Competition Tribunal Tribunal de la Concurrence

CT-1989-002 – Doc # 176a

IN THE MATIER OF an application by the Director of Investigation and Research under sections 79 and 77 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATIER OF The NutraSweet Company

BETWEEN:

The Director of Investigation and Research
Applicant

and

The NutraSweet Company
Respondent

and

Tosoh Canada Ltd.
Intervenor

<u>REASONS AND ORDER</u>

Dates of Hearing:

January 9-11, January 22-26, January 30-February 16, February 20, 21, and 23, April 26, and July 10, 1990

Presiding Member:

The Honourable Mr. Justice Barry L. Strayer

Judicial Member:

The Honourable Mr. Justice Max M. Teitelbaum

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

Warren Grover, Q.C.
John J. Quinn
Mark Katz
Winston Fogarty
Graham Garton, Q.C.
Rory R. Edge

Counsel for the Respondent:

The NutraSweet Company

Bruce C. McDonald
James B. Musgrove
H. Scott Fairley

Counsel for the Intervenor:

Tosoh Canada Ltd.

R. Roy McMurtry, Q.C.
Alan Pratt

INDEX

COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

The NutraSweet Company

I. INTRODUCTION

On June 1, 1989 the Director of Investigation and Research ("Director") filed a notice of application under sections 79 (abuse of dominant position) and 77 (exclusive dealing and tied selling) of the *Competition Act*.[1] The Director asks the Tribunal to prohibit certain business practices of The NutraSweet Company ("NSC"), the respondent, which are alleged to be contrary to those sections, as well as to make such orders as may be necessary to overcome any adverse effects of those practices in the market.

NSC is a major producer of the sweetener aspartame which it markets under the brand name NutraSweet. Aspartame is primarily used in diet soft drinks, chewing gum, low calorie formulations of various foods (e.g. yogurt), and as a table-top sweetener.

[1] R.S.C. 1985, c. C-34, as amended.

One intervenor, Tosoh Canada Ltd. ("Tosoh"), a rival producer of aspartame, applied for and was granted leave to intervene in these proceedings. The two major buyers of aspartame in Canada, Coca-Cola Ltd. ("Coke") and Pepsi-Cola Canada Ltd. ("Pepsi") also applied for leave to intervene but later withdrew their applications, agreeing instead to an arrangement whereby their respective witnesses would have counsel present to safeguard company interests during any examination.

NSC Canada is a branch of NSC, a United States corporation that is a wholly-owned subsidiary of Monsanto Co., another U.S. corporation. NSC had earlier been a division of G.D. Searle & Co. ("Searle") which was acquired in 1985 by Monsanto Co.

Aspartame is a high-intensity sweetener that was discovered in 1966 by Searle researchers. Searle obtained use patents (now exploited by NSC) on the product in a large number of countries, but due to delays in obtaining approvals for its use from regulatory health authorities aspartame did not come on the market until late in the lives of these patents. Approval for use in Canada was first granted in 1981 and the Canadian use patent expired in July 1987. In the United States health approval was effectively also first obtained in 1981, but this was for very limited use and aspartame was only permitted in soft drinks (by far aspartame's largest source of sales) in 1983. The life of the use patent was extended in a number of countries: from 1983 to 1987 in the United Kingdom, and until December 1992 in the United States and Australia.

Worldwide sales of aspartame in 1989 were approximately 7500 metric tonnes, consisting of somewhat over 75 percent sold in the United States, 5 percent in Canada, and 15 percent in Europe. Of the remaining roughly 5 percent, an appreciable percentage was sold in Australia. Canada and Europe are the principal regions where a use patent does not apply. Sales in Europe have grown rapidly, first surpassing those in Canada in 1987 and attaining a level of growth such that the increase in sales between 1988 and 1989 exceeded the total of Canadian sales in 1989.

NSC of course accounts for all sales in the United States and Australia (where the use patents are still in effect) and over 95 percent and 80 percent, respectively, of Canadian and European sales.[2] The Canadian (and worldwide) customers of NSC are primarily food and beverage manufacturers who use aspartame as a sweetening ingredient in their "sugar- free" or "diet" products. In 1989, NSC sold aspartame for use in Canada to about 65 customers for a total volume of 359 tonnes. Five soft drink franchisers figured among the top eight Canadian purchasers of aspartame (by volume and

[2] Exhibits R-19, D-38 and X-16 (confidential).

excluding Searle, the parent company) and accounted for over 300 tonnes. Those five were A & W, Cadbury Schweppes, Crush, Coke and Pepsi. The other three major Canadian buyers were Kraft General Foods, Wrigley and Adams Brands (the last two are chewing gum manufacturers). Coke and Pepsi are obviously by far the largest individual purchasers in this group.

NSC operates two plants in the United States with a combined capacity of 5400 tonnes per annum and it obtains supplies from Ajinomoto, a Japanese company with a high degree of expertise in the manufacture of aspartame. Until the mid-1980s, NSC also obtained supplies from other manufacturers before its own facilities could provide sufficient output. It has recently entered into similar arrangements with two manufacturers for supplies to bridge the period until planned expanded plant capacity is on stream in 1992. (Sales in a given year may exceed plant capacity due to the drawdown of inventories).

The relationship with Ajinomoto dates back to at least the early 1970s. NSC first obtained approval for the sale of aspartame from the United States Food and Drug Administration ("FDA") in 1974. For reasons that are not germane to the present proceedings, this approval was not implemented. An arrangement for supplies had been entered into with Ajinomoto in anticipation of FDA approval. Ajinomoto holds a large patent portfolio relating to the production of aspartame. It licenses both patents and know-how to NSC in some areas of manufacturing. Ajinomoto and NSC are joint owners in NutraSweet AG which markets aspartame under the NutraSweet trademark in Europe. The product for NutraSweet AG sales is supplied by Ajinomoto. It uses the great majority of its remaining output to supply NSC under long-term contract and a large percentage of Canadian supplies is derived from this source. According to the available evidence the terms of the contract with Ajinomoto restrict it from marketing directly in North America until 1996. Ajinomoto's manufacturing capacity is approximately 1500 tonnes per annum. Less than ten percent of this capacity is used to satisfy demand in Japan where per capita sales of aspartame are very low. Ajinomoto, like NSC, is proceeding with plant expansion.

There is only one producer of aspartame who is currently selling m competition with NSC in Europe and Canada. Holland Sweetener Company ("HSC") is a joint venture between Naamloze Vennootschap DSM and Tosoh Corporation of Japan. It operates a 500-tonnes per annum plant in Holland. Marketing in Europe is conducted by HSC and in Canada by Tosoh, a wholly-owned subsidiary of Tosoh Corporation. Tosoh started marketing efforts in Canada as soon as the Canadian use patent expired in the summer of 1987. HSC started production in mid-1988, several months behind schedule, and it has only recently been able to approach full capacity output. Sales have, to date, lagged behind output.

Several other firms have produced aspartame from time to time m small pilot plants or in general purpose fine chemical facilities. According to the available evidence none are currently producing. There is evidence, however, that at least some of them were left with inventories after they stopped producing. For example, Pierrel, a firm that had supplied NSC for a time and stopped producing in the mid-1980s, was left with inventory that a distributor was trying to sell in Canada in 1987 and 1988. While customers are not receptive to buying from a supply source that they cannot rely on, there is a strong incentive for firms holding inventories to dispose of them and it is likely that they are being sold and form part of worldwide supplies.

The Director's investigation was initiated by a complaint made by Tosoh.

In our view, the Director's principal allegations fall under two broad heads. Under the first head are contract terms that, it is alleged, create an exclusive supply relationship between NSC and its customers and thus restrict the entry or expansion of would-be or existing competitors. This type of allegation is advanced by the Director under two sections: under section 77, which specifically addresses exclusive dealing and tied selling; and under section 79, which addresses "anti-competitive acts". The Director contends that these exclusive supply devices fall within the general criteria for anti-competitive acts in section 78, even though not specifically mentioned in the non-exhaustive list of such acts in that section. Under the second broad head is the allegation that NSC has been selling below its "acquisition cost", one of the anti-competitive acts specifically set out in section 78. This virtually constitutes a separate case with regard to the elements that must be satisfied.

Before addressing the specific allegations certain background Issues are discussed below under the headings of "Product Market", "Geographic Market" and "Aspartame Production: Potential Entrants and Entry Conditions into Manufacturing". This background is required not only for an understanding of market context, but also in directly addressing a number of elements in sections 77 and 79.

II. THE PRODUCT MARKET

The need to identify a relevant product arises in both subsection 77(1) and paragraph 79(1)(a), which refer, respectively, to a supplier of a "product" and substantial or complete control of "a class or species of business". Paragraph 79(1)(c), which refers to substantial lessening of competition in a "market", also requires identification of a relevant product. It is not useful at this time to address the submissions regarding specific interpretations. Whichever interpretation is adopted for specific paragraphs, both sides accept that, at one point or another, it is necessary to consider the degree to which aspartame is sufficiently distinct from other sweeteners in order to decide whether it should be treated as a separate product or as part of a broader class of sweeteners.

The question is whether, and in what ways, other sweeteners are good substitutes for aspartame. In any given competition law case, a wide range of factors may be relevant in considering product substitutability. Factors which have proved pertinent in the instant case include taste, caloric content, other physical characteristics, safety concerns, price differences, and users' responses to price changes.

The respondent has submitted that it may not always be useful to define the product market exactly, that decisions can more reasonably be arrived at without taking this step since the factors to be considered in defining the market may be ones that are required in considering other critical questions such as market power. As the Tribunal understands the respondent’s submission, it is that a narrow definition of the product market could lead to the conclusion that NSC has market power, whereas this conclusion might not follow if all competitive pressures (including those arising from sweeteners considered not to be sufficiently close substitutes to be included in the delineated product market) are taken into account when considering the market power question. It is the Tribunal's view that it is necessary that the overall purpose of a section be kept in mind when dealing with the elements which the legislative scheme requires to be specifically addressed. In approaching the discussion of product market, the Tribunal has kept in mind the implications that its conclusions would have for its consideration of market power.

1. <u>Sweeteners</u>

Caloric sweeteners and high-intensity sweeteners form two broad classes. Sugar and high-fructose corn syrup are the two most important caloric sweeteners.

High-intensity sweeteners have a perceived sweetness that is, by weight, many times that of sugar. On a rough average (since there is some variation by use), aspartame, cyclamates and saccharin are 180, 30 and 300 times sweeter than sugar, respectively.

There are, however, dimensions (or characteristics) other than sweetness that determine the demand for the various sweeteners. An obvious difference between high-intensity and caloric sweeteners is that the former have comparatively very little bulk. Thus, in uses where sugar provides an important part of the bulk, such as in chocolate bars, bulking agents must be added to the product if a high-intensity sweetener is to be used. The price comparisons among sweeteners contained in the evidence during the proceedings did not include the cost of bulking agents. Comparison between sweetener prices is usually done on a sweetness equivalency basis. The only product in which there is widespread use of high-intensity sweeteners and bulking agents is chewing gum. The bulking agents used in chewing gum provide roughly the same calories as sugar; however, neither the bulking agents nor the high-intensity sweeteners contribute to cavities.

2. Categories of Demand for Sweeteners

Sweetener consumption is conveniently divided in the first instance between table-top and industrial use. Table-top use refers to purchases of sweeteners by households and restaurants for direct consumption by individuals. Industrial demand derives from the inclusion of sweeteners as an ingredient in the entire gamut of food and beverages sold to households and institutions. In the table below covering Canada, the United States and the European Economic

Community ("EEC"), table-top sales are seen to be only three or four percent of total sales in Canada and the United States. Industrial sales of aspartame are overwhelmingly driven by demand from the soft drink industry in each of the three geographic areas. Approximately 85 percent of industrial sales are made to this one industry. Coke and Pepsi have a similar order of importance to the soft drink industry as that industry has relative to the overall industrial demand for aspartame.

Aspartame's large percentage of sales to the soft drink industry contrasts with limited sales for other large scale industrial sweetener uses. There are technical problems in using aspartame in baked goods, and confectionery generally consists in large part by volume of sugar so that the use of a high-intensity sweetener (without a bulking agent) would cause much of the product to disappear. There are outstanding petitions to health authorities in Canada and in the United States for approval of the use of aspartame in encapsulated form in baked products. The Canadian petition was filed in September 1988. In spite of this petition and one filed in May of the same year, requesting approval of aspartame for use in such products as fruit spreads and salad dressings, there is nothing in the past history of the demand for aspartame or in the demand projections of NSC that suggest that the pivotal role played by the soft drink industry is likely to change in the foreseeable future.

	Table-Top Use as a Percentage of Total Sales in 1988	Carbonated Soft Drinks as a Percentage of Industrial Use in 1988
	All Sweeteners	
Canada	29	35
United States	21	40
European Economic Community	36	30
	Aspartame	
Canada	3	85
United States	4	84
European Economic Community	27	87

Source: Confidential schedules to the expert affidavit of J. Fry for NSC, Schedule 6 (Exhibit R-13-C).

3. High-Intensity Sweeteners

High-intensity sweeteners are subjected to a lengthy, rigorous approval process in developed countries. The concerns that arose over the safety of cyclamates and saccharin were apparently responsible for what was described by Mr. Smith of the Health Protection Branch ("HPB") of the Government of Canada as a "new era in the kinds of testing" required by governments for approval of new artificial sweeteners.[3] It required five years

[3] Transcript at 198 (10 January 1990).

from the date of the petition for approval to be granted to the last high-intensity sweetener admitted in the United States. Petitions to HPB are not made public so it is not officially known if, or when, a petition for this same product, acesulfame-k, was filed in Canada. According to Ms. Mathews, formerly Manager of Regulatory Affairs with NSC, the manufacturer of acesulfame-k has publicly stated that a Canadian petition was filed. In any event, acesulfame-k has not been approved for use in Canada, two years after it was granted the approvals sought in the United States.

All the studies designed to show that a new food additive is safe, in the quantities that it would be consumed in the uses requested in a petition, must be completed prior to the filing of a formal petition. Thus most of the effort, and a good part of the time, required to obtain approval for a new product has already been invested by the time a formal petition is filed. There are two new sweeteners, alitame and sucralose, for which petitions were filed in the United States in 1987 and, as might be expected, were likely filed at approximately the same time in Canada. Any other new high-intensity sweeteners on which work is being done are, based on the absence of evidence of imminent filings, so far from being marketed that they can safely be ignored.

There are currently four high-intensity sweeteners that have approval in either Canada, the United States or the EEC. These are aspartame, acesulfame-k, cyclamates and saccharin. In Canada and the United States, only aspartame is approved for a variety of "wet" and "dry" uses; that is, both in applications that do and do not require the high-intensity sweetener to be dissolved when it reaches the consumer. Cyclamates are approved for table-top use in Canada but are banned in the United States. Saccharin can be sold for table-top use in Canada solely in drug stores. In the United States, it is formally banned by the FDA but it has received a number of important congressional exemptions, including most importantly for use in carbonated soft drinks. In the United States the use of acesulfame-k in a number of dry uses was permitted in 1988.

Aspartame is considered to be closest to sugar from a taste point of view. However, it suffers from a number of technical deficiencies that tend to limit its use or make it vulnerable to competition from other sweeteners. Aspartame is not heat stable (i.e. it loses its sweetness when heated) and this has prevented its use as a sweetener in baked foods. This deficiency has been remedied technically by encapsulating the aspartame and petitions for use of this product in baking are pending in Canada and in the United States. Aspartame's less-than-perfect stability also manifests itself when it is used as a sweetener in carbonated soft drinks.It loses its sweetness if the product is stored for lengthy periods. As a result, diet fountain drinks in the United States tend to contain a blend of aspartame and saccharin, since saccharin is much more stable. Aspartame is exclusively used by Coke and Pepsi (and possibly by all brands) in their diet packaged products in Canada and the United States.

Saccharin is very inexpensive on a sweetness equivalency basis, the least expensive sweetener by far. It suffers, however, from an unpleasant (bitter) aftertaste and is considered to pose some potential health risks. The problem with saccharin's aftertaste can be resolved by blending saccharin with sweeteners such as aspartame or cyclamates.

Acesulfame-k is described as similar to saccharin. It is however, much more expensive. Its primary advantage over saccharin is that it apparently does not raise health concerns. Only limited capacity to produce acesulfame-k is in place, approximately 100 metric tonnes which is less than two percent of the capacity dedicated to the production of aspartame. Acesulfame-k is being marketed in the United States primarily as a table-top sweetener and approval for wet use has not been sought. Although there is no evidence of the wholesale prices of finished products, or of the ingredient cost of acesulfame-k, there is evidence of a pronounced increase in NSC's expenditures on promotion in response to the introduction of acesulfame-k in table-top use in the United

States. Based on this evidence, it is reasonable to conclude that acesulfame-k is an important substitute product in table-top use in the United States and elsewhere where it has approval.

Acesulfame-k is used in a blend in Diet Coke in France, but there is no evidence that it has been adopted in diet formulations in other countries. Unfortunately the evidence does not allow a conclusion on whether this limited penetration of acesulfame-k in diet soft drinks is of broader competitive significance or whether it reflects a peculiarity of the French market or regulatory regime. Based on the considerable delay in obtaining regulatory approvals, acesulfame-k is unlikely to be a factor in the United States or Canadian soft drink industry for some time.

According to several witnesses, there is speculation that the United States' ban on cyclamates will shortly be lifted. As noted earlier, cyclamates application in Canada is limited to table-top use. In the EEC cyclamates are approved for soft drinks use only in West Germany. Clearly, little or no weight can be given to the potential competition from cyclamates in major uses in Canada or in the United States. Apart from the unknowns regarding regulatory approvals (if, when and for what applications), it is highly doubtful that industrial users would move quickly to incorporate an ingredient about which there has been recent health concerns.

Two new high-intensity sweeteners could affect the competitive position of aspartame. The most serious competitive threat appears to be sucralose which, like aspartame, is considered to be similar to sugar in taste but is more stable than aspartame. A number of wet and dry applications are being sought for this product in petitions filed in mid-1987 with the FDA in the United States. The second product, alitame, appears to be considered less of a potential competitive threat. Petitions for various wet and dry applications were filed with the FDA in early 1987. To date, no country has granted approval to either ingredient for any application.

Blending of more than one high-intensity sweetener provides users with the opportunity to reduce their costs by adjusting the mix of sweeteners according to the prices and characteristics of the sweeteners. Blending also provides a synergistic increase in perceived sweetness beyond the level that would be anticipated from the perceived sweetness of each of the sweeteners if separately used. This means that although none of the presently approved high-intensity sweeteners is considered by itself to be an acceptable substitute for aspartame, such sweeteners, if blended, could provide price competition by affecting the proportion of aspartame used in the blends. Whether sweeteners are used individually or in blends, the evidence shows that taste is a major concern of most industrial users of sweeteners. Possible blends offering an acceptable taste profile in soft drinks, mentioned in evidence, are aspartame with saccharin (or acesulfame-k) and aspartame with cyclamates and saccharin. Professor Wilson, who appeared on behalf of the Director, is of the opinion that because of the possibility of blending, the relevant "product" is intense sweeteners.

4. Price Competition Between Sweeteners

Competition between sweeteners can be direct, in the sense that one sweetener is selected over another for a particular use, or the competition can be indirect in that there is competition among the products containing the sweeteners.

It is noteworthy that although aspartame prices fell below EEC sugar prices in 1986 and stood at 42 percent of sugar prices by 1989, aspartame has not been introduced into non-diet soft drinks as a sweetener in the EEC. An hypothesis held out by Dr. Fry, an expert witness for the respondent, is that at prices where aspartame is cheaper than caloric sweeteners it will replace them, with the result that the demand for aspartame becomes very sensitive to price changes. An implication of this result would be that producers of aspartame would be very reluctant to raise prices because to do so would entail a large loss in sales. There is no evidence of direct competition between aspartame and caloric sweeteners, although there is evidence that saccharin (or possibly acesulfame-k) is used in non-diet or regular carbonated soft drinks in the United Kingdom. There is clearly a cost incentive to use saccharin instead of other sweeteners, including sugar. Yet since 1982, when the use of saccharin peaked, the amount of saccharin (or acesulfame-k) used in regular carbonated soft drinks has steadily fallen; by 1989 it was down by 43 percent from its 1982 peak. There is no cost justification for this change since saccharin prices were 3.9 percent of sugar prices in the EEC on a sweetness equivalent basis in 1982 and 3.8 percent in 1989.[4]

Dr. Fry drew on the growing market share of diet soft drinks as evidence of indirect competition between aspartame and caloric sweeteners. Using the change in the ratio of aspartame to sugar price between 1984 and 1988 in Canada and the change in the percentage share which diet drink sales form of total carbonated soft drink sales, he measured the average "cross-elasticity" between sugar and aspartame to be equal to .14. That is, he concluded that a one percent decline in the price of aspartame, keeping the price of sugar constant, resulted in a .14 percent increase in the diet drinks' share.[5] The

---

[4] Confidential schedules to the expert affidavit of J. Fry, Schedules 14 and 11 (Exhibit R-13-C). There is wide geographical variation in sugar prices because of the varying extent to which countries or trade groupings like the EEC protect their sugar producers. Although prices of aspartame in Canada and the EEC have been fairly close, the Canadian price did not fall below the landed price of sugar until 1989.

[5] Expert affidavit of J. Fry at B-34 to B-37 (Exhibit R-13-E); Schedules to the expert affidavit of J. Fry, Schedule 12 (Exhibit R-13-F)

prices of diet and regular soft drinks have been kept equal by producers. Therefore, the mechanism by which the increase in market share is claimed to have been achieved is via increased advertising or other marketing effort in respect of diet soft drinks by the suppliers as the profit margin on the diet drinks became more favorable with declining aspartame prices. There is no evidence whatever that this hypothesized increase in marketing expenditures actually occurred. The only available evidence on advertising is for the United States. There the opposite occurred: less money both absolutely and relative to regular soft drinks was spent on diet drinks as the price of aspartame fell.[6] Furthermore, the logic of Dr. Fry's hypothesis is not clear since throughout the period in question in his study the ingredient price of aspartame was above that of sugar. Thus, even though the price of aspartame was falling and its cost disadvantage was decreasing, it is difficult to see why soft drink suppliers would find it in their interest to increase promotion of a lower profit product. Even on the basis of Dr. Fry's hypothesis it is unclear what the measured "cross-elasticity" represents since the claimed effect of the price change is so indirect.

[6] Supplementary expert affidavit of J. Fry, Schedule 23, Table 1 (Exhibit R-13-G).

Measuring cross-elasticity is a difficult thing to do because of the problems of isolating the effect of price changes from other factors affecting sale. It is perfectly clear that the demand for diet products is greatly affected by life-style. No attempt was made to allow for this factor, nor could it have been, given the limited number of available observations. The growth in sales of diet drinks has been much faster than that for regular drinks over a long period predating the introduction of aspartame (as shown by the data filed for the United States between 1972 and 1988):[7] the growth rate in the diet segment was well over two and one-half times that for regular drinks between 1972 and 1982, before aspartame was a factor, and in spite of perceived health problems with the ingredient then used in diet drinks. The fact that there was continued growth after aspartame was introduced and its price was falling does not in any way support a finding that the growth in the diet segment can be attributed to the fall in the price of aspartame. While it is possible that aspartame could indirectly compete with caloric sweeteners in Canada and the EEC now that aspartame's price is lower on a sweetness equivalency basis, the evidence regarding this possibility and how it might affect the pricing of aspartame can only unfold in the future.

The question of indirect competition between aspartame and caloric sweeteners was also addressed through evidence on "cannibalization",

[7] *Ibid.*

which in the present context refers to sales of low-caloric or diet formulations of a product at the expense of the regular or full-caloric formulations. The import of this evidence on whether the price of aspartame is constrained by prices of caloric sweeteners is unclear. As stated by Professor Wilson, the fact that some consumers always or occasionally prefer a low-caloric formulation tells us absolutely nothing about the indirect <u>price</u> competition between aspartame and caloric sweeteners.[8] Dr. Fry gave evidence regarding cannibalization of regular soft drinks by diet versions in the United States. This evidence is in the form of a regression equation in which the consumption of soft drinks (diet, or diet plus regular) is "explained" by gross national product.[9] Apart from whether this evidence is relevant to the issue of substitutability, the Tribunal finds it unconvincing on its own terms given the failure of Dr. Fry to take into account the false statistical signals and misleading impressions of causality created by underlying trends in the economy that are common in this type of analysis.

Examples of advertising by associations of sugar producers in Australia and other countries, highlighting the "naturalness" of sugar compared to aspartame, were introduced by the respondent as further evidence of competition between

---

[8] Transcript at 1161-62 (8 February 1990).

[9] Supplementary expert affidavit of J. Fry at 2-3 and Schedule 23, Tables 2, 3 (Exhibit R-13-G).

sugar and aspartame. While these advertisements indicate that the sugar associations believe that they can affect the demand for sugar (and aspartame) by discrediting the origin of aspartame, they do not affect the conclusion that substitution between diet and regular products is primarily life-style rather than price related.

Dr. Fry also submitted measures of the "cross-elasticity" between aspartame and cyclamates using the sales of table-top brands containing cyclamates and aspartame.[10] The figure obtained is approximately .35 which indicates a greater degree of indirect price competition than in the case of aspartame and caloric sweeteners used in soft drinks. There is no more reason to believe that the figures used by Dr. Fry measure the "cross- elasticity" between aspartame and cyclamates in table-top use than that similar figures measured the degree of indirect competition between aspartame and caloric sweeteners in soft drinks. The pattern captured by the numbers is a steady decline in the price of aspartame relative to that of cyclamates at the same time that sales of table-top sweeteners containing aspartame rose while those containing cyclamates were falling. It is noteworthy, however, that although the price of aspartame fell, it was at all times much more expensive than cyclamates -- approximately nine times in 1984 and slightly less than four times in 1988.[11] While the ingredient

[10] Schedules to the expert affidavit of J. Fry, Schedule 12 (Exhibit R-13-F).

[11] Confidential schedules to the expert affidavit of J. Fry, Schedule 11 (Exhibit R-13-C).

cost of aspartame and cyclamates are in evidence, the prices charged for these table- top sweeteners are not. Figures in evidence on advertising expenditures of the principal table-top brand containing aspartame do not provide any coherent pattern.[12] The evidence does not support a conclusion that the changes in the relative shares of brands containing aspartame and cyclamates were due solely or primarily to what was happening to the prices of those ingredients. For example, consumers' perceptions of the safety of the two ingredients will obviously influence their relative sales.

This is not to say that it is unlikely that there is competition, broadly conceived, between aspartame and cyclamates. The critical question for present purposes is the extent to which this broad competition limits the ability of aspartame producers to raise prices. The information on which the measurement of cross-elasticity is based is simply too inadequate for the measurement to be useful in this regard. Finally, the fact that sales of aspartame for table-top use represent a very small percentage of total sales of aspartame means that the extent to which aspartame is in direct or indirect competition in this area has a correspondingly small effect on changes in profitability resulting from price changes.

---

[12] Supplementary expert affidavit of J. Fry, Schedule 24, Table 2 (Exhibit R-13-G).

The most potent source of competition for aspartame is likely to be from new high-intensity sweeteners. It is, however, difficult to weigh the potential competitive impact of a product that has not yet been approved for any use in any jurisdiction and will undoubtedly take a number of years to be brought into full-scale production after it is approved. The same comment applies to the possible legalization of cyclamates in the United States. While cyclamates are regarded as a good blended sweetener for soft drinks, whether they will be allowed for this purpose and will be an ingredient that beverage producers choose to use is unknown.

The best way of judging the extent to which the price of aspartame is constrained by sweeteners currently on the market, and those that are anticipated to be introduced, is to compare the price of aspartame in jurisdictions where the only competition comes from these other sweeteners to the price in jurisdictions where there is at least the possibility of competing aspartame suppliers. The former is the case in the United States where the use patent has been extended; the latter is the case in Canada. The average price of aspartame in the United States is more than 50 percent higher than it is in Canada. Alternative sweeteners do not provide sufficient competition to limit the market power of NSC in the United States.

In considering the competitive impact of alternative sweeteners it is also relevant to consider the decision of NSC to double, approximately, its production capacity. This decision has been taken in order to safeguard its market share once its United States use patent expires at the end of 1992. In weighing the risks posed by other sweeteners the decision was clearly taken to confront potential competition from other producers of aspartame by developing a highly efficient production capacity capable of meeting much of the future demand.

Conclusion as to the Product Market

To sum up, there is no evidence of direct competition between aspartame and caloric sweeteners and very weak evidence of indirect competition between diet and full-caloric products. There is, in comparison, some direct competition from other currently approved high-intensity sweeteners serving the diet market. None by itself, however, is a good substitute in large market segments, and there is also little indication that there is a serious threat from blends. We therefore would define the product market as being aspartame. It really matters little, however, whether the relevant product is defined as "aspartame" or "high-intensity sweeteners" so long as the limited extent to which other high-intensity sweeteners constrain aspartame prices is kept in mind. In Canada, aspartame is the only high-intensity sweetener allowed as a food additive.

Any competition in the table- top segment is likely to have very limited effect on overall prices. Therefore, the effect in Canada of competition from other high-intensity sweeteners must be indirect, flowing from foreign to Canadian aspartame prices. The critical question is the extent to which the Canadian market is insulated from the effects of competition, if any, elsewhere. The answer to this question lies in the definition of the geographic market.

III. THE GEOGRAPHIC MARKET

Given that there is no production of aspartame in Canada, from the point of view of source of manufacturers' supply Canada is necessarily part of a geographic market that extends beyond its borders. Since Canadian buyers are dependent on manufacturers in other countries, the further question arises as to whether Canada is a separate geographic market at the level of distribution.

The Director takes the position that the relevant geographic market for assessing the impact of the respondent's practices on competition in the sale of aspartame is Canada. He submits that this is supported by: price relationships in different geographic areas (in particular, as between Canada and the EEC); the separate treatment of Canada with respect to volume and price in multi-country contracts between NSC and Coke and Pepsi; and Canada's own regulatory scheme for admitting intense sweeteners as food additives, a scheme that leads to results different from those found in countries within the EEC. In the view of the Tribunal, the latter consideration is not very helpful in the delineation of geographic markets. It is true that more restrictive regulations regarding other high-intensity sweeteners are likely to increase the demand for aspartame and allow for higher prices. However, this consideration does not address the critical question required to be answered in defining geographic markets, namely, whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas.

The respondent's position is that the geographic market is worldwide (save for those countries where NSC still holds a use patent, presumably). It is based on the considerations that transportation costs are low, that there are no Canadian tariff or non-tariff barriers[13] and that, according to Professor Mathewson, an expert witness for the respondent, the minimal required infrastructure for distribution makes entry easy. Professor Mathewson

---

[13] The nominal tariff rates for aspartame are as follows: Most-Favoured-Nation Tariff, 12.5%; General Preferential Tariff, 8%; United States Tariff (as of 1 January 1990), 7.5%. See *Customs Tariff,* R.S.C. 1985, c. C-54, item 2924-29.00.10. Under the *Chemicals and Plastics Duties Reduction or Removal Order, 1988,* SOR/88-74, as am. SOR/88-340, SOR/89-327, SOR/90-383, aspartame comes into Canada free of duty until30 June 1991. On that date the exemption will likely be renewed for another year; an extension is apparently a routine matter.

concludes that as long as there are existing suppliers outside Canada they would quickly enter, directly or through others, should NSC attempt to raise Canadian prices.

Geographic market definition represents an attempt to determine the extent of the territory where there is competition and in which prices for a product tend toward uniformity. In most industries, the absence of governmental trade barriers and low transportation costs is enough to ensure that national boundaries do not create separate markets, particularly where there is easy entry into distribution. Under these circumstances one is usually justified in assuming that sellers (or even buyers) will move product from lower-priced areas to higher-priced areas so that attempts to charge higher prices in any region will be frustrated. This cannot, however, be taken for granted.

Any tendency towards equalization of aspartame prices 1s unlikely to result from arbitrage in a narrow sense, i.e. the physical movement of goods from lower-priced to higher-priced areas, since supply contracts for aspartame are country or region specific. To the extent equalization occurs, it is more likely to come from the negotiating position of multinationals who account for a large fraction of purchases. Even in companies that do not negotiate centrally, personnel in the different regions know the prices paid elsewhere.

On the supply side, HSC has an incentive to push its selling efforts in the region that offers the higher returns, thus tending to create downward pressure in the region with higher prices. Potential new entrants into distribution would have the same incentive. Professor Mathewson's conclusion on the ease of entry into distribution should be qualified by noting that the mere existence of the NutraSweet logo, its history and its use on the packaging of most of the major aspartame buyers is one of the conditions of entry faced by new distributors. Whether and to what extent the logo constitutes a barrier to entry need not be discussed here. The most important test of the operation of this and other factors in segregating the Canadian market from the rest of the world where there is competition (i.e. except for patent protected areas) is in the prices actually paid. The most complete price information in evidence is for Canada and Europe, particularly the EEC, and, in fact, these are the only two significant areas of aspartame consumption outside of the patent areas, the United States and Australia.

Conclusion as to the Geographic Market

The bottom line price of NSC, or the "net/net price" to use the term employed by NSC, is arrived at by applying a series of discounts that may be region or customer specific. NSC's average net/net prices in Europe were 10 percent higher than Canadian prices in 1987, the year that the use patents expired in Canada and in the United Kingdom (which had the largest sales of aspartame in Europe), 6 percent higher in 1988, and 13 percent lower in 1989.[14] Country-specific clauses in multi-country contracts along with these average price differences indicate that market conditions in Canada, which include the marketing practices of NSC, can and have produced prices that differ significantly from those in other regions of competition. In other words, it is reasonable to treat Canada as a separate geographic market for the purposes of evaluating the effects of NSC's marketing practices.

IV. ASPARTAME PRODUCTION: POTENTIAL ENTRANTS AND ENTRY CONDITIONS INTO MANUFACTURING

Aspartame is produced by combining (or "coupling") aspartic acid and phenylalanine. The former is available from a number of sources because it has uses other than in the production of aspartame. Phenylalanine,

[14] Exhibit D-3 (confidential).

on the other hand, is almost exclusively used as an input in aspartame and aspartame producers must integrate in one way or another into its production.

NSC has two plants for the production of aspartame, one in University Park, Illinois and the other in Augusta, Georgia. The former was opened in 1982 and employs a less capital intensive, but overall apparently more costly coupling technology, the "Z" process. The Augusta plant, started up in 1985, uses the "F" process that is based on technology developed by NSC's parent, Monsanto Company.[15] HSC uses the "Z" process, but it employs an enzymatic rather than a chemical process. Although having expertise in both processes, Ajinomoto apparently employs a third chemical process.

There are a number of steps in aspartame production. Each or several combined, depending on the technology, is the subject of patents held by different firms. Apart from NSC (through its licensing agreements with Ajinomoto) and Ajinomoto, no single firm holds patents covering all steps. Ajinomoto is the sole firm with patents covering crystallization, which comes near the end of the production process. Ajinomoto has, according to the evidence of HSC, launched suits in England and Holland against HSC

[15] The cost estimates provided by NutraSweet did not include a cost for the use of capital apart from depreciation. Allowing for the cost of capital would have a greater effect on the more capital intensive "F" process and tend to eliminate or reverse the cost difference that is estimated to exist without this cost component.

claiming patent infringement. A number of firms are known to hold patents covering one or more steps. Apart from the current large scale producers (NSC, Ajinomoto and HSC), only Mitsui Toatsu of Japan is known to hold a relatively full patent portfolio. It covers all production steps save for crystallization.

The Director takes the position that existing patent portfolios create a significant barrier to would-be entrants. He is also of the view that this barrier is reinforced by the economies of scale and sunk costs of aspartame production. The respondent's position with regard to patent portfolios is that it is in the interest of those holding unutilized technology to license their patents and the fact that <u>individual firms</u> do not have patents covering all processes does not create a barrier. The Tribunal accepts that it is not necessary to hold patents in order to produce aspartame; it is only necessary to have access to technology that does not violate patents held by others. Further, the fact that a patent is held does not indicate that the technology covered by the patent is low cost. The Tribunal is of the view that technology and proprietary technology protected by trade secrecy is an impediment to entry, but the available evidence is not sufficiently detailed to go beyond this mild conclusion. Potential entrants probably face a trade-off between investing in low cost technology and using available higher cost techniques. Firms contemplating large-scale entry through dedicated plants would almost certainly have to make investments in technology to assure that they could achieve competitive costs.

Dr. Fry and Professor Mathewson take the position that there are numerous potential entrants, represented by general fine chemical firms or former aspartame producers, who can easily enter or re-enter the industry. Professor Mathewson summarizes Dr. Fry's evidence and its implications:

> James Fry lists the current producers of aspartame in the world, including their production capacities, as well as potential new producers of aspartame. Further, he details the costs and time lags for converting fine chemical plants to the production of aspartame or reconverting former aspartame facilities to produce aspartame again. In general, any conversion costs are low and the time lags are short....
>
> [Given low transportation costs and ease of entry into distribution in Canada], the competitive pressures of potential suppliers under these circumstances would seem to be substantial. The ease of entry into the production and distribution of aspartame implies that NSC must act competitively to survive.[16]

Dr. Fry and Professor Mathewson stress the length of time it would take a fine chemical producer to convert to aspartame production. Their analysis does not take account of the fact that fine chemical producers must have a source of phenylalanine and this requires investment in the production of this input directly or through a contractual commitment. Mr. Minarich, Vice-President of Operations and Technology for NSC, stated that it should be

[16] Expert affidavit of F. Mathewson at paras 31-32 (Exhibit R-20-C) [footnotes omitted].

possible to purchase phenylalanine. The price range he suggested is well above NSC's cost of producing this ingredient. The evidence of Dr. Fry and of Professor Mathewson also avoids the key question regarding relative costs of producing aspartame in dedicated and general purpose plants. The uncontested evidence of Mr. Vermijs, General Manager of HSC, is that it is considerably more expensive to produce in general purpose plants which would presumably be the type used by fine chemical firms to commence aspartame production.

A tolling agreement between NSC and Hexcel, a fine chemical producer, does not support the view that such producers can easily enter the industry. Under this agreement Hexcel is to manufacture aspartame for NSC. The apparently more costly "Z" coupling technology is to be employed, presumably because it requires equipment that the toll producer, for the most part, has on hand. The price to be paid to Hexcel may not reflect its production costs since NSC will be supplying the know-how, essential raw materials and some equipment. Furthermore, the other alternatives open to Hexcel are not known. The returns that it could earn from producing other fine chemicals would determine what it would demand from NSC. A restrictive covenant in the contract prevents Hexcel from producing aspartame for a five-year period following the termination of its supply agreement with NSC.

Dr. Fry cited a number of firms that have produced aspartame at one time, are currently producing it, or have expressed an interest in producing it. The latter evidence is too inconclusive with respect to potential competition to be meaningful (or useful). The information regarding former or current producers is summarized below. The scale of the plants is based on the evidence of Dr. Fry[17] but the evidence of other witnesses has been taken into account in establishing their status where his evidence was not definite or was contradicted. The first six firms are European, the two following Japanese, and the last two Korean.

FIRMS	**SCALE (tonnes/yr)**	**STATUS**
Laboratoires Bottu	50	Produced in mid-1980s
Isochem	70	Not producing
Farmitalia (currently Antibioticus)	1000	Will produce under contract
Farchemia	100	Not producing
Pierrel	630	Last produced m 1985 or 1986
Orgamol	25	Produced in mid-1986

[17] Expert affidavit of J. Fry at 1-1 to 1-7 (Exhibit R-13-E).

Mitsui Toatsu	15	Laboratory or pilot plant[18]
Tosoh	25	Pilot plant
Cheil Sugar	25	Not producing
Green Cross	125	Recently stopped producing[19]

Although a number of firms have produced aspartame, very little is known about the cost at which they could do so if they chose to re- enter into production. The European firms discontinued production in the mid-1980s when the price of aspartame was two to three times higher than its current price outside the United States. In almost all cases such production occurred (or is occurring) in pilot or general purpose plants.

The opportunity cost, and thus the willingness to begin producing aspartame, of existing fine chemical producers obviously depends on the returns that they can earn by producing other fine chemicals. Even though it is appreciably more expensive to produce in a general purpose fine chemical plant than one dedicated to the production of aspartame (and phenylalanine) when the cost comparison is made for plants constructed *de novo*, fine chemical producers might nevertheless have costs more comparable to dedicated producers when

[18] Dr. Fry cites Mitsui Toatsu as having a pilot plant but according to the evidence of Mr. Vermijs it is not clear whether this company is at the laboratory or pilot plant stage.

[19] Dr. Fry does not state whether Green Cross is currently producing. The evidence of Mr. Kuipers, Marketing Manager of HSC, is that it is not.

there are anticipated depressed conditions in the fine chemical industry.

Pierrel, Farmitalia and Green Cross appear to have been the most serious entrants. Pierrel produced out of a general purpose facility. It supplied NSC for a time when NSC had inadequate capacity to satisfy demand. Pierrel also tried to sell on its own account. It reportedly discontinued production with large, unsold inventories. Pierrel, like the other firms that left the industry, faced formidable difficulties because the volume of sales possible outside of the areas covered by NSC's use patent was very small.

Farmitalia supplied NSC during the period 1982-85. It will be supplying NSC under a tolling agreement during part of 1990-91. It has equipment for all of the production steps and will be employing its own technology. NSC will be supplying the two basic raw materials. The high price to be received by Farmitalia under the agreement does not support the view that its potential entry would provide a constraint on the pricing of existing producers. In any event, Farmitalia is excluded, as is Hexcel, from producing aspartame for five years following the expiration of its supply agreement.

Little is in evidence regarding Green Cross other than that it recently discontinued production and that it was not considered to be a useful toll producer by NSC.

Based on its patent portfolio, Mitsui Toatsu appears to be a potential entrant. Dr. Fry states that it has a pilot plant but according to Mr. Vermijs it may not yet be at that stage. In any event, it takes about two years to construct a full-scale aspartame plant and then several months to overcome production problems. Since there is no evidence that Mitsui Toatsu has embarked on construction it is at least that far away from entry. If it does not have a pilot plant its entry would be delayed by a further two years or so, based on the experience of HSC.

Access to technology is a necessary first step for entry. However, even a firm with comparable technology to that used by existing firms may find entry conditions difficult, particularly prior to the expiration of the United States use patent at the end of 1992. According to the evidence of Mr. Minarich, there are economies of scale for a plant with a capacity of up to more than one-third of current world output. This is consistent with the evidence submitted by Mr. Vermijs that a decline in capital equipment requirements per unit as scale increases is a common feature in the chemical industry; that is, the cost of vessels and pipes increases less quickly than their capacity. The new 2100-tonne plant that is being constructed in Augusta falls short of Mr. Minarich's estimate of minimum efficient scale, but it nevertheless represents more than a quarter of world output and more than the total sales outside the United States. Thus, a firm that hopes to achieve cost parity with NSC must achieve a large market share. Such large scale entry entails significant risks since, according to the evidence of Mr. Vermijs, much of the investment in a dedicated aspartame plant is sunk: its value is much less in alternative uses. Another difficulty for would-be entrants is the existence of a marked learning curve in phenylalanine and aspartame production. Even a large, fully utilized plant may not provide costs comparable to those of NSC's present costs until the entrant has accumulated production experience.

Conclusion as to Entry Barriers

The Tribunal is satisfied that there are very serious barriers to the entry of new manufacturers of aspartame other than NSC. Entry is difficult because would-be entrants who hope to attain production costs comparable to those of NSC face barriers in the form of the patent portfolios of existing producers, significant economies of scale relative to existing world demand for aspartame and sunk costs that increase the risks of entry. Moreover, even for firms that have the necessary technology in place and the experience of pilot plant production behind them, there is a minimum two year lag before they can begin large-scale production.

V. SECTION 79

The Director alleges that NSC is engaging (and has been engaging since the expiry of its Canadian use patent) in the practice of a number of anti-competitive acts resulting in the likely substantial lessening of competition. The elements that must be met under section 79, quoted below, are found in paragraphs (a), (b) and (c) of subsection (1).

> 79. (1) Where, on application by the Director, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

1. "Control"

Paragraph (l)(a) requires that:

> one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.

This first element raises a question regarding the meaning to be attributed to "control" in "substantially or completely control".

The Director submits that the ordinary dictionary definition of "control" should be applied:

> To exercise restraint or direction upon the free action of; to dominate, command.[20]

In the view of the Director, "control" is control over supply, which can be evaluated by looking to NSC's share of worldwide capacity and share of Canadian sales, or alternatively to the fact that it holds exclusive contracts covering over 90 percent of Canadian sales.

---

[20] Written argument of the Director at 17.

The respondent's view is that "control" is most meaningfully treated as synonymous with "market power". Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period. While this is a valid conceptual approach, it is not one that can readily be applied; one must ordinarily look to indicators of market power such as market share and entry barriers. The specific factors that need to be considered in evaluating control or market power will vary from case to case.

The Tribunal is persuaded that the respondent's position is in keeping with the logic of the section and the Act. This finding is of little practical import because, ultimately, all relevant indicators of market power must be considered in determining whether there is likely to be a prevention or lessening of competition substantially. Furthermore, it is difficult to see how any definition of control, including the dictionary definition, could exclude a consideration of conditions of entry. The structure of the section does, however, raise a question regarding how far it is necessary to go into the evidence on control since it may include an examination of the alleged anti-competitive acts and their effects. If all of the evidence is taken up here then the three principal elements in paragraphs (a), (b) and (c) of subsection 79(1) may become melded in the evaluation of the first element. This is pervasive in competition law because the relevant factors in the different statutory elements are rarely distinct and it is impossible not to draw on common factors whenever required.

In the alternative argument of the Director, if control is defined to mean "market power" or "monopoly power", the evidence supports the conclusion that NSC has control by reason of its very large share of sales and capacity and the existence of barriers to entry into the intense sweetener market. The latter are set out as:

> (a) process patent barriers associated with producing aspartame; (b) significant sunk costs required to produce aspartame efficiently; (c) the Respondent's contractual practices, which preclude marginal entry and therefore increase the scale of and the costs associated with initial entry; (d) marketing practices of the Respondent which require competitors to engage in similar, expensive marketing in order to compete; and (e) delays associated with regulatory approval and subsequent consumer acceptance of any new intense sweetener. In addition, the most logical potential entrant into the market, Ajinomoto, has been expressly precluded by contract with the Respondent from entering the market.[21]

Earlier discussions of entry conditions into manufacturing and the product market cover the Director's points (a), (b) and (e), while (c) and (d) relate to allegations regarding NSC's conduct. Certain terms of NSC's contract with Ajinomoto are also considered by the Director to constitute an anti-competitive act on the part of NSC. For immediate purposes, the relevance of Ajinomoto's

[21] Confidential written argument of the Director at 21.

relationship with NSC is that virtually their total combined capacity is under the control of NSC.

The respondent's first submission regarding control is that declining prices and increased output since 1987 are evidence that NSC does not have market power. It is difficult to draw this conclusion from the evidence, particularly when it is considered along with the allegation that NSC is engaging in the anti-competitive act of pricing below its cost. What the evidence does show, and this is quite obvious in any event, is that what, if any, market power NSC currently possesses is much less than it held prior to the expiration of its Canadian use patent.

The respondent's key submission concerns the ability of Coke and Pepsi, as very large buyers, to protect their interests and to counteract any power NSC might have. Their strong bargaining power is stated to reside in the fact that they control sufficient volume to be able, if need be, to set up a rival producer to satisfy their demand. Their position is further strengthened, it is submitted, by the existence of NSC's sunk costs that make it highly vulnerable to such a threatened course of action. The respondent's submission is incomplete because it fails to consider that significant sunk costs, particularly when accompanied by extensive economies of scale, also affect the position of Coke and Pepsi as would-be entrants. As a result of this omission the respondent has greatly exaggerated the ability of Coke or Pepsi to enter the industry. Above all, this argument ignores the negative consequences that such entry could have on the relative position of the entrant vis-a-vis its major rival and other producers of diet carbonated beverages. Assuming that either firm could find a producer capable of producing at an acceptable cost level, the effect of sufficiently large scale entry to meet the needs of either Coke or Pepsi would be the creation of significant excess capacity. This would tend to place downward pressure on aspartame prices, and this would redound to the benefit of the firm that did not integrate backwards without cost to it. Meanwhile the soft drink firm that did enter, through long-term contract or ownership, would be locked into a situation that could very well result in higher input costs than those faced by its competitors.

There is no doubt that Coke and Pepsi are extremely important customers to NSC and that it must carefully weigh their likely response to any course it adopts. It is clear that the reverse is also true. Coke and Pepsi will still be critically dependent on NSC even after the United States use patent expires, since they will still have to rely on NSC for significant volumes of a highly important ingredient. They must each also consider how the other will react. For example, the risk to them in terms of lost sales if both remove the NutraSweet logo from their containers[22] is lower than if one of them does so alone, as would be the case if either of them did decide to enter the aspartame business. The history of the adoption of the NutraSweet logo by Coke is instructive in this regard. When aspartame was approved for use in carbonated soft drinks in the United States in 1983, Coke initially chose to use a mixture of aspartame and saccharin and Pepsi opted to use aspartame alone and to display the NutraSweet logo on its containers. Within months Coke had followed.

While Coke and Pepsi have considerable resources to protect their interests, the Tribunal is not persuaded that this consideration eliminates NSC's market power. This is particularly so while the United States use patent is in force and contractual negotiations regarding Canada are affected by it. Whatever conclusions may be reached regarding the nature and the effect of the allegedly anti-competitive contractual terms,[23] it cannot be concluded that NSC lacked market power while these were being negotiated.

---

[22] Under their contracts with NSC, both Coke and Pepsi have agreed to display the NutraSweet brand name and "swirl" logo on their diet product packages in return for a significant price discount on the aspartame they buy.

[23] Exclusivity and the related contract terms are discussed *infra* at 64ff.

The respondent also submits that NSC does not have market power because of the existence of other competitors and potential competitors. With respect to smaller competitors, the respondent submits that at the price Mr. Minarich stated that phenylalanine could be purchased (on two or three months notice), these firms might be able to achieve cost levels below the current prices in Canada. Although the evidence does not permit a conclusion regarding exact cost levels of general purpose fine chemical producers, it could possibly support the respondent's conclusion. As noted in the discussion of entry conditions, much depends on the returns that could be earned if the facilities were used to produce other products. In any event, it cannot be concluded that a comparison of <u>production costs</u> and <u>prices</u> alone means that NSC does not possess market power because of potential entry; there are other costs associated with distributing the product about which there is no evidence apart from the costs of NSC, which occupies a unique market position.

The evidence that NSC possesses appreciable market power given its market share (over 95 percent of sales in Canada), entry conditions and the constraints operating on its largest customers is sufficiently compelling so that the boundaries of <u>substantial</u> need not be explored. Its "control" is clearly substantial. Nor is it necessary to consider here the effect of the alleged anti-competitive acts on entry into distribution and indirectly into manufacturing.

2. <u>"Class or Species of Business"</u>

In the Director's view, the "class or species of business" referred to in paragraph 79(1)(a) should be interpreted in a "commercial" sense rather than in the economic sense of a product market, and when a commercial interpretation is applied the class or species of business is the manufacture and supply of aspartame. The Tribunal concurs with the opposing view of the respondent that "class or species of business" IS synonymous with the relevant product market. This interpretation IS consistent with the Tribunal's view that the meaning of "control" is market power since this concept can only meaningfully be related to a product market. Nothing hangs on the distinction in the instant case since the Tribunal considers the relevant product in Canada to be aspartame.

The Director cites *Eddy Match Co. v. R.*[24] in support of his point of view. This case was brought under the *Combines Investigation Act*,[25] a predecessor to the *Competition Act*. Section 32 provided that anyone who was a party to or

---

[24] (1953), 109 C.C.C. 1 (Que. Q.B., AS.).

[25] R.S.C. 1927, c. 26, s. 32, 2.

knowingly assisted in the formation or operation of a combine was guilty of a criminal offence. "Combine" was defined in subsection 2(1) to include:

> a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, ...

Paragraph 2(4)(b) further specified that "merger, trust or monopoly" could mean:

> one or more persons ... who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada <u>the class or species of</u> <u>business</u> in which he is or they are engaged, ... (emphasis added)

The underlined phrase contains the same wording as paragraph 79(1)(a).

Eddy Match Co. ("Eddy") was charged with operating a combine, namely a merger, trust or monopoly, which controlled the business of manufacturing and distributing wooden matches. Eddy and related companies had pursued an aggressive course of conduct towards and subsequent acquisition of, any new entrants into wooden match production. In identifying wooden matches as the relevant "class or species of business" the court did not consider it necessary to take into account other means of producing a flame as possible substitutes. The court recognized that "lighting devices" was a general class which could contain many types of business but held that "class or species of business" meant wooden matches since that was the only business of Eddy and the matches were distinct from the other lighting devices.

Based on the facts in *Eddy Match Co.* and the different legislative schemes of the *Combines Investigation Act* and the *Competition Act*, the Tribunal does not believe that this case provides a sound basis for identifying "class or species of business" without referring to possible substitutes. The court in that case was seized with charges under a criminal statute, a case in which the accused had engaged in highly aggressive conduct towards other producers of wooden matches; Eddy certainly acted as though wooden matches were sufficiently distinct so that it was worthwhile for it to concentrate its efforts on that industry. In the present statute, however, section 79 provides other remedies and the deciding body is a specialized tribunal. It would run contrary to the spirit of this legislation for the Tribunal to eschew other relevant factors (i.e. possible substitutes) on some presumed technical ground.

Furthermore, the Director recognizes that the product market must be considered at some point in subsection 79(1). In his view, the appropriate place to do so IS m paragraph 79(1)(c) m reference to the substantial lessening of competition m "a market", which requires the identification of both the product and geographic dimensions. In the view of the Tribunal, the logic of the section is better followed if the product market is precisely identified in connection with the question of "control" rather than being partially dealt with under paragraph 79(1)(a) and then revisited m paragraph 79(1)(c).

3. <u>Practice of Anti-Competitive Acts</u>

There are two elements that must be determined in paragraph 79(1)(b), namely whether there is a "practice" and whether there are "anti-competitive acts". Nine anti-competitive acts are set out in section 78:

> 78. For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:
>
> (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
> (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
> (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

> (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor; (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
> (f) buying up of products to prevent the erosion of existing price levels;
> (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
> (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
> (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

This list of anti-competitive acts is clearly not meant to be exhaustive and the respondent admits that other conduct not specifically mentioned in section 78 can constitute an anti-competitive act. A number of the acts share common features but, as recognized by the Director and the respondent, only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.

The term "practice" is mentioned at a number of points in the Act, but it is undefined. This question was addressed by the Director but not by the respondent. The Director submits that the interpretation of "practice" adopted in an Ontario decision on resale price maintenance is an appropriate one. The trial judge found, and was affirmed by the Court of Appeal in *R. v. William E. Coutts* Co.,[26] that conduct with respect to the sale of greeting cards over a week constituted a "practice". The trial judge stated: "I believe the word is used in the section in the sense that it denotes a distinction from an isolated act or acts.[27] The Director also submits that different anti-competitive acts may be considered together, as well as repeated instances of one act, to determine whether there is a "practice".

In considering the meaning of "practice" the Tribunal is mindful of an important difference between resale price maintenance and conduct covered under section 79. The former is a criminal offence (with limited defences) whereas section 79 provides a civil remedy with a number of interrelated elements that must be satisfied before the remedy can be granted. If there is a good reason to avoid a limiting interpretation of "practice" under criminal law, it is all the more important to do so under section 79. The anti-competitive acts covered in section 78 run a wide gamut. Some almost certainly entail a course of conduct over a period of time, such as freight equalization in paragraph 78(c), whereas others consist of discrete acts, such as the setting of product specifications in paragraph 78(g). The interpretation of "practice" must

---

[26] [1968] 1 O.R. 549.

[27] *Ibid.* at 555.

be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the Tribunal is of the view that a practice may exist where there is more than an "isolated act or acts." For the same reasons, the Tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice. It is important to stress, however, that this does not in any way relieve the Director of the burden of establishing an anti-competitive purpose for each of the acts.

The Director identifies eight anti-competitive acts allegedly practiced by the respondent. With the exception of "anti-competitive pricing", none of them is specifically related to the anti-competitive acts set out in section 78. Four of the alleged anti-competitive acts relate to the terms of NSC's supply contracts and are part of a supposed attempt by NSC to induce the majority of Canadian aspartame buyers to deal exclusively in its product. These are best treated together. (A conclusion as to whether they constitute separate acts or are terms of contracts with a common theme is reserved until later.) Before discussing this area, the allegations of "abuse of governmental reporting" and "contractual exclusion of potential competitors" are taken up. "Anti-competitive pricing" and "use of U.S. patent to foreclose competition" are considered last.

The determination of an anti-competitive act, and particularly its purpose component, is a difficult task. The Director submits that evidence of subjective intent (through verbal or written statements of personnel of the respondent) or a consideration of the act itself (the premise that a corporation can be taken to intend the necessary and foreseeable consequences of its acts) can be used to establish purpose. The Tribunal finds nothing objectionable in these submissions. In most situations, of course, the purpose of a particular act will have to be inferred from the circumstances surrounding it.

(a) Abuse of Governmental Reporting Requirements

The Director submits that the fact that NSC showed a loss in its Canadian income tax returns for 1986-88 constitutes an anti-competitive act given its strong market position and the reasonable expectation that it should have been profitable. The Director's reasoning is that since NSC does not pay Canadian taxes on its Canadian operations, and will not have to do so for the foreseeable future because of its accumulated losses, it is provided with a competitive advantage vis-a-vis existing and potential competition. The respondent denies that NSC is avoiding taxes overall; if it is saving taxes in Canada, it is paying additional taxes in the United States as a result.

The Director also alleges that since there is no clear explanation for NSC's method of fixing the value of imported aspartame as shown on customs declaration forms, this too constitutes an anti-competitive act. He argues that NSC is avoiding the costs (admittedly very small) of accurately filling out the required forms. There is no duty or other monies payable by NSC associated with the import of aspartame and thus there is no financial implication associated with the accuracy of the returns.

In the v1ew of the Tribunal, this allegation fails since the Director does not even attempt to demonstrate an anti-competitive purpose associated with these alleged abuses of governmental reporting requirements.[28]

(b) Contractual Exclusion of Potential Competitors

The Director alleges that the exclusion of Ajinomoto from Canada as an independent supplier of aspartame pursuant to an agreement

[28] Teitelbaum J. makes this further observation: With regard to the reporting by NSC of a financial loss in its Canadian operation on its Government of Canada corporate income tax returns for the 1986-1988 taxation years, information which NSC solemnly declared to be the truth, and although the Director has been unable to demonstrate an anti-competitive purpose to this reporting, I would comment that senior executive representatives of NSC, including its President, testified under oath that NSC made a profit from its Canadian operations. It thus becomes obvious that by "creative accounting" NSC is able to avoid paying to the Government of Canada income taxes on the profits made by NSC in Canada. It is no excuse to state, as a representative of NSC did, that NSC would pay income taxes on its Canadian profits to the Government of the United States and would thus not avoid paying income tax on these profits.

between Ajinomoto and NSC constitutes an anti-competitive act. The written agreement has not been filed in evidence, but there is testimony from NSC witnesses that Ajinomoto has agreed not to sell in Canada (and the United States) through 1995. The respondent submits that the decision of Ajinomoto not to sell in Canada is not an anti-competitive act but part of an overall agreement that is efficiency enhancing. However, this submission is unsupported by any references to technical or economic complementarities arising from the Ajinomoto/NSC relationship.

Ajinomoto was selected as a supplier by NSC in the early 1970s (if not before) due to its expertise in areas allied to aspartame production. Until recently, Ajinomoto could not function as an independent supplier since NSC's use patents covered most of the world. The evidence shows that NSC relies on Ajinomoto for a small part of its own supply, all of the supply for the joint venture with Ajinomoto in Europe (NutraSweet AG), and for patented and proprietary technology for which it pays a royalty. Ajinomoto is free to sell in Japan for its own account.

Company documents[29] contain information indicating that NSC made large investments in the Ajinomoto plant in the early 1980s. According to the oral

[29] Exhibit VIII-29 (confidential): NSC 1989 Long Range Plan, table entitled "Capital Expenditure Trends".

evidence, the price paid by NSC to Ajinomoto for aspartame in the early and mid-1980s was set at a level designed to allow Ajinomoto rapidly to recover its capital. In later years the price had to cover primarily variable costs. A similar approach is to be used for output from a planned expansion of Ajinomoto facilities. Whether NSC will be providing capital as well for this additional capacity is not in evidence.

On its face, what is known about the arrangement suggests that NSC has ensured that it will not have to confront Ajinomoto as a competitor in the near future. Apart from the licensing of Ajinomoto technology, which is highly likely to be desirable from an efficiency standpoint, it is difficult to perceive any efficiency enhancing or pro-competitive elements in the relationship. Rather, the contrary appears to be true: the two leading producers, each with formidable, if somewhat different, strengths have in effect agreed not to compete.

The critical question is whether the agreement is an anti-competitive act under section 78. In the Director's view, the fact that NSC, given its market position, has an arrangement with Ajinomoto that excludes Ajinomoto from selling in Canada qualifies the arrangement as such. In the Tribunal's view, this by itself is not sufficient. A consistent pattern in the anti-competitive acts cited in section 78 (save for that in paragraph (f)) is that the competitor of the dominant firm is a target not a fellow actor. While the Tribunal is reluctant to conclude that all horizontal arrangements are excluded from sections 78 and 79, we do not believe that we have been provided with adequate justification for including the NSC/Ajinomoto arrangement (insofar as it affects Canada) as an anti-competitive act under section 78.

(c) Contract Terms Associated with Exclusivity

The Director alleges that the respondent's use of the contractual terms described below constitutes a practice of anti-competitive acts.

(i) Exclusive supply clauses require that the customer purchase all of its aspartame requirements from NSC. Exclusive use clauses require that the customer use aspartame produced by the respondent as the sole or primary sweetener in some or all of the customer's products. A common formulation of these clauses is:

> X agrees to use NutraSweet brand aspartame as the sole (or primary) intense sweetening ingredient in its [list of products by name] [diet and sugar-free products] produced in Canada during the duration of this agreement and further agrees to purchase all of its requirements of NutraSweet brand aspartame from NSC.

A reference herein simply to "exclusivity" includes both types of clause. The two are slightly repetitive since NutraSweet brand aspartame cannot normally be purchased from anyone other than NSC. The result of such clauses is that the customer agrees to purchase only NutraSweet brand aspartame for all of its non-caloric sweetener requirements or for all of those requirements for a particular product line.

(ii) The trademark display allowance or logo display allowance provides a substantial discount from the gross price of the aspartame to the customer. In return, the customer must display the NutraSweet name and logo on its packaging and in print and television advertising featuring the product containing NutraSweet brand aspartame. The allowance is fixed at $X/lb calculated on the total number of pounds of aspartame the customer buys, not on the number of uses made of the trade mark. NSC dictates what has to appear on the packaging (the "NutraSweet/NutraSuc" brand name and the swirl logo) and in what colours and sizes.

Cooperative marketing allowances provide a further discount to the customer in the form of a per pound payment by NSC for support of marketing programs promoting customer products containing only NutraSweet brand aspartame. The payment is calculated on the basis of the total amount of aspartame purchased and must be applied towards NSC-approved advertising ventures. The approval process is apparently relatively informal, consisting of mutual ongoing discussions or endorsement after the fact. One witness for a customer said that making sure the NutraSweet name and logo were in the advertisement was all that was necessary. This is in fact also dictated by the terms of the standard trademark display allowance.

(iii) In some contracts, a meet-or-release clause gives NSC the option to meet a lower price offered to its customer or to release the customer to purchase from the other supplier; and a most-favoured-nation clause ensures that the price to a particular customer is the lowest price paid by any customer for an equivalent volume of aspartame. Payment from NSC under a most-favoured-nation clause is made by cheque to the particular customer at year-end, without any further explanation.

The first two items, (i) and (ii), clearly constitute a practice since they appear in virtually every one of the respondent's supply contracts. Since the Coke and Pepsi contracts contain the two clauses in (iii) and they cover a large volume of sales over several years, the Director submits that the inclusion of these clauses constitutes a practice. This viewpoint is not disputed by the respondent and the Tribunal agrees with the Director on this point.

Exclusivity as such is not mentioned among the anti-competitive acts m section 78, but in this case it is wholly consistent with them. Exclusivity and the contract terms related to it stem from NSC's "branded ingredient strategy". The idea of identifying and promoting an ingredient such as aspartame is apparently unique to NSC. Buyers of ingredients to be used in their products tend to be highly informed; they are generally interested in the properties of the ingredient they buy and not in its image. Normally the ultimate consumers are only marginally aware, if at all, of particular ingredients in the product they consume. The NSC branded ingredient strategy was implemented soon after the FDA gave approval for the use of aspartame in carbonated soft drinks in the United States. There is no evidence that NSC ever made the use of the NutraSweet name and logo a condition of supply; rather NSC made the use of the name and logo attractive to customers through the offer of discounts for its display and for joint advertising. However, as long as NSC was, through its patent monopoly, the sole supplier of aspartame, the distinction between inducing the use of the name and logo through price reductions and requiring it as a condition of supply was largely a semantic one since NSC could arrange its prices so that customers had little effective choice. The branded ingredient strategy becomes a matter of exclusivity wherever the use patent expires and customers have at least the legal opportunity of buying from other suppliers.

As stressed in the evidence of Professor Mathewson, there is widespread exclusivity in the economy and there are numerous examples where exclusivity in distribution is required to bring forth the necessary effort for the efficient distribution of the product or service. Exclusivity can clearly be the outcome of competitive markets.

According to internal documents, NSC believes that the branded ingredient strategy is necessary to prevent price from falling to the level of marginal costs of production, which tends to occur with other chemicals that are sold as commodities. The internal documents also stress what is referred to as a "sole supplier strategy", that NSC should endeavour to capture and to keep as much of the market as possible for NutraSweet brand aspartame.[30] On the basis of this evidence and the fact that the strategy was introduced when the use patent was in force and customers did not have a choice of suppliers and marketing approaches, the Tribunal is persuaded that the strategy has been and is pursued for the purpose of excluding future or existing competition and not because it is

[30] Section 69 of the *Competition Act* provides that company documents stand as *prima facie* proof that the respondent had knowledge of their contents and that they were created with its authority. The Tribunal's conclusions on the purpose of the branded ingredient strategy are drawn from the Strategic Plan 1984-88 of the NutraSweet Group (developed in 1983 for Searle management) and NSC's Long Range Plans (1986 and 1989), prepared by Mr. Shapiro, President, for presentation to the Executive Management Committee of Monsanto Co. (Exhibits V-20, VIII-29, VIII-31)(confidential). It is not disputed that these documents accurately reflect NSC corporate policy; it is only disputed that the implications of such a policy are anti- competitive.

required for efficient distribution or use of the product.

NSC witnesses stated that the purpose of promoting NutraSweet brand aspartame was to dispel consumers' concerns regarding the safety of aspartame -- concerns that were to be expected given the adverse publicity associated with high-intensity sweeteners such as cyclamates and saccharin. In fact, NSC does not promote aspartame, but rather its own name and mark. According to surveys conducted on behalf of NSC, at least some consumers believe that the presence of NutraSweet brand aspartame in products is a positive thing. However, the fact that consumers react positively to the NutraSweet brand is an outcome for which any company engaging in extensive promotion of its product hopes and does not affect the Tribunal's conclusions regarding NSC's purpose in pursuing exclusivity.

The logo display and cooperative marketing allowances create a strong inducement for the logo's use. Any customer who wants to buy from NSC is virtually compelled to use the logo on any packaging containing NutraSweet aspartame, given that the price inducement is of the order of 40 percent when both logo display and promotion allowances are considered, with the discount for logo display comprising by far the major part. The amount of the logo display allowance is not, as far as anything in evidence shows, in any way related to the value to NSC of the exposure obtained when its logo is displayed on one customer's packaging as compared to another's. A recent increase in the amount of this allowance was explained by Mr. Rosa, Group Vice-President and General Manager of the Sweetener Group of NSC, as being NSC's preferred form of price reduction.

The logo and advertising discounts create an "all-or-nothing" choice for customers. In the event that customers decide that they would prefer not to use the logo for a particular product line or not to commit themselves to use it on all of that line, they are forced to purchase all their supply from another supplier because it is too expensive to buy from NSC without the logo and advertising discounts. This means that new suppliers must become sufficiently established so that potential customers are willing to entrust all of their needs for a product line to the new supplier.

Although NSC is obviously interested in promoting its name and mark, exclusivity in its own right, rather than exposure of its product name, is clearly at play in the contracts with Coke and Pepsi. They receive logo display allowances for their diet drinks sold in large returnable bottles that do not bear NutraSweet brand identifiers; the trademark is represented only in tiny lettering on the bottle cap. The allowance is also paid for their diet fountain products which do not carry the logo at all.

Therefore, it is clear that the logo display and promotion allowances are essentially inducements to exclusivity.

The Director objects to the meet-or-release clause, as does Tosoh, on the grounds that it gives NSC an advantage over its competitors. When invoked by a customer, the clause provides NSC with information on competitors' offers. To retain the customer's business (or the part on which the customer received a competing bid), NSC need only match the offer. According to Tosoh, competitors are discouraged from making offers if they know that such offers will only be used as a bargaining chip with NSC. According to Professor Thompson, appearing for the Director, meet-or- release clauses are sometimes regarded by economists as an information exchange device among competing firms. In the instant case, it is his view that the clauses serve as entry-deterring devices that reinforce the anti-competitive effects of exclusivity.

In the view of the Tribunal the meet-or-release clause is there at the behest of the largest customers, Coke and Pepsi, who had entered into long-term exclusive contracts. The clause was seen as a way of mitigating the effects of being locked in by an exclusive contract. If exclusive supply is objectionable in the instant case, so is a meet-or-release clause: by making exclusivity more acceptable to customers it serves as an inducement for customers to enter into exclusive arrangements. There is also no reason to conclude that the clause mitigates the entry-barring effects created by exclusivity. Competitors are discouraged from submitting bids since they know that NSC will be given the opportunity of meeting any price that they submit. In the event that competing bids are submitted, NSC is in a position to ensure that it keeps the business.

The Director's submission regarding the most-favoured-nation clause is that it is an inducement to exclusive dealing because it assures customers that they will not be treated worse than their competitors. The Director submits, correctly in the Tribunal's view, that only a firm with a very large market share can be expected by its customers to provide a most- favoured-nation clause because only it will almost certainly be selling to the customers' competitors. The Tribunal would observe that to the extent that large buyers can exert pressure on their suppliers and thus enhance competition, they are more likely to do so if (unlike the present case) they are assured that they alone will benefit from the pressure they exert and that competitors will not similarly benefit from their efforts. Thus, like the meet- or-release clause, the most-favoured-nation clause does not mitigate the objectionability of exclusive supply.

The Director submits that each of these contract terms associated with exclusive supply should be considered a separate anti-competitive act. In support, he cites case law from the United States relating to exclusive dealing, and case law from the European Commission concerned with "fidelity rebates" similar to the logo display and cooperative marketing allowances, and decisions from the same body relating to meet-or-release clauses. The Tribunal sees little purpose in the context of the present case in determining whether each clause constitutes an anti-competitive act. It is doubtful whether the meet-or-release and most-favoured-nation clauses would exist in the absence of an explicit or implicit exclusive supply agreement. In the Tribunal's view, the issue is whether the agreements requiring exclusive supply, and all the contract terms related to it, have an exclusionary purpose. The Tribunal is persuaded that this is the case.

(d) Selling Below Cost: Relevant Cost Standard

The Director alleges that NSC is engaging m the anti-competitive act described in paragraph 78(i) of "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor." The Director submits alternative interpretations or sources of cost information for "acquisition cost" in the instant case. The respondent submits, correctly in the Tribunal's view, that acquisition cost does not easily lend itself to manufacturing situations. In fact, the language of the paragraph suggests that Parliament intended this paragraph to be applied to distribution, i.e. to situations where articles are purchased for resale. Since NSC buys product from Ajinomoto, there is a purchase and resale by NSC. The respondent's submission with respect to these purchases, that acquisition cost is restricted to the cost of the articles and not to the cost of distributing them, is consistent with the language of the paragraph; that is, only the price paid to Ajinomoto, and not the marketing and distribution costs of the Canadian operations, conforms to acquisition cost. Under this interpretation, NSC's prices exceeded its acquisition costs by a comfortable margin.

The respondent also submits that if paragraph 78(i) is to be applied to the aspartame manufactured by it then only the cost of manufacturing the product conforms to the meaning of acquisition cost, and other costs, such as marketing and distribution, are excluded. There is no reason, however, for applying paragraph 78(i) to manufacturing situations where there is not a purchase and resale of articles. Therefore, paragraph 78(i) does not apply with respect to NSC's manufacturing and other costs and the Director's allegation that NSC has been selling below acquisition cost fails.

Some considerable time was spent before the Tribunal in argument as to whether, apart from the allegation of selling below acquisition costs, NSC is guilty of an anti-competitive act through some other form of predatory pricing not specified in section 78. The Tribunal is satisfied that the term "anti-competitive act" in section 78 is broad enough to cover other predatory pricing. We will not deal with this question extensively, however.

First, in spite of an exhaustive review of the evidence we find it less than compelling as to whether there has been pricing below cost by NSC. The Director did not present a consistent or coherent case as to the proper measurement of cost for this purpose. While the correct definition of "cost" here is highly debatable, we accept for present purposes the view of Areeda and Turner[31] that marginal cost (that is, the added cost of producing an additional unit) ("MC") is an appropriate standard. We also agree with them that, because MC is so difficult to determine, a proxy for it is normally average variable cost ("AVC"), that is the average cost per unit of all production taking into account only the cost components that vary with output. It flows from this, however, that AVC is only a valid proxy for MC when a firm is producing below capacity. Areeda and Turner, following common usage by economists, define "capacity" with reference to the output level that corresponds to the point where the average

[31] P. Areeda & D.F. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 Harv. L. Rev. 697, reprinted in (1980) 10 J. Reprints for Antitrust L. & Econ. 1.

total cost per unit of production ("ATC") is a minimum.[32] MC is equal to ATC at this point and therefore ATC rather than AVC is obviously the better proxy for MC for a firm producing at capacity. Capacity in this sense need not correspond to any notion of a physical limit to output since firms can often increase output by more intensively utilizing existing facilities. Doing this will cause MC to rise above ATC.

In the instant case NSC operates its plants 24 hours per day, seven days per week, with an annual shutdown of several weeks for maintenance. In the absence of further information we have adopted "capacity" to be equal to this physical limit, which also probably closely approximates the low point of ATC. Thus when at capacity, NSC can increase output only by investing in additional plant and equipment rather than by utilizing existing facilities more intensively.

It is not clear whether the plants are operated so intensively for technical reasons or because it is (and was) cheaper to do so taking into account existing and anticipated increases in sales. Given that the plants apparently have been operated at their physical limits for some time, a judgment as to whether NSC has been operating at capacity, in the sense of straining to satisfy its

[32] *Ibid.* at 710.

level of sales, requires an examination of output and sales or inventory levels. This evidence, along with NSC's investment and purchasing decisions, leaves no doubt that NSC has been and will be fully utilizing its existing capacity to meet its sales. Under these circumstances MC is most closely approximated by ATC, that is all costs including the costs of capital. Identifying a precise date when capacity was reached is not possible, but according to the evidence of Mr. Balbirer, Vice-President of Finance and Planning for NSC, the supply situation of NSC became "very tight" towards the end of 1988. It appears to us that prior to this period, NSC was operating at less than capacity so that the appropriate test of cost would have been AVC. It also appears that during that period its prices were above AVC.

Even if NSC was pricing below cost after 1988, it is highly unlikely that NSC would be able to recoup from Canadian consumers the foregone profits resulting from below-cost pricing. There is, however, evidence that NSC would have a strong commercial motive to sell below cost, outside the United States, having regard to its desire to discourage entry into international markets now so as to preserve its own giant American market when the patent expires there in 1992. However, from the evidence available we can draw only tentative conclusions as to the relationship between prices and ATC, the relevant cost standard for a firm at capacity, after 1988.

Finally, even if we reached a conclusion against NSC in this respect, the Director in his pleadings did not ask for any remedy concerning prices other than that they be forbidden to fall below "acquisition cost", a concept we have found to be irrelevant to this case. Therefore a specific finding on selling below cost is not required in respect of any potential remedy.

(e) <u>Use of United States Patent to Foreclose Competition</u>

The final anti-competitive act alleged by the Director is that NSC has used its United States use patent in three different ways to gain a competitive advantage in Canada.

First, the existence of the patent is stated to have been instrumental in causing Coke and Pepsi to agree to exclusive supply contracts outside of the United States. This matter has already been considered in other contexts and in the view of the Tribunal the evidence does not support a finding that it constitutes or is part of a separate anti-competitive act.

The second way that the patent is stated to have been used anti-competitively is as an instrument for financing below-cost pricing in Canada. The argument that the patent provided NSC with a "deep pocket" is part of the allegation that NSC was and is pricing below cost in Canada, but in the view of the Tribunal this argument does not advance the allegation.

The third way that the patent was allegedly used involved U.F.L. Foods Inc. ("UFL"). UFL is a Canadian co-packer for Nutri/System; it supplies various low calorie dishes or formulations that are marketed by Nutri/System. UFL had had a supply agreement with Tosoh for the purchase of aspartame used in these products. NSC approached Nutri/System and succeeded in obtaining its cooperation by offering it a number of incentives if it would require its co-packer, UFL, to purchase its aspartame from NSC. One of the benefits consisted of a rebate on all products containing NSC aspartame imported by Nutri/System from co-packers in the United States, equal to the difference between the NSC's United States and Canadian prices times the amount of aspartame contained in the imports.

There are several aspects to this rebate which lead to the conclusion that the United States patent is being used to exclude competition, and in a most heavy-handed fashion. It is virtually impossible for HSC or any other competitor to meet NSC's offer, short of providing customers with a blank cheque. Competitors cannot know how much the rebates on a customer's United States imports will amount to. The large difference between the price in the United States and Canada and the effect that rebating this amount has on the net/net price is evidence that NSC is willing to price without regard to its cost in order to prevent the expansion of HSC. NSC would not have any way of knowing how costly its offer might be.

This is a form of dumping in that NSC can in effect export its product at a price below that charged in the United States, without any risk to its domestic price which is protected by its exclusive patent rights.

The Tribunal accepts the Director's submission that the use of a monopoly position (created by the United States patent) to obtain a competitive advantage for a dominant firm in another market is an anti-competitive act.

4. <u>Preventing or Lessening Competition Substantially in a Market</u>

The final element that must be satisfied for an order to issue is that the practice of anti-competitive acts has or is likely to have "the effect of preventing or lessening competition substantially in a market." For reasons that have been previously addressed, the market in question is the sale and purchase of aspartame in Canada.

The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC has market power. In essence, the question to be decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC's market power.

The issue with respect to the contract terms associated with exclusivity and the use of the United States patent as leverage in competing for Canadian customers is the degree to which these anti-competitive acts add to the entry barriers into the Canadian market and, additionally therefore, into the industry.

The arguments of the Director and the respondent can be summed up as follows. The Director submits that the NSC supply contracts and their terms tie up a very large percentage of the market and prevent small scale or "toe-hold entry" and that the proof lies in the very limited inroads into NSC's market share by HSC and would-be entrants. The respondent submits that: the supply terms are not particularly restrictive; HSC's failure to make more rapid progress is due to growing pains which are now being overcome; NSC's large market share is due to superior economic performance; and, finally, the presence of large buyers who are able to create supply options for themselves is a guarantee that they will not accept supply contracts that injure their (and their consumers') interests.

The HSC plant was originally scheduled for completion in November 1987, but it did not get into production until mid-1988, and it did not achieve its rated capacity until the end of 1989. Prior to output being available from its plants, HSC relied on the limited output from the Tosoh pilot plant and the accumulated inventories from that operation. As a result of having to rely on output from the pilot plant, Tosoh ran into some difficulties in providing consistent samples for product testing and this delayed the acceptance of its product by some buyers. There were, however, no difficulties with acceptance by most prospective customers and, in particular, there were none with those in the carbonated soft drink industry which accounts for 84 percent of aspartame purchases. But the delay in getting the plant into full production could have caused a more general credibility problem that contributed to HSC's difficulty in attracting customers. The importance of this consideration is greatly diluted by the fact that, as its Canadian patent expired, NSC entered into exclusive contracts running, for the most part, to the end of 1988. Even upon expiry of those contracts, the customer/supplier relationship entrenched by the contract terms (discussed further below) dictated that a new supplier would have to be able to meet all of a customer's requirements, or at least those for a product line;

the customers did not have the option of placing small orders with suppliers as a way of trying them and contributing to their survival. Thus, to the extent that HSC may have had a credibility problem at the end of 1988, it cannot be separated from the effect of NSC's practices.

Success or failure for an entrant into aspartame sales hinges on its ability to obtain business from Coke or Pepsi. Both companies had entered into worldwide exclusive contracts in 1986. There was a possible opening for an entrant due to the meet-or-release clauses in those contracts.

In response to overtures from HSC/Tosoh both Coke and Pepsi asked for bids for all of their 1989 requirements. HSC/Tosoh refused on the stated ground that it did not have sufficient free capacity to meet all the needs of both companies and it wanted to deal with both in the same way. It submitted a bid covering a substantial volume but much less than that requested. The respondent submits that in so doing HSC/Tosoh was the author of its lack of success in obtaining any volume from Coke or Pepsi. We agree with Tosoh's view that it was being used by Coke and Pepsi to obtain a better price from NSC and that there was little chance that either of them was seriously considering giving all of its Canadian business to Tosoh. The fact that neither Coke nor Pepsi had conducted consumer surveys to determine the effect of removing the NutraSweet name and logo from its packages (upon changing aspartame supplier) is very strong evidence of this. It is highly unlikely that either would take such an important step without testing likely consumer reaction. This conclusion is strongly supported by the impression left by the witnesses representing the two companies in the proceedings. As potential markets for which HSC can compete, these two companies are more restricted in their decisions on sourcing aspartame than a smaller buyer that can easily have its total requirements met by HSC. Their strategic position is also much affected by their rivalry.

The Tribunal is convinced that the exclusivity in NSC's contracts, which includes both the clauses reflecting agreement to deal only or primarily in NutraSweet brand aspartame and the financial inducements to do so, impedes "toehold entry" into the market and inhibits the expansion of other firms in the market. Since exclusive use and supply clauses appear in virtually all of NSC's 1989 contracts, and thus cover over 90 percent of the Canadian market for aspartame, it is clear that during the currency of those contracts there is little room for entry by a new supplier.

It is true that these contracts are generally only one year in duration. Theoretically, therefore, the bulk of the market is only tied up for a year at the most and then a new supplier would have the same chance as NSC of bidding for and winning the supply contracts that have expired.

There are, however, significant differences m such circumstances m the position of a new supplier and that of NSC.

There is the question of the logo unit that appears on the packaging of those customers using NutraSweet brand aspartame who also receive the logo display allowance (in 1989, all of them). If a customer switched suppliers or sourced with two suppliers, the logo unit would have to be removed from its packaging. (The practicality of sourcing from different suppliers by product or product line and thus leaving the NutraSweet logo unit on some packages and not others will be dealt with below.) If changes to advertising are involved and must be put in on short notice, then there are additional costs. There was no evidence that any customer considered the costs of removing the logo to be prohibitive to a change in aspartame supplier, although it would certainly be a factor in the decision. In the cases of Cadbury-Schweppes and Stafford Foods, who did switch to Tosoh aspartame and thus removed the logo from some or all of their packaging, Tosoh contributed to the costs of changing over.

More important than the physical or advertising costs of removing the logo is the uncertainty expressed by customers, particularly the soft drink franchisers, as to the effect of the removal, both on consumers and on their position relative to their competitors. Although Cadbury-Schweppes has removed the logo from certain canned diet products sold in Ontario and

Quebec, namely Schweppes Diet Ginger Ale and Diet Tonic Water, and buys its aspartame for those products from Tosoh, Mr. Matthews, Managing Director at Cadbury Beverages Canada Ltd., indicated that before his company would give more business to Tosoh, entailing the removal of the logo unit from other products, it would want to see one of the major cola brands (i.e. Coke or Pepsi) stop using the swirl. Cadbury-Schweppes has no concrete information that the logo is significant to consumers and is not aware of any direct negative effects resulting from the limited removal already undertaken. There is, however, obviously considerable uncertainty as to whether the logo *might* have some value and, as Mr. Matthews put it, Cadbury-Schweppes is not willing to risk putting itself at a competitive disadvantage vis-a-vis the major cola companies by taking it off all packaging.

Even Coke and Pepsi themselves expressed similar reluctance to take a chance in removing the logo. Neither has conducted market research into how their consumers feel about the logo although both Mr. Eames, President of Coca-Cola Ltd. (the Canadian subsidiary), and Ms. Price, Manager of Package Marketing for Pepsi-Cola Co., believed that there was some NSC-conducted research that appeared to indicate that diet consumers may feel that the logo indicates a safer product. Mr. Eames stated that the issue of having the logo or not is "pretty tough now it has been on for several years".[33]

[33] Confidential transcript at 622 (25 January 1990).

Before recommending that his company take the logo off its products, Mr. Eames would want to be very comfortable that there would be no negative impact from a consumer perspective. He said that putting the logo on is "primarily a function of price; taking it off would be more than that ... ".[34] Coke does in fact sell its products without the logo in certain EEC countries. Pepsi also has some products in the EEC which do not carry the logo but Ms. Price admitted that Pepsi had been concerned that NSC and Coke would take a strong marketing position in support of a Coke brand containing NutraSweet brand aspartame and against the Pepsi products without it and that Pepsi management thoroughly canvassed this issue before the decision was taken to launch those products. The major cola companies may be ambivalent about the consumer reaction to the logo; they are certainly very apprehensive about taking a chance on removing it that a rival has not taken.

The cost of removing the logo and customers' concerns about a possible negative impact on sales from removal would be present even if all NSC contract clauses relating to exclusivity were removed. Nevertheless, the effect of the logo on entry conditions is relevant in evaluating whether exclusivity and the inducements thereto have the effect of substantially lessening competition.

[34] *Ibid.* at 626.

Past exclusivity has contributed to the present importance of the logo. More importantly, the starting position as well as the change in market power resulting from a practice need to be considered in evaluating its effects.

Furthermore, the attitude of customers to sourcing from two different aspartame suppliers, thus allowing a smaller supplier to enter the market and gain a track record, is significant. Most of the buyers have an internal policy of using two suppliers for key ingredients, if possible. With respect to aspartame the only practical way to source from two suppliers, given the NSC pricing structure, seems to be to split sources by product line or (for soft drink makers) by package type (e.g. fountain drinks or returnable bottles). In this manner, the logo can be retained on the packaging for products containing NutraSweet brand aspartame and the logo display and cooperative allowances will still apply to that line of product or packaging. If these rebates are not available because all of the aspartame is mixed together, then the higher price on the NSC-sourced component makes the overall price too high. Sourcing from two suppliers means maintaining two inventories and keeping all the aspartame totally separate. In addition, it is not practical for all customers to split off product lines in this manner. Crush, for example, promoted all of its products jointly since none of them generated enough sales on its own to justify independent promotion and thus could not advertise separately those lines containing NSC aspartame. Wrigley's has only one sugar-free brand of chewing gum ("Extra") as does Adams Brands ("Trident").

The Director further submits that the failure of two particular Canadian distributors of food additives and other ingredients to make any headway in attracting aspartame customers is due to the exclusionary tactics of NSC. In one case the distributor represented Lark and Pierrel (Italy) and in the other Mitsui Toatsu (Japan). The evidence of aspartame buyers is that they were not interested in purchasing from distributors who did not represent manufacturers with ongoing production. This evidence illustrates that in the presence of NSC's branded ingredient strategy, it is difficult to see any potential for "hit and run" entry of fine chemical producers into aspartame production. It is also true that NSC's price was falling rapidly. This was not mentioned as a consideration by buyers, but it obviously affected the potential profitability of the distributors.

The respondent, through its expert witness Professor Mathewson, submits that exclusivity is necessary for NSC to make the investments to meet customers' needs. A similar submission is that overall inventory costs are lower under exclusivity than they would be if each customer had to look after its own needs, as per-unit inventory costs are less when inventories are centrally managed (by NSC) . This line of reasoning, it should be noted, is not an "efficiency defence". It leads, rather, to the conclusion that customers are, on balance, better off as a result of exclusivity and that they pass these cost savings on to consumers. Under exclusivity customers are able to negotiate a band of minimum and maximum purchases. Without it, the customers would presumably have to commit to a specific volume and would have to hold inventories to satisfy higher-than-anticipated demand, or would have to make higher-than-required purchases in the event that requirements were less than anticipated. An executive of a major customer stated that the broad band negotiated by the customer in its exclusive contract does not mean that this is an important consideration; the customer is, in any event, quite capable of accurately forecasting demand for its product. Whatever the customer's abilities, the Tribunal does not see much merit in the respondent's line of reasoning. It can always be claimed that the risk and cost of holding plant and inventory are reduced if there is a single supplier rather than several. Unless it can be shown that an industry has special characteristics that make this claimed source of cost savings important, there is no reason to give it any weight.

The respondent also submits that exclusivity is necessary to protect NSC against "free riding". NSC bore all the costs of obtaining regulatory approvals and developing markets for aspartame and now other suppliers could reap the benefit of those investments. The Tribunal does not accept that NSC is entitled to any more protection against competition than it was able to obtain through patent grants that provided it with a considerable head start on potential competitors.

Conclusion on Section 79

The Tribunal therefore concludes that NSC substantially controls through its market power a class or species of business, namely the sale of aspartame in Canada.

Further, we conclude that NSC has engaged, and is engaging, in a practice of anti-competitive acts. There are several such acts, and they have been frequently repeated. They include the use in its supply contracts of exclusive supply and use clauses, logo display allowances, cooperative marketing allowances, meet-or-release clauses, and most-favoured-nation clauses. They also include the use of its United States patent to foreclose competition by a system of rebates on exports from the United States to induce Canadian importers to have only NSC aspartame used in products purchased by them in Canada.

We also conclude that these practices have had and are having the effect of preventing or lessening competition substantially.

VI. SECTION 77

1. Exclusive Dealing

Section 77(1) defines "exclusive dealing" as:

> (a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to
>
> (i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or
> (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and
>
> (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; ....

The Director submits that it can be proven that, as a condition of supplying aspartame to its Canadian customers, NSC required the customers to enter into exclusive contracts or, alternatively, that the various "fidelity rebates" (logo display allowance and cooperative marketing funds) in the contracts constitute inducements for a customer to deal exclusively in NutraSweet brand aspartame. These arguments are put forward to meet the requirements of paragraphs (a) and (b), respectively, of subsection 77(1).

In support of his first submission, the Director argues that the presence of an exclusivity clause in the supply contracts constitutes exclusive dealing since failure by a customer to comply with the exclusivity requirement would entitle NSC to suspend its performance under the contract, namely the supply of aspartame. This follows either because of a specific rescission clause in the contract or because the exclusivity clauses are essential to the contract. The Director also argues that a "condition" of supply is simply a term or provision of the supply contract and that, therefore, the mere inclusion of an exclusivity clause in a supply contract constitutes exclusive dealing.

The Director may be correct in his submission that the exclusivity clauses constitute a "condition" of the contract once the contract is entered into, in the sense that under contract law they must be complied with or certain results will flow, including the right to repudiate. But we are of the view that in considering an allegation of exclusive dealing it is the circumstances in which the particular terms of supply were agreed upon that are critical. The ordinary meaning of the words used in paragraph 77(1)(a) is that the supplier must have refused to supply the product unless the buyer agrees to the terms described in subparagraph 77(1)(a)(i) or (ii). The respondent submits that the evidence does not show any refusal to supply aspartame or threats of such refusal unless customers agreed to purchase exclusively from NSC. The Tribunal agrees that there is no evidence on the record that customers were refused or threatened with a refusal of aspartame supply if they did not enter into exclusive contracts with NSC. Several customers explicitly denied any coercion and admitted that the request for exclusivity originated with them. The Tribunal therefore accepts that there is no exclusive dealing in this case in the sense set out in paragraph 77(1)(a).

The Director then argues that the fidelity rebates constitute clear financial inducements to the customer both to deal only in the respondent's brand of aspartame and to refrain from using another producer's aspartame. The provision of rebates in the form of the logo display allowance and the cooperative marketing funds encourages customers to use only NutraSweet brand aspartame. In order to qualify for those discounts the logo must appear on the customer's packaging and in its television and print advertising.
Obviously, if the logo appears on the package or in the advertising, it follows that only NutraSweet brand aspartame may be used in the particular product or product line to which the packaging and the advertising belong. A customer would have to pay NSC substantially more for aspartame if he did not qualify himself for these rebates. In its written argument, the respondent concedes

that the set of circumstances surrounding these customer contracts

> probably does amount to an "inducement" of exclusivity by NutraSweet within the meaning of Section 77(1)(b), simply because a real benefit passes from NutraSweet to the customer in return for the commitment in the form of lower price or other better value.[35]

Therefore we conclude that the financial incentives and the exclusivity clause amount to exclusive dealing within the meaning of paragraph 77(1)(b): the customers clearly agreed to deal only or primarily in the products of NSC and in return received various rebates whose existence depends on exclusive use of NutraSweet brand aspartame. There are, however, other requirements to be met before an order can be made.

(a) "Practice"

The Director submits that the same definition of "practice" as holds for sections 78 and 79 should apply here (something other than an isolated act). The Tribunal accepts that this is an appropriate approach. The respondent does not dispute that a practice of exclusive dealing exists on these particular

[35] Written argument of NSC at 156.

facts in view of the number of contracts containing exclusive use and supply clauses.

(b) Other Requirements for Order

Once the existence of a practice of exclusive dealing is established, subsection 77(2) sets out the requirements for a Tribunal order to issue:

> 77. (2) Where, on application by the Director, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
>
> (a) impede entry into or expansion of a firm in the market,
> (b) impede introduction of a product into or expansion of sales of a product in the market, or
> (c) have any other exclusionary effect in the market,
>
> with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

In considering whether NSC is a "major supplier" of a "product" m a "market", the Tribunal adopts the definition of a "major supplier" established by the Restrictive Trade Practices Commission ("RTPC") in *Director of Investigation and Research v. Bombardier Ltd.:*

> A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells.[36]

In that case, which dealt with exclusive dealing in the snowmobile industry, the RTPC went on to state that a firm's market share is a good indicator of its importance, along with characteristics such as its financial strength and record as an innovator, and possibly other factors depending on the industry.

The relevant product and geographic market having been previously defined, it is not necessary to look beyond the respondent's extremely large market share and share of production capacity in order to conclude that NSC is a major supplier in the Canadian aspartame market. The respondent admits that if "major" denotes nothing more than quantitative sales share, then NSC is a major supplier. The respondent does not advance any other factors that might be taken into account that would affect this conclusion, and does not dispute, in any event, that the practice of exclusive dealing is widespread in Canada since virtually all customers buy pursuant to requirements contracts from either NSC or Tosoh.

---

[36] (1980), 53 C.P.R. (2d) 47 at 55.

There remains the further question of whether there has been a "substantial lessening of competition". Paragraphs (a), (b) and (c) of subsection 77(2) are most conveniently, and logically, considered as part of the overall question of whether the exclusive dealing results in a substantial lessening of competition in the market. These paragraphs provide clarification of *how* such an effect on competition would be achieved. This was the approach adopted in *Bombardier:*

> Whether exclusive dealing by a supplier impedes expansion or entry of competitors in the market is most easily and meaningfully considered as part of the determination of whether there is or is likely to be a substantial lessening of competition as a result of the practice.[37]

The effect on competition of exclusivity and the related contractual terms, specifically the logo display allowance and cooperative marketing funds, have been discussed thoroughly in the context of section 79. Since the fundamental test of substantial lessening of competition is the same in both sections of the Act, the same conclusions apply.[38]

The Director also argues that the exclusive dealing practices of the NSC will have an adverse effect on the introduction of a new intense sweetener.

---

[37] *Ibid.* at 56.

[38] See *supra* at 80ff.

Not only will regulatory approval have to be obtained, he submits, but a new producer will have to await the expiry of the contracts of the major users of intense sweeteners. We are not convinced that the effects on the introduction of new sweeteners would be significant and, in the light of our other conclusions it is not necessary to consider this further.

2. Tied Selling

Subsection 77(1) also defines tied selling. For the purposes of the section, "tied selling" means:

> (a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to
> (i) acquire any other product from the supplier or the supplier's nominee, or
> (ii) refrain from using or distributing in conjunction with the tying product another product that is not of a brand or manufacture designated by the supplier or the nominee, and
> (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms if the customer agrees to meet the condition set out in either of those subparagraphs.

The Director submits that the respondent's trademark constitutes a tying product. He argues that, as a condition of supplying the trademark (the NutraSweet brand name and logo) to a customer, the respondent requires that the customer purchase another of its products, namely aspartame, and refrain from using the aspartame of any other producer in conjunction with the trademark. He further argues that the respondent also offers to supply the trademark on more favourable terms, through the logo display allowance, if the customer purchases aspartame from NSC and does not use any other aspartame with the trademark.

The Tribunal recognizes that, in appropriate circumstances, a trademark might be the subject of a tying arrangement. It is not, however, convinced by the Director's argument that such is the case on the facts before it. In fact, the Director's argument on this point has not been consistent. As pointed out by the respondent, in his notice of application the Director alleged that the tying product was NutraSweet brand aspartame; in his written argument the trademark itself is alleged to be the tying product. Further, it is not clear that the Director seeks any additional remedy in this respect beyond those designed to deal more generally with exclusivity practices. In fact, the Director recognised that the respondent's proprietary rights in its trademark should not be interfered with. Therefore we are making no finding with respect to tied selling.

Conclusion on Section 77

The Tribunal therefore concludes that NSC has induced exclusive dealing with its aspartame customers through its financial incentives or fidelity rebates, and its exclusivity clauses. These inducements amount to a practice. NSC is a major supplier and this exclusive dealing has lessened, and is likely to lessen, competition substantially.

VII. REMEDIES

Having reached the above conclusions as to the applicability of sections 79 and 77 to this situation, the Tribunal is authorised by subsections 79(1) and 77(2) to make orders prohibiting the respondent from engaging in the practices complained of and found to have been committed. It is also authorised by subsections 79(2) and 77(2) to make orders to overcome the effect of such practices as may have already occurred.

In formulating an appropriate order the Tribunal is of the view that it must confine itself essentially to the kind of orders requested by the Director in his original application with such modifications as may fairly be considered to have been in issue in the case. While other possible remedies were discussed during argument, no amendment was sought to the application in this respect.

It is a matter of fairness that the respondent not now be faced with a remedy of which it had no formal notice. Further, although Tosoh suggested various other remedies, it is not a party and cannot define the issues including that of the remedies being sought.

This means that the Tribunal must confine itself to the consideration of the remedies applied for by the Director whose particulars are set out at pages 28 to 31 of his Notice of application, filed on June 1, 1989.

As already noted, this means that we cannot make any order as to selling below cost, as those particulars only request a prohibition against sale below acquisition cost, a concept we have found to be irrelevant. It also means that we cannot make an order specifically addressed to the kind of rebates that NSC offered to UFL to compensate it for the difference between the United States and Canadian prices, even though we found this to be an anti-competitive act.

We have been asked in effect to declare various contracts, some of them not even made in Canada, to be invalid in whole or in part. Some questions have been raised in the pleadings as to our jurisdiction to make such declarations. Without addressing that issue, we find it preferable to confine ourselves to certain directions to the respondent both with respect to enforcing certain terms of existing contracts or entering into such terms in the future.

Apart from these considerations we will also confine our order to terms which we believe will be relatively certain and enforceable.

We will therefore issue an order prohibiting NSC from enforcing, or entering into, certain terms of contracts for the supply of aspartame to Canadian customers: terms which require the purchaser to purchase or use only NSC aspartame; terms which provide financial inducements to purchase NSC aspartame through trademark display, advertising, or similar allowances; meet-or-release terms; and most-favoured- nation clauses, unless such clauses are also inserted in supply contracts between the respondent and any competitor of that Canadian customer.

VIII. CONSTITUTIONAL VALIDITY OF THE TRIBUNAL

1. The Issues

After the Tribunal had heard all the evidence in the present case, but before final argument had been presented, Philippon J. of the Superior Court of

Quebec rendered a decision in the case of *Alex Couture Inc.* c. *P*.G. *Canada.*[39] In that decision he concluded that major sections of the *Competition Act* are constitutionally invalid and he also found the Competition Tribunal to be invalidly constituted. His reasons may perhaps be adequately summarized in the following paragraph from his decision:

> A notre avis, le Parlement n'a pas la compétence d'accorder les pouvoirs que la Loi accorde au Tribunal de la concurrence, l'assimilant à une cour supérieure d'archives avec taus les pouvoirs d'une véritable cour, sans accorder à ce tribunal les attributs essentiels d'indépendance.[40]

An unofficial translation has rendered this paragraph as follows:

> In our opinion, Parliament does not have jurisdiction to grant the powers which the Act confers on the Competition Tribunal, treating it like a superior court of record with all the powers of a true court, without giving the Tribunal the characteristics essential to independence.

As a result of this decision, counsel for the respondent, NSC, m the present case requested and obtained, on April 26, 1990, leave to amend its response in order to challenge the constitutionality of the Tribunal. As a result the following paragraph was added to its response:

---

[39] (6 April 1990), Quebec 200-05-001361-877. This decision has been appealed to the Quebec Court of Appeal.

[40] *Ibid.* at 86.

> 25a. The Respondent says that the Competition Tribunal is constituted pursuant to the *Competition Tribunal Act* in a manner contrary to the *Constitution Act, 1982*, and the *Canadian Bill of Rights*, and is therefore without jurisdiction to adjudicate in this matter in that, although it is required to act judicially:
>
> (a) the legislative provisions providing for the appointment and removal of members of the Competition Tribunal other than Federal Court judges, pursuant to which appointments have purportedly been made, do not safeguard the independence and impartiality of the Tribunal; and
>
> (b) F. Roseman, a full-time, non-judicial member of the Tribunal, continues as a member of the Restrictive Trade Practices Commission under the Combines Investigation Act with statutory responsibilities that are inconsistent with constitutional requirements of neutrality, impartiality and independence that are necessary for the Competition Tribunal to act judicially.[41]

Consequently, an additional date was set aside in July 1990 for argument of the constitutional issue.

For convenience we will first set out the legislative provisions which give rise to this challenge. Subsections 5(2) and (3) of the *Competition Tribunal Act*[42] provide as follows:

> (2) Each lay member shall be appointed for a term not exceeding seven years and holds office during good behavior but may be removed by the Governor in Council for cause.

[41] Amended response of NSC.

[42] R.S.C. 1985 (2d Supp.), c. 19.

> (3) A member of the Tribunal, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term.

When the *Competition Act* was extensively amended and the Competition Tribunal was established, it was provided in the amending legislation as follows:

> 60(1) Notwithstanding any other provision of this Act, the members of the Restrictive Trade Practices Commission appointed under the *Combines Investigation Act* (in this section referred to as the "members" and the "Commission"), while this subsection is in force, continue in office as such and may exercise such of the powers and perform such of the duties and functions as were, before the coming into force of this Act, vested in them as such for the purpose only of completing any inquiry or other matter or proceeding commenced under the *Combines Investigation Act* or any other Act of Parliament before the coming into force of this section.
>
> (2) For the purposes of any inquiry or other matter or proceeding referred to in subsection (1), the *Combines Investigation Act* and any other Act of Parliament amended by this Act shall be read as if this Act has not come into force.
>
> (3) While the members continue in office in accordance with this section, they may, if so appointed, hold office as members of the Competition Tribunal, but any person who, pursuant to this subsection, holds more than one office is entitled to be remunerated only in respect of one of those offices.
>
> (4) The Governor in Council may, by proclamation, repeal subsection (1) when he is satisfied that the Commission no longer has any inquiry or other matter or proceeding referred to in subsection (1) before it and that the Commission has reported to the Minister of Consumer and Corporate Affairs in respect of all inquiries before it.[43]

---

[43] *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, R.S.C. 1985 (2d Supp.), c. 19.

The panel of the Tribunal hearing the present case is composed of two judicial members who are judges of the Federal Court- Trial Division, and one "lay member". The two judicial members, Strayer and Teitelbaum JJ., were appointed members of the Tribunal for a period of seven years effective June 30, 1986. The "lay member" is Dr. Frank Roseman who is presently serving under an appointment by the Governor in Council for a term of seven years commencing May 12, 1987.

The challenge to the validity of the Tribunal here is based on the presence of Dr. Roseman on the panel. The contention is that, as a matter of law, the Tribunal panel cannot be validly constituted because: (1) Dr. Roseman does not enjoy sufficient independence because he is appointed for a limited term of seven years but is eligible, under subsection 5(3) of the *Competition Tribunal Act*, for re-appointment should the Governor in Council so choose, and because he may be removed, according to subsection 5(2) of that Act, by the Governor in Council "for cause"; (2) Dr. Roseman is still a member of the Restrictive Trade Practices Commission ("RTPC") in accordance with the provisions of section 60 of the amending Act as quoted above and in that role has executive functions which are "institutionally inconsistent with a duty to act judicially".[44]

[44] Memorandum of constitutional argument of NSC at para. 43.

It must be emphasized at the outset that the respondent is not disputing the personal integrity, independence and impartiality of Dr. Roseman in fact. In its factum it states the following:

> The Respondent has complete confidence in the actual personal sense of independence, impartiality and neutrality of Dr. Roseman, just as it does with respect to the other members of the Tribunal. However, it is respectfully submitted, that is not the issue.[45]

It should also be noted that when the respondent first raised this issue before the Tribunal, Dr. Roseman stated for the record that he had had absolutely nothing to do with the work of the RTPC since becoming a member of the Tribunal. He offered to provide an affidavit to this effect but none was requested.

No issue has been raised as to the independence of the judicial members of the Tribunal. They have full independence as judges of the Federal Court. They are appointed for limited terms of up to seven years as members of the Tribunal. This involves only a portion of their time since work at the Tribunal is conducted in place of some Federal Court work and carries no additional remuneration. There is no provision for the removal of judicial members of the

---

[45] *Ibid.*

Tribunal before their terms as judicial members are completed, provided they continue as judges of the Federal Court.

The Tribunal accepts that it must deal with the constitutional issue to the extent that it is relevant to the hearing of this particular case by this particular panel. We are not in a position such as that of a judge of the Quebec Superior Court in the *Alex Couture Inc.* case to issue declarations as to the general validity or invalidity of legislation, but we must, in determining the law applicable to the case before us, have regard to all of the law including the law of the constitution. The determination of these questions of law must, in accordance with paragraph 12(1)(a) of the *Competition Tribunal Act,* be made by the two judicial members of the panel.

It is not suggested that the composition of the present panel in any way conflicts with legislation duly enacted by Parliament: indeed, it is clearly in accordance with the provisions of the *Competition Tribunal Act* and subsection 60(3) of the amending Act quoted above. Therefore the whole issue is a constitutional one. It involves a question of whether our constitution requires Parliament to provide some prescribed standard of independence for members of a tribunal such as this, such independence to involve some minimum security of tenure and a separation from the exercise of non-judicial functions.

To underline further the nature of the issues involved here, it must be emphasized that the legislation under attack is federal legislation dealing with a federal appointment to a federal tribunal. This has no direct relationship to the creation of provincial tribunals and the constraints which section 96 of the *Constitution Act, 1867*[46] has been held to impose on provincial legislation.

While a variety of alleged constitutional constraints on Parliament were suggested in argument, we believe they may be most conveniently grouped in two categories: implied constraints, and specific constraints arising out of the judicature provisions of the *Constitution Act, 1867* (sections 96-101).

2. Implied Constitutional Constraints

The essential argument made here is that the Competition Tribunal performs judicial functions and therefore the constitution implicitly requires that all members of the Tribunal must enjoy some degree of independence akin to that enjoyed by the traditional senior courts.

---

[46] (U.K.), 30 & 31 Viet., c. 3.

It is admitted that there is no express constitutional requirement precisely to this effect. While some reference was made to section 7 and paragraph 11(d) of the *Canadian Charter of Rights and Freedoms,*[41] counsel for the respondent conceded that these provisions do not apply to the situation. Section 7 in guaranteeing the right to "life, liberty and security of the person" and the right not to be deprived thereof "except in accordance with the principles of fundamental justice" does not apply: there is no life, liberty or security interest involved in these proceedings which relate to alleged anti-competitive practices by the respondent in the marketing of aspartame. Further, it is clear that as a corporation the respondent cannot invoke section 7.[48]

Paragraph 11(d) of the Charter, guaranteeing the right to a hearing by an "independent and impartial tribunal", only guarantees that right to a "person charged with an offence". The respondent is not charged with an offence in these proceedings.

The respondent has also made reference to paragraph 2(e) of the *Canadian Bill of Rights*[49] which requires that:

---

[47] Part I of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[48] *A.G. Quebec v. Irwin Toy Ltd.,* [1989] 1 S.C.R. 927 at 1003, 1004, 1009.

[49] S.C. 1960, c. 44.

> no law of Canada shall be construed or applied so as to
>
> …
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; ....

While this is not a constitutional requirement it does require us to interpret the *Competition Tribunal Act* so as not to deny the respondent a "fair hearing in accordance with the principles of fundamental justice". But unless that paragraph must be read to have abolished *per se* a multitude of federal tribunals exercising judicial and quasi-judicial power whose members are not given an independence akin to that of judges, which we do not accept, then it must be understood to permit an examination of the circumstances in each case as to whether fairness or natural justice is being denied. We will come back to this question later.

It was argued that even if the above provisions do not create a specific requirement binding on Parliament in this specific situation, they are but examples of a broader principle which is implicit in the constitution. This principle is also said to be, impliedly, part of the constitution of Canada because of the words of the preamble of the *Constitution Act, 1867,* which stated that Canada was to have "a constitution similar in principle to that of the United Kingdom." It is said that the independence of the judiciary is part of the constitution of the United Kingdom and therefore the Canadian constitution also requires that anyone who exercises judicial functions must enjoy the kind of independence accorded to judges of senior courts.

It might first be noted that this line of argument proceeds on an idealized view of separation of powers in the United Kingdom. The phrase "separation of powers" should, in relation to the United Kingdom constitution, be understood as descriptive rather than prescriptive. Even as a description it must be seen as a generalisation to which there are many exceptions. While it would not be productive to explore this question in detail, it might be observed, for example, that if Canada fully adopted the model of the constitution of the United Kingdom, the Chief Justice of Canada would, like the Lord Chancellor, be a member of the federal Cabinet and would preside in the Senate. Also, at the time of Confederation, when we inherited the principles of the United Kingdom constitution, the Master of the Rolls (the Chief Justice of the Court of Appeal) was still entitled to sit as a member of the House of Commons.[50]

Further, the United Kingdom constitution does not appear to require that judicial functions be confined to legally trained full-time judges with security of tenure. There are, for example, some 25,000 active justices of the peace in

[50] S. Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland, 1976) at 15.

England and Wales who try criminal cases and who can impose sentences of up to six months. They are mostly lay people who have no security of tenure and who serve part time.[51] Lay juries have long been a feature of both British and Canadian law. All that is required of these lay adjudicators is that they not be biased in the particular case before them. They are not constitutionally disqualified from performing judicial functions. It is also instructive to note that the constitution of the United Kingdom seemingly accommodates the existence of a tribunal similar in many respects to this Tribunal. The Restrictive Practices Court, which deals with issues of the nature before the Tribunal in this case, is composed of five superior court judges and up to ten lay members. The lay members serve for limited terms as fixed by Her Majesty on the recommendation of the Lord Chancellor and may be removed by the Lord Chancellor (himself a member of the government in power) "for inability or misbehaviour" or for conflict of interest. They are also eligible for re-appointment. Unlike this Tribunal, the Restrictive Practices Court is expressly made a "superior court of record".[52]

It must always be remembered that when the *Constitution Act, 1867* gave Canada a constitution "similar in principle to that of the United Kingdom" it

---

[51] SA. de Smith, *Constitutional and Administrative Law,* 5th ed. by H. Street & R. Brazier (Harmondsworth, Eng.: Penguin, 1985) at 369-70, 389.

[52] *Restrictive Practices Court Act 1976* (U.K.), 1976, c. 33, s. 1,3. *Restrictive Trade Practices Act 1976* (U.K.), 1976, c. 34.

also included the principle of parliamentary sovereignty which was to be subject only to such limitations as were imposed by other provisions of the constitution. Therefore any implied guarantees of separation of powers or independence of those exercising a judicial function must be weighed against the implied powers of Parliament to provide what it regards as the most effective means for adjudicating difficult economic and social issues.

The respondent instead argues that Parliament is precluded by the constitution from conferring any judicial functions on any person or body who or which does not enjoy the kind of individual and institutional independence typical of conventional courts. The terms of this alleged constitutional imperative, however, are drawn by counsel from cases involving the judges of conventional courts and involving other constitutional provisions.[53] They are of little help in defining the constitutional requirements of independence, if such there be, in relation to specialized tribunals such as the Competition Tribunal.

The Tribunal recognizes that most of its functions are of a judicial nature. In substance we determine facts on the basis of evidence and we apply pre-existing law to those facts to render binding decisions. Procedurally it is clear that we must respect the rules of natural justice and fairness in the

[53] *Valente v. R.,* [1985] 2 S.C.R. 673; *R. v. Beauregard*, [1986] 2 S.C.R. 56.

conduct of our hearings. But we are, as the Federal Court of Appeal has recently pointed out, "an inferior Court".[54] We do not have the implied powers of a superior court and we are subject to the supervision of a superior court.[55]

If there is any implied constitutional requirement, which we doubt, for Parliament to legislate certain safeguards of independence for such a tribunal, that implied requirement would surely be consonant with the common law requirements traditionally recognized in England and in Canada. These are probably well expressed in paragraph 2(e) of the *Canadian Bill of Rights,* also relied on by the respondent, which obliges us to interpret an Act of Parliament such as the *Competition Tribunal Act* as not depriving a person of the right "to a fair hearing in accordance with the principles of fundamental justice". Insofar as those principles of fundamental justice would require independence, they have probably been best summed up by de Grandpre J. in *The Committee for Justice and Liberty v. The National Energy Board:*

---

[54] *Chrysler Canada Ltd. v. Competition Tribunal,* (10 July 1990), A-135-90 at 4. This was the position taken by both counsel which the Court accepted.

[55] There is a right of appeal under section 13 of the *Competition Tribunal Act* from the Tribunal to the Federal Court of Appeal on any question of law and with leave on any question of fact; the Superior Court of Quebec has taken the position, apparently, that the Tribunal is also subject to the review powers of the superior courts of the provinces: see *Alex Couture Inc. c. P.G. Canada* (6 August 1987), Quebec 200-05-001361-877 (S.C.), granting a stay against the Tribunal, confirmed by the Court of Appeal in *P.G. Canada c. Alex Couture Inc.,* [1987] R.J.Q. 1971.

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through-- conclude. Would he think that is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."[56]

This test has subsequently been applied by the Federal Court of Appeal in at least two cases involving allegations of bias.[57] It will be noted that all of these decisions specifically involved the standard applicable to federal tribunals other than ordinary courts.

Using this test, we do not accept that because of the tenure and re-appointment provisions of the *Competition Tribunal Act* and the fact that Dr. Roseman is still a member of the RTPC, the presence of Dr. Roseman would create in a reasonable, informed person an apprehension of bias. This imaginary reasonable, informed person would take into account factors such as the following: that each member of the Tribunal, including lay members, must

---

[56] [1978] 1 S.C.R. 369 at 394. This test has been approved as a constitutional requirement in certain contexts; in *Valente v. R, supra* note 53 at 689, in respect of the requirement of an "independent and impartial tribunal" under paragraph 11(d) of the *Charter;* and by Mahoney J. in *Canadian Imperial Bank of Commerce v. Rifou,* [1986] 3 F.C. 486 at 493 (CA.), as a suggested implied constitutional requirement on Parliament in respect of the exercise of its authority to create courts under section 101 of the *Constitution Act, 1867.*

[57] *Sethi v. Minister of Employment and Immigration* (1988), 87 N.R. 389 at 393, 31 Admin L.R. 123 at 129-30 (F.CA.), leave to appeal denied (1988), 36 Admin L.R. xln (S.C.C.); *Mohammad v. Minister of Employment and Immigration* (1988), 91 N.R. 121 at 132 (F.CA.), leave to appeal denied (1989), 101 N.R. 157 (S.C.C.).

before commencing his duties take an oath that he will "duly and faithfully, and to the best of his skill and knowledge, execute the powers and trusts reposed in him as a member of the Tribunal";[58] that no member can take part in any matter before the Tribunal in which he has a direct or indirect financial interest;[59] that a lay member must be assigned to a particular case by the Chairman who is a judge of the Federal Court and who will, presumably, take into account any valid reason including that of possible bias for not assigning a particular lay member to a particular case; that every panel hearing a case is presided over by a judge of the Federal Court who will also, presumably, be conscious of any apparent bias in a lay member and halt proceedings where he feels such bias to exist;[60] that lay members do not participate in the decision of any question of pure law;[61] and that there is an appeal from the Tribunal to the Federal Court of Appeal as of right on any question of law or mixed law and fact, and with leave on any question of fact alone.[62] Surely a reasonable, informed person would see in these arrangements adequate protection against bias on the part of a given lay member.

---

[58] *Competition Tribunal Act*, s. 7(1).

[59] *Ibid.*, s. 10(3).

[60] *Ibid.*, s. 10(2).

[61] *Ibid.*, s. 12(1)(a).

[62] *Ibid.*, s. 13.

It is argued by the respondent, of course, that the conditions of tenure of lay members such as Dr. Roseman, given that they are appointed for a term not exceeding seven years and hold office "during good behavior but may be removed by the Governor in Council for cause", combined with the possibility of re-appointment, would make it appear to the reasonable observer that such members would decide for the Director of Investigation and Research and against a respondent in order to avoid dismissal or to create favour in hope of re-appointment. We do not accept that the right of dismissal "for cause" gives the Governor in Council the right to dismiss a member simply because he has decided a case or cases against the Director. In our view, the word "cause" must be interpreted as confined to a reason for removal involving the conduct of the member in relation to his ability to perform his duties properly, and the test of proper performance of his duties cannot depend on whether he decides in favour of the Director rather than a respondent. Instead it must depend on whether he performs his duties "duly and faithfully, and to the best of his skill and knowledge" as he has taken an oath to do.

If there is any ambiguity in the words "for cause" then we must interpret them in a way which is consistent with paragraph 2(e) of the *Canadian Bill of Rights,* as we are obliged to do by that section, and we should interpret them consistently with the alleged requirement of the constitution that such members be independent.[63] Further we respectfully concur with the view of the Federal Court of Appeal in the *Sethi* case[64] to the effect that the reasonable, informed observer should not be taken to assume that the government will favour a member of a tribunal who deals unfairly with a party before that tribunal. While it is true that a government officer, the Director of Investigation and Research, is typically a party before the Competition Tribunal, the Minister of Consumer and Corporate Affairs who nominates lay members of the Tribunal has a broader responsibility to ensure that the *Competition Tribunal Act* and the *Competition Act* are administered in accordance with the law, and the law requires a fair hearing for parties before the Tribunal including a lack of bias on the part of members of the Tribunal.

It is also in effect argued by the respondent that a reasonable, informed person would conclude that by the mere fact of his membership in the RTPC, Dr. Roseman cannot be seen to be an unbiased member of the Competition Tribunal. But this informed observer would also note that by the very words of section 60 of the amending Act, quoted above, which continued Dr. Roseman as a member of the Commission and enabled him to sit on the Tribunal at the same time, it would be impossible for a matter which had been commenced

---

[63] See *e.g. Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 at 1078.

[64] *Supra,* note 57 at 394.

before the Commission, in respect of which it is argued Dr. Roseman might have had some administrative involvement by his membership in the Commission, to come before the Tribunal. Therefore, he could not reasonably be seen to have an institutional bias in respect to any matter coming before the Competition Tribunal. If there were, as counsel hypothesized, a case before the Tribunal closely related to matters which had previously been before the Commission it would be time enough for Dr. Roseman to disqualify himself from that particular case or for the Chairman to refrain from assigning him to it. There is no suggestion that any such circumstance exists in respect of the present case with which we are dealing.

The other aspect of the argument that Dr. Roseman's membership in the RTPC constitutionally disqualifies him as a member of this Tribunal is really based on some imagined constitutional imperatives. That is, it is contended that if a person may be called upon in another role to exercise executive functions, he cannot legally exercise any judicial functions. We see no support in the law for such a rigid separation of powers, assuming there is no reasonable apprehension of bias in respect of a given case.

We therefore conclude that, even if the legislative provisions authorizing the membership of Dr. Roseman in the Tribunal must be tested against some constitutional standard appropriate for such tribunals, the relevant legislation meets that standard for the purposes of this case. It may well be that longer terms of appointment and clear safeguards as to security of tenure would, in the interest of good public administration, be desirable but we are not persuaded that there is an implied constitutional imperative which prevents Dr. Roseman from sitting on this panel in this case.

3. **Express Judicature Provisions of the *Constitution Act. 1867***

This aspect of the respondent's argument is to the effect that the Tribunal has been given "superior court functions" and that sections 96 to 100 of the *Constitution Act, 1867* preclude not only provincial legislatures but also the Parliament of Canada from conferring such functions on any body other than a superior court. In support of this argument the respondent relies essentially on jurisprudence concerning the constitutional limitations on provincial legislatures in respect of the creation of provincially-appointed bodies with powers analogous to those of superior, district and county courts. There are several reasons why this jurisprudence is of little help in determining the power of Parliament in respect of the creation of courts and tribunals.

It must first be observed that the limitation on provincial legislative powers in this respect has usually been tied to the provision in section 96 of the *Constitution Act, 1867* that the judges of superior, district and county courts are to be appointed by the Governor in Council. Impugned provincial legislation has, of course, provided for appointment by provincial authorities. In the present case, however, there is no such issue as the members of the Competition Tribunal are appointed by the Governor in Council and for that reason such appointments do not *per se* conflict with section 96.

The significance of section 96 has usually been seen in its keystone role in the distribution of powers -- both executive and legislative -- in respect of the constitution, maintenance, and staffing of the provincial courts. It was an essential part of the Confederation "deal", a compromise whereby provincial courts would administer all provincial laws and most federal laws. For this reason each level of government would have a role in the operation of those courts: the province through its legislative role under section 92, head 14 of the *Constitution Act, 1867,* Parliament through its role in assigning jurisdiction to such courts and in providing for the salaries of their judges, and the Governor in Council through his power of appointment of judges. It is this rationale which is referred to in *McEvoy v. A.G. New Brunswick,*[65] a case heavily relied upon by

[65] [1983] 1 S.C.R. 704.

the respondent. In a unanimous judgment, the Court stated:

> The traditional independence of English Superior Court judges has been raised to the level of a fundamental principle of our federal system by the *Constitution Act, 1867* and cannot have less importance and force in the administration of criminal law than in the case of civil matters. Under the Canadian constitution the Superior Courts are independent of both levels of government. The provinces constitute, maintain and organize the Superior Courts; the federal authority appoints the judges. The judicature sections of the *Constitution Act, 1867* guarantee the independence of the Superior Courts; they apply to Parliament as well as to the Provincial Legislatures.[66]

From the context it is obvious that this refers only to provincial superior courts, and that the "independence" being referred to is the lack of complete dependence on one level of government or the other which these courts enjoy.

It was also part of the Confederation "deal", however, that Parliament would retain the authority under section 101 of the *Constitution Act, 1867* to create other courts for the administration of federal law. That section provides:

> 101. The Parliament of Canada may, *notwithstanding anything in this Act,* from Time to Time provide for the

[66] *Ibid.* at 720.

> Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. (emphasis added)

It is fundamental to note that Parliament is given power to establish "additional courts for the better administration of the laws of Canada" and that this authority is conferred *"notwithstanding anything in this Act".* Of these words, Duff C.J. once said:

> Whatever is granted by the words of the section, read and applied as *prima facie* intended to endow Parliament with power to effect high political objects concerning the self-government of the Dominion ... in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely.[67]

These words were quoted with approval in the judgment of the Judicial Committee of the Privy Council on appea1.[68]

[67] *Reference Re Abolition of Appeals to the Privy Council,* [1940] S.C.R. 49 at 63-64, affd *(sub nom. A.G. Ontario v. A.G. Canada)* [1947] A.C. 127 (P.C.).

[68] *A.G. Ontario v. A.G. Canada, ibid.* at 152.

With all due respect to those of a different view[69] section 101 does not read "notwithstanding *some things* in this Act". Thus, whatever limitations flow from sections 96 to 100 of the *Constitution Act, 1867* with respect to the nature of tribunals which provincial legislatures can create, those limitations cannot apply to Parliament in the exercise of its overriding authority under section 101. Cases such as *McEvoy* are not relevant because there what was in issue was the hypothetical exercise of Parliament's criminal law jurisdiction under section 91, head 27 of the *Constitution Act, 1867.* It was held that the exercise of that authority could not override the distribution of legislative and executive powers pertaining to provincial courts as specified in sections 96 to 100. *McEvoy* did not involve the exercise of Parliament's authority under section 101.

In fact the respondent's case rests, not on distribution of powers arguments which might be relevant if a provincial tribunal were involved, but on some kind of separation of powers which, it contends, applies to federal organs of government. In effect, it is arguing that Parliament cannot exercise its power to create courts under section 101 in a way which confers certain kinds of

---

[69] See *e.g.* W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769, 1139 at 1175-76. It is accepted by the Tribunal, of course, that Parliament could not, for example, use its power under section 101to preclude <u>any</u> judicial review on constitutional issues. That flows, however, not from other provisions of the *Constitution Act, 1867,* but from the power of judicial review that is implicit in a constitution which limits the powers of governments. Stone, J. in *Canadian Imperial Bank of Commerce v. Rifou, supra,* note 56 at 510-15 also held that Parliament's power under section 101 was not limited as to the nature of the "courts" it could create.

judicial functions on bodies other than traditional courts. In support of this proposition the respondent has referred to the statements by two judges of the Federal Court of Appeal in *Canadian Imperial Bank of Commerce v. Rifou*[70]. One of the issues involved in that case was whether an adjudicator under the Canada Labour Code had been validly given 'judicial powers" by Parliament. The three members of the panel hearing the case agreed that the particular powers in question had been validly conferred. However, two members of the panel, Urie and Mahoney JJ., did not accept that Parliament's powers in this respect were completely unfettered. It appears that these comments were *obiter dicta,* and it was therefore unnecessary for those learned judges to define the source or scope of such a limitation on Parliament's powers. The point upon which they agreed in this respect was that as long as Parliament did not preclude judicial review of the decision of such an adjudicator it would not offend the constitutional limitation. This conclusion supports the validity of the Competition Tribunal as there is not only judicial review of it provided, but full powers of appeal from its decisions.

If however we should be wrong in the conclusion that Parliament is not constrained in the exercise of its powers under section 101 in the matter of courts or tribunals which it can create, we will outline briefly why we believe

[70] *Supra,* note 56.

the traditional limitations imposed on provincial legislatures, if applicable to the establishment of federal tribunals, would not invalidate the inclusion of lay members such as Dr. Roseman in the Competition Tribunal.

It should first be underlined that the Tribunal is not a "superior court". This has been recently confirmed by the Federal Court of Appeal in *Chrysler Canada Ltd. v. Competition Tribunal*[71] with the result that this "inferior tribunal" does not have the implied powers of a superior court. It was held in that case that the Competition Tribunal, unlike a superior court, has no power to punish for a contempt committed *ex facie* of the Tribunal as no such power was specifically conferred on it.

It is true, of course, that the Tribunal does exercise essentially judicial functions. But that fact by itself does not invalidate the creation of a tribunal other than a superior, district or county court. It is a long recognized principle of administrative law that inferior tribunals can exercise judicial functions: indeed, until recently the supervising writs of prohibition and *certiorari* were available only in respect of tribunals exercising judicial and quasi-judicial functions. The criteria now accepted for determining whether a provincial court or tribunal is in reality a superior, district or country court and therefore invalidly constituted

[71] *Supra,* note 54.

if not staffed with section 96 judges, are those set out by the Supreme Court of Canada in the *Reference Re The Residential Tenancies Act, 1979.*[72] Three criteria were identified there, and unless a tribunal comes within all three it does not violate the requirements of sections 96 to 100 of the *Constitution Act, 1867.* We will refer to the first test only which is:

> ... whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. [73]

We are satisfied that the kind of jurisdiction exercised by the Competition Tribunal in the present case was not exercised by a superior, district or county court at the time of Confederation. In general terms, what we are called upon to decide in this case is whether the respondent has been practising "exclusive dealing", "tied selling", or "anti-competitive acts" in its sale of aspartame in Canada. If we find that the respondent has committed any or all of these acts we must still be satisfied that the result of such acts is that competition is or is likely to be lessened substantially. There was no comparable law at the time of Confederation or for many years thereafter, and provincial, county and district courts at the time of Confederation had no comparable

---

[72] [1981] 1 S.C.R. 714 at 734-36.

[73] *Ibid.* at 734.

power or jurisdiction to intervene in the market-place as the Tribunal is called upon to do. The issues involved are in many respects essentially economic and require the input of specialized knowledge in a manner unknown to pre-Confederation courts.[74]

Further, the contest is, in effect, between an officer of the state and the respondent, the proceedings, though civil in nature, being brought to protect the public interest and not simply to advance the personal interests of the initiating party. In this respect they fall between the civil and criminal law proceedings which were typical of the jurisdiction of pre-Confederation courts. Therefore the Tribunal fails to come within the first criterion of the *Residential Tenancies Act* case and it is unnecessary to consider the other criteria of that case.

In a sense, the respondent's contention that Parliament can only confer such judicial functions on section 96 courts, or possibly on federal superior courts, fails because it proves too much. It is implicit in such an argument that a "superior court" created by Parliament under section 101 has also to meet any relevant requirements in sections 96-100. The result would be that any federal tribunal to which such judicial functions are assigned could consist

[74] For a history of the development of competition legislation see the reasons of Dickson J. in *A.G. Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206 at 250-54.

only of lawyers, members of the Bars of the respective provinces as prescribed in sections 97 and 98. Further, if they exercise any "superior court functions" they would have to have security of tenure to age 75 in accordance with section 99 and presumably they would have to devote themselves full time to the tribunal. This would not only invalidate a host of existing federal tribunals but would also preclude for the future the inclusion in such tribunals of persons with specialized knowledge (other than that of law) or persons who wish to continue on a part-time basis the careers from which they derive the economic, business, or other special knowledge which they are expected to bring to that tribunal. We find it difficult to believe that the constitution of Canada compels such a result.

Conclusion on Constitutional Issues

We therefore conclude that the Tribunal panel hearing this case has been validly constituted.

IX. ORDER

FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT:

1. In this order "Canadian customer" includes any person or corporation entering into agreements whether inside or outside of Canada for the purchase of aspartame, in respect of any aspartame to be delivered in Canada for use as a food ingredient.

2. The respondent, The NutraSweet Company, shall not enter into, or enforce, any term of an agreement for the supply of aspartame which:

(a) requires a Canadian customer

(i) to buy all of its aspartame requirements from the respondent; or

(ii) to use the respondent's aspartame exclusively or primarily as the sweetener in some or all of the customer's products;

(b) entitles a Canadian customer to receive

(i) a discount or allowance in return for the use of the respondent's trademark or logo on the customer's products or in its advertising; or

(ii) any similar discount or allowance whose purpose is to induce such customer to buy aspartame exclusively from the respondent as an ingredient for any or all of that customer's products;

(c) entitles a Canadian customer

(i) to require the respondent either to meet any price at which aspartame is offered to the Canadian customer by a competitor of the respondent or to allow that customer to be relieved from his contractual obligations to the respondent; or

(ii) to require the respondent to supply aspartame to the Canadian customer on terms as favourable as those on which the respondent supplies aspartame to any of the customer’s competitors, unless such requirements is also included in the respondent’s contracts for the supply of aspartame to any of that customer’s competitors.

DATED at Ottawa, this 4th day of October, 1990.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) B.L. Strayer
B.L. Strayer