of all of these recommended changes, the Competition Bureau must commit to rewriting its enforcement guidelines on strategic alliances, merger review and abuse of dominant position, not the least of which must be expanded to include predatory pricing, vertical price maintenance and price discrimination practices.

Finally, the Committee is convinced that these recommendations reflect the expert testimony it received; this testimony was thorough and comprehensive. A consensus was reached on most issues, allowing for specific and concrete recommendations to be made. Where a consensus was not immediately obtainable, further study was recommended. As such, we believe this report has the makings of a blueprint for a government White Paper on competition policy in Canada and the next round of amendments to the *Competition Act*.

APPENDIX A
WITNESSES

Associations and Individuals	Date	Meeting
As Individual	04/12/2001	59
George Addy, Lawyer, Osler, Hoskin & Harcourt		
A. Neil Campbell, Lawyer, McMillan Binch		
Jeffrey Church, Professor, University of Calgary		
Paul Crampton, Lawyer, Davies Ward Phillips & Vineberg		
Calvin Goldman, Lawyer, Davies, Ward & Beck		
Lawson Hunter, Lawyer, Stikeman Elliott		
Tim Kennish, Lawyer, Osler, Hoskin & Harcourt		
Donald McFetridge, Professor, Carleton University		
John Quinn, Lawyer, Blakes, Cassels & Graydon		
Thomas Ross, Professor, University of British Columbia		
Robert Russell, Lawyer, Borden Ladner Gervais		
Margaret Sanderson, Vice-President, Charles River Associates		
John Scott, President, Canadian Federation of Independent Grocers		
John Sotos, Lawyer, Sotos Associates		
Roger Ware, Professor, Queen's University		
Douglas West, Professor, University of Alberta		
Stanley Wong, Lawyer, Davis and Company		
Department of Industry	31/01/2002	64
Gaston Jorré, Acting Commissioner of Competition		
André Lafond, Deputy Commissioner of Competition, Civil Matters Branch		
R.W. McCrone, Assistant Deputy Commissioner of Competition, Criminal Matters		

Associations and Individuals	Date	Meeting
As Individual	05/02/2002	65
Paul Crampton, Lawyer, Davies Ward Phillips & Vineberg		
Tim Kennish, Lawyer, Osler, Hoskin & Harcourt		
John Rook, Lawyer, Osler, Hoskin & Harcourt		
Robert Russell, Lawyer, Borden Ladner Gervais		
Roger Ware, Professor, Queen's University		
Stanley Wong, Lawyer, Davis and Company		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this report within one hundred and fifty (150) days.

A copy of the relevant Minutes of Proceedings of the Standing Committee on Industry, Science and Technology (*Meetings Nos. 59, 64 and 65 which includes this report*) is tabled.

Respectfully submitted,

Walt Lastewka, M.P.
St. Catharines

Chair

Supplementary Opinion — Canada's Competition Regime

Canadian Alliance Party
Charlie Penson
James Rajotte

Over the past two years, the Standing Committee on Industry, Science and Technology has studied the Competition Act extensively, including several private members bills, the VanDuzer report, the Committee's own interim report of June 2001, Bill C-23 and now a report from the Standing Committee. The Canadian Alliance commends the work of the members of the Standing Committee on this report and on their vigilance in studying the subject of competition policy in Canada.

Throughout these hearings, Canadian Alliance members of the Committee have consistently put forth the view that Canadian consumers and producers are best served not by a tribunal or by government interference in the marketplace, but by genuine, business-to-business competition. The focus of competition policy should not be to protect individual competitors, but should instead be to facilitate competition itself.

While the Canadian Alliance endorses the majority of this report, there are three areas where we disagree with the recommendations — specifically Chapters One, Three and Eight.

Chapter One: Competition Law cannot replace competition

Chapter One recommends that conspiracy-related crimes against competition (i.e. price fixing) should be one of the most important concerns for the Competition Bureau. It also supports the idea that there should be no special rules for specific industries within overarching framework law.

In the opinion of the Canadian Alliance, the underlying theme of market regulation contained in Chapter One is fundamentally flawed. The Liberal party's policy of tinkering with competition law and regulating the market place cannot replace the need for a healthy business environment.

The report acknowledges the monopoly-creating distortion of government policies, such as foreign ownership rules, which act as barriers to entry in the airline and retail book industries. Canada's small domestic market and large geography are usually used as justification for regulation, but the Canadian Alliance believes that these problems have been compounded by the Liberal government's approach to industrial policy. There are too many sectors in the Canadian economy that escape market forces — telecommunications, wheat marketing, and transportation being examples. It

is far better to have a proper business and tax environment for many competitors than regulation for a few.

Direct government interference in these sectors has resulted in reduced competition. The Liberal's reaction is not to reduce regulations, but to compensate by amending the Competition Act. This approach compromises competition law and does not facilitate competition. For example, the government has amended the *Competition Act* to regulate the airline industry using cease and desist powers, monetary penalties and a consumer complaints referee. Yet, all these changes cannot discipline Air Canada like a competitive marketplace would. In addition, framework law such as the *Competition Act* is not the right place to regulate industry.

There is a belief that certain industries must be protected from foreign ownership or interference, but at what cost to the Canadian consumer? The National Energy Program made no sense for the Canadian oil industry and the Canadian Alliance suggests that mandated national ownership is not advantageous for other industries. Even if the situation could be corrected completely by the *Competition Act*, which is doubtful, it would certainly cost much more for the same result a market solution would produce.

In recent years, the Competition Commissioner has approved large-scale mergers in the airline or retail book industry, with caveats that certain assets be sold to other interests. In both cases, the deadlines passed with no prospective buyers coming forward due to government-imposed domestic-ownership rules. The end result in both industries has been a more concentrated monopoly and less choice for the Canadian consumer.

The Canadian Alliance therefore recommends:

The Liberal government and the Minister of Industry should designate business-to-business competition as one of its highest priorities by making a concerted effort to reduce regulation and government interference in the marketplace.

Chapter Three — Delays at the Competition Tribunal

Chapter Three attempts to deal with difficulties at the Competition Tribunal. The Canadian Alliance would like to call attention to undue delays in reaching a final decision. The abuse of dominance case that WestJet and now defunct Canada 3000 (CanJet) brought against Air Canada case is certainly an example where justice delayed is justice denied. This case will play a part in determining the future of the Canadian airline industry, and yet Air Canada has managed to secure two six-month adjournments. At present, the case is scheduled to resume in Fall 2002 — a full two years after the Air Canada seat sale at issue had taken place.

The Canadian Alliance is very concerned about these developments. Not only is Air Canada not being held accountable for its actions, but much needed clarity on competition rules has been put off again. Continuing ambiguity discourages new entrants into the market. Delays in the process mean that it is very difficult to entice investors to put money into new passenger air carriers.

The Canadian Alliance therefore recommends:

That the Competition Tribunal should increase its efforts to ensure cases brought before it are heard in a timely manner.

Chapter Eight — Vertical Integration in the Oil and Gas Retail Industries.

Chapter Eight is particularly troublesome because the experts convened in preparation for this report did not raise the relationship between vertically integrated corporations and their independent retailers. Indeed, this Chapter is essentially based on one association's point of view and from testimony delivered in October 2001 when the association appeared before the Committee's study of Bill C-23.

The inclusion of this issue in the Committee's report serves to highlight the Liberal government's predisposition to politicize competition law and policy.

It is the opinion of Canadian Alliance members of the Committee that the recommendation to clarify the Bureau's guidelines with respect to Section 75 is not constructive. There are times when scarcity methods of allocation are necessary and retailers should not be able to use private access to leverage their contracts. The Canadian Alliance believes that the Competition Act should not interfere with contract law and these types of complaints would be better dealt with under Section 79 (abuse of dominance).

NDP Dissenting Opinion
Bev Desjarlais, MP Churchill, NDP Industry Critic

Introduction

The Majority Report focuses exclusively on fine-tuning Canada's existing competition laws and makes recommendations to that effect. What the Committee has failed to recognize is that competition laws, while important, are not the be all and end all of competition policy.

Due to its narrow focus, the Majority Report does not consider the implications of other government policies on Canada's overall competitive framework. Tinkering with competition laws, as this Report recommends, will have little impact on competition in Canada without addressing the broader policies government policies that undermine competitive markets.

The Social Benefits of Competitive Markets

It is worth underlining that social democrats support the establishment of competitive markets as a fundamental social good unto itself. Our history in the twentieth century has proven, beyond any doubt, that competitive market economies deliver better, more prosperous, more comfortable and fulfilling lives for citizens than any of the anti-market alternatives. Competitive markets maximize our prosperity by encouraging entrepreneurship and efficiency and by widening consumer choice.

The Liberals and the other right-wing parties talk incessantly about the benefits of markets. Unfortunately, all this talk is merely a smokescreen for policies that distort markets and promote monopoly at the expense of competition.

Perfect Competition

It should go without saying that competition is the basis of a properly functioning market. Economists evaluate the competitiveness of a given market against an idealized model of perfect competition. Perfect competition requires: 1) that buyers and sellers have all the information they need to make informed choices; 2) that there are enough buyers and sellers to prevent any one actor from influencing the market; 3) homogeneous products; 4) that there are no barriers to market entry; and 5) perfect mobility of production factors.

Eliminating Distortion

In real life, markets never achieve the ideals of perfect competition. Any real life factor that interferes with one of the five assumptions of perfect competition is a market distortion. The fewer distortions there are in a given market, the more its outcomes benefit society. Conversely, when markets are distorted, the benefits of competition are reduced or negated. Thus, the object of our government's competition policy should be to eliminate and/or mitigate market distortions.

Regulation vs Distortion: How the Right Distorts Competition

The political right has built a false mythology about markets. This mythology holds that all government regulation is, by definition, a market distortion. It follows from this that removing regulations removes distortions and moves markets closer to perfect competition. The Liberal government uses this ideological approach to justify deregulating everything they possibly can.

The problem with this approach is that regulation is <u>not</u>, by definition, a market distortion. Sometimes it is, but most government regulations actually promote competition by <u>reducing</u> market distortions, thereby making markets <u>more</u> competitive. This is due to the fact that, in the real world, markets have built in distortions. Effective regulations eliminate or mitigate these distortions and make markets more competitive.

Real Life vs Ideology: The Repeated Failures of Deregulation

Without sufficient regulation to eliminate or mitigate distortions, many markets inevitably become, to a greater or lesser degree, anti-competitive, inefficient and harmful to consumer choice. The kinds of markets that are prone to these outcomes when deregulated are those that, structurally, are the furthest from the ideal of perfect competition. The more distortions a market has in its unregulated state, the more anti-competitive it is in the absence of corrective regulations.

In our experience with deregulation in North America, markets with severe barriers to entry and limited numbers of sellers have consistently been the most failure prone when deregulated. Examples of such industries include the airline industry, electricity and health care.

Canada's airline industry is a striking example of an industry in which government deregulation has increased market distortion, leading to a single-airline monopoly. This is because the airline industry is, structurally, so far from the ideal of perfect competition that, in the absence of regulations to correct its distortions, it rapidly trends toward the elimination of competition. It has enormous barriers to market entry and far too few sellers to prevent market manipulation. For consumers, the end result of deregulation

has been the elimination of choice and higher air fares, the opposite of what the government promised when it deregulated the industry.

Outcomes have been similarly negative in the electricity and health care sectors. Jurisdictions that have deregulated electricity markets, such as California and Alberta, have experienced monopolistic price manipulation and, in the case of California, deliberate manipulation of energy supplies that led to blackouts.

America's supposedly free market health care system is, in fact, demonstrably less efficient than Canada's highly regulated system. The American system is also highly intrusive into personal medical decisions. Private insurance companies routinely second guess treatments and prevent Americans from switching doctors. Thus, Canada's highly regulated health care system delivers the benefits of competition, greater efficiency and choice, better than America's less regulated model.

When confronted with the real life failures of their mythology, the Liberal government and others on the political right respond with a convenient tautology. Any time deregulation fails, they simply claim that they did not deregulate enough and use this to justify further deregulation that further distorts the market. This refusal or inability to grasp when cold hard reality contradicts theory is classic ideological behaviour.

How Regulation Promotes Competition

All markets have built in distortions that reduce or negate the benefits of competition. Economists recognize that perfect competition is an unattainable ideal. Regulation promotes competition by eliminating or mitigating market distortions.

For an example of how regulation eliminates market distortion, look no further than your local supermarket. The government imposes very strict labelling regulations on most supermarket products to make sure consumers have information on nutritional factors and price per unit. Since consumer information is one of the requirements of perfect competition, these regulations eliminate a market distortion and help the market function more efficiently. The world is full of similar examples of regulations that expedite commerce, like government regulations of weights and measures and enforcement of standards and labelling on other products, like textiles and consumer durables.

Regulations can also mitigate market distortions to reduce their harmful effects on competition. Let us return to the example of the airline industry. No regulations can eliminate the barriers to market entry, such as the prohibitive start-up costs and the limitations of the supporting infrastructure like airports and air traffic control resources. However, more effective regulations to prevent the Air Canada monopoly from using its market power to systematically destroy all competition could at least mitigate the distortions inherent in this market.

New Democrats, New Vision for Competition

Canada's New Democrats propose a new approach to competition policy, beginning from the assertion that government has a positive role to play in promoting competition by eliminating and mitigating market distortions. This would mean a departure from the dominant mythology that government regulation is automatically distorting.

While New Democrats do not oppose the minor tinkering proposed by the Majority Report, we consider the report inadequate because it is constrained by its narrow focus. There is no discussion of, for example, the role that consumer rights play in competition policy. Well-informed consumers are a necessary part of a healthy competitive market, and one of the requirements for perfect competition, yet the Liberal government continues to ignore growing public demands for more information on the labels of consumer products.

New Democrats have been at the forefront of campaigns for mandatory labelling of genetically modified foods and changes to the Textile Labelling Act that would tell Canadian consumers whether or not the clothes they buy are produced with Third World child labour. By refusing to make this information available to consumers, the Liberal government is deliberately protecting the market distortions created by this lack of information. In so doing, they contradict their stated support for competitive markets and expose their real agenda — to protect companies with existing market power at the expense of new entrepreneurs and competitors who would offer the public a wider range of choices.

Labelling is just one example of an area where the Liberal government's ideologically driven antipathy to regulation results in less competition and choice. Another example is their headlong rush to deregulate industries, like the airline industry, which contain major structural distortions that require regulation to prevent natural monopolies from taking hold. The result of their "deregulate everything" approach is less competition, the rewarding of inefficiency, less choice and higher prices for consumers. The only winners are companies that already have market power, which are free to abuse their dominant market positions. The losers are consumers, smaller and newer businesses, entrepreneurs and society as whole, which loses out on the benefits of a dynamic and innovative economy.

When New Democrats challenge the Liberal government's ideological refusal to promote competition in the economy, the government typically responds with unfounded accusations that the NDP is an enemy of business and enterprise. Nothing could be further from the truth. We do not call for massive government intervention in the economy, but rather a balanced approach focused on promoting healthy competitive markets. Indeed, the real enemies of enterprise are the anti-competitive policies of the government that promote and protect inefficient monopolies, gouge consumers and squeeze the innovation out of our economy by blocking competition from newer, smaller and more dynamic businesses.

MINUTES OF PROCEEDINGS

Tuesday, April 9, 2002
(*Meeting No. 74*)

The Standing Committee on Industry, Science and Technology met *in camera* at 9:15 a.m. this day, in Room 308, West Block, the Chair, Walt Lastewka, presiding.

Members of the Committee present: Larry Bagnell, Stéphane Bergeron, Walt Lastewka, Serge Marcil, Dan McTeague, James Rajotte, Andy Savoy and Paddy Torsney.

Acting Member present: Cheryl Gallant for Charlie Penson.

In attendance: *From the Library of Parliament*: Dan Shaw and Geoffrey P. Kieley, Research Officers.

Pursuant to the Committee's mandate under Standing Order 108(2), the Committee resumed consideration of the Competition Law and Policy *(See Minutes of Proceedings, Tuesday, December 4th, 2001, Meeting No. 59)*.

It was agreed, — That pursuant to Standing Order 109, the Committee request that the Government table a comprehensive response to this report within one hundred fifty (150) days.

It was agreed, — That the Chair be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the Draft Report to the House.

It was agreed, — That the Draft Report (as amended) be concurred in.

Ordered, — That the Chair present the Report (as amended) to the House at the earliest possible opportunity.

It was agreed, — That in addition to the 550 copies printed by the House, an additional 1000 copies of the Report be printed in a tumble format.

It was agreed, — That a News Release be issued.

It was agreed, — That a News Conference be held upon presentation of the Report.

It was agreed, — That the Committee express its appreciation for the professionalism and excellent work of Daniel Shaw and Geoffrey Kieley, Research Officers, Library of Parliament and to Norm Radford, Clerk Committees Directorate.

At 11:00 a.m., the Committee adjourned to the call of the Chair.

Normand Radford
Clerk of the Committee