CT-2023-007

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by Apotex Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under section 79 of the Act;

AND IN THE MATTER OF an application by Apotex Inc. for an order pursuant to section 79 of the Act;

B E T W E E N:

APOTEX INC.

Applicant

- and -

PALADIN LABS INC., ENDO PHARMACEUTICALS INC., TAKEDA CANADA INC., and TAKEDA PHARMACEUTICALS U.S.A. INC.

Respondents

APOTEX INC. BOOK OF AUTHORITIES

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COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

RECEIVED / REÇU
Date: 28 juillet 2021
CT- 2021-001

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.	Doc. #13

PUBLIC

FORTIER D'AMOUR GOYETTE
AVOCATS - NOTAIRES - FISCALISTES - MÉDIATEURS

Longueuil, le 28 juillet 2021

Par courriel : tribunal@ct-tc.gc.ca

Édifice Thomas D'Arcy McGee
90, rue Sparks, bureau 600
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SOUS TOUTES RÉSERVES

OBJET : **Animalerie Le Toucan Inc.**
c.
PLB International Inc.

Cause : **CT-2021-001**
N/D : **GGP 19761-01 JGGP**

Madame,
Monsieur,

Nous sommes les représentants de la demanderesse, Animalerie Le Toucan Inc., relativement au dossier mentionné en titre.

Par la présente, nous tenons à vous informer qu'une entente est intervenue entre les parties et que celle-ci a été signée en date du 27 juillet 2021. Ceci met donc fin au présent litige.

Nous désirons donc vous aviser par la présente que nous nous désistons de toutes les procédures produites au dossier dans la cause CT-2021-001.

Si des questions s'avéraient nécessaires, n'hésitez pas à communiquer avec la soussignée.

Veuillez recevoir, madame, monsieur, nos salutations distinguées.

FORTIER, D'AMOUR, GOYETTE S.E.N.C.R.L.

Alexandrine Comtois, stagiaire en droit
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c. c. Me Daniel Grodinsky
Animalerie Le Toucan

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Competition Tribunal Tribunal de la Concurrence

PUBLIC VERSION

Reference: *Audatex Canada, ULC v. CarProof Corporation*, 2015 Comp. Trib. 28
File No.: CT-2015-010
Registry Document No.: 078

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

AND IN THE MATTER OF an Application by Audatex Canada, ULC for an Order pursuant to section 103.1 granting leave to make application under section 75 of the *Competition Act*.

B E T W E E N:

Audatex Canada, ULC

(applicant)

and

CarProof Corporation, Trader Corporation, and Marktplaats B.V.

(respondents)

Decided on the basis of the written record.
Before Judicial Member: Gascon J. (Chairperson)
Date of Reasons for Order and Order: December 16, 2015

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE

I. OVERVIEW

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

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

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

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

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

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

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

II. BACKGROUND

A. The Parties

a. Audatex

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

i. Total loss valuation services

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

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

ii. Partial loss estimating services

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

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

b. The Respondents

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

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

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

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

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

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

B. The Relevant Facts

[19] Audatex complains that it no longer has access to the AutoTrader and Kijiji automobile listings data from Trader and Marktplaats. In September 2009, Audatex North America had entered into the Trader Agreement, pursuant to which Audatex received Canadian automobile listings data from Trader. It had a **[CONFIDENTIAL]**, which automatically renewed for additional **[CONFIDENTIAL]** terms unless either party gave at least **[CONFIDENTIAL]**

notice of termination prior to the end of the current term. On March 24, 2015, Trader sent Audatex North America a letter advising of its termination of the Trader Agreement, effective on August 31, 2015. Since that date, Audatex no longer receives automobile listings data from Trader. The Toth Affidavit states that the reason for terminating the Trader Agreement was because Trader had concluded a long-term, exclusive agreement to provide its Canadian automobile listings data to CarProof.

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

[21] Audatex claims that access to AutoTrader's and Kijiji's Canadian automobile listings data is vital to its business. According to the Toth Affidavit, Audatex generated over **[CONFIDENTIAL]** Valuation Reports in the 2015 fiscal year and, since its algorithm requires at least **[CONFIDENTIAL]** comparable automobile listings in order to generate each Valuation Report, Audatex requires access to approximately **[CONFIDENTIAL]** Canadian automobile listings per month. Without access to either AutoTrader's or Kijiji's Canadian automobile listings data, Mr. Toth says that Audatex is not able to have a sufficient number of "new" listings per month, causing the Valuation Reports **[CONFIDENTIAL]**. This, according to Mr. Toth, severely restricts Audatex from continuing to provide its total loss valuation services.

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

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

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

C. The Parties' Arguments

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

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

[27] CarProof, Trader and Marktplaats respond that the product for which Audatex seeks relief is not the automobile listings data itself but a license to use the confidential and proprietary Trader and Marktplaats data. The Respondents only supply their automobile listings data through licenses and, based on the ratio in *Canada (Director of Investigation and Research) v Warner Music Canada Ltd.* (1997), 78 CPR (3d) 321 (Comp. Trib.), licenses are not products for the purposes of section 75 of the Act as they are not in "ample supply". Trader and Marktplaats further argue that Audatex's claimed inability to obtain adequate supplies is due to the allegedly anti-competitive conduct of CarProof, not a lack of competition among suppliers. CarProof says it has been more than willing to sublicense available automobile listing data to Audatex on fair and reasonable terms consistent with industry practice, and claims that its negotiations with Audatex reflect the complex relationship between the parties and the ubiquity of multi-faceted value exchanges in the industry. The Respondents also submit that Audatex does not provide information regarding the size of the downstream market which it claims will be affected by the refusal to deal, the size of Mitchell or its market power absent Audatex's participation, or the number and size of competitors in that market. Therefore, the Tribunal could not have reason to believe that an order could be issued under the refusal to deal provision.

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

D. The Reply Affidavit Evidence

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

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

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

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

[33] Rule 120 simply provides that "[the] person making an application for leave under section 103.1 of the Act may serve a reply on each person against whom an order is sought (…)". Contrary to the language used in Rules 115 and 119, no reference is made to affidavit evidence or even to the possibility of seeking leave for it in the context of a reply. Audatex's claim that Rule 120 provides for the right to file an entire reply record, encapsulating a reply affidavit, is without merit. In the context of applications for leave, filing an affidavit in reply is contemplated neither explicitly nor implicitly by the Rules. In fact, given the express language found in Rules 115 and 119, the only reasonable interpretation of Rule 120 is that no reply affidavit evidence is to be submitted. This, in my view, is consistent with the nature of an application for leave under section 103.1 of the Act, which is meant to be a summary process (*Symbol Technologies Canada ULC v Barcode Systems Inc.*, 2004 FCA 339 ("*Barcode FCA*") at para 19). Audatex's unilateral filing of affidavit evidence with its reply is therefore not permissible under the Rules.

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

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

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

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

[38] In those circumstances, and bearing in mind the principles set out above, I believe that, pursuant to Rule 2, the Tribunal could have supplemented the application of Rule 120 and allowed Audatex to file reply affidavit evidence to respond to this specific factual evidence. While Audatex should have asked the Tribunal permission to do so prior to or at the time of filing its reply affidavit evidence, I am satisfied that the Tribunal can exercise its discretion to consider the application of Rule 2 at this stage. However, Audatex's reply affidavit evidence could only be allowed to the extent that it is responding to the factual evidence filed by CarProof and Marktplaats and for which specific, tailored leave has been granted by the Tribunal. This is what Audatex did for most of its reply evidence, but this is not the case for those paragraphs of the Cairo Affidavit dealing with Audatex's substantial harm and the effect of not having the listings data on Audatex's business. The Respondents made written representations about this issue but neither the Antony Affidavit nor the Neil Affidavit provide factual evidence on Audatex's business. I therefore cannot conclude that the portions of the Cairo Affidavit dealing with this matter constitute proper reply evidence in the context of these proceedings. I further note that the Cairo Affidavit does not specify whether this additional evidence of harm was available or could have been available to Audatex before it filed its application on October 1, 2015.

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

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

III. ANALYSIS

A. The Leave Test

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

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

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

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

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

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

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

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

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

75.(1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	**75**.(1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,	*a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
(*b*) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,	*b*) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit

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

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

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

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

sur ce marché;

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

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

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

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

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

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

[51] In *Barcode FCA*, Mr. Justice Rothstein was more specifically referring to the requirement of paragraph 75(1)(*e*) of an adverse effect on competition in a market. However, I note that the overarching concern about the competition and market-related dimension of the refusal to deal provision is also reflected in the language of paragraph 75(1)(*b*) requiring that the inability to obtain adequate supplies result from "insufficient competition among suppliers of the product in the market". Insufficient competition has been held to mean that the competitive conditions in the market for the supply of the product must be the "overriding reason" that adequate supplies are not available (*Canada (Director of Investigation and Research) v Xerox*, [1990] CLD 1146 at para 83; *Nadeau Final Order* at para 229; *Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2011 FCA 188 at para 61).

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

B. The Requirement of Direct and Substantial Effect

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

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

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

a. Audatex's evidence

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

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

> **42** Given the need for current automobile listing data and the insufficiency of Audatex's other data sources, Audatex's total loss valuation service will soon begin to experience significant performance issues if access to sufficient Canadian automobile listings data is not restored.
>
> **43** As Audatex's performance dips below the accepted service levels in its customer agreements, its customers will be able to terminate their contracts. Additionally, the uncertainty of the situation will likely cause Audatex's customers who are in the contract renewal process to reconsider staying with Audatex. In fact, **[CONFIDENTIAL]**. Audatex is concerned that the current situation will negatively impact those negotiations.
>
> **44** Once Audatex can no longer provide the total loss valuation service, all revenues and profits generated from it will be lost. As set out in Exhibit "3", Audatex's total loss valuation service, which generates approximately one-quarter of its revenues and profits will rapidly decline to zero as Audatex can no longer meet the mandated service levels in its customer agreements. Given that Audatex's insurance company customers are able, and I believe will in all likelihood want, to cancel their partial loss estimating service upon cancelling or losing their total loss valuation service, I expect that a further one-third of Audatex's revenues and profits will also be severely impacted. Finally, without any insurance company customers themselves using or mandating automobile repair shops to contract with Audatex, I believe the remaining revenues and profits, derived from automobile repair shops, will also steadily shrink.
>
> **45** In other words, Audatex's entire business is in jeopardy.

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

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

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

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

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

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

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

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

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

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

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

[67] The Toth Affidavit however says that Audatex requires **[CONFIDENTIAL]** automobile listings data per month. It further estimates that AutoTrader posts 1.1 million listings per month and Kijiji 760,000 listings. Arguably, the Tribunal could deduct from these figures that supplies from the Respondents "could" account for about **[CONFIDENTIAL]** of Audatex's total supply of automobile listings data, assuming Audatex had indeed used all the potential supply available from these two sources. Based on this information, the lost supply of the AutoTrader and Kijiji automobile listings data could represent about **[CONFIDENTIAL]** of Audatex's total loss valuation business, which is itself only approximately one-quarter (22-23%) of the total revenues of its "primary business".

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

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

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

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

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

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

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

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

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

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

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

d. Conclusion on direct and substantial effect

[78] The Tribunal is essentially left with an alleged impact on Audatex's total loss valuation business. Even if the Tribunal were to accept that all of Audatex's total loss valuation services business can be considered to be directly affected by the Respondents' refusal to supply automobile listings data (despite the fact that these supplies only account for a portion of the automobile listings data used by Audatex in that business), and even if the Tribunal were to accept that Audatex's "primary business" represents its total business (despite unclear evidence about that), I am not persuaded that, overall, the figures and evidence provided constitute sufficient credible evidence to allow the Tribunal to reasonably believe that Audatex may be directly and substantially affected in its business.

[79] Audatex's own evidence indicates that the total loss valuation services at issue represent only about one-quarter (or in fact 22-23%) of Audatex's total revenues in its "primary business".

And, as mentioned above, the evidence on the effect on the remaining partial loss estimating services is at best speculative. This, in my opinion, is insufficient to establish that Audatex could be affected in an important or significant way by the alleged refusal. An effect of this magnitude does not rise to the level of substantial effect typically considered sufficient by the Tribunal to grant applications for leave under subsection 103.1(7).

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

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

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

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

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

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

[86] This finding is fatal to Audatex's application.

C. The Section 75 Factors

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

IV. CONCLUSION

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

FOR THE ABOVE REASONS, THE TRIBUNAL THEREFORE ORDERS THAT:

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

[90] The Respondents are awarded costs.

DATED at Ottawa, this 16th day of December, 2015.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL

For the applicant:

Audatex Canada, ULC

Donald B. Houston
Julie K. Parla
Jonathan Bitran

For the respondents:

CarProof Corporation

Adam Fanaki

Trader Corporation

Michael Koch

eBay Canada Limited

Davit Akman

3

Competition Tribunal Tribunal de la Concurrence

Reference: *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1
File no.: CT2003008
Registry document no.: 0011

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

B E T W E E N:

Barcode Systems Inc.
(applicant)

and

Symbol Technologies Canada ULC
(respondent)

Decided on the basis of the written record.
Member: Lemieux J. (presiding)
Date of reasons and order: 20040115
Reasons and order signed by: Lemieux J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[25] The application for leave is granted.

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

DATED at Ottawa, this 15th day of January, 2004.

SIGNED on behalf of the Tribunal by the judicial member.

(s) François Lemieux

REPRESENTATIVES

For the applicant:

Barcode Systems Inc.

David P. Church

For the respondent:

Symbol Technologies Canada ULC

Colin MacArthur, Q.C.

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Reference: *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22
File No.: CT-2004-005
Reference: Registry Document No.: 0009

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

AND IN THE MATTER OF an application by 1177057 Ontario Inc. c.o.b. as Broadview Pharmacy (Broadview) for an order pursuant to section 103.1 of the *Competition Act* granting leave to bring an application under section 75 of the Act;

B E T W E E N :

1177057 Ontario Inc. c.o.b. as Broadview Pharmacy
(applicant)

and

Wyeth Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

APPLICATION

[1] The applicant is 1177057 Ontario Inc., carrying out business as Broadview Pharmacy (Broadview), a corporation incorporated under the laws of the Province of Ontario. The pharmacy operates in Toronto.

[2] The respondent is Wyeth Canada Inc. (Wyeth), a corporation incorporated under the laws of Canada, which carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

[3] Broadview has been operating at its Toronto address since 1960. Within a two block radius, there are six other retail pharmacies.

[4] Broadview has sold Wyeth products for the past several years. The sale of Wyeth drugs represents a little more than 5 per cent of Broadview's total annual sales. Some of Wyeth's patented medicines include an anti-depressant (Effexor), a number of very popular birth control pills (Tripasil, Alesse, Minovral) and female hormone replacement drugs (Premarin and Premplus).

[5] In a letter dated April 26, 2004, Wyeth informed its Canadian distributors that they were not to sell any Wyeth products to purchasers appearing on a list of "unapproved purchasers." Broadview being on this list, it can no longer obtain pharmaceutical products from Wyeth.

[6] Broadview believes this refusal to deal is linked to the fact that Broadview has in the past supplied some pharmaceutical products through the internet pharmacy business. Broadview has ceased this practice. Despite assurances to this effect given by Broadview, Wyeth continues to refuse to supply or deal with Broadview.

[7] For now, Broadview has managed to obtain some short-term substitute supplies; however, this solution cannot be long-term. Without the supply coming directly from Wyeth, Broadview will not be able to serve its customers, which will have a significant negative impact on its business. Broadview argues that customers who cannot fill all their prescriptions in one location will take their business elsewhere.

[8] Broadview's alleges that its financial viability is threatened. Wyeth occupies a dominant position in the market place with respect to its patented pharmaceutical products. Wyeth's products are widely available in the Toronto area, including from Broadway's neighbouring competitors.

RESPONDENT'S POSITION

[9] Wyeth Canada Inc. (respondent) opposes the application on the grounds that there is no reason to believe the applicant will suffer direct and substantial effects from the alleged conduct of the respondent, and no reason to believe that the conduct could be subject to an order under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[10] The applicant had engaged in internet selling of pharmaceutical products. The applicant contends it has stopped doing so, but has given the respondent no assurance that it would abide by the usual terms of trade and refrain from selling products through the internet.

No direct and substantial effect

[11] Given the small percentage which the respondent's pharmaceutical products represent for the applicant, the first branch of the test under subsection 103.1(7), direct and substantial effect, would not be satisfied. As acknowledged in the applicant's affidavit, only 5 per cent of the applicant's sales of pharmaceutical drugs (not total sales) are from the sale of drugs manufactured by the respondent. At present, the applicant is able to obtain the respondent's pharmaceutical drugs from other sources. The applicant provides no figures to support its contention that it will suffer from loss of clientele because customers cannot fill multiple prescriptions.

Test under section 75

[12] The applicant states that there is significant competition among retail pharmacies in the area where it is located. The respondent contends that the test under section 103.1 must include an assessment of whether an order could be granted under section 75. Since all the conditions of section 75 are not met, namely paragraph 75(1)(e) (adverse effect on competition), an order could not be granted, according to the respondent.

ANALYSIS

[13] Section 103.1 of the Act is a new section which has been the basis of five decisions so far, which can be briefly summarized as follows:

[14] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, Justice Dawson found that the refusal to grant the applicant full access to the Parliamentary Press Gallery was entirely within the privilege of Parliament, as vested in the Speaker, and thus could not be subject to an order under section 75 since the Competition Tribunal (the "Tribunal") did not have the jurisdiction, any more than the courts, to examine that particular exercise of the privilege. For this reason, the requirement of subsection 103.1(7) was not met.

[15] In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, Justice Lemieux granted leave to Barcode, having found sufficient credible evidence to give the Tribunal reason to believe that the applicant may have been directly and substantially affected. There was evidence that on petition of the Royal Bank of Canada, an interim Receiver had been appointed for all property, assets and undertakings of Barcode. Barcode also asserted in its materials that it had laid off half of its employees.

[16] In *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (Justice Lemieux), the applicant Allan Morgan and Sons Ltd. filed an application under section 103.1 for leave to make an application under section 75, alleging that the respondent La-Z-Boy Canada Ltd., by terminating its right to act as representative of the respondent, had directly and substantially affected its business.

[17] The applicant presented various tables to show sales by category, gross profits and estimates of profit loss due to the respondent's restrictions which occurred before the contract was terminated. Based on these figures, Justice Lemieux found that there was sufficient credible evidence to satisfy himself that the applicant "may have been directly and substantially affected by the actions of La-Z-Boy." He then added: "Morgan's Furniture, at the leave stage, is not required to meet any higher standard of proof threshold."

[18] Madam Justice Simpson has recently rendered two decisions on section 103.1 applications, *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13 and *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15. In both cases, leave was granted. Justice Simpson indicated that leave requirements set in subsection 103.1(7) of the Act had been met; she then added that under section 75, an order could issue, because for each condition the Tribunal could conclude that the condition was satisfied.

[19] In this case, I believe the applicant has failed to meet the test of "directly and substantially affected in the applicant's business." It is therefore not necessary to consider whether an order could issue under section 75. The applicants must show sufficient credible evidence of a direct and substantial effect. In *Barcode*, for example, the company was in receivership and fifty per cent of the employees had been laid off. In *La-Z-Boy*, the applicant had figures showing a 46 per cent decrease in its sales. There was thus a credible basis as to substantial effect.

[20] The Tribunal has never defined specifically what was to be considered "substantial"; however, it stated as follows in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1:

> The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.
>
> The cut-off resulted in a decline of over $200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October, 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of $30,000. Losses of the order of magnitude of $200,000 in sales and $30,000 in gross profits constitute a substantial effect for a small business such as Brunet's.

[21] In this case, the losses are speculative and undocumented. From the applicant's affidavit, Wyeth products represent 5 per cent of its annual sales of pharmaceutical drugs. The applicant fears losing customers because they will not be able to fill multiple prescriptions including the respondent's products. No figures are provided to show the impact or potential impact of the loss of the respondent's products, and no evidence presented to support the assertion that not filling all the prescriptions for a given patient will mean not filling any. A loss of 5 per cent of pharmaceutical sales, which does not represent the totality of the business of the pharmacy, cannot in good faith be considered a substantial impact.

THEREFORE THE TRIBUNAL ORDERS THAT:

[22] The application for leave is dismissed.

DATED at Ottawa, this 20th day of September, 2004.

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

(s) Pierre Blais

REPRESENTATIVES

For the applicant:

Broadview Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Wyeth Canada Inc.

Neil Finkelstein
Jeff Galway
Matthew Horner

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[2007] 2 F.C.R. 57

A-106-05

2006 FCA 236

Commissioner of Competition *(Appellant)*

v.

Canada Pipe Company Ltd./Tuyauteries Canada Ltee *(Respondent)*

INDEXED AS: CANADA (COMMISSIONER OF COMPETITION) V. CANADA PIPE CO. (F.C.A.)

Federal Court of Appeal, Desjardins, Letourneau and Pelletier JJ.A.—Ottawa, February 7, 9 and June 23, 2006.

Competition — Cross-appeal from Competition Tribunal's dismissal of Commissioner of Competition's application for order under Competition Act, ss. 77, 79 — Tribunal holding respondent dominant in each of relevant markets in Canada for cast iron drain, waste and vent (DWV) products — Cross-appeal concerning Tribunal's assessment of product market definition, market power, both pertaining to finding respondent dominant in relevant markets — Tribunal's conclusion applicable market not including DWV products made from variety of different materials, because cast iron treated as separate market by distributors, not unreasonable — Conclusion respondent had market power in relevant markets also open to Tribunal — Cross-appeal dismissed, Pelletier J.A. dissenting as to issue of market power.

This was a cross-appeal from a decision of the Competition Tribunal dismissing the Commissioner of Competition's application for an order against the respondent under sections 77 and 79 of the *Competition Act*. The application related to the respondent's Stocking Distributor Program (SDP) for the sale and supply of its cast iron drain, waste and vent (DWV) products. The Tribunal held that the respondent was dominant in each of the relevant markets in Canada for cast iron DWV products, that it was a "major supplier" of cast iron products, and that by marketing its cast iron DWV products using the SDP, the respondent had engaged in a practice of exclusive dealing. At issue in the cross-appeal was the Tribunal's assessment of product market definition and market power (*Competition Act*, paragraph 79(1)(*a*)). The respondent submitted that if the Tribunal had followed the analytical approach it was required by law to adopt, it would have had to define the applicable market to include competing DWV products made from a variety of different materials. The issue of market power would not have arisen in such a properly defined product market as the respondent's market share would not have exceeded approximately 10 %.

Held (Pelletier J.A. dissenting), the cross-appeal should be dismissed.

Per Desjardins J.A. (Letourneau J.A. concurring): The Tribunal correctly identified the legal principles applicable to the determination of the product market, and adopted an appropriate methodology to apply these principles in the particular case of the respondent. The Tribunal considered "substitutability", that is, whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. As no direct evidence was presented to the Tribunal on the cross-elasticity of demand, the Tribunal proceeded to consider the indirect evidence by reference to the topics enumerated in the *Enforcement Guidelines on the Abuse of Dominance Provisions*. It concluded that cast iron still played a distinct role in the DWV industry and was treated as a separate market by distributors. Moreover, because of the significant price variation in cast iron DWV products, from region to region, the Tribunal found there were six geographic markets. Since the Tribunal considered the appropriate elements and arrived at a reasonable conclusion, these findings were immune from judicial intervention.

The Tribunal also correctly identified and articulated the principles applicable to the determination concerning market power, including both the direct and indirect approaches to this issue. It concluded that the evidence established the respondent could and did exercise market power in the relevant markets. Considering the evidence, it was open to the Tribunal to conclude on the direct approach that the respondent was pricing pipe and fittings with "hefty margins", and that for pipe, fittings and mechanical joint couplings, it had a "significant ability to vary prices across the regions." This indicated supra-competitive pricing. On the indirect approach, it was open to the Tribunal to conclude that the respondent had market power.

Per Pelletier J.A. (dissenting): The Tribunal's conclusion with respect to market power was unreasonable. Given the Tribunal's definition of market power as the ability to set prices above competitive levels for a considerable period, it was difficult to see on what basis the Tribunal could conclude that the respondent had market power in four of the six geographic markets identified. The respondent lowered its prices after the emergence of competing suppliers of cast iron products in those markets. The fact of lowering prices to respond to the emergence of new competitors is inconsistent with the definition of marker power.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Combines Investigation Act, R.S.C. 1970, c. C-23, s. 51 (as enacted by S.C. 1986, c. 26, s. 47).

Competition Act, R.S.C., 1985, c. C-34, ss. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19), 1.1 (as enacted *idem), 77 (as am. idem,* s. 45; S.C. 1999, c. 2, ss. 23, 37(y); c. 31, s. 52 (F); 2002 c. 16, ss. 11.2, 11.3), 79 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1990, c. 37, s. 31; 1999, c. 2, s. 37(z); 2002, c. 16, s. 11.4).

CASES JUDICIALLY CONSIDERED

APPLIED:

Canada (Director of Investigation and Research) v. Southam Inc. [1997] 1 S.C.R. 748; (1996), 144 D.L.R. (4th) 1; 50 admin. 1.R. (3d) 199; 71 C.P.R. (3d) 417; 209 N.R. 20 (as to standard or review); *Dr. Q v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Amin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34; 2003 SCC 19 (as to standard or review); *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247; (2003), 257 N.B.R. (2d) 207; 223 D.L.R. (4th) 577; 48 Admin. L.R. (3d) 33; 31 C.P.C. (5th) 1; 302 N.R. 1; 2003 SCC 20 (as to standard of review); *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606; (1992), 114 N.S.R. (2d) 91; 93 D.L.R. (4th) 36; 313 A.P.R. 91; 74 C.C.C. (3d) 289; 43 C.P.R. (3d) 1; 15 C.R. (4th) 1; 10 C.R.R. (2d) 34; 139 N.R. 241.

CONSIDERED:

Canada (Commissioner of Competition) v. Canada Pipe Co., [2007] 1 F.C.R. 3; (2006), 268 D.L.R. (4th) 193; 49 C.P.R. (4th) 241; 350 N.R. 291; 2006 FCA 233; *Canada (Director of Investigation and Research) v. NutraSweet Co*. (1990), 32 C.P.R. (3d) I (Comp. Trib.); *Canada (Director of Investigation and Research) v. Southam Inc*., [1995] 3 F.C. 557(1995), 127 D.L.R. (4th) 263; 21 B.L.R. (2d) 1; 63 C.P.R. (3d) 1; 185 N.R. 321 (C.A.); revd on other grounds [1997] 1 S.C.R. 748; (1996), 144 D.L.R. (4th) 1; 50 Admin. L.R. (2d) 199; 71 C.P.R. (3d) 417; 209 N.R. 20; *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748; (1997), 144 D.L.R. (4th) 1; 50 Admin. L.R. (2d) 199; 71 C.P.R. (3d) 417; 209 N.R. 20*; Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc*. (1997), 73 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd*. (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

REFERRED TO:

Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385 (Comp. Trib.); rev'd on other grounds, [2001] 3 F.C. 185(2001), 199 D.L.R. (4th) 130; 11 C.P.R. (4th) 289; 269 N.R. 109; 2001 FCA 204; Canada (Director of Investigation and Research) v. Southam Inc. (1992), 43 C.P.R. (3d) 161 (Comp. Trib.); Canada (Director of Investigation and Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); The Queen v. J. W. Mills & Son Ltd et al., [1968] 2 Ex. C.R. 275; (1968), 56 C.P.R. 1; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; (1997), 144 D.L.R. (4th) 1; 50 Admin. L.R. (2d) 199; 71 C.P.R. (3d) 417; 209 N.R. 20.

AUTHORS CITED

Competition Bureau. Enforcement Guidelines on the Abuse of Dominance Provisions. Industry Canada: Ottawa, 2001.

CROSS-APPEAL from a decision of the Competition Tribunal ((2005), 40 C.P.R. (4th) 453 (Comp. Trib.)) which, although dismissing the Commissioner of Competition's application for an order against the respondent under sections 77 and 79 of the *Competition Act*, found that the respondent was dominant in each of the relevant markets. Cross-appeal dismissed, Pelletier J.A. dissenting.

APPEARANCES:

Randall Holley and *Leslie J.F. Milton* for appellant.

Kent E. Thomson, James W. E. Doris and *Charles E. Tingley* for respondent.

SOLICITORS OF RECORD:

Johnston & Buchan LLP, Ottawa, and *Deputy Attorney General of Canada* for appellant.

Davies Ward Phillips & Vineberg LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

[1] DESJARDINS J.A.: The Competition Tribunal (the Tribunal) dismissed an application by the appellant Commissioner of Competition (the Commissioner) seeking an order against the respondent (Canada Pipe or Bibby, which is a division of the respondent) under sections 77 [as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, ss. 23, 37(y); c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3] and 79 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1998, c. 37, s. 31; 1999, c. 2, s. 37(*z*); 2002, c. 16, s.11.4] of the *Competition Act* [R.S.C., 1985, c. C-34, s. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19)] (reported as (2005), 40 C.P.R. (4th) 453 (Comp. Trib.)).

[2] The application related to the marketing strategy—referred to as the Stocking Distributor Program or SDP—adopted by Canada Pipe for the sale and supply of its cast iron drain, waste and vent (DWV) products. The Tribunal held that Canada Pipe is dominant in each of the relevant markets in Canada for cast iron DWV products, that Canada Pipe is a “major supplier” of cast iron products, and that by marketing its cast iron DWV products using the SDP, Canada Pipe has engaged in a practice of exclusive dealing. The Tribunal further held, however, that the Commissioner had failed to establish that Canada Pipe has engaged in a practice of anti-competitive acts that has, is or is likely to result in a substantial lessening or prevention of competition in the relevant markets, or that Canada Pipe’s practice of exclusive dealing is likely to impede entry or expansion of a firm in a market or have any other exclusionary effect in a market such that competition is or is likely to be lessened substantially.

[3] The appeal by the Commissioner is disposed of in separate reasons [[2007] 2 F.C.R. 3 (F.C.A.)].

[4] We are seized of the cross-appeal whereby Canada Pipe claims that the Tribunal erred in its assessment of product market definition and market power.

[5] Canada Pipe’s cross-appeal is confined to the Tribunal’s treatment of paragraph 79(1)(*a*) of the Act and to its determinations concerning the issues of product market and market power. (In a footnote to its memorandum of fact and law, paragraph 119, Canada Pipe adds, however, that these submissions have equal application to the exclusive dealings provisions of the Act in subsection 77(2). The determination of whether a market participant is a “major supplier” of a product in a market within the meaning of subsection 77(2) also hinges on the issues of market definition and market power.)

[6] The purpose of defining the relevant product market is to identify the possibility for the exercise of market power (*Canada (Commissioner of Competition) v. Superior Propane Inc*. (2000), 7 C.P.R. (4th) 385 (Comp. Trib.), at paragraph 47, revd on other grounds [2001] 3 F.C. 185C.A.)). Market power has been defined as the ability to set prices above competitive levels for a considerable period of time (*Canada (Director of Investigations and Research) v. Southam, Inc*. (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), at page 177; *Canada (Director of Investigation and Research) v. NutraSweet Co*. (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), at page 28).

[7] Canada Pipe submits that if the Tribunal had followed the analytical approach it was required by law to adopt in respect of these issues, it would have had to define the applicable product market to include competing DWV products made from a variety of different materials, including plastic, copper, stainless steel, asbestos cement and cast iron. Canada Pipe’s market share in such a properly defined product market would not have exceeded approximately 10% at any relevant point in time. Canada Pipe says this is so regardless of the manner in which the applicable geographic markets are defined and regardless of whether the product market is further subdivided into pipe, fittings and couplings. The issue of market power, says Canada Pipe, simply does not arise in respect of a market participant having a market share in the range of 10%. There has

never been, it says, an abuse of dominance case brought against a market participant having a market share of less than 10% (memorandum of fact and law of the respondent Canada Pipe, paragraph 119).

PRODUCT MARKET—ANALYSIS OF THE LAW AND THE EVIDENCE

[8] Defining the relevant product market is a necessary first step under paragraph 79(1)(*a*) of the Act, as the Tribunal clearly recognized.

[9] Paragraph 79(1)(*a*) provides:

> **79.** (1) Where, on application by the Commissioner, the Tribunal finds that
>
> (*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business, [Emphasis is mine.]

[10] The Tribunal was careful in defining the operative terms of this provision of the Act (paragraphs 65, 66 and 67 of its reasons and order):

> A "class or species of business" has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression "Canada or any area thereof" is to be understood as the geographic market, while "control" has been found to be synonymous with market power *(Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* ((1995), 64 C.P.R. (3d) 216 (hereinafter *Nielsen* decision)); *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* ((1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (QL) (Comp. Trib.) *(Laidlaw)); Canada (Director of Investigation and Research) v. NutraSweet Co.* ((1990), 32 C.P.R. (3d) 1 (Comp. Trib.) *(NutraSweet)); Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* ((1997), 73 C.P.R. (3d) 1 *(Tele-Direct)).* [Emphasis is mine.]

[11] The Tribunal further explained:

> The Act does not specify how the analysis under paragraph 79(1)(*a*) of the Act is to proceed. However, in the above-mentioned cases, the analysis begins with a definition of the product market. This approach is also the one adopted by the Competition Bureau's (the "Bureau") *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "Guidelines"). Although the Guidelines have no binding effect on the Tribunal, they are useful in that they serve to indicate how the Bureau will proceed in an abuse of dominance case. At section 3.2.1 the Guidelines underscore the importance of defining the product market:
>
> > This paragraph [79(1)(*a*)] of the Act contains a number of elements that need to be separately clarified: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of "control"; and (iii) the meaning of "one or more persons."
> >
> > 3.2.1(a) "Class or species ofbusiness"—Product Market Definition
> >
> > A precondition for assessing market power is identifying existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The 1986 provisions adopted the term "class or species of business" rather than the term "market" in the context of the control element. The

> Bureau approach is to consider defining a "class or species of business" as synonymous with defining a relevant product. The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring.

The Tribunal restates the same principle in *Tele-Direct,* and adds that the exercise is also necessary for the purposes of section 77:

> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if *Tele-Direct,* as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.), that "class or species of business" means product market and "control" means market power …. [Emphasis is mine.]

[12] The Tribunal then explained (at paragraph 68 of its reasons and order) that in determining the relevant product market, it had to consider "substitutability". This meant whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes.

[13] The Tribunal [at paragraph 68] adopted the definition of "substitutability" which is found in the decision of this Court in *Canada (Director of Investigation and Research) v. Southam Inc.,* [1995] 3 F.C. 557at pages 632 and 633, revd on other grounds [1997] 1 S.C.R. 748.

> In determining the relevant product market one considers substitutability—in other words, whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. In *Tele-Direct,* the Tribunal cites the market definition set out in *Canada (Director of Investigation and Research) v. Southam Inc.,([1995]* 3 F.C. 557 63 C.P.R. (3D) I (F.C.A.)), where the Federal Court of Appeal defines what is meant by substitutability:
>
> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes. *(Ibid,* at paragraph 161). [Emphasis is mine.]

[14] The Tribunal noted, at paragraphs 69 and 71, that no direct evidence was presented to the Tribunal on the cross-elasticity of demand—that is, whether increasing the price of DWV cast iron products would lead to an increased demand for DWV products made of other materials. Therefore, the product market could not be determined directly.

[15] Given the importance of determining whether other products would constrain price increases of cast iron DWV products, the Tribunal proceeded to consider the indirect evidence by reference to the topics enumerated in the *Enforcement Guidelines on the Abuse of Dominance Provisions* (the Guidelines), which include such headings as the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; end use, physical and technical characteristics; price relationship and relative price levels; substitutability; and three product markets or one.

[16] The Tribunal thus correctly identified the legal principles applicable to the determination of the product market, and adopted an appropriate methodology to apply these principles in the particular case of Canada Pipe. The Tribunal considered the indirect evidence under each of the topics suggested in the Guidelines. Its conclusions on the basis of this evidence included the following findings.

[17] First, the Tribunal, at paragraph 82 of the reasons and order, under the heading "Trade Views, Strategies and Behaviour", made the finding that "in high-rise buildings, cast iron offers the advantage of meeting all requirements for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts."

[18] Second, with respect to end use, other advantages of cast iron were noted, namely strength, durability and lower level noise. The Tribunal then indicated (at paragraph 92 of the reasons and order) that although plastic may eventually replace cast iron entirely, "this has vet to happen, and cast iron continues to be in a class of its own" (my emphasis).

[19] Third, the Tribunal noted, at paragraph 97 of the reasons and order, under the heading "Price Relationships and Relative Price Levels", that the evidence showed that Canada Pipe had reacted to the entry of new cast iron suppliers, whether manufacturers (Vandem) or imports (Sierra, New Centurion), by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices had increased since 1998.

[20] Fourth, at paragraphs 101 and 102 of the reasons and order, under the heading "Substitutability" with regard to paragraph 102, the Tribunal said the following:

> The competition with plastics appears to have had little effect on the prices of cast iron. Bibby devotes considerable effort to promoting the physical characteristics of cast iron products as compared to plastics, but these efforts do not lead to a reduction in price for cast iron products. From the evidence, it appears that the use of plastics is prevalent and increasing across the country. The prices of cast iron have not been decreasing with the increased use of plastics. Prices of cast iron DWV products have increased in Quebec and the Maritimes. They have decreased where Bibby has met cast iron competition—in Ontario with Vandem, in the West with importers. In other words, even though the Respondent claims that plastic is a competing material, there is no evidence that plastic products have had a constraining effect on prices of cast iron DWV products.
>
> The experts on both sides agreed that there was a lack of data for calculating the elasticity of the demand, such that a direct measure of substitutability was impossible. The

> Tribunal does not have sufficient evidence to show whether consumers (in this case, distributors) would change their behaviour because of a rise in prices. In the present context, such an analysis is impossible, and not only because of a lack of data. The fact is that the choice to buy cast iron over other products is not only a matter of price; as seen earlier in these reasons, other important considerations come into play. From the evidence of Mr. Zorko and others, we find that for certain applications, such as in vertical shafts, non-combustible material remains the only acceptable material, which in practical terms means cast iron. In certain other applications, where considerations of safety and non-combustibility are paramount (based on use, occupancy, and height of building) the use of material other than metal will be constrained. For example, a sprinkler system may be compulsory or fire separation sealants will be required. The Respondent sought to convince the Tribunal that this situation was evolving, and that plastics in particular were offering true competition. On the evidence, <u>the Tribunal is satisfied that for certain applications, cast iron has no economic substitute</u>. [Emphasis is mine.]

[21] On the basis of its review of the indirect evidence, the Tribunal concluded as follows on product market and geographic markets (paragraph 112 of the reasons and order):

> The evidence reflects a market that is changing because of the increasing importance of plastics in the DWV industry. We find the American data presented by Dr. Ware on plastics replacing cast iron of limited assistance in the Canadian context, given the impact of Canadian regulations on the choice of materials and the absence of statistical evidence showing a similar trend in Canada. From the evidence we have heard, however, plastics seem to offer a number of advantages to the construction industry and appear to be increasingly used. <u>Nevertheless, the Tribunal is of the view that cast iron still plays a distinct role in the DWV industry, and it is treated as a separate market by distributors and contractors. More importantly, it is treated differently by Bibby itself, in its marketing and its pricing policies</u>. In consequence, the Tribunal finds that the product market is the cast iron DWV product market, within which three distinct markets can be identified: cast iron pipe and fittings and MJ couplings. <u>Because of the significant price variations in cast iron DWV products from region to region, we find that there are six distinct geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes</u>. [Emphasis is mine.]

[22] The Tribunal was therefore of the view (paragraph 112 of the reasons and order) that cast iron still played a distinct role in the DWV industry and was treated as a separate market by distributors and contractors, and by Canada Pipe itself. It found that the product market was the cast iron DWV product market, within which three distinct markets were identified: cast iron pipe, fittings and MJ couplings. Moreover, because of the significant price variations in cast iron DWV products, from region to region, the Tribunal found there were six distinct geographic markets: British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes.

MARKET POWER—ANALYSIS OF THE LAW AND THE EVIDENCE

[23] The Tribunal then addressed the issue of market power. Its analysis in this regard was divided into two sections, titled “Direct approach” and “Indirect approach”. The Tribunal explained the distinction between the two approaches as follows (at paragraph 122):

Market power is defined as the ability to set prices above competitive levels for a considerable period. The direct approach involves showing that prices are indeed above the competitive level. In *Tele-Direct,* for example, the Tribunal found that the very large accounting profits were a direct indication of market power. However, as was the case in *Laidlaw, Nielsen* and *NutraSweet,* this approach is not always feasible. If a market is monopolized or not perfectly competitive because of a trade restraint imposed by a major supplier, it may be difficult to determine what would be the relevant competitive benchmark. In such a case, an indirect approach can be taken, which will consider such indicia as market share, barriers to entry and customer countervailing

[24] Later in its decision, the Tribunal explained the principles underpinning the indirect approach (at paragraphs 138 and 139):

As stated in *Laidlaw* and *Nielsen,* a large market share leads to a *prima facie* conclusion that the firm likely has market power. In order to establish market power, this conclusion must be supported by other findings on issues such as the existence of barriers to entry, the number of other competitors, excess capacity and the state of the market. Where barriers to entry are non-existent, even a very large market share will not support a finding of market power. In the case of cast iron DWV products, it would appear that the following barriers to entry should be considered: sunk costs, cost of entry, incumbent advantage and the Stocking Distributor Program.

The Tribunal must also review evidence of actual entry into the market, which would serve to negate the presence of barriers. Entry, of course, must be both effective and viable to be significant. In addition, the Tribunal must consider customer countervailing power and the state of the market. [Emphasis is mine.]

[25] It is apparent that the Tribunal correctly identified and articulated the principles applicable to the determination concerning market power, including both the direct and indirect approaches to this issue. The above-quoted passages show that the Tribunal properly understood the analytic purpose and role of the different types of direct and indirect evidence adduced with respect to the issue of market power.

[26] The Tribunal summarized the direct and indirect evidence adduced by the Commissioner on the issue of the market power (paragraphs 114 to 117 of the reasons and order) in the following manner:

The Commissioner's case for market power relies heavily on Dr. Ross's analysis of the direct evidence—i.e. evidence that Bibby has the ability to raise and maintain prices above competitive levels for a significant period of time. Dr. Ross never defines what the competitive price levels would be; rather, he postulates that the direct information on prices and margins leads to the conclusion that Bibby's prices are supra-competitive. More specifically, Dr. Ross relies on three elements of direct evidence to conclude that Bibby has market power in the relevant markets: 1) high profit margins; 2) prices well above the landed prices of imports; and 3) Bibby's capacity to set prices, as shown by the high prices where no competition exists (Quebec and the Maritimes) and its capacity to lower its prices dramatically in the face of competition. (Expert Report of Dr. Ross at paragraph 31.)

There are as well, according to Dr. Ross, indirect indicators of Bibby's market power: Bibby's considerable market share and little or no sustained and successful entry for the last several years. His conclusions on this last point are summarized as follows:

While imports have made inroads periodically, they have been met by aggressive responses from Bibby, and Bibby's market share remains very high. Similarly, Vandem has been trying to establish itself as a largely domestic competitor, but has had considerable difficulty. (Expert Report of Dr. Ross at paragraph 32.)

Dr. Ross is of the view that there are several barriers to entry. First, he states that it would be difficult to establish a new foundry, or adapt a current foundry to produce cast iron DWV pipe and fittings. Secondly, since there is excess capacity in the industry, the industry may not be likely to attract new investment. Adapting an existing foundry to produce DWV cast iron products could represent risky sunk costs. Given the fact that Bibby itself holds much of the excess capacity, it could use or threaten to use this capacity to produce large quantities to be sold at low prices. (Expert Report of Dr. Ross at paragraph 68.) In addition, although not a barrier *per se,* both parties agree that the cast iron DWV industry is a mature industry, not one in which one can expect great growth or innovation.

Thirdly, Dr. Ross maintains that imports face barriers of their own. Bibby is a well-established manufacturer, offering complete lines of products. Imported product lines may be less complete, and buyers may be wary of their quality and of the warranties attached. Fourthly, Bibby's vigorous response to entry by imports and by Vandem may have had a chilling effect on potential entrants. Finally, and most importantly, the SDP program is itself a barrier to entry: entrants, whether importers or manufacturers, have difficulty having access to the distributors, already tied into Bibby's loyalty program. [Emphasis is mine.]

[27] The Tribunal then considered the direct and the indirect evidence concerning market power that was adduced before it, as the following summary and extracts demonstrate.

[28] The direct evidence related to Dr. Ross' submission in three main areas: high margins, prices substantially above import prices, and high prices absent competition with the corollary of being able to significantly lower prices where competition occurred.

[29] With regard to high margins, the Tribunal stated (at paragraph 124):

When studied closely, Dr. Ross's *[sic]* presentation on high margins appears somewhat strained. The margins are based on cost of production (fittings and pipe) and do not include MJ couplings (which Bibby imports). In addition, the analysis is centred on margins, not profits. Dr. Ross cautions that marginal costs do not necessarily give us an exact idea of Bibby's profits, because the costs are extrapolated from Bibby data without complete information on how those costs were established. We have no information on whether the costs include only variable costs, or also fixed costs. (Expert Report of Dr. Ross at paragraph 17 and footnote 6.) However, the Tribunal is prepared to accept Dr. Ross' calculations of production costs and variable costs, from which he derives gross profit margins and contribution margins. (Expert Report of Dr. Ross at Appendix 3, p. 6.) We note that the marginal costs are only based on the cost of production of pipe and fittings; they therefore exclude MJ couplings, which Bibby does not manufacture but imports from a sister company. [Emphasis is mine.]

[30] The Tribunal was apparently very critical of Dr. Ross' analysis, as also shown in paragraphs 127, 131 and 135, but nevertheless noted at paragraph 137 that Canada Pipe had offered no evidence to rebut the Commissioner's assertions of high margins.

[31] Turning to the indirect evidence of market power, the Tribunal first considered Canada Pipe's market share. It stated (at paragraph 140 of the reasons and order):

> The concentration of the market in Bibby's hands, through the various buy-outs, consolidations and marketing arrangements with American sister companies, has given Bibby an overwhelming share of the market. Evidence shows that Bibby controls between 80 and 90% of the market in cast iron DWV products. Market share can be a significant indicator of market power, absent evidence of ease of entry for competitors *(Tele-Direct).* What needs to be considered, therefore, is whether the barriers to entry or other factors preclude other competitors from entering the market. [Emphasis is mine.]

[32] The Tribunal considered under the heading of "Barriers to Entry": sunk costs, cost of entry, incumbent advantage, stock distributor program, and actual entry. Under the heading "Other Factors", it considered countervailing power and the state of the market.

[33] Sunk costs were defined by the Tribunal as costs that cannot be recovered if investment is made to enter the market and that attempt fails. While sunk costs could be a significant barrier to entry, the Tribunal did not find them significant considering the paucity of explanation given by the Commissioner on the question (paragraph 141 of the reasons and order).

[34] The cost of entry, wrote the Tribunal, involved either refitting an existing foundry or buying imported goods. The Tribunal estimated that the viability of the current importers did not seem threatened and imports were steadily on the rise (paragraphs 142 and 143 of the reasons and order).

[35] On the topic of the incumbent advantage, the Tribunal noted that Canada Pipe was a well-known and well-established manufacturer and that a new entrant would probably have difficulty competing with the quality and quantity of products Canada Pipe was able to offer. No other supplier, it said, had a strong national presence (paragraph 144 of the reasons and order).

[36] With regard to the factor of the Stocking Distributor Program, the Tribunal was satisfied that it had an impact in the market. There was, however, no direct evidence that would support the conclusion that it was a barrier to entry (paragraph 149 of the reasons and order).

[37] With respect to the factor of actual entry, the Tribunal came to the conclusion that successful entry was possible—but limited, considering that Canada Pipe maintained a considerable market share (paragraph 156 of the reasons and order).

[38] The Tribunal was of the view that distributors had little countervailing power, considering that Canada Pipe had maintained its SDP since 1998 (paragraph 159 of the reasons and order).

[39] The Tribunal accepted that the market was mature, i.e., it was a market with little real growth potential. This factor could therefore discourage more active entry (paragraph 160 of the reasons and order).

[40] Ultimately, the Tribunal accepted Dr. Ross' analysis that the direct <u>and</u> indirect evidence together established that Canada Pipe could and did exercise market power in the relevant markets (paragraph 161 of the reasons and order). This conclusion of the Tribunal will be considered in more detail further below.

THE STANDARD OF REVIEW AND ITS APPLICATION

[41] I agree with Pelletier J.A. that to be successful on the cross-appeal, Canada Pipe must demonstrate that the Tribunal acted unreasonably, considering that product market and market power raise issues of mixed fact and law. As examined in detail above, the Tribunal articulated the correct legal tests in the course of its determinations concerning product market and *market* power. The Supreme Court's conclusion in *Southam* therefore applies with equal force in this case: "if the Tribunal erred, it was in applying the law to the facts; and that is a matter of mixed law and fact" (paragraph 44).

[42] The nature of the question is an important factor in determining the standard of review according to the pragmatic and functional approach. In general, all else being equal, a question of mixed fact and law attracts the reasonableness standard of review. However, the jurisprudence has recognized the existence of different types of questions of mixed fact and law: as McLachlin C.J. explained in *Dr. Q v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226, a question of mixed fact and law "will call for more deference if the question is fact-intensive, and less deference if it is law-intensive" (paragraph 34). In *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, the Court applied this analysis, observing that the question of mixed fact and law at issue in that case contained fact-intensive elements which did "not involve easily extracted and discretely framed questions of law" (paragraph 41).

[43] The issues raised in the case at bar contain fact-intensive elements which do not involve easily extracted and discretely framed questions of law.

[44] I agree with Pelletier J.A. that the analysis of the categories or factors referred to in the Guidelines as indirect evidence for the determination of product market (namely the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; end use; physical and technical characteristics; and price relationships and relative price levels) is a matter of weighing evidence. It therefore falls within the province of the Tribunal. Consequently, unless the Tribunal's conclusion is unreasonable, it is of no concern to this Court. Substitutability is always a question of degree *(The Queen v. S.J. Mills & Sons Ltd. et al.,* [1968] Ex.C. R. 275, cited with approval in *Canada (Director of Investigation and Reserach) v. Southam Inc.,* [1997] 1 S.C.R. 748). Since the Tribunal considered the appropriate elements and arrived at a reasonable conclusion, its finding on product market is therefore immune from judicial intervention.

[45] I do not share Pelletier J.A.'s view, however, that the Tribunal's findings on market power in four of the six geographic markets, namely British Columbia, Alberta, the Prairies and Ontario, are flawed and warrant the intervention of this Court.

[46] My analysis with respect to the Tribunal's determination on market power is the following.

[47] As stated earlier, the Tribunal was highly critical of Dr. Ross' analysis of the direct evidence of market power, as evidenced in paras 124 to 137 of the reasons and order, and of Canada Pipe's lack of response on the topic (paragraph 137 of the reasons and order).

[48] The Tribunal, with hesitation, I would say, accepted Dr. Ross' calculations of production costs and variable costs from which he derived gross profit margins and contribution margins. However, the Tribunal noted (at paragraph 124 of the reasons and order) that the marginal costs were only based on the cost of production of pipe and fittings: they therefore excluded MJ couplings which Canada Pipe did not manufacture but imported from its sister company. The Tribunal indicated that Dr. Ware, for Canada Pipe, cast some doubt on Dr. Ross' calculations.

[49] The Tribunal concluded, at paragraph 136 and 137 of the reasons and order:

> Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbia and Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontario has exerted downward pressure on the prices in that province. No such movement is noted in Quebec and the Maritimes.
>
> It is somewhat puzzling that Bibby offers no evidence to rebut the Commissioner's assertions of high margins. Dr. Ware and counsel for the Respondent certainly have shown the frailties of the Commissioner's position, but the Tribunal notes that no cost calculations are provided in response. It would have been within Bibby's power to present the true profitability of pipe and fittings sales. No such evidence is before us**. We are left with Bibby's hefty margins and its significant ability to vary prices across the regions**. [Emphasis is mine.]

[50] The Tribunal bolstered the conclusions derived from the direct evidence with a careful analysis of the elements contained in the indirect approach, stressing the positive elements and the drawbacks. The Tribunal then concluded (at paragraph 161):

> The Tribunal is of the view that Bibby can and does exercise market control in the three product markets and the six geographic regions. The evidence provided by the direct approach was incomplete, since the high margins dealt only with two of the three products. For those two products, the Tribunal finds that Bibby is pricing above marginal cost. For all three products, Bibby's ability to lower prices indicates supra-competitive pricing. With regards to the indirect approach, the Tribunal finds that on balance the evidence indicates that Bibby has market power. The evidence on barriers to entry is not entirely conclusive. However, Bibby's large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that Bibby does control a substantial part of the cast iron

DWV products market. [Emphasis is mine.]

[51] Considering the evidence, with all its flaws, left uncontradicted by Canada Pipe, it was open to the Tribunal to conclude on the direct approach that Canada Pipe was pricing pipe and fittings with "hefty margins" (paragraph 137 of the reasons and order), and that for pipe, fittings and MJ couplings, Canada Pipe had a "significant ability to vary prices across the regions" (paragraph 137 of the reasons and order). This indicated supra-competitive pricing. On the indirect approach, it was open to the Tribunal, on the balance of the evidence, to conclude that Canada Pipe had market power.

CONCLUSION

[52] The Tribunal correctly interpreted and applied the law with respect to paragraph 79(1)(*a*) throughout in its reasons. Market power is not an easy concept to handle. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at paragraph 101, the Supreme Court of Canada noted that with regard to paragraph 79(1)(*a*) of the Act (formerly section 51 [*Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 51 (as enacted by S.C. 1986, c. 26, s. 47)]), alleged holders of a dominant position must be shown to "substantially or completely control, throughout Canada or any other area thereof, a class or species of business". Gonthier J. for the Court added "The required degree of market power under s. 51 of the Act comprises 'control', and not simply the ability to behave independently of the market." The Tribunal in the case at bar complied with this analysis.

[53] The factual analysis by the Tribunal is sometimes not as clearly stated and analyzed as one might have wished. This may be explained in part by the variety of factors the Tribunal was called upon to consider. But one cannot ignore, on the point raised by Pelletier J.A., that the Tribunal considered not only the direct evidence of market power, <u>but also</u> extensive indirect evidence. On both approaches, it was satisfied that Canada Pipe exercised market power. I cannot say that the Tribunal acted unreasonably in so concluding: the Tribunal demonstrably "had its reasons for doing so, and those reasons cannot be said to be without foundation or logical coherence" (S.C.C., *Southam*, at paragraph 68).

[54] Considering the standard of review and the intense fact-finding character of these issues, the further intervention of this Court is, in my view, unwarranted.

[55] I would dismiss this cross-appeal with costs.

LETOURNEAU J.A.: I concur.

* * *

The following are the reasons for judgment rendered in English by

PELLETIER J.A. (dissenting):

INTRODUCTION

[56] In response to the Commissioner's appeal of the dismissal of her application, Canada Pipe has cross-appealed from the Competition Tribunal's (the Tribunal) finding that it dominated the market for cast iron DWV pipes, joints and fittings. Canada Pipe attacks both aspects of that finding, namely the definition of the product and geographic markets, as well as the finding that it has market power in the relevant markets.

[57] As my colleague Desjardins J.A.'s reasons allowing the Commissioner's appeal make clear, the Tribunal was required to decide a number of discrete questions in disposing of the Commissioner's application for an order against Canada Pipe pursuant to section 79 of the *Competition Act*, R.S.C., 1985, c. C-34 (the Act). The Commissioner's appeal deals with two of those questions, namely whether Canada Pipe's Stocking Distributor Program (SDP) was a practice of anti-competitive acts, and whether the SDP had the effect of substantially preventing or lessening competition in a market. This cross-appeal deals with the issue of whether Canada Pipe occupies a dominant position in that market; in other words, does Canada Pipe "substantially or completely control, throughout Canada or any area thereof, a class or species of business", to use the words of paragraph 79(1)(*a*) of the Act?

[58] That question can be broken down into two other questions: the definition of the product and geographic markets in which Canada Pipe trades, and whether Canada Pipe exercises market power within those markets. The Tribunal decided that there were three product markets, namely the markets for cast iron pipe, cast iron fittings and cast iron joints, and six geographical markets, namely British Columbia, Alberta, the Prairies, Ontario, Quebec and the Maritimes. It also decided that Canada Pipe exercised market power in all those markets and that, as a result, the conditions of paragraph 79(1)(*a*) of the Act were satisfied. It is those conclusions which are in issue in this cross-appeal.

[59] As an aside, the Tribunal decision refers to Canada Pipe as Bibby because the Stocking Distributor Program is operated by its Bibby Ste-Croix division. In these reasons, I will refer to the cross-appellant as Canada Pipe and to the respondent by cross-appeal as the Commissioner.

THE TRIBUNAL DECISION

[60] The first question which the Tribunal had to address was the definition of the product and geographic markets in which Canada Pipe trades. This question is fundamental because any finding of abuse of market dominance must be in relation to those markets.

[61] This Court took up the question of the definition of a product market in *Canada (Director of Investigation and Research) v. Southam Inc*., [1995] 3 F.C. 557 (*Southam*, F.C.A.) where the following appears (at page 632):

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity.

Whether products are close substitutes for one another can be proven either directly or indirectly (at paragraph 161):

> Direct evidence of substitutability includes both statistical evidence of buyer sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.

The Tribunal noted that direct evidence of substitutability was not available and went on to examine the indirect evidence. It considered the views, strategies, behaviour and identity of buyers, the trade's views, strategies and behaviour, end use, physical and technical characteristics, price relationships and relative price levels, and substitutability.

[62] Under the heading of views, strategies, behaviour and identity of buyers, the Tribunal noted that while contractors used both plastic and cast iron products, cast iron was the product of choice for certain applications. As for the trade's views and strategies, the Tribunal found that the fact that the National Building Code specifies cast iron for certain applications, notably vertical shafts in highrise buildings, was an important consideration. The industry view appeared to be that there was no substitute for cast iron in that application, notwithstanding the development of non-combustible plastic pipe. The Tribunal's conclusion was that "in high-rise buildings, cast iron offers the advantage of meeting all requirements for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts" (Tribunal reasons, paragraph 82).

[63] The Tribunal then considered the issue of functional interchangeability under the heading of "End Use". In other words, are plastic DWV (drain, waste and vent) products and cast iron DWV products interchangeable? The Tribunal reviewed the evidence as to the advantages and disadvantages of each material. It noted the growing prevalence of plastic products in Canada, but could draw no conclusion as to the pace of change, in the absence of detailed data for the Canadian marketplace. In the end, the Tribunal concluded that, by reason of its strength, durability, lower noise level as well as non-combustibility, cast iron "continues to be in a class of its own" (Tribunal reasons, paragraph 92).

[64] Under the heading of "Physical and Technical Characteristics", the Tribunal briefly touched upon the same physical properties as in prior parts of its analysis.

[65] The Tribunal then considered the issue of price relationships and relative price levels. It quoted a passage from the *Enforcement Guidelines on the Abuse of Dominance Provisions* (Competition Bureau, 2001) (Enforcement Guidelines) to the effect that the absence of a correlation in price movements between two products over a significant period of time is an indication that the two products are not in the same market, while the presence of such a correlation is an indication that the two products compete in the same market (Tribunal reasons, paragraph 96).

[66] The Tribunal specifically noted the absence of evidence of relative price movement between cast iron DWV products and products made from other materials. However, it also noted that Canada Pipe's prices dropped where it faced competition from other cast iron product suppliers, whereas prices increased in those markets where there was no such competition (Tribunal reasons, paragraph 97). This is not to say that Canada Pipe ignored competition from plastic products; the Tribunal found that it devoted considerable marketing resources to persuading buyers of the advantages of cast iron over plastic. But these efforts did not include price reductions. The Tribunal's key conclusions on this issue are found in the following passage (at paragraph 101):

> The prices of cast iron have not been decreasing with the increased use of plastics. Prices of cast iron DWV products have increased in Quebec and the Maritimes. They have decreased where [Canada Pipe] has met cast iron competition—in Ontario with Vandem, in the West with importers. In other words, even though the Respondent [Canada Pipe] claims that plastic is a competing material, there is no evidence that plastic products have had a constraining effect on prices of cast iron DWV products.

[67] The Tribunal concluded its analysis of the market definition by considering the issue of substitutability. It noted that the question of whether to use cast iron DW V products or plastic DWV products is not simply a question of price. Cast iron is the only material which, in practical terms, meets current National Building Code requirements as to the use of non-combustible materials. On balance, the Tribunal concluded that "for certain applications, cast iron has no economic substitute". (Tribunal reasons, paragraph 102).

[68] Having regard to the fact that "all three products [pipe, fittings and joints] can be bought separately from different suppliers and the pricing trends for each appear independent", [at paragraph 103] the Tribunal decided that there are three relevant product markets, namely cast iron pipe, cast iron fittings and cast iron joints.

[69] On the issue of geographic markets, the Tribunal attributed some importance to the fact that while Canada Pipe has a national presence, its competitors do not. The result is that competition is regionalized so that prices are constrained by competition from cast iron products in Ontario, for example, but they are not so constrained in Quebec and the Maritimes. This led the Tribunal to conclude that there are six geographic markets, defined by the competitive environment, namely British Columbia, Alberta, the Prairies, Ontario, Quebec, and the Maritimes.

[70] The Tribunal then turned to the second step of its inquiry under paragraph 79(1)(*a*) of the Act, the issue of market power. Market power is defined as the ability to raise and maintain prices above competitive levels for a significant period of time: *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc*. (1997), 73 C.P.R. (3d) 1 (Comp. Trib.), at page 82.

[71] As in the case of close substitutes, market power can be proven directly or indirectly. In this case, the Tribunal considered both the direct and the indirect evidence of market power. It considered high margins, prices substantially above import prices,

high prices absent competition (or lower prices in the presence of competition) as direct evidence of market power.

[72] The Tribunal found that the evidence of high margins was not persuasive. The Commissioner's expert purported to calculate Canada Pipe's profit margins on the basis of partial data supplied by Canada Pipe. However, there was no way of comparing Canada Pipe's margins with those of other vendors. In any event margins varied across geographic regions: consistently high in Quebec and the Maritimes, but dipping into the negative for considerable periods of time in Alberta, the Prairies and British Columbia (Tribunal reasons, paragraph 127).

[73] The Tribunal considered the evidence of the Commissioner's expert Dr. Ross, who attempted to show that Canada Pipe's prices were above competitive levels by comparing them to the price of imported products. The Tribunal discounted this evidence because of an absence of raw data, and an absence of information on the pricing philosophy of offshore producers, who may be selling at artificially low prices to achieve market penetration.

[74] Finally, the Tribunal considered the argument that regional price disparities suggested that prices were above competitive levels in the high price regions. For example, certain Canada Pipe products cost the same in Ontario, where they are produced, and in British Columbia. It is clear that if prices were at competitive levels, the price would be higher in British Columbia given the cost of transporting the product from Ontario to British Columbia.

[75] The Tribunal was persuaded that the price differentials between those regions where Canada Pipe faced competition from cast iron products and those regions where it did not indicated that prices in the latter areas were above competitive levels.

[76] The indirect evidence of market power related to market share, barriers to entry and the state of the market.

[77] Based upon its definition of the product market, the Tribunal concluded that Canada Pipe had an overwhelming share of the market, somewhere between 80% and 90% of the market for cast iron products. However, market share alone does not indicate market power if there are no barriers to entry to that market. The Tribunal noted that there was little evidence of sunk costs as a barrier to entry. In particular, the importation of product does not require a significant physical plant.

[78] The Tribunal considered whether the SDP itself operated as a barrier to entry. The emergence of another cast iron manufacturer, Vandem, suggested that the SDP was not an effective barrier to entry. Entry is one thing, viability is another. The Tribunal did not have evidence before it of Vandem's viability but it did have evidence that it had captured a not insignificant share of the market in a relatively brief period of time. Canada Pipe, however, continued to have by far the largest market share. Importers had also succeeded in establishing themselves in the West. But both Vandem and the importers had achieved only limited market penetration.

[79] A final consideration is the state of the market. The market for cast iron DWV products is a mature market in the sense that there is not likely to be significant growth in the size of the market, which operates to discourage entry since growth potential is limited.

[80] The Tribunal concluded that Canada Pipe "can and does exercise market power in the three product markets and the six geographic regions" (Tribunal reasons, paragraph 161). In particular, the Tribunal found that Canada Pipe's ability to lower prices to meet competition indicated that prices in the areas where there was no competition were supra-competitive. As regards the indirect evidence of market power, the Tribunal found that Canada Pipe's "large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that [Canada Pipe] does control a substantial part of the cast iron DWV products market" (Tribunal reasons, paragraph 161).

[81] In the end result, the Tribunal found that the conditions of paragraph 79(1)(*a*) of the Act were satisfied.

STANDARD OF REVIEW

[82] Given that any challenge to the Tribunal's conclusions must be assessed through the lens of the appropriate standard of review, I propose to deal with that question first.

[83] It was in the course of disposing of a competition law case, *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, (*Southam*, S.C.C.), that the Supreme Court of Canada recognized the possibility of a standard of review other the correct or the patently unreasonable decision, namely the reasonable decision. Given that this appeal raises many of the same questions as were raised in *Southam*, S.C.C., it seems to me that one can usefully refer to that case in undertaking the pragmatic and functional analysis with respect to this appeal.

[84] The Supreme Court noted at paragraphs 30 and 31 of its decision that there is a statutory right of appeal under the Act. In the same way, this case raises no issues of jurisdiction, save for one discreet argument by the Commissioner to the effect that since leave was not obtained to appeal questions of fact, this Court has no jurisdiction to consider an appeal on the question of the definition of the product and geographic markets because those determinations are findings of fact. That argument leads into the second question in the pragmatic and functional analysis, namely the nature of the question before the Court.

[85] In *Southam*, F.C.A., this Court held that the question of the analytical framework to be applied in defining a product market was a question of law, and therefore a matter on which the Court owed no deference to the Tribunal's decision. Before the Supreme Court, the argument turned on whether the Tribunal had in fact properly applied the test for defining the product market. In *Southam*, S.C.C., the Supreme Court held that if the

Tribunal erred, it was in the application of the law to the facts, a question of mixed fact and law. It was therefore entitled some deference on the part of the Court.

[86] The question as to whether Canada Pipe exercised market power is, it seems to me, a question of the same order. There is no particular dispute as to the nature of the factors to be considered; the disagreement is as to whether those factors were properly considered. In the circumstances, I conclude that both questions raised by the cross-appeal are questions of mixed law and fact.

[87] The next issue is the purpose of the statute administered by the Tribunal. The Supreme Court referred to the purpose clause found at section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] of the Act to conclude that the aims of the legislation are more economic than legal. Concepts like “the efficiency and adaptability of the Canadian economy” and the effect of foreign competition on Canadian companies are better understood by businessmen and economists than by judges. This is as true in this case as it was in *Southam*, S.C.C.

[88] This led the Court to consider the expertise of the Tribunal. The Court recognized the Tribunal’s expertise in economics and commerce. The Court’s review of the Tribunal’s expertise in light of the problem which it had before it is particularly apposite to this case [*Southam*, S.C.C., at paragraph 52]:

> The particular dispute in this case concerns the definition of the relevant product market—a matter that falls squarely within the area of the Tribunal’s economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

The problem before this Court is exactly the same problem as was before the Court in *Southam*, S.C.C. I have little difficulty in coming to the same conclusion as the Supreme Court did on this issue, which is that the Tribunal is better equipped to decide such questions than are the courts.

[89] Having reviewed these factors, the Supreme Court found that they called for a standard less deferential than the patently unreasonable decision but more deferential than correctness. This led it to conclude that the standard of review of a decision of the Competition Tribunal on the issue of market definition was reasonableness. In my view, that conclusion applies equally well to this case in so far as the issue of market definition is concerned. The question of market power raises the same kinds of issues as does the question of market definition and leads to the same conclusion with respect to the standard of review.

[90] I therefore conclude that the standard of review of the Tribunal's decision with respect to the issues raised in this cross-appeal is that of the reasonable decision.

ANALYSIS OF CANADA PIPE'S GROUNDS OF APPEAL

[91] Canada Pipe's position on the issue of product market definition is that the relevant product market includes competing DWV products made from a variety of materials. In support of its position, it refers to a number of discrete arguments which I reproduce below in a summary way:

(a) the Tribunal ignored its own conclusion that there was competition between cast iron products and those made of other materials in all applications except vertical shafts in highrise buildings;

(b) the Tribunal ignored evidence that manufacturers market their products by comparing products made of different materials to each other;

(c) the Tribunal erred in requiring complete overlap in the applications in which competing DWV products can be used;

(d) the Tribunal failed to quantify the extent of the use of cast iron pipe in vertical shafts in highrise buildings in order to determine if it was material to the issue;

(e) the Tribunal failed to consider whether Canada Pipe is able to price discriminate based upon end use in applications for which it has no substitute; and

(f) the Tribunal ignored evidence of price relationships between cast iron and other materials.

[92] As noted earlier, the issue with respect to market definition is whether products are close substitutes for each other. All are agreed that there was no direct evidence on that issue. Consequently, the Tribunal proceeded on the basis of the indirect evidence of close substitutability. In *Southam*, S.C.C., the Court noted that the Tribunal considered the following as *indicia* of close substitutes (at paragraph 16):

> Accordingly, the members determined that recourse should be had to "indirect evidence" of substitutability. Indirect indicia of substitutability include (at p. 179) "the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices". Also relevant are "[t]he views of industry participants about what products and which firms they regard as actual and prospective competitors".

[93] At page 630 of the Court's reasons in *Southam*, F.C.A., the Competition Bureau's Enforcement Guidelines were quoted at length and were incorporated into the Court's analysis. I do not propose to reproduce them here due to their length but I note that they identify the following as indications that products are close substitutes: Views, strategies, behaviour and identity of buyers; trade views, strategies and behaviour; end

use, physical and technical characteristics. These are the very criteria which the Tribunal applied in this case.

[94] The Enforcement Guidelines are not binding on this Court, but they are an indication of the Competition Bureau's views as to the factors to be considered. Given the Competition Bureau's role in the enforcement of the legislation, the Enforcement Guidelines are an element to be taken into account in the interpretation of the legislative requirements. The ultimate question is always one for the Court, but it may find some assistance in the Competition Bureau's views.

[95] If these are the appropriate factors to take into account in deciding whether products are close substitutes, then the weight to be assigned to those factors is a matter for the Tribunal. The parties, or this Court, might assign them more, or less, weight than did the Tribunal but in the end, it is the Tribunal's assessment which is to prevail. In this case, the Tribunal acknowledged that there was competition between DWV products made from different materials but discounted this apparent competition because it found it had no effect on prices (Tribunal reasons, paragraph 101). It treated the evidence of comparison marketing between products made from different materials in the same way (Tribunal reasons, paragraph 98).

[96] The Tribunal did not misapprehend the evidence when it noted that, for all practical purposes, cast iron is the only product to be used in vertical shafts in highrise buildings. The weight to be assigned to that evidence is a matter for the Tribunal. The fact that there was no quantitative evidence in support of that conclusion does not detract from the Tribunal's ability to take it into account.

[97] The fact that price discrimination by end-use may be evidence of different markets (as set out in paragraphs 148-150 of Canada Pipe's memorandum) does not mean that the opposite is true, namely that the inability to price discriminate according to end use indicates a common market.

[98] It is true that the Tribunal did not consider evidence of price relationships between cast iron and other products; it is not true to say that it ignored such evidence since even Canada Pipe agrees that there was no such evidence before the Tribunal (see Canada Pipe's memorandum of fact and law). The Tribunal cannot ignore what is not before it. The Tribunal did attach considerable significance to the fact that the price of cast iron products dropped in the presence of competition from cast iron products but that it remained high when there were no other cast iron suppliers in a given geographic market.

[99] As Iacobucci J. pointed out in *Southam*, S.C.C., "the weighing of criteria in a balancing test must be largely a matter of discretion. The very purpose of a multi-factored test, such as the one that the Tribunal used to determine the dimensions of the relevant product market, is to permit triers of fact to do justice in diverse particular cases" (paragraph 66). The Tribunal exercised its discretion in the weighing of the various factors which it considered and defined the product market accordingly. Having

regard to the evidence and to its reasons, I cannot say that its conclusion was unreasonable.

[100] The Tribunal's conclusions with respect to market power is another matter.

[101] Section 79 of the Act provides as follows:

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

[102] The expression "market power" does not appear in section 79. What does appear is the requirement that a person "substantially or completely control … a class or species of business." The use of market power as a proxy for the element of control is one which has been developed in the jurisprudence, both that of the Tribunal and of this Court.

[103] That position is expressed with admirable concision in the Enforcement Guidelines:

> **3.2.1(d)** "Substantially or completely control"? Market Power.
>
> Once the universe of existing competitors is delineated, it is necessary to assess the extent to which these rivals constrain any market power that the dominant fin-11(s) might otherwise possess. The Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time.

The same idea appears frequently in the Tribunal jurisprudence (*Tele-Direct*, at pages 33-34):

> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd*. ((1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.)), that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof', refers to the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power

(*NutraSweet*, at page 28)

> 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.

[104] The same theme is found in the Tribunal's decision in *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd*. (1992), 40 C.P.R. (3d) 289, at page 325:

> In deciding whether a firm has substantial or complete control of a market, one asks whether the firm has market power in the economic sense. Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the ability to earn supra-normal profits by reducing output and charging more than the competitive price for a product. As was said in the NutraSweet decision supra (at p. 28): "Market power is generally accepted to mean an ability to set prices above competitive levels for a considerable period." [Emphasis added.]

This Court has not been previously called upon to consider this question. It has addressed the question of market power, but in the context of the review of a transaction likely to substantially lessen competition. Market power was defined as follows in *Southam*, F.C.A. (at page 608):

> It is universally accepted that a merger must be examined in terms of its likely effect on competition within a relevant market. The central concern is with respect to exercise of market power by a single dominant firm or a group of firms acting collectively. In turn, market power is recognized as the ability to profitably raise prices above competitive levels without losing a significant portion of business to rival firms or firms that may become rivals as a result of the price increase: … [Emphasis added.]

[105] Finally, the Supreme Court of Canada considered the question of market power in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, a case involving a prosecution under the *Combines Investigations Act* [R.S.C. 1970, c. C-23] (repealed) the precursor of the Act. Speaking of market power in relation to conspiracies to lessen competition, the Court described market power as the "ability to behave relatively independently of the market" (page 653). However, the Court went on to say that in the case of the abuse of dominance provisions, market power meant control and not simply the ability to behave independently of the market. This simply reflects the language of paragraph 79(1)(*a*) and its precursor, paragraph 32(1)(*c*) of the *Combines Investigation Act*. The Supreme Court's comments simply confirm the Tribunal's position with respect to market power as the test for control.

[106] In this case, the Tribunal defined market power as [at paragraph 122] “the ability to set prices above competitive levels for a considerable period,” a definition that is entirely consistent with the jurisprudence.

[107] While there appears to be broad agreement as to the use of market power as a proxy for control of the market, there is some difference of opinion as to how that factor is to be proved. In the passage cited above from the *NutraSweet* decision, the Tribunal indicates that some regard must be had for market share and barriers to entry. These are regarded as indirect proof of market power. But where direct evidence of market power is available, it should be considered (*Tele-Direct*, at pages 82 and 83):

> …, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry. (*NutraSweet*, *supra*, footnote 3; *Laidlaw*, *supra*, footnote 24; *D & B*, *supra*.)
>
> The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded.

As will be seen, this is a case in which the direct evidence is available and, in my view, determinative.

[108] Canada Pipe’s attack on the Tribunal’s conclusions with respect to market power can be summarized as follows:

I- The Tribunal incorrectly relied upon evidence of high margins.

2- The Tribunal incorrectly relied upon Canada Pipe’s ability to lower prices.

3- The Tribunal erred in finding market power without conclusive evidence of barriers to entry.

[109] It is true that the Tribunal was critical of the evidence of high margins put forward by the Commissioner’s expert, Dr. Ross, as can be seen from the following paragraph in the Tribunal’s reasons (at paragraph 129):

> When looking at the summary of gross profits margins, the numbers seem high, though negative in some cases, as stated above. Dr. Ross himself, in his report, cautions the reader as to the interpretation of these figures. Dr. Ross made his calculations based on limited data provided by [Canada Pipe], but cannot say how those costs were established by [Canada Pipe] nor what they include. Moreover, he adds, even high margins do not necessarily lead to a conclusion of high economic profits, because the extra revenues (beyond marginal costs) might be necessary to cover fixed costs. Further, the Tribunal has no data on [Canada Pipe’s] ratio of fixed costs to variable costs.

It is also true that the Tribunal appears to have given this evidence some credit in that it relies upon it to conclude that in two of the product markets, Canada Pipe is pricing above marginal cost. The two markets in question are the markets for pipe and fittings (Tribunal reasons, paragraph 124).

[110] Looking at the evidence of high margins, I may not have come to the same conclusion as did the Tribunal. But as Iacobucci J. said in *Southam*, S.C.C. (at paragraph 79):

> It is possible that if I were deciding this case *de novo*, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam's own expert, an American newspaper consultant, identified the community newspapers as the source of Southam's difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the community newspapers by Southam substantially lessened competition. But again, I cannot say that the Tribunal's approach was unreasonable.

[111] Faulty as the evidence of high margins appears to be, it was for the Tribunal to assess it. The fact that I may have come to a different conclusion does not make its conclusion unreasonable.

[112] The more compelling argument against Canada Pipe's possession of market power in all 18 markets identified by the Tribunal is its reaction to the emergence of competitive suppliers. The Commissioner relied on the evidence of price reductions in response to competition to argue that the ability to reduce prices indicated that they were above competitive levels to begin with. But if prices have become competitive as a result of the emergence of competing suppliers, the significance of non-competitive prices at an earlier point in time is not obvious.

[113] Since market power is defined in terms of price, the best evidence of market power is a supplier's pricing following changes in the market. One would think that a supplier who is able to maintain prices above competitive levels (however defined) would be impervious to the emergence of competing suppliers. How did Canada Pipe react to the emergence of competing suppliers of cast iron DWV products (Tribunal reasons, at paragraph 97)?

> The evidence shows clearly that Bibby [Canada Pipe] has reacted to the entry of new cast iron suppliers, whether manufacturer (Vandem) or imports (Sierra, New Centurion) by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices have increased since 1998. Although it is shown that Bibby [Canada Pipe] monitors the prices for plastic DWV products, there is no evidence of the prices of plastic products having a disciplinary effect on the price of the cast iron products.

If Canada Pipe's prices were supra-competitive in the absence of competition, they became competitive when new suppliers of cast iron products emerged. What was the effect of these price reductions (Tribunal reasons, at paragraph 127)?

> The evidence on profit margins in the present case is not as clear as it was in *Tele-Direct*. Whereas in the latter case Tele-Direct was able to consistently pay 40 percent of its revenues to the telephone companies, in this case margins vary from one region to the next. They are consistently high in Quebec and the Maritimes, but dip in other regions, to the point of being negative for considerable periods of time in Alberta, the Prairies and British Columbia.

[114] In my view, this passage documents the Tribunal's acceptance of the fact that in some markets, margins were not high, though they were in others. It also shows that the Tribunal ultimately accepted that Canada Pipe's price reductions, in those regions where they occurred, were the result of competition from new suppliers (Tribunal reasons, at paragraph 136):

> Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby [Canada Pipe] products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbia and Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontario has exerted downward pressure on the prices in that province. No such movement is noted in Quebec and the Maritimes.

Given the definition of market power, it is difficult to see on what basis the Tribunal could conclude that Canada Pipe had market power in British Columbia, Alberta, the Prairies and Ontario after the emergence of competing suppliers of cast iron products in those regions. The fact of reducing prices to respond to the emergence of new competitors is inconsistent with "the ability to set prices above competitive levels for a considerable period".

[115] Seen in this light, Canada Pipe is only in a position to exercise market power in Quebec and the Maritimes, where it faces no competition, and where prices have risen, not fallen. In the other four geographic markets, it is constrained by the presence of importers and manufacturers of cast iron products to reduce its prices significantly. Those reductions are inconsistent with possession of market power.

[116] In its concluding paragraph on this issue, the Tribunal summarizes its position on market power, as disclosed by the indirect evidence, as follows (at paragraph 161):

> The evidence on barriers to entry is not entirely conclusive. However, Bibby's [Canada Pipe's] large market share, its range of products and national presence, the limited penetration of competitors and the fact that this market offers only limited growth potential are sufficient to establish that Bibby [Canada Pipe] does control a substantial part of the cast iron DWV products market.

If there is a test of control other than market power, the Tribunal has not articulated it. If the test is market power, then the Tribunal's failure to recognize the significance of the price reductions which followed the emergence of new entrants in the market in Ontario and the western geographic regions is unreasonable.

[117] Canada Pipe also attacks the Tribunal's finding on barriers to entry. The Tribunal found that (at paragraph 152):

> Entry must be shown to be both effective and viable. In this instance, entry by various players, especially in the West and to a lesser extent in Ontario, has certainly had an effect on prices. From Bibby's reaction to these new entrants, it can be said that they are perceived as competitors. Thus entry has been effective where it has occurred. Its viability remains to be determined.

In my view, this passage incorporates two findings of fact which are conclusive against a finding of market power on the part of Canada Pipe. New suppliers did emerge, so that barriers to entry, if present, were not determinative, and the new suppliers had an effect on Canada Pipe's prices, which is inconsistent with the latter exercising market power.

[118] As a result, I find that the Tribunal's conclusion that Canada Pipe had market power in British Columbia, Alberta, the Prairies and Ontario is unreasonable as it is inconsistent with its own definition of market power, the test of whether Canada Pipe had control or substantial control of the 18 markets which the Tribunal defined. As a result, the Tribunal's finding as to market power applies only to the three product markets in two of the six geographic markets which it defined, namely Quebec and the Maritimes.

CONCLUSION

[119] Having regard to the evidence which the Tribunal had before it, as well as the standard of review applicable to these questions, I find that the Tribunal's definition of the product markets do not justify this Court's intervention. However, I am of the view that we must intervene with respect to the question of Canada Pipe's market power in British Columbia, Alberta, the Prairies and Ontario, four of the six geographic markets identified by the Tribunal. The fact that Canada Pipe was required to lower prices in response to competition from other suppliers of cast iron products in those markets is inconsistent with the definition of market power. Consequently, I would return the matter to the Competition Tribunal with a direction for reconsideration on the basis of these reasons.

6

Competition Tribunal Tribunal de la Concurrence

#185(a)

CT - 88 / 4

IN THE MATTER OF an application by the Director of Investigation and Research under section 75 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF a refusal to supply automotive parts for export by Chrysler Canada Ltd. to Richard Brunet.

B E T W E E N :

The Director of Investigation and Research

Applicant

\- and -

Chrysler Canada Ltd.

Respondent

REASONS AND ORDER

Date of Hearing:

July 4 - 18 and 21, 1989

Presiding Member:

The Honourable Mr. Justice Max M. Teitelbaum

Judicial Member:

The Honourable Mr. Justice Leonard A. Martin

Lay Member:

Dr. Frank Roseman

Counsel For the Applicant:

Director of Investigation and Research

William J. Miller
John S. Tyhurst
John F. Rook, Q.C.

Counsel For the Respondent:

Chrysler Canada Ltd.

Thomas A. McDougall, Q.C.
Anne Mactavish

Amicus Curiae:

Yves Bériault
Madeleine Renaud

COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

Chrysler Canada Ltd.

On December 14, 1988, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended ("Act"), requesting the following relief:

> 1. An order against the Respondent Chrysler Canada Ltd. (Chrysler) requiring that it forthwith and thereafter accept Richard Brunet (Brunet) as a customer on trade terms usual and customary to its relationship with Brunet for the supply of Chrysler Parts (as hereafter defined) to Brunet; and
>
> 2. Such other and further orders which in the circumstances may be just, including:
>
>   a) requiring and directing that Chrysler reverse all steps taken to dissuade any person (including Chrysler franchised dealers) in Canada from conducting business with Brunet with respect to Chrysler Parts;

b) restraining Chrysler from combining or arranging with any other person to refuse, suppress, hinder or delay the supply of Chrysler Parts to Brunet; and

c) directing that Chrysler take all such ancillary and necessary steps and actions to restore Brunet to the position he enjoyed before the actions herein complained of.

In 1977 Richard Brunet ("Brunet") opened and began to operate a business in the City of Montreal, Province of Quebec, commonly known as R. Brunet Company ("RBC"). The business was registered as a sole proprietorship.

Brunet's father had operated a similar business in New York City, State of New York, in the United States of America, under the name of G. Brunet Company. This business was involved in the export of automotive parts, including automotive parts of Chrysler Corporation, Ford Corporation and General Motors Corporation. The automotive parts were exported, in the main, to Colombia, Peru and Venezuela. In November 1974, following the death of his father, Brunet took over the operation of his father's business until 1976 when he came to live in Canada.

Brunet, as had his father, exported automotive parts to markets outside of North America, initially to South America, and later to the Middle East, Scandinavia and the United Kingdom.

Although RBC deals with the sale of automotive parts which it purchases from various suppliers, the present application pertains to the relationship between RBC and Chrysler Canada and the sale by RBC of Chrysler automotive parts in the export market.

Throughout the proceedings, certain terminology relating to the Chrysler parts has been used. The most frequent references are to two groups of Chrysler parts: "A Parts" and "B Parts". On its price lists, Chrysler[1] identifies its parts by a seven-digit number and by one of the above two letters.

B Parts are commonly known as "captive" parts. Mr. Clifford Roy Burnett ("Burnett"), the recently retired Vice-President of Parts and Service and Technical Programs of Chrysler Canada, who since 1974 had the responsibility through various positions for the parts distribution in Canada, testified that some automotive parts that are considered captive parts may in fact be available from a source other than Chrysler. Generally, however, if an owner of a Chrysler motor vehicle must replace a B Part, the part will have to be obtained from Chrysler. Sheet metal parts or interior mouldings were referred to as clear examples of captive parts that could only be supplied by Chrysler.

A Parts are commonly known as "competitive" parts since these parts are available from a variety of automotive parts

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[1] "Chrysler" without a modifier refers to the entire Chrysler organization in North America.

manufacturers for a particular application. An example of a competitive part would be a shock absorber or a fan belt.

Automotive parts can also be divided according to the use to which the part is put. When reference is made to "service" parts, this is taken to mean parts that are used to repair a vehicle, consequent upon an accident or some other malfunction, as opposed to "aftermarket" parts which are replaced as a matter of course during routine maintenance. The breakdown according to application relates to the captive/competitive dichotomy in the following way: service parts may be both captive and competitive; aftermarket parts are competitive more than captive.

Certain brand names specific to the Chrysler organization also appear in the evidence. "Autopar" is a line of Chrysler parts which comprises only competitive parts and which is marketed only by Chrysler Canada. "Mopar" is a line of Chrysler parts which, in Canada, includes mainly captive parts.

Finally, mention should be made of the "Interparts" programs of Chrysler U.S. Interparts programs involve a bulk purchase of some minimum quantity of an automotive part from a special production run of that specific part. These programs include both captive and competitive parts and are only available through Chrysler U.S.

RBC had its first dealings with Chrysler Canada in 1977 and continued to buy from them until the events that led to the present application. Apart from selling Chrysler parts Brunet dealt with two major suppliers in the United States (described as "Other U.S." in Table 1 below). He has also purchased small volumes of auto parts from several suppliers in Canada. His principal supplier in the U.S. until 1983 was Ford Corporation. His relationship with this company ended in 1985. The "Other U.S." since 1985 consists, for practical purposes, of purchases from a single source of supply on behalf of a particular customer. The purchases from Chrysler Canada dealers relate to the present proceedings. Table 1 divides the sales of RBC by the aforementioned sources of supply since 1984.

TABLE 1

R. Brunet Company

Gross Sales by Line of Business

Year	Chrys. Canada	Chrys. Canada Dealers	Chrys. U.S.	Inter-parts, M.D.*	Other Canada	Other U.S.
1989 #	-	26,618	67,630	-	21,706	-
1988	-	119,310	52,734	156,464	23,985	376,648
1987	99,154	223,495	24,126	325,872	78,280	140,890
1986	362,245	-	25,180	171,551	50,920	225,207
1985	259,892	-	20,442	95,235	11,984	338,824
1984	300,394	-	27,813	23,631	57,373	508,370

Notes:

* M.D. = Master Distributors

To May 12, 1989 only. Transactions with customers were placed in supplier categories by Mr. Reinke of Arthur Anderson Co. based on the supplier from whom Brunet made the largest purchases in each transaction. As a result, there are some minor discrepancies between the values in the table for 1989 and the actual sources of supply.

Total Gross Sales

Year	Total
1989#	115,954
1988	729,141
1987	891,817
1986	835,103
1985	726,377
1984	917,581

Notes:

To May 12, 1989 only.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand, for the Director of Investigation and Research, Schedules A to H; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989, prepared by B.J. Reinke, C.A.

It is uncontested that Brunet was encouraged by Chrysler Canada throughout his association with it to expand the sale of Chrysler Canada auto parts in the export market. A number of actions were taken by Chrysler Canada in its treatment of Brunet to allow for the needs of his customers who faced particular problems of exchange controls and import permits with time deadlines. The details of some of the particular services provided by Chrysler Canada will be discussed in connection with the definition of market. Brunet undertook to represent the Autopar line at trade shows in South America with posters supplied by Chrysler Canada. On occasion Chrysler Canada referred potential customers to Brunet.

On August 29, 1986, Brunet received a telephone call from a Mr. P.R. Williams, National Parts and Sales and Marketing Manager for Chrysler Canada, who informed Brunet that all his orders with Chrysler Canada had been placed on hold. By letter dated October 8, 1986, in reply to a letter from Brunet dated October 2, 1986, sent to Burnett and dealing with a matter referred to as "Requirement for Britain",[2] Burnett advised Brunet that there was "no longer any organizational responsibility for handling these orders in Canada". This letter went on to state that all orders currently in the system would be processed according to "normal practice and/or availability of supply":

October 8, 1986

Mr. Richard Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

Your letter of October 2, 1986 is received and since there is no longer any organizational responsibility for handling these orders in Canada I have referred your request to Mr. B.J. Lerner in the U.S. Chrysler Export Sales Office who will handle all of your requirements.

All orders currently in the system will be filled and shipped as per our normal practice and/or availability of supply.

Thank you for your inquiry. You will hear from Mr. Lerner's office in the near future.

Yours very truly,

(s) C.R. Burnett[3]

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2 Exhibit 3, Tab 162.

3 Exhibit 3, Tab 164.

The orders currently in the system were filled by Chrysler Canada over the following five to six months. No new orders were accepted by Chrysler Canada after October 8, 1986 causing Brunet to try to find alternative sources of supply. In January 1987, Brunet approached several Montreal-area Chrysler Canada dealers in order to source parts to service his customers. It did not take long for Chrysler Canada to become aware that Brunet was purchasing parts from its dealers. This information was relayed to Chrysler Canada's head office by Chrysler Canada field representatives through its Montreal office. Suspicion was also aroused by a large order placed by a Chrysler Canada dealer through the Chrysler Canada computer system. This order contained an unusually large number of older automotive parts, far in excess of normal domestic demand. A representative of Chrysler Canada (head office) contacted the Sales Manager of the Regional Office in Pointe Claire, Province of Quebec, a Mr. Jacques St. Pierre, and asked St. Pierre to have his district managers instruct their dealers not to sell Chrysler automotive parts for export.

This initiative was followed up by a bulletin to all Chrysler Canada dealers dated May 8, 1987:

> Bulletin No. 87-37
> May 8, 1987
>
> TO ALL DEALERS AND AUTOPAR DISTRIBUTORS
> OF CHRYSLER CANADA LTD.
>
> **EXPORT PARTS SALES**
>
> We have received several inquiries recently from Dealers regarding the sale of Chrysler Parts for **Export Sales** purposes. The requests may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets.

The sales of Mopar and Autopar Parts by Chrysler Canada is strictly to service our Canadian customers, not for export. If you receive an inquiry concerning export sales, please contact your Regional Parts Sales Manager, for referral to our Export Sales Office in Detroit. All Chrysler Canada Export Sales will be handled in this manner.

We would appreciate your co-operation in this matter.

(s) P.R. Williams

P.R. WILLIAMS
National Parts Sales
and Marketing Manager[4]

Bulletin n° 87-37
Le 8 mai 1987

AUX CONCESSIONNAIRES ET DISTRIBUTEURS
AUTOPAR DE CHRYSLER CANADA LTÉE

VENTE DE PIECES POUR L'EXPORTATION

Plusieurs concessionnaires nous ont récemment contactés au sujet de la vente de pièces Chrysler **pour l'exportation**. Les demandes sont peut-être reliées à la parution de certains articles dans la presse déclarant que Chrysler étendrait la vente de certains produits de fabrication nord-américaine aux marchés étrangers.

La vente des produits Mopar et Autopar par Chrysler Canada est strictement réservée à nos clients canadiens et non à l'exportation. Pour toute demande concernant la vente pour l'exportation, veuillez communiquer avec votre directeur régional, secteur vente des pièces, qui en référera au bureau des ventes pour l'exportation à Detroit. Toutes les ventes de pièces pour l'exportation de Chrysler Canada seront ainsi traitées.

Votre collaboration dans cette affaire sera grandement appréciée.

Le Directeur national,
vente et commercialisation
des pièces,

(s) P.R. Williams

P.R. Williams[5]

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4 Exhibit 4, Tab 230 (underlining added).

5 *Ibid.* (underlining added).

Despite the general language of this bulletin, the Tribunal is satisfied, from the testimony of Burnett, that the bulletin *was aimed at preventing Brunet* from obtaining Chrysler parts to service his customers.

> Q. Now, in the second sentence in that first paragraph, it says:
>
> > "The request may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets."
>
> Given your evidence to this point on this bulletin, would you agree with me that the specific impetus for the bulletin was Mr. Brunet and not any articles that may have appeared in the press?
>
> A. That is true, although there were articles in the press about Chrysler entering the European market.
>
> Q. But I put it to you that, in the absence of Mr. Brunet's activities, you would not have sent this memorandum.
>
> A. Probably not, sir.[6]

Notwithstanding the issuance of the bulletin Brunet was still able to purchase, with difficulty, Chrysler parts from Chrysler Canada dealers. On September 27, 1987 a second bulletin was issued by Chrysler Canada.[7] This second bulletin was much the same as the first. It emphasized, as did the first, that parts were not to be sold for export and that all requests for parts for export should be

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6 Cross-examination of Burnett at p. 1534 of the transcript.

7 Exhibit 16.

referred to the dealer's Regional Manager who, in turn, would refer the matter to the office of Export Sales in Detroit.

Some time after the May 1987 bulletin, Chrysler Canada commenced a review of all of its dealer agreements which culminated in the re-signing of all the Chrysler Canada dealers to new dealer agreements. A clause was inserted in order to restrict parts sales to the domestic market in the following terms:

> Whereas the parties hereto have heretofore entered into a Sales and Service Agreement relating to, among other things, a means for the sale, in Canada, of parts and accessories and other products and services manufactured or distributed by CHRYSLER ... .
>
> <u>And to provide parts to the Canadian domestic market to assure service to those vehicles sold in Canada for the full extent of their service requirements.</u>[8]

Although no sanctions or penalties have as yet been applied against any of its dealers by Chrysler Canada for breach of the clause, Burnett is of the view that the new agreement gives Chrysler Canada the power to terminate the franchise of a dealer who sells parts to Brunet. Changes were also made to the computerized ordering system of Chrysler Canada to flag atypical orders involving large volumes or unusual parts.

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8 *Parts Wholesale Sales Agreement*, Exhibit 6, Tab 338 (underlining added). See also *Parts Merchandising Sales Agreement*, Exhibit 26.

Section 75 of the *Competition Act*

On the basis of the above facts the Director instituted the proceedings pursuant to section 75 of the Act. Section 75 reads:

> 75. (1) Where, on application by the Director, the Tribunal finds that
>
> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
>
> (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
>
> (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and
>
> (d) the product is in ample supply,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.
>
> (2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.
>
> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

In order for the Tribunal to exercise its discretion to make an order pursuant to the section the Director must establish all of the elements contained in each of the paragraphs (1)(a) to (1)(d). Paragraphs (1)(c) and (1)(d) are not in serious dispute. The Tribunal is satisfied that Brunet is willing and able to meet the usual trade terms of Chrysler Canada and that the product is in ample supply. No evidence was led to the contrary. Before turning to the determination of whether the elements of (1)(a) and (1)(b) have been met, it is necessary to establish the meaning of "product" and "market".

Product

Is the product in question Chrysler Canada auto parts as submitted by the Director, Chrysler auto parts, or auto parts in general as submitted by the respondent? The definition of market is closely tied to the answer to this question. The Tribunal is satisfied that the relevant product is, for the reasons explained below, Chrysler auto parts.

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers.

Although Brunet's business is the export of auto parts, the definition of the product in relation to Brunet's dealings with Chrysler Canada depends on the demand of customers who purchased Chrysler auto parts. The issue is whether they treated Chrysler auto parts as a distinct product or as one for which they would readily accept substitutes. The evidence shows that Brunet responded to direct orders of customers, that customers *specified* that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. There was no question of substituting parts of other suppliers for those of Chrysler. The product in question is thus Chrysler auto parts.

The respondent submits that subsection 75(2) severely constrains the definition of the product as Chrysler auto parts: "the effect of subsection 75(2) with its reference to class of articles is that the Tribunal must define a product by a genus or class or kind description, unless the product meets the single exception thereto."[9] The applicant takes the position that the subsection "adds little to the analysis. In a buyer-derived demand situation alternative branded goods are of little utility and the particular sought branded goods will always be of importance."[10]

In the view of the Tribunal subsection 75(2) does not enter into the definition of the product as Chrysler auto parts. The product is Chrysler auto parts not "only because it is differentiated from the other articles in its class by a trade mark, proprietary name or the like".[11] It is not only the existence of the trademark that determines the definition but rather the demand of Brunet's customers. Subsection 75(2) forecloses reliance being placed on trademarks (save for the specified exception) to define products in spite of the existence of acceptable substitutes to customers. This factor, the presence or absence of acceptable substitutes to customers, is of paramount importance in arriving at the appropriate definition of the "product" and was the determining factor in the present case.

The evidence is that it is primarily service parts and within that group mainly captive parts that are ordered from Brunet. This is consistent with the designation of other parts as competitive

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9 Respondent's Memorandum of Law at para. 40.

10 Memorandum of Law of the Applicant at para. 35.

11 *Competition Act*, R.S.C. 1985, c. C-34, as am., s. 75(2) (underlining added).

because for these parts there are numerous alternative sources of supply and active price competition. Looking to the fact that sales by Brunet of the Autopar line, which consists only of competitive parts, were very limited, Chrysler Canada would have the Tribunal exclude the Autopar line from the product definition. The Director has stressed, through the evidence of Brunet, that in Brunet's experience competitive parts are ordered in the same way as captive parts (as a seven-digit number) and with the same insistence on genuine Chrysler parts. Virtually nothing turns on the finding of a distinction; no element of the decision depends on whether the product in question is Chrysler auto parts, captive and competitive, or exclusively captive Chrysler auto parts since the volume of competitive parts ordered from Brunet appears to have been minimal. A finding for Chrysler Canada would require that Brunet's sales and gross profits be modified to exclude sales of Autopar. This was not done by the Respondent's accounting expert. Given the foregoing and the fact that from Brunet's perspective (if not that of his customers insofar as they shop for cheaper sources of supply prior to ordering from Brunet) there is no difference between competitive and captive parts, the Tribunal makes no distinction between captive and competitive Chrysler parts.

The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.

This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion.

Market

Having defined the product as Chrysler auto parts, the Tribunal must now determine the market in which Brunet buys

Chrysler auto parts. The applicant contends that the relevant market comprises Canada, that Chrysler Canada is the sole supplier and Brunet, in the event, is the sole buyer. The respondent submits that the market consists of both the U.S. and Canada, that Chrysler U.S. is the supplier and exporters of Chrysler auto parts are the buyers. The Tribunal is satisfied that the relevant market is Canada, and that the U.S. and Canada are separate markets. This conclusion is discussed in the following section that deals with the differences between purchases from Chrysler Canada and from Chrysler U.S. in small and large volumes.

(a) Parts Purchased in Small Volume

This refers to the number of units of each part and to the fact that the parts are individually packaged. It does not refer to the size of the total order.

The automotive parts purchased from Chrysler Canada or Chrysler U.S. are physically identical. However, Chrysler Canada and Chrysler U.S. each publish separate price lists for these parts. The evidence is that prices in Canada are established with respect to market conditions in Canada. According to the evidence of Burnett, Chrysler Canada used the U.S. price list as a point of departure and made its modifications to price in the light of domestic conditions, subject to meeting the financial tests within Chrysler.

The reason why prices (*denominated in a common currency*) for some parts are cheaper in Canada than in the U.S. was addressed in the evidence of Burnett and, more speculatively, in the evidence of Professors Schwindt and Winter. Burnett states that Canadian prices are primarily cheaper for parts used for older models of cars. He also said that Chrysler Canada tends not to change the prices of inventory until it is necessary to reorder and since the turnover of inventory is much slower in Canada than in the U.S., reordering occurs less frequently and thus price increases lag behind those in the U.S.

Winter hypothesizes that parts prices in Canada fell at the time of the decline in the Canadian dollar as compared to the American dollar in late 1970s. He reasons that Chrysler, in common with other companies, is reluctant to incorporate the effect of exchange rate changes in their prices because this would be too disruptive. Professor Richard Schwindt concludes that prices of vehicles and parts in Canada are more sensitive to import competition than in the U.S. and thus tend to be lower. All the explanations share the common feature that, *whatever the cause, market conditions in the U.S. and Canada are different and the differences are reflected in different parts prices.* The percentage of all Chrysler parts that were priced lower in Canada is not in evidence. The only specific evidence is that it is primarily older parts that are affected.

The evidence generally indicates that customers tended to buy exclusively or primarily from Brunet those parts that were cheaper to source through Chrysler Canada. Parts that were generally less expensive to source in the U.S. were purchased through other suppliers.

In addition to the price differences between Chrysler Canada and Chrysler U.S., there were several other important differences between them as sources of service parts. Chrysler Canada offered Brunet (and thus Brunet's customers) "price protection" against changes in prices between the time of order and delivery. This protection was offered for a period of up to four months, covering two bi-monthly changes in price lists. Only recently, in February 1989, was this protection made available to Brunet by Chrysler U.S.

Furthermore, when an order was sent to Chrysler Canada it responded with an "availability report" which identifies the parts that were immediately available and the length of the delay that would be required in supplying each of the remaining parts.

Brunet also asserts, with some corroboration from correspondence with customers, that Chrysler Canada offered superior service in other ways. Brunet claims that the percentage of orders immediately filled by Chrysler Canada was much higher than was the case with Chrysler U.S. and that the latter tended to fill orders through a series of relatively small shipments to Brunet's designated port. The result was slower shipment to Brunet's customers and higher costs. Brunet also claims that the accuracy with which orders were filled was higher in Canada than in the U.S. As a result there were fewer customer claims when supply was obtained from Chrysler Canada. The only evidence offered in contradiction is testimony by Burnett to the effect that the "fill rate" on orders received by Chrysler *from dealers* is 95 per cent in the U.S. compared to 96 per cent in Canada. This evidence does not, however, provide any information on Brunet's experience with Chrysler U.S. since Brunet *is not a dealer and does not make typical dealer's orders.*

The Tribunal does not accept Brunet's allegations that it is cheaper to ship to European destinations from a port in Montreal rather than a port in New Jersey. This evidence, given by Brunet, is contradicted by the evidence of a Mr. Jansson, a witness from Sweden who imports Chrysler Canada vehicles and Chrysler parts from Canada.

The importance to Brunet's customers of all of the foregoing differences between sourcing from Chrysler Canada and Chrysler U.S. that are not directly related to differences in the price lists cannot be accurately assessed. To do so would require evidence on whether Brunet's customers chose to source from Chrysler Canada when its prices were *higher* than those set by Chrysler U.S. In the absence of evidence of this kind, or at least evidence of customer statements that they clearly preferred to source from Chrysler Canada, the Tribunal concludes that these factors *alone* do not create two distinct sources of supply. This conclusion is supported by evidence that Brunet's customers tend to buy parts that are cheaper to source from Chrysler U.S. through other exporters than Brunet. This suggests that whatever problems there might have been in sourcing from Chrysler U.S., they could be overcome by price concessions or other advantages that these other exporters offered Brunet's customers. Insofar as Brunet's customers were concerned, he was a preferred source of supply primarily for parts that are cheaper to source in Canada.

Brunet earned a considerably higher profit margin on parts sourced from Chrysler Canada than on U.S. orders as the Canadian price list necessarily included Canadian federal sales tax and duty on parts imported into Canada. The duty and tax did not apply on parts exported from Canada. The duty and sales tax paid by Chrysler Canada were returned to Brunet and constituted the major part of his profit margin. The higher profitability Brunet earned on parts obtained in Canada put him in a position to offer discounts on the published price lists or to absorb some of the cost of higher prices, as may be the case when he buys from dealers. Thus, customers could be encouraged to purchase Canadian-sourced parts when list prices in the U.S. and Canada were similar. Whether discounts were in fact offered by Brunet is less important than his ability to do so.

Schwindt is of the view that the separate price lists in the two countries and the other differences discussed above create a separate "product bundle" with respect to Chrysler parts sourced in Canada and those sourced in the U.S., even though the parts are physically identical. He concludes that the differences are sufficiently great to create two distinct markets:

> When sourcing his purchases, Brunet considered a number of elements which were important to his purchase decision. These elements include: the physical characteristics of the automotive part; the delivery point; the probability that the order would be filled in a single delivery; the reliability of the supplier in meeting promised delivery dates; the predictability of trade terms; the probability of unauthorized substitutions; the probability of missing, misplaced or damaged goods; the supplier's cancellation policy; and price. Generally the physical characteristics of Chrysler automotive parts supplied by Chrysler Canada Ltd. were identical to those supplied by Chrysler U.S. However, the other elements of the product bundle could differ significantly between these suppliers.[12]

As indicated above, the Tribunal concludes that the critical difference between the two sources of supply is price.

Winter concludes that the physical identity of the parts obtained from the two sources is critical in establishing market boundaries, and since the only difference between the two sources is price (or other claimed advantages that can be translated into a price

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[12] Exhibit 22: Exhibit "A" to the Affidavit of Richard Schwindt, dated June 4, 1989 at p. 7.

difference), parts supplied from Chrysler Canada and from Chrysler U.S. are in the same market:

> Products that are physically identical, and are perfectly substitutable in their end uses are properly regarded as in the same market unless geographical distance and directly related costs preclude their substitutability. Almost all of the items that Professor Schwindt lists, such as higher handling costs of U.S. sourced product, less price protection, less accommodation of timing requests, a stricter cancellation policy, and the unilateral substitution of technically equivalent parts, are equivalent to a higher cost of purchasing from Chrysler U.S., or a higher price paid to Chrysler U.S. The physical products from the two sources were identical; from the buyer's point of view all differences in terms of trade are equivalent to differences in price.[13]

He states that to conclude, as does Schwindt, that Chrysler Canada is in a different market than Chrysler U.S., is to arrive at the odd result that there is one supplier and one customer. He states that the effect of denying Brunet supply from Chrysler Canada is to place Brunet on the same footing as exporters operating from the U.S., whereas before he had the advantage of being able to sell from both price lists and to buy from both sources:

> The prices paid by Brunet to Chrysler U.S. and the trade terms available to Brunet from Chrysler U.S., were the same terms faced by every other distributor of Chrysler parts for export from North America (*supra*, Section II, paragraph 9). If a buyer of a particular article can obtain perfectly substitutable products at a modest or moderate price or cost increase, which price increase puts the buyer on an equal footing with other buyers of the product, then the substitute products should properly be included in the same market definition. The perfect

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[13] Exhibit 29: Report Prepared by Ralph A. Winter, dated June 20, 1989 at para. 9.

> substitutability of the parts from Chrysler U.S. and Chrysler Canada fulfils the essential criterion for inclusion of products in the same market.[14]

Whether Brunet is placed on the same footing as exporters in the U.S. (described by Burnett as the "level playing field") is not relevant to a determination of market definition, but may be relevant in deciding whether the Tribunal should exercise its discretion in issuing an order in the event that the applicant is successful in the present proceedings.

The existence of separate price lists in the U.S. and Canada and the fact that they are intended, according to the evidence of Burnett, to respond to different market conditions in the two countries strongly implies the existence of separate markets. No convincing evidence to the contrary has been presented. The price lists are used by the vast dealer networks in the two countries. It is difficult to believe that anyone would question that dealers in the U.S. and Canada are in separate markets with respect to the purchase of their parts. Yet Winter and the respondent submit that Brunet is in the same market as the numerous U.S.-based exporters with whom he competes for non-North American business. The Tribunal does not accept this conclusion, given that Chrysler Canada and Chrysler U.S. are in separate markets.

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[14] *Ibid.* at para. 10.

In the case of Brunet it is clear that the market niche he occupies is based on the fact that some Chrysler auto parts are cheaper in Canada than in the U.S. The price differences are maintained by Chrysler for its own purposes. Similarly, the apparently anomalous situation where there is a single seller and a single buyer is also a result of Chrysler corporate policy. The decision to allow Brunet to address the non-North American markets from Canada was taken by Chrysler. It would similarly be able, apart from the question of the application of section 75 of the Act, to decide that all non-North American exports will originate in the U.S.

(b) Interparts - Parts Purchased in Large Volume

Are parts purchased under the Interparts programs in the United States in the same market as service parts purchased from Chrysler Canada? Although they are physically identical, parts purchased through Interparts and parts from Chrysler Canada are not generally substitutes and hence are not in the same market. This conclusion follows from the features of the Interparts programs: very large minimum purchase requirements; orders must be placed in advance for later manufacture and hence it may take considerable time for an order to be filled; parts are packaged in bulk rather than individually; prices are much lower than for parts ordered in small volumes. The dollar value of minimum purchases was recently raised by a large multiple in conjunction with the creation of Master Distributors of Interparts. The effect of this change is the virtual elimination of any substitution that may have occurred between sourcing of service parts in Canada and from Interparts.

The Law

As previously stated, the present application is made pursuant to section 75 of the Act. In order for the Director to succeed in his present application, he must satisfy the Tribunal of the existence of each element contained in the section.

(a) Business Substantially Affected

The establishment of the product and market as being Chrysler auto parts available in Canada allows a consideration of the element found in paragraph 75(1)(a), that is, whether Brunet was "substantially affected" in his "business" by the refusal of Chrysler Canada to supply Brunet with Chrysler auto parts.

The applicant submits that the "business" in issue relates to the "specific line or product within the overall enterprise affected by the refusal", that is, Brunet's business is exporting Chrysler Canada auto parts.[15] The respondent submits that a broader

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15 Memorandum of Law of the Applicant at para. 42.

interpretation is required in light of the definition of "business" found in subsection 2(1) of the Act which states:

> "business" includes the business of
> (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
> (b) acquiring, supplying and otherwise dealing in services.

The respondent submits that the evidence shows that Brunet's "business" is the "export business" or "conceivably his business of exporting automotive parts".[16]

A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used. It is clear that a fair analysis of the situation in the present case requires that a broader interpretation is required than the one urged by the applicant. The submission of the applicant, if accepted, would be unnecessarily restrictive since this could preclude a proper understanding of the effects of the refusal to supply.

This does not mean, however, that the effect of the refusal to supply can be established solely by examining the overall sales and profit figures. To understand the effect of the refusal to supply, it is necessary to answer the following:

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16 Respondent's Memorandum of Law at para. 25.

(a) does the product in issue account for a large percentage of the overall business?

(b) is the product easily replaced by other products sold by the business?

(c) does the sale of the product use up capacity that could be devoted to other activities?

(d) is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?

Reliance on an examination of the overall business result may be appropriate where it is difficult to do a more disaggregated analysis. This is not necessary in the case of Brunet's business; it is very small, he has few customers and it is possible to inquire meaningfully whether there is a relationship between transactions. Under the circumstances the figures on his overall business provide information for only an initial step in the evaluation. The accountants called as expert witnesses by the parties did not have any particular familiarity with the auto parts export business in general, or with Brunet's business in particular. They were not, therefore, in a knowledgable position to give evidence on how the refusal of Chrysler Canada to sell to Brunet affected his overall sales and profits. Similarly, Winter, who stated the hypothesis that the capacity formerly used on the sale of Chrysler Canada-sourced parts was redirected to the sale of parts from other sources, was not in a position to confirm the factual validity of this submission.

The figures placed in evidence by the accountants for the two sides were similar and served to confirm that the records maintained by Brunet fairly represented his business transactions. There is agreement that the few discrepancies in their treatments are not of material importance in determining whether Brunet is substantially affected in his business.

The respondent stresses that Brunet had larger sales and profit after Chrysler Canada refused to supply Brunet in 1986 (referred to by the Director as the "cut-off") than in the years preceding it and therefore Brunet was not substantially affected by his inability to obtain supply from Chrysler Canada. As noted earlier, in some cases this type of evidence might be conclusive, but only where it is not possible to analyze how the separate parts of the business are related. The Tribunal is satisfied, through the evidence of Brunet, that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of capacity or by way of demand, to the sale of Chrysler parts. The sale of other parts took very little of Brunet's time or that of his assistant and his business could easily have accommodated these additional sales if he had not lost sales of Chrysler parts as a result of his inability to obtain supplies from Chrysler Canada. Similarly, the demand for Chrysler auto parts was independent of the demand for other parts. Accordingly, any changes in the sales of other parts and the gross margins therefrom would have taken place whether or not Brunet's relationship with Chrysler Canada had changed. The same conclusion is applicable with respect to Interparts since service parts and Interparts represent separate markets. There is no reason to believe that Brunet's customers would be influenced to increase their demand for Interparts as a result of Brunet's inability to obtain supply from Chrysler Canada. If the cut-off had any effect on the sale of Interparts it would be a negative one to the extent that Brunet lost customers as a result of Chrysler Canada's refusal to supply auto parts.

Large sales of other auto parts to a single customer in 1987 and in 1988 virtually disappeared during the first four months of 1989. The large sales and resulting gross profits from these transactions were an essential part in the overall sales and gross profit figures that the respondent relies on to state that the cut-off does not have a substantial effect on Brunet's business because overall sales and gross profits did not fall after 1986. The most recent figures submitted show that overall sales and gross profits are much lower, on an annual basis, than before the cut-off.[17] This illustrates the danger of relying on aggregate data when more specific and relevant information is available. The Tribunal is satisfied that the evidence shows that both the increase in the sales of other auto parts and the subsequent decline are unrelated to the extent to which Chrysler parts are available to Brunet in Canada.

Following the cut-off Brunet was able to obtain parts from Chrysler Canada dealers. Under his arrangement with them he paid them their acquisition cost plus five per cent. It is noteworthy that Canadian-sourced parts were sufficiently more price attractive than those obtainable from Chrysler U.S. that Brunet and his customers preferred to pay the additional five per cent rather than purchase from Chrysler U.S.

A review of the extent to which Brunet was able to replace Chrysler Canada by its dealers must take into account the steps that Chrysler Canada took to discourage its dealers from selling to Brunet. The verbal warnings to particular dealers, the bulletins to all dealers and, finally the re-signing of all dealers to new contracts with a clause that is designed, according to the evidence of Burnett,

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[17] Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989; Table 1, *supra* at p. 7-8.

to give Chrysler Canada the authority to discontinue supplying a dealer in the event that the dealer sells for export, have progressively changed the conditions under which Brunet can buy from Chrysler Canada dealers. Chrysler Canada has modified its computer software to more readily enable it to detect orders that may be intended for export. As a result of these efforts by Chrysler Canada, Brunet is forced to split his orders and to spread them over some time to attempt to avoid detection. There is evidence that three dealers openly sell to Brunet. The evidence is not clear on whether any of them have wholesale dealer status. If they do not, the prices that they pay for captive parts are more than those which Brunet paid to Chrysler Canada. In addition, it must be assumed that the dealers are earning some profit margin on their sales to Brunet, such as the five per cent referred to previously, thus causing Brunet to pay a substantially higher price for the auto parts than that paid by Brunet to Chrysler Canada.

Table 2 shows Brunet's gross profit and sales resulting from purchases from Chrysler Canada, Chrysler Canada dealers and Chrysler U.S. from 1984 to May 1989.

TABLE 2

Gross Sales and Profit*: Parts Sourced from Chrysler Canada, Chrysler Canada Dealers and Chrysler U.S.

1984-1989

Year	Chrys. Canada	Chrys. Canada Dealers	Gross Profit Chrys. Canada & Dealers	Chrys. U.S.	Gross Profit Chrys. U.S.
1984	300,394		49,161	27,813	1,410
1985	259,892		39,407	20,442	1,019
1986	362,245		47,202	25,180	1,885
1987	99,154	233,495	43,554	24,126	1,555
1988	—	119,310	14,706	52,734	4,321
1989**	—	26,618	3,856	67,630	6,140#

Notes:

* Gross profit (or gross margin or mark-up) is gross sales minus cost of goods sold. The Coopers & Lybrand report prepared on behalf of the applicant uses the terminology "mark-up" rather than "gross margin". There does not in fact appear to be any difference between the two terms except when expressed as a percentage, which involves the use of a different denominator. The principal discrepancy between the gross margins of Arthur Anderson and the mark-up of Coopers & Lybrand is with respect to dealers in 1988. Arthur Anderson arrived at a figure of $18,495, which compares to $14,706 in the table. The figures in all other cases are the same or very close. The Arthur Anderson study provided gross margins for fewer years for the categories shown in the table and thus the decision to use the Coopers and Lybrand information was, so to speak, by default.

** January 1 - May 12.

\# Includes purchases from Chrysler U.S. and from Master Distributors of Interparts.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand for the Director of Investigation and Research, Schedules A to D; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989.

The effectiveness of Chrysler Canada's efforts in preventing Brunet from exporting from Canada is shown in the above table. There is a marked decline in sales and profits on purchases of Chrysler auto parts in Canada between 1986 and 1988 and on through somewhat more than the first quarter of 1989. The figures for 1989 are taken as providing only an order of magnitude because the period is relatively short. The 1989 figures are based on an analysis by Mr. Reinke of Arthur Anderson & Co. who appeared as an expert witness on behalf of the respondent. Reinke prepared the figures in response to a request made to him during cross-examination. He examined the ledger cards used by Brunet and included only those transactions for which both a purchase and a sale were recorded. In the view of the Tribunal, this was the only reasonable course. Ledger cards on which only one part of a transaction are recorded cannot be included as part of sales for the period in question. Some transactions started in 1988 are part of the partial 1989 figures and it is to be expected that some transactions started between January 1 and May 12, 1989 will be completed and recorded as such after May 12, 1989. There is no obvious bias imported into the 1989 figures by this factor. The only legitimate concern that the volume of sales is understated relates to the possibility that Brunet failed to make entries on the ledger cards for completed transactions. No evidence of this was presented to the Tribunal.

The respondent points to variations in demand that are unrelated to the cut-off as a possible explanation for any decline in sales and gross margins experienced by Brunet. This is a possibility that must be taken into account. Variation in demand certainly accounted for swings in the sale of other auto parts. In considering this factor the Tribunal notes that neither party attempted to provide a benchmark against which the changes in Brunet's sales of service parts might be measured (such as, for instance, the total exports of Chrysler service parts from North America during the years in question). The Tribunal is not satisfied that the large changes in sales experienced by Brunet were caused by variations in demand that are unrelated to the cut-off.

To evaluate the changes in sales and profits experienced by Brunet, it is necessary to determine the meaning of "substantially affected". The applicant submits that "substantially affected" simply means more than a *de minimis* effect. This conclusion is based on the fact that an earlier draft of the Act required only that the person be "adversely affected" which could mean a negative effect to a small degree.

The respondent submits that "substantially" does not simply mean "some" or "to a degree" but rather "major" or "significant". The respondent takes the position that the ordinary dictionary definition should be used in the absence of strong reasons to the contrary. The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond *de minimis.* While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.

The cut-off resulted in a decline of over $200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of $30,000. Losses of the order of magnitude of $200,000 in sales and $30,000 in gross profits constitute a substantial effect for a small business such as Brunet's. The figures for more than a third of 1989 and the fact that Chrysler Canada has put in place contracts that will permit it to discipline dealers who sell for export suggest that even greater losses may be anticipated in the future.

(b) Inadequate Competition in the Market

The issue as to whether Brunet is unable to obtain supplies because of inadequate competition in the market turns on whether Chrysler Canada dealers are in the same market as Chrysler Canada as suppliers to Brunet. The Tribunal concludes that the restrictions placed by Chrysler Canada on its dealers clearly make them inferior sources of supply to Brunet and that they therefore do not provide adequate competition to Chrysler Canada.

Exercise of Discretion

The Tribunal is satisfied that the Director has proven, through the evidence presented, all of the elements of section 75 of the Act. Once this prerequisite is met, the Tribunal has the discretion to issue an order requiring Chrysler Canada to resume supplying Brunet with Chrysler auto parts within a specified time on usual trade terms.

There are several areas of evidence and argument that bear on the exercise of the Tribunal's discretion. These are: the reasons behind Chrysler Canada's decision to discontinue supplying Brunet; the market position of Chrysler and the changes that it was making in its distribution system; the long association between Brunet and

Chrysler Canada; the unquestioned encouragement that Chrysler Canada provided Brunet; and the manner in which the cut-off was implemented.

(a) The Decision to Discontinue Supply to Brunet

The respondent takes the position that the decision to no longer permit Brunet to buy from Chrysler Canada was taken in response to Brunet breaking one of the conditions attached to such supply, that Brunet not sell to franchised dealers outside of North America in competition with Chrysler U.S.

The existence of such a condition is in dispute. Burnett alleges that this condition, along with the condition that Brunet not divert supplies into the North American market, were clearly set out in a verbal arrangement between himself and Brunet. There is no written agreement between Chrysler Canada and Brunet. Brunet denies that it was ever understood that he was not to sell to Chrysler dealers outside of North America. The Tribunal accepts his evidence.

Associated documentary evidence supports Brunet's position. Correspondence between Chrysler Canada and Brunet corroborates that Chrysler Canada was concerned that parts sold to Brunet not be diverted into the domestic market. Procedures were established to ensure that such diversion was prevented. In contrast, there is no mention in any of the correspondence between Brunet and Chrysler Canada prior to 1986 that the latter was concerned about the possibility that Brunet might be selling to franchised dealers outside of North America. Concern about Brunet competing with Chrysler U.S. is first raised in May 1986 in connection with Brunet's approach to an "Interparts distributor" (rather than a franchised dealer) in Peru:

May 1, 1986

Mr. R. Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

This letter will serve to confirm our telephone conversation regarding your letter of March 19, 1986, to Colonial Motors in Peru. Your letter suggests that in some cases, it is more advantageous to purchase parts from yourself than it is to purchase from Chrysler Corporation. Colonial Motors is an authorized Interparts Distributor.

I would like to remind you that when you are representing Chrysler Canada Ltd. in the export market, your objective is to compliment (*sic*) the Corporation's Interparts Division's sales activities, not to compete for their Distributors' business. We would appreciate your co-operation in this matter.

Yours very truly,

CHRYSLER CANADA LTD.

(s) P.R. Williams
National Parts Sales
and Marketing Manager

cc: C.R. Burnett[18]

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18 Exhibit 3, Tab 134.

The context and the language of the letter create ambiguities. This sole written reference to the claimed Chrysler Canada understanding with Brunet is not persuasive.

Most importantly, sales to a Mr. Karlsson, a franchised dealer in Sweden, took place against a backdrop of a visit by Karlsson to the central Chrysler Canada parts depot. Brunet introduced Karlsson to the manager of the warehouse and sent Burnett a copy of a letter that Brunet sent to the manager following Karlsson's visit. Burnett passed on the letter to Williams, the author of the May 1986 letter referred to above.[19] It is difficult to believe that Brunet would have been so open in presenting and discussing Karlsson if he knew that sales to Karlsson's company would have been in contravention of a condition of purchase from Chrysler Canada. Furthermore, Brunet claims that he was referred to Karlsson by an employee of Chrysler Canada, a Mr. Barton, through a Mr. Hedlund who was acting as Canadian agent for Karlsson. This evidence is not contradicted. It is also undisputed that the same employee, Barton, had referred a Mr. Jansson, a non-franchised dealer in Sweden who had purchased vehicles from Chrysler Canada and needed parts, to Brunet. Burnett states that he did not know that Karlsson was a franchised dealer although Chrysler Canada had access to this information. More critical to the issue is the fact that Burnett never

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19 *Ibid.*

inquired, leaving the impression that whether Brunet was selling to franchised Chrysler dealers outside of North America was of no concern to Chrysler Canada.

(b) Consolidation of Control of Chrysler Exports

Although the evidence does not support the respondent's position that Chrysler Canada had an agreement with Brunet with respect to export to Chrysler franchised dealers, this does not mean that Chrysler was not concerned by such exports. It does not require specific evidence to conclude that the Chrysler export arm would find it embarrassing to have to compete with Brunet for the trade of its dealers. But beyond any such potential embarrassment, it is easy to accept that Chrysler would want to consolidate control of exports in one country and not be concerned with pricing differences between Canada and the United States affecting export markets. One does not have to go so far as Winter and conclude that the motive for consolidating exports is strictly to enhance efficiency in order to conclude that the decision is not solely intended to protect a separate price structure in Canada. Although Burnett denies that the Chrysler organization was in disarray in the early 1980s when Chrysler was in financial difficulty, the evidence shows that plants outside North America were sold off and the sale of Chrysler vehicles through (foreign) Chrysler franchised dealers was stopped. The evidence shows that, in recent years, Chrysler vehicles are once again being sold through (foreign) franchised dealers. It is easy to understand that Chrysler would want to make organizational changes that can better accommodate its changing distribution system.

The respondent has not attempted to provide a cohesive explanation of the Chrysler distribution system. The principal argument put forward is that Brunet was being placed in the same position as U.S.-based exporters who, according to the evidence of Burnett, numbered somewhat more than one hundred and had combined annual sales of $80 million (U.S.). No details were provided regarding who these firms are, who they sell to or their relation with Chrysler U.S.

The Tribunal must consider that the respondent has not presented any evidence that the granting of an order pursuant to section 75 of the Act would disadvantage the respondent. A point that has been raised in connection with the attempt to prevent dealers from selling for export is that exporting some parts that are in short supply (this applies particularly to older vehicles) could deprive domestic consumers. It strikes the Tribunal that this concern could most effectively be dealt with by having Brunet deal directly with Chrysler Canada. To the extent that Brunet is successful in buying from dealers, Chrysler Canada cannot identify the orders from dealers that are destined for export, which was not the case when it was selling directly to Brunet.

(c) Brunet's Long Association with Chrysler Canada

It is uncontested that Brunet was encouraged throughout his association with Chrysler Canada. A number of actions were taken by Chrysler Canada to accommodate its treatment of Brunet to allow for the needs arising from dealing with customers who faced problems of exchange controls and import permits with time deadlines. Burnett confirmed that Chrysler Canada had encouraged Brunet in his efforts to expand the sale of Chrysler Canada auto parts. Chrysler Canada on occasion referred potential customers to Brunet. In spite of this long and friendly relationship, no attempt was made by Chrysler Canada to resolve any problems that they perceived in Brunet selling to Karlsson in Sweden or attempting to sell to Colonial Motors, an Interparts dealer in Peru. There was no warning that he might be cut off and there was no face-to-face meeting to discuss the situation. Brunet was shown little consideration apart from Burnett agreeing to fill orders received by him prior to the cut-off date.

Conclusion

Section 75 is different than other sections in Part VIII of the Act. The test for whether the elements in the section are satisfied is not the effect on competition or efficiency. These considerations enter, where applicable, in the exercise of discretion.

The Tribunal accepts that Chrysler or Chrysler Canada does not occupy a very strong market position in the automobile industry (even though, as might be expected, it is in a very strong position with respect to the distribution of its products) and that it may have legitimate business interests that it is trying to protect. Weighing against this consideration is the long relationship between Brunet and Chrysler Canada, the manner in which sales to Brunet were terminated, and the fact that the respondent has not made any effort to establish that the granting of an order by the Tribunal would prejudice it in any way. Brunet has been substantially affected by the denial of supplies. He merits relief and it will be provided in the order.

The Tribunal is of the view that a proper balancing of interests in this case might be better accomplished with an order that was limited with respect to time, or perhaps with respect to the category of buyers that would be open to Brunet. Such an order could probably best be achieved through negotiations between the parties.

The Tribunal is satisfied, however, that its authority under section 75 is limited to the issue of an order that requires the respondent to supply Brunet Chrysler parts under the usual trade terms as it had done up to October 1986. Such an order shall issue.

There shall be no order as to costs. The Tribunal is satisfied that it does not have the jurisdiction to order the payment of costs.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT Chrysler Canada Ltd. accept Richard Brunet as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with Brunet as the said terms existed prior to August, 1986.

DATED at Ottawa, this 13th day of October, 1989.

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

(s) M.M. Teitelbaum
M.M. Teitelbaum

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Competition Tribunal

Tribunal de la Concurrence

Reference: *CarGurus, Inc v Trader Corporation*, 2016 Comp. Trib. 15
File No.: CT-2016-003
Registry Document No.: 41

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

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

BETWEEN:

CarGurus, Inc.
(applicant)

and

Trader Corporation
(respondent)

Decided on the basis of the written record.
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Reasons for Order and Order: October 14, 2016

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE

I. OVERVIEW

[1] On April 15, 2016, CarGurus, Inc. ("**CarGurus**") applied to the Competition Tribunal, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34 (the "**Act**"), for leave to bring an application under sections 75, 76 and 77 of the Act dealing respectively with refusal to deal, price maintenance and exclusive dealing. If leave is granted, CarGurus seeks an order directing Trader Corporation ("**Trader**") to accept CarGurus as a customer and to supply certain vehicle listings data to it on standard trade terms, and prohibiting Trader from continuing to engage in the practices forming the basis of CarGurus' application.

[2] On May 4, 2016, Trader submitted a request by letter for leave to file affidavit evidence as part of its representations in writing in response (the "**Response**") to CarGurus' application for leave. On June 9, 2016, the Tribunal partially granted Trader's request to file certain affidavit evidence as part of its Response. On June 23, 2016, Trader filed its Response and CarGurus subsequently filed its reply (the "**Reply**") on June 30, 2016.

[3] In support of its application for leave, CarGurus submitted an affidavit sworn on April 14, 2016 by Ms. Martha Blue, the Senior Vice-President Business Development for CarGurus (the "**Blue Affidavit**"). As an exhibit attached to the Blue Affidavit, CarGurus submitted another affidavit of Ms. Blue sworn on March 3, 2016 (the "**Blue Copyright Affidavit**") which had been filed in the context of an on-going copyright litigation between CarGurus and Trader before the Ontario Superior Court of Justice (the "**Copyright Proceeding**").

[4] In its Response, Trader submitted an affidavit sworn on June 23, 2016 by Mr. Roger Dunbar, Vice President of Marketing for Trader (the "**Dunbar Affidavit**"). Trader also relied on several affidavits filed in the Copyright Proceeding, and which were included by CarGurus as attachments to the Blue Affidavit, notably an affidavit of Mr. Dunbar sworn December 22, 2015 (the "**Dunbar Copyright Affidavit**").

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

[6] CarGurus claims that it has provided sufficient credible evidence to satisfy the Tribunal that there is a reasonable possibility that its business is directly and substantially affected by Trader's practices, and that such practices could be the subject of an order under either section 75, 76 or 77 of the Act. Trader opposes CarGurus' application for leave and seeks an order denying it, with costs. Trader argues that CarGurus has failed to provide sufficient credible evidence for each of the requirements set out in sections 75, 76 or 77 as well as subsections 103.1(7) and 103.1(7.1) of the Act.

[7] For the reasons that follow, I am not satisfied that CarGurus has met its burden under subsection 103.1(7) to apply for relief under the refusal to deal and exclusive dealing provisions of the Act, nor under subsection 103.1(7.1) with respect to the relief sought under the price maintenance provision.[1]

II. BACKGROUND

A. THE PARTIES

a. CarGurus

[8] CarGurus owns and operates websites that enable potential purchasers of automobiles to research and compare vehicle listings for used and new automobiles within a geographic area, and to contact the sellers of those vehicles. In the context of this application, CarGurus refers to such websites as "**Digital Marketplaces**". CarGurus launched its website in the United States (known as cargurus.com) in 2007 and announced the launch of its Canadian website (i.e., cargurus.ca) on May 26, 2015.

[9] CarGurus asserts that it provides its vehicle listings services to dealers for free and operates on a lower-cost subscription model. It generates the leads to dealers and then follows up with those dealers to offer them additional services. CarGurus argues that it is this low-cost offering that has made it a very successful competitor in the United States.

b. Trader

[10] Trader operates a Digital Marketplace for vehicles in Canada and also offers other related services. Through its websites autotrader.ca and autohebdo.net, Trader advertises an inventory of new and used vehicles for sale in Canada. It sources its inventory of vehicle listings from private sellers and vehicle dealers. It does not buy or sell vehicles, but acts as an intermediary between buyers and sellers.

[11] In addition to offering its listing services, Trader also offers "capture services". If a dealer subscribes to Trader's capture service, Trader has one of its employees, or a contractor who has assigned his or her intellectual property rights to Trader, visit the dealership, consult with and gather information from the dealer and take photographs of the vehicles. The Trader representative then organizes this vehicle information and photographs and uploads all this data for display on one or more of Trader's and the dealer's websites (the "**Trader Vehicle Listings**").

[12] Trader makes its Trader Vehicle Listings available to other competing Digital Marketplaces through a licensing process known in the industry as a "**Syndication Agreement**".

[13] Access to the supply of the Trader Vehicle Listings is the core issue raised by this application for leave filed by CarGurus.

[1] The Tribunal wishes to indicate that its decision was ready to be released in mid-September but that, further to Directions issued on September 14 and October 4, 2016, it had agreed to temporarily hold off releasing its decision in light of the parties' settlement discussions.

B. THE RELEVANT FACTS

a. The Industry

[14] CarGurus and Trader both carry on business in the online marketing of automobiles. They compete by offering Digital Marketplaces that allow consumers to search vehicle listings from automobile dealers and private sellers for new and used vehicles for sale. Consumers use the Digital Marketplaces to acquire information about vehicle availability, features and prices in the search and evaluation process leading to the purchase of a vehicle. However, although consumers conduct their search online, the actual purchase of vehicles still typically takes place when consumers visit the physical premises of automobile dealers or the private sellers.

[15] The vehicle listing information available on Digital Marketplaces normally includes, for each vehicle, the make, model, year, vehicle information number, mileage, price, photographs and other details. It is uncommon to market a vehicle without a photograph.

[16] Online marketing of vehicles involves the downstream market where Digital Marketplaces such as CarGurus and Trader offer their services as well as an upstream market for the supply of vehicle listing data (the "**Vehicle Listings**") used by those Digital Marketplaces to deliver their services. CarGurus describes Digital Marketplaces as a two-sided platform connecting sellers of vehicles and potential buyers of vehicles, where both sides benefit from the increase in the size of the group sitting on the opposite side of the platform.

[17] Vehicle Listings are commonly provided by original equipment manufacturers (i.e., the car manufacturers), automobile dealers, private sellers and Digital Marketplaces themselves. Entities known in the industry as feed providers (the "**Feed Providers**") also receive Vehicle Listings from dealers and provide data feeds of such Vehicle Listings to Digital Marketplaces.

[18] CarGurus, Trader and the other operators of Digital Marketplaces aggregate Vehicle Listings information from car manufacturers, automobile dealers and private sellers and make it accessible to consumers through search engines on their respective websites.

[19] CarGurus estimates that there are approximately 10 businesses in Canada operating Digital Marketplaces, including Trader. CarGurus further claims that Trader is the dominant supplier of Vehicle Listings to Digital Marketplaces. While CarGurus does not include Kijiji as a competitor in Digital Marketplaces, Kijiji represents itself as the largest automotive Digital Marketplace in Canada in its advertising materials.

[20] Given that consumers want to have access to comprehensive vehicle information when they are shopping for a vehicle, there is a direct correlation between Vehicle Listings, website traffic, specific inquiries from consumers to dealers about a vehicle (known as "leads" to dealers), and resulting revenues for the Digital Marketplaces. According to CarGurus, the ability to generate leads to dealers is the basis of its revenue model.

b. Relationship between CarGurus and Trader

[21] Trader claims that it owns copyright in the vehicle photographs that are included in its inventory of Vehicle Listings and more specifically in the Trader Vehicle Listings.

[22] In May 2015, Trader found that its vehicle photographs contained in the Trader Vehicle Listings appeared on CarGurus' website and advised CarGurus that it held the copyright on these photographs. In July 2015, Trader sent CarGurus a draft Syndication Agreement relating to the potential future supply of the Trader Vehicle Listings to CarGurus. CarGurus did not accept the terms of the Syndication Agreement proposed by Trader, as CarGurus claims that a number of its provisions would have prevented it from effectively competing with Trader in the Canadian marketplace.

[23] There were no further communications between the parties between July and December 2015.

[24] In December 2015, Trader commenced the Copyright Proceeding seeking declarations that CarGurus had infringed Trader's copyright in relation to some 217,856 photographs added to a website administered by Trader, as well as statutory damages in respect of those infringements.

[25] On December 8, 2015, CarGurus removed over 1 million photographs from its website for Vehicle Listings that were not obtained from Feed Providers.

[26] The litigation between CarGurus and Trader remains pending and the central issue to be determined in that contested Copyright Proceeding is whether the vehicle photographs contained in the Trader Vehicle Listings do actually enjoy copyright protection.

C. THE PARTIES' ARGUMENTS

a. CarGurus

[27] In its application for leave, CarGurus argues that Trader is engaged in the following anticompetitive conduct in order to exclude or impede CarGurus' expansion in the downstream market for Digital Marketplaces in Canada (the "**Trader Conduct**"):

- Trader discriminates against CarGurus in respect of the Trader Vehicle Listings that Trader administers by refusing to syndicate those vehicle listings on the usual trade terms made available to other Digital Marketplaces;

- Trader refuses to syndicate to CarGurus Vehicle Listings from dealers who request that Trader does so;

- Trader instructs third parties not to syndicate to CarGurus by threatening to otherwise cut off its syndication to these third parties; and

- Trader improperly asserts copyright and has commenced litigation over thousands of non-copyrightable photographs, in an attempt to litigate CarGurus out of the market for Digital Marketplaces.

[28] On this final point, CarGurus adds that, even if Trader's copyright assertions are upheld, Trader's refusal to supply its copyrighted photographs is also violating the Act since such a refusal is more than a mere exercise of copyright because of its cumulative effect on Trader's market power in the provision of Digital Marketplaces.

[29] CarGurus contends that as a result of the Trader Conduct, it has been directly and substantially affected in its business through a significant decrease in leads generated for dealers, a reduced conversion rate (i.e., the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) and a drop in detailed views of CarGurus pages leading to a corresponding drop in advertising revenue. CarGurus estimates that the Trader Conduct has reduced CarGurus' revenue by 39% or $75,000 USD to date and that its forgone revenue through the end of 2017 is expected to be $3.7 million USD.

[30] CarGurus further argues that the Trader Conduct could be the subject of an order by the Tribunal under each of sections 75, 76 and 77 of the Act.

i. Section 75

[31] CarGurus first asserts that the five elements of section 75 on refusals to deal have been met in the following manner:

- CarGurus is substantially affected in its business and precluded from carrying on business due to its inability to obtain the Trader Vehicle Listings for inclusion on its website on usual trade terms (through a Syndication Agreement);

- CarGurus is unable to obtain adequate supply of Vehicle Listings because the Trader Vehicle Listings are in Trader's sole control and Trader controls at least 42.5% of all Vehicle Listings supplied in Canada;

- CarGurus is willing to meet the usual trade terms of Trader for the syndication of the Trader Vehicle Listings through a commercially reasonable agreement based on Trader's standard trade terms with other Digital Marketplaces;

- Vehicle Listings, and more specifically the Trader Vehicle Listings, are not in limited supply and are regularly supplied by Trader to Digital Marketplaces as a matter of course; and,

- Trader's refusal to deal is having an adverse effect on competition in the downstream market for Digital Marketplaces as Trader Conduct denies the expansion of CarGurus' innovative, consumer-focused website in the market.

ii. Section 76

[32] Turning to section 76 on price maintenance, CarGurus argues that the Trader Conduct could be caught under paragraph 76(3)(a) since Trader is engaged in the business of supplying a "product" (i.e., Vehicle Listings). Additionally, CarGurus pleads that if it is accepted that Trader holds copyright in the photographs appearing in the Trader Vehicle Listings, the Trader Conduct could also be caught under paragraph 76(3)(c) as Trader would have the exclusive rights and privileges conferred by the copyright.

[33] CarGurus contends that Trader Conduct breaches subparagraph 76(1)(a)(ii) since Trader has refused to supply the Trader Vehicle Listings to CarGurus in an attempt to keep CarGurus from competing in the downstream market for Digital Marketplaces. CarGurus alleges that Trader is doing so because of CarGurus' low pricing policy for various services, including the "Instant Market Value" produced by CarGurus' mathematical algorithms, and other innovative features.

[34] Furthermore, CarGurus argues that the Trader Conduct also falls within subparagraph 76(1)(a)(ii) because it has "otherwise discriminated" against CarGurus by denying it access to the Trader Vehicle Listings and by refusing to deal with it on the standard trade terms granted by Trader to other Digital Marketplaces.

[35] CarGurus also alleges that Trader has induced Dealer Dot Com ("**DDC**") and other Feed Providers not to syndicate the Trader Vehicle Listings to CarGurus as a condition of doing business with Trader, thus also contravening subsection 76(8) of the Act.

[36] Finally, CarGurus submits that the Trader Conduct has impeded its entry and expansion into the downstream market for Digital Marketplaces in Canada, thereby resulting, or likely to result, in a substantial lessening or prevention of competition.

iii. Section 77

[37] With respect to section 77 on exclusive dealing, CarGurus argues that, as a threshold element, Trader is a "major supplier" of Vehicle Listings in Canada since it is the sole supplier of the Trader Vehicle Listings. It also claims that the exclusivity provisions found in Trader's agreements with dealers and Feed Providers preclude those dealers and other Feed Providers from syndicating their inventory of Vehicle Listings to CarGurus without Trader's consent – which Trader refuses to grant.

[38] CarGurus submits that, as a consequence, Trader's exclusive dealing has impeded CarGurus' entry and expansion in the downstream market for Digital Marketplaces in Canada. It claims that this has resulted, and is likely to result, in a substantial lessening of competition in the market.

b. Trader

[39] Trader opposes CarGurus' application for leave. It argues that CarGurus has failed to provide sufficient credible evidence to give rise to a *bona fide* belief that it has been directly and substantially affected in its business by Trader's actions, or that Trader has engaged in conduct that could be subject to an order under sections 75, 76 or 77 of the Act.

i. Section 75

[40] Regarding refusal to deal, Trader submits that, in evaluating paragraph 75(1)(a), it is proper to query whether the applicant has "other options in terms of supply" and argues that where the applicant has access to an alternative source of supply which the applicant chooses not to pursue, it cannot be said that insufficient competition among suppliers is the "overriding reason" for the refusal. In terms of alternative source of supply, Trader argues that CarGurus can obtain Vehicle Listings from other Feed Providers and/or generate its own content (including photographs). By way of example, it refers to Kijiji as a company that has competed and grown by obtaining Vehicle Listings information from other Feed Providers. It also argues that there is no impediment to CarGurus replicating Trader's capture services.

[41] Trader also notes that CarGurus has experienced exponential growth even after Trader asserted its copyright on photographs and launched its Copyright Proceeding.

[42] Trader interprets paragraph 75(1)(b) to require that an applicant's inability to "obtain adequate supplies of the product" be causally linked to the "insufficient competition among suppliers of the product in the market". It argues that this provision requires the "insufficient competition among suppliers" be the "overriding reason" why the applicant is unable to obtain adequate supplies of the product. Trader further cites *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42 ("***B-Filer***") as stating that "any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason" that explains the respondent's conduct. In this regard, Trader submits CarGurus' blatant infringement of Trader's copyright is its objectively justifiable business reason.

[43] With respect to the criteria under paragraph 75(1)(c), Trader argues that it is customary for Trader and a potential syndication partner to negotiate the terms of their syndication agreement. It emphasized that it is willing to syndicate its copyright content to other competing Digital Marketplaces and does so regularly. It submits that, by choosing copyright infringement over negotiation, CarGurus is not willing to meet Trader's usual and customary trade terms.

[44] Trader relies on the Tribunal's decision in *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26 ("***Stargrove***") in support for its position that relief under paragraph 75(1)(d) is simply not available to CarGurus as the impugned conduct involves the refusal to grant a licence over copyrighted materials.

[45] Trader finally argues that CarGurus has failed to provide sufficient credible evidence that the alleged Trader Conduct is likely to have an adverse effect on competition, as required by paragraph 75(1)(e). It submits that the relevant market is (at its narrowest) the downstream market for Digital Marketplaces, which includes numerous websites such as Kijiji, eBay Motors U.S, Edmunds, Canadian Black Book, Cars.com, Wheels.ca, Auto123.com and AutoExpert. It notes that Trader and CarGurus are but two of many competitors in this market.

ii. Section 76

[46] With respect to price maintenance, Trader argues that CarGurus has failed to meet its burden under both subsections 76(1) and 76(8) of the Act.

[47] Trader submits that, given the decision in *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("***Visa***"), subsection 76(1) requires a "resale" of a product that is "identical or substantially similar" to the product for which price is being allegedly maintained. In this regard, it pleads that CarGurus will oftentimes alter the Trader content before repackaging it and that section 76 does not cover the supply of an "input product".

[48] Trader adds that CarGurus has not presented any evidence beyond bald, unsubstantiated allegations that Trader has induced any supplier to refuse supply to CarGurus as required by subsection 76(8).

[49] With respect to CarGurus' argument that Trader had "otherwise discriminated" against it, Trader notes that the *Stargrove* decision interpreted that phrase to mean "treating a person differently than another without proper justification". Trader claims that it has not treated CarGurus any differently than any other competitor since it provided CarGurus with their standard form of Syndication Agreement and was anticipating a negotiation. To the extent it has treated CarGurus differently, it is solely because CarGurus had "scraped" Trader's copyrighted content.

[50] Trader also contends that CarGurus' application presents no evidence demonstrating that Trader has been motivated by a low pricing policy of CarGurus. Additionally, it denies being motivated by any alleged low pricing policy since it believes that CarGurus' price structure is simply different and not actually "low cost" as compared to Trader's model.

iii. Section 77

[51] With respect to exclusive dealing, Trader argues that CarGurus has failed to provide evidence to support a claim under either paragraph (a) or (b) to the statutory definition of "exclusive dealing" contained in subsection 77(1) of the Act.

[52] Trader asserts that it does not have exclusive control over Vehicle Listings and that many of its customers (i.e., automobile dealers) list their vehicles with Trader as well as with other Digital Marketplaces. Trader does not require dealers to deal exclusively or primarily with it. Furthermore, Trader does not preclude CarGurus from developing its own equivalent to Trader's data feed information in partnership with dealers.

[53] Trader submits that CarGurus' application contains no evidence, and provides no reasonable inference to suggest, that Trader has induced dealers to meet exclusivity conditions by offering to supply information on more favourable terms or conditions as a result. It argues that there is no evidence that dealers receive a financial benefit in return for dealing exclusively with Trader.

[54] Similar to its argument under section 75, Trader also submits that relief under section 77 is simply not available where the alleged exclusivity pertains to a refusal to licence intellectual property.

[55] Regarding the issue of the direct and substantial impact on CarGurus' business, Trader submits that CarGurus has not raised more than a mere speculation that its business has been substantially affected and has based its analysis on its own non-certified projections of revenue without providing a basis for those projections and whether they were commercially reasonable. It also claims that the measurements relied on by CarGurus assumes that they would be infringing Trader's copyright as a baseline.

[56] Finally, Trader submits that should the Tribunal find that CarGurus has met the leave requirements, the Tribunal should nonetheless decline to exercise its discretion to grant leave. In this regard, it argues that it is not commercially reasonable for CarGurus' infringement of Trader's copyright to be rewarded by an order of the Tribunal that would be tantamount to a compulsory licence.

III. ANALYSIS

A. The Leave Test

[57] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 and 77 of the Act, whereas subsection 103.1(7.1) does the same for section 76 of the Act. They read as follows:

103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.	**103.1(7)** Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.
103.1(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.	**103.1(7.1)** Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article

[58] Subsection 103.1(7) provides that leave may be granted under sections 75 or 77 if the Tribunal "has reason to believe that an applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section". Subsection 103.1(7.1) is similar but does not include the word "substantially".

[59] The approach to the granting of leave for relief under section 75 was recently set out in detail in *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28 ("***Audatex***") at paras 42-47. The Tribunal also summarized that approach in *Stargrove* at paras 17-21, in respect of an application relating to sections 75, 76 and 77. I adopt these principles for the purpose of this application for leave.

[60] As indicated in those decisions, leave applications under section 103.1 of the Act require the Tribunal to determine whether the application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly (and substantially in the case of sections 75 and 77) affected in its business by the alleged practice, and that the alleged practice could be subject to an order. While the Tribunal's role at the leave stage is to perform a screening function and the evidence is assessed on a standard that is less than the balance of probabilities, the evidence must nonetheless show more than a mere possibility that the business may be directly and substantially affected (*Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 ("***Barcode FCA***") at para 19).

[61] With respect to the first part of the test under subsection 103.1(7) (i.e., being "directly and substantially affected"), it is worth citing the *Audatex* decision at para 45:

> For the "substantial" component, terms such as "important" are acceptable synonyms to considering whether there has been a "substantial" impact, which is ultimately assessed by reviewing the circumstances at issue (*Canada (Director of Investigation and Research) v Chrysler Canada Ltd* (1989), 27 CPR (3d) 1 (Comp. Trib.), aff'd 38 CPR (3d) 25 (FCA) at para 64). In the *Nadeau* decision on the merits, Mr. Justice Blanchard specified that "the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on its business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way" (*Nadeau Poultry Farm Limited v Groupe Westco Inc et al*, 2009 Comp. Trib. 6 ("*Nadeau Final Order*") at para 131, aff'd 2011 FCA 188).

[62] Turning to the second part of the test (whether the conduct "could be the object of an order"), all the elements of the practice must be addressed (*Barcode FCA* at para 19) and the Tribunal must be satisfied that "each of the elements set out in subsection 75(1) could be met when the application is heard on the merits" (*B-Filer Inc v The Bank of Nova Scotia*, 2005 Comp Trib 38 ("***B-Filer Leave***") at para 53). At the leave stage, it is understood that the question of whether the reviewable conduct "could" be subject to an order is being considered in an application which is not supported by a full evidentiary record (*The Used Car Dealers Association of Ontario v Insurance Bureau of Canada*, 2011 Comp Trib 10 ("***Used Car Dealers***") at para 32).

[63] Since the current application for leave filed by CarGurus relates not only to section 75 but also to section 76 on price maintenance and section 77 on exclusive dealing, I would simply add that the specific evidence which could be justified under these two other provisions similarly has to focus on the particular elements to be determined by the Tribunal under these restrictive trade practices. The approach under those provisions remains guided by the principles established in *Audatex* and *B-Filer Leave*.

B. CarGurus' Application under Sections 75 and 77

[64] For the reasons that follow, I am not satisfied that CarGurus has met its burden for leave to apply for relief under either section 75 or section 77, as it has not demonstrated that there is reason to believe that it has met the first part of the leave test, namely, that it has been or could be substantially affected in its business by the Trader Conduct. I instead find that CarGurus has failed to submit sufficient, non-speculative and cogent evidence to give me reasonable grounds to believe that the impact of the Trader Conduct on its business could reasonably be considered to constitute a "substantial" effect.

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

[66] I have assumed, for the purpose of this decision, that CarGurus is "directly" affected in its business by the Trader Conduct.

a. CarGurus' Evidence on Substantiality

[67] CarGurus' argument relating to this first part of the leave test is found at paragraphs 84 to 93 of its Memorandum of Fact and Law and at paragraph 27 of its Reply Memorandum. The evidence in support of that argument is set forth at paragraphs 46 to 54 of the Blue Affidavit and at paragraphs 120 to 124 of the Blue Copyright Affidavit.

[68] CarGurus submits that the removal of the Trader photographs and its inability to display the Trader Vehicle Listings has led to less traffic and is generating less leads to dealers, which has negatively affected its revenue realization. It submits that it is substantially affected in the following manner:

- The number of multiple leads CarGurus can generate for dealers has diminished significantly;
- CarGurus has lost 60% of leads for dealers whose Vehicle Listings are related to Trader;
- CarGurus has lost approximately 25% of its overall lead volume;

- CarGurus' conversion rate (i.e., the percentage of visitors to the CarGurus website who contacted at least one dealer about a car for sale) has decreased by 16%; and

- Detailed views of CarGurus' pages have dropped by 31%, leading to a corresponding 31% drop in advertising revenue.

[69] CarGurus estimates that, further to those reduced leads, conversion rates and page views, the Trader Conduct has reduced CarGurus' revenues by $75,000 USD or 39% up to the end of March 2016, and that its forgone revenues through the end of 2017 are expected to be $3.7 million USD.

[70] It appears that CarGurus assumes a direct (and linear) correlation between the lead volume, number of leads generated by CarGurus' website, the page views and its revenue realization generated through these indicators.

b. Shortcomings of CarGurus' Evidence

[71] There are five major problems with the evidence of substantial effect provided by CarGurus.

[72] First, there is no reliable evidence on the proportion of CarGurus' total inventory of Vehicle Listings which is represented by the Trader Vehicle Listings that were deleted from CarGurus' website and that Trader allegedly refuses to supply.

[73] The Blue Affidavit (at paragraphs 33, 34, 49 and 56) and the Blue Copyright Affidavit (at paragraphs 67 and 71) refer to Trader as being dominant and having a 42.5 % market share, but there is no clear explanation of how this figure is arrived at and what it actually represents.

[74] A review of the record leads the Tribunal to conclude that the 42.5% figure represents Trader's estimated market share in the downstream market where Digital Marketplaces offer their services. It appears that, in its assessment of the substantial effect attributed to the Trader Conduct, CarGurus assumes that this 42.5% market share of Trader in the downstream market can be used as a proxy for Trader's market share in the supply of Vehicle Listings in the upstream market. However, there is no evidence on the overall supply of Vehicle Listings which would allow the Tribunal to verify whether this assumption can be supported, or on the proportion of the overall supply of Vehicle Listings in the online marketing of automobile business that is accounted for by Trader. Nor is there evidence of the proportion of Vehicle Listings supplied to CarGurus that was actually accounted for by Trader and its Trader Vehicle Listings.

[75] In other words, the Blue Affidavit does not provide information on the actual supply of Vehicle Listings lost by CarGurus further to Trader's refusal to supply the Trader Vehicle Listings, or on the proportion of CarGurus' total inventory of vehicle listings data represented by Trader. The Blue Affidavit only states that Trader has a dominant 42.5% market share. The Blue Affidavit does not describe the volume of Trader Vehicle Listings that is available or that was supplied by Trader (before CarGurus decided to delete the Trader photographs from its website).

[76] I appreciate that there will inevitably be incomplete information on some topics at the application for leave stage (*Used Car Dealers* at para 32). However, sufficient and credible information on the magnitude of the supply of the product at stake and on the proportion represented by the supplier refusing to supply are fundamental and basic elements needed by the Tribunal in order to be able to make a determination on whether the evidence provides the basis for the Tribunal to form a *bona fide* belief of a direct and substantial effect pursuant to subsection 103.1(7) of the Act (*Audatex* at para 68). As indicated in *Audatex*, this type of evidence was typically available to the Tribunal in those cases where it decided to grant an application for leave under section 103.1 of the Act. In *Nadeau Poultry Farm Limited v Groupe Westco Inc et al,* 2008 Comp Trib 7 ("***Nadeau Leave Order***") for example, the evidence of substantial effect was found sufficient by the Tribunal, as the applicant had provided figures showing that the exact supply held by the respondents represented 48% of the overall chicken processing business of Nadeau. This allowed the Tribunal to have a reliable measure of the impact of the intended cut-off in supply, which had not yet occurred in that case.

[77] In the current case, the evidence does not clearly indicate to the Tribunal the proportion of the supply represented by Trader in CarGurus' business, or in the upstream market as a whole. As indicated, the principal evidence adduced on this point is with respect to the market share that Trader allegedly represents in the downstream market for Digital Marketplaces where Trader and CarGurus compete.

[78] I pause to underline that even the 42.5% market share figure used by CarGurus raises significant concerns, as it appears to be based on a market estimate in which the competitor Kijiji has not been taken into account. Yet, the evidence on the record suggests that Kijiji may be, by far, the largest player in the Digital Marketplaces in Canada. According to CarGurus' own data contained in Exhibit 10 to the Blue Affidavit, Kijiji appears to be the most significant player in the supply of online automotive listings, being 2.5 times as large as Trader in terms of total unique visitors and even much larger if indicators such as total views or total visits are used. Other evidence indicates that Kijiji describes itself as the largest supplier of Vehicle Listings in Canada. Neither the Blue Affidavit nor the Blue Copyright Affidavit provides a satisfactory explanation for excluding that entity from CarGurus' market share estimate. If Kijiji were included in the downstream market for Digital Marketplaces, Trader's estimated market share of 42.5% would drop, by at least half. It remains puzzling to the Tribunal how Kijiji could have been entirely excluded from CarGurus' market share calculations and estimates without a more detailed explanation on its reasons for doing so.

[79] The <u>second</u> problem with CarGurus' evidence relates to the actual and expected "reduced revenues" identified by CarGurus, which do not represent an actual drop in existing or anticipated revenues of CarGurus. CarGurus is a new entrant in the Digital Marketplace business in Canada and its evidence on reduced revenues essentially reflects reductions compared to business *projections* it had initially made for its emerging business.

[80] The only financial evidence provided by CarGurus is found at Exhibit 11 of the Blue Affidavit. Exhibit 11 does not contain actual profit and loss statements but rather reproduces two different sets of monthly projections of revenues. Exhibit 11 first provides the original "Canada 2015-2017" monthly projections of revenues of CarGurus established in December 2015 and covering the period until December 2017 (the "**Initial Projections**"). It also includes revised monthly projections made in April 2016, covering the same time period and allegedly reflecting the impact of the refusal to supply of the Trader Vehicle Listings (the "**Revised Projections**"). Finally, Exhibit 11 provides the actual revenues generated by CarGurus' Digital Marketplaces business for a period of six months, up to the month of March 2016.

[81] The $75,000 USD reduction in actual revenues as of March 2016 and the estimated anticipated loss of $3.7 million USD up to end of 2017 reflect the difference between actual and projected revenues, or between the two sets of projections made by CarGurus. These are not actual or real reductions in revenues. The reduced revenues claimed by CarGurus to be evidence of "substantial effect" on its business essentially portray projections which are not of the same magnitude as what was initially contemplated and expected.

[82] I further note that no support was provided to the Tribunal by CarGurus for these projections of anticipated sales. Indeed, neither Exhibit 11 nor the rest of the Blue Affidavit offer background or explanation on how CarGurus' projections were established, the basis for these projections and how the supply of Vehicle Listings by Trader was factored into these projections.

[83] I agree with CarGurus that it is only required to provide "sufficient credible evidence" to satisfy the Tribunal that there is a reasonable possibility that its business may be directly and substantially affected by a refusal to deal. I am also mindful of the fact that CarGurus does not have to wait until harm actually occurs before bringing an application under subsection 103.1 of the Act (*Nadeau Leave Order* at para 25). But sufficient, cogent evidence is needed, even for anticipated harm. Relying on projections to establish a substantial impact on a business under subsection 103.1(7) still requires support in the form of clear and convincing evidence, which CarGurus has not provided. A party relying on projections has the onus to at least provide a basis for those projections.

[84] This case is quite different from the situation in *Nadeau Leave Order* where the evidence of substantial effect was found sufficient by the Tribunal. In *Nadeau Leave Order*, supply had not yet ceased, but there was nonetheless sufficient and measurable evidence of the anticipated effects of the refusal. Nadeau had provided figures showing the exact supply held by the respondents, as well as solid financial evidence of the proportion of Nadeau's supply actually represented by the suppliers of chicken who intended to terminate supply. This allowed the Tribunal to find reliable evidence regarding the substantiality of the upcoming refusal on Nadeau's business.

[85] This type of evidence has not been offered by CarGurus in this case.

[86] In *Mrs. O's Pharmacy v Pfizer Canada Inc*, 2004 Comp Trib 24("***Mrs. O's Pharmacy***"), the Tribunal indicated that simple projections and forecasts are not enough to constitute convincing and credible evidence of substantial effect on an applicant's business. Similarly, CarGurus has not provided hard data on the supply of Vehicle Listings actually accounted for by Trader in the upstream market, nor any hard data on its own lost sales or reduced revenues, save for Exhibit 11 to the Blue Affidavit.

[87] It bears underscoring that, at the leave application stage, there must be credible evidence to give the Tribunal a reason to believe that a causal relationship exists between the action of the supplier and the business consequences for the applicant. When only unsupported projections or forecasts are used, causality becomes speculative as several factors could have an impact on the growth a new business (*Mrs. O's Pharmacy* at para 25). I find that the "projections" evidence adduced by CarGurus only amounts to a mere possibility of substantial effect and is speculative. In a situation like this where the contemplated detrimental effect of the Trader Conduct is through a series of projections for which the assumptions are unknown, I am not satisfied that CarGurus' evidence can be considered as sufficient.

[88] The third problem with CarGurus' evidence of substantial effect is that it is alleged to be occurring or to be likely to occur in a context in which CarGurus expects and forecasts its revenues to continuously *increase* until the end of December 2017. As a practical matter, this renders more difficult the Tribunal's assessment of the alleged substantial adverse effects.

[89] Whether one looks at the Initial Projections or at the Revised Projections contained in Exhibit 11 to the Blue Affidavit, CarGurus' revenues are projected to increase steadily, every single month, until December 2017. This is true even for the Revised Projections of revenues where the alleged refusal to supply the Trader Vehicle Listings and more generally the Trader Conduct are taken into account. The evidence provided by CarGurus indicates that, under the Initial Projections, monthly revenues were expected to increase from $22,000 in December 2015 to $301,000 in December 2016, and then to $762,000 in December 2017. The Revised Projections represent 50% to 60% of the initial forecast, but CarGurus' revenues are nonetheless projected to increase to $192,000 in December 2016, and to $392,000 in December 2017. Even under those projections which allegedly reflect the impact of the refusal to supply the Trader Vehicle Listings, the revenues generated by CarGurus' Digital Marketplace business are expected to increase every single month throughout the period, though at a slower pace than the initial December 2015 forecast.

[90] I appreciate that it is of course more difficult to demonstrate that a refusal to supply or other practice substantially affects a business when the applicant has not been historically supplied by the respondent. But some credible basis for assertions in this regard must nevertheless be provided. I underline that this is not a situation where supported projections of increased revenues did not eventually materialize because of a refusal to supply. CarGurus' case is about revised projections which have not yet been confirmed and have not yet happened.

[91] I agree with CarGurus and acknowledge that, in its assessment of the substantial effect, the Tribunal is essentially conducting a "but for" analysis. As the Tribunal recently elaborated in detail in *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 7 ("***TREB***") at paras 477-483, a "but for" approach involves comparing a situation in the presence of the impugned conduct with a scenario that likely would have prevailed in the absence of such conduct. Therefore, the fact that CarGurus has or would have managed to increase revenues despite the Trader Conduct, or is projecting increasing revenues, does not, in and of itself, act as a bar to CarGurus' case. However, even using a "but for" approach, I am not convinced that there is sufficient credible evidence to conclude that a "substantial effect" exists in this case.

[92] The test is not simply whether CarGurus' business would have substantially grown but for the Trader Conduct. The Tribunal must also determine whether the reduced projections attributable to the Trader Conduct are enough to conclude that CarGurus' business could be negatively affected in an important or significant way. Given the uncertainty about those projections and the lack of support on their basis, and in light of expected increased revenues, I am not persuaded that there is non-speculative evidence supporting such a finding. I am not convinced that CarGurus' evidence showing projections of continuing increasing revenues for a new entrant in the business, despite the refusal to deal or exclusive dealing being complained of, gives rise to a reasonable belief that it is substantially affected in its business.

[93] The fourth problem with CarGurus' evidence of substantial effect relates to the actual revenues posted by CarGurus since it entered the Digital Marketplace business in Canada. The limited data provided by CarGurus does not show an adverse effect caused by the Trader Conduct so far.

[94] While CarGurus claims in the Blue Affidavit that the 31% drop in detailed page views in December 2015 attributable to the loss of the Trader photographs corresponds to a 31 % decrease in advertising revenues, this is not what the actual revenues reported by CarGurus show. Quite the contrary.

[95] There was instead an *increase* in advertising revenues in the months following the termination of the supply of the Trader Vehicle Listings. Exhibit 11 to the Blue Affidavit indicates that CarGurus' monthly revenues coming from the dealer subscription revenues in fact grew from $2,602 in October 2015 to $10,471 in December 2015, and up to $43,895 in March 2016. It is also striking to note that those revenues have increased in each of January, February and March 2016 compared to the previous month, and that they were four times as large in March 2016 as they were in December 2015.

[96] In addition to Exhibit 11 to the Blue Affidavit, other evidence provided by CarGurus also suggests that, even after Trader's refusal to supply in December 2015, CarGurus' monthly revenues have continued to increase. The Blue Affidavit reports that CarGurus' monthly advertising revenues have increased from $16,000 in December 2015 to $80,000 in March 2016, despite the Trader Conduct. In the same four-month period, the number of Canadian dealers with advertising packages with CarGurus increased from 39 to 137, and the average amount paid by dealers went from $400/month to $500/month.

[97] So, the actual revenues show continuous growth over the first six months of CarGurus's entry in this new line of business.

[98] I acknowledge that this evidence is limited to only a few months, but this suggests that other sources of supply of Vehicle Listings have remained and will remain available to CarGurus from Feed Providers and other potential sources. It also illustrates that, even without the Trader Vehicle Listings, CarGurus continued to post growing revenues. This undermines CarGurus' assertion that it has been or is likely to be substantially affected in its business. Furthermore, even the financial projections revised in April 2016 that apparently factor in the Trader Conduct which is the subject of this leave application show continuous growth in sales and revenues, month after month, between now and the end of 2017.

[99] It may be that the Revised Projections are not as optimistic as the Initial Projections made prior to December 2015, but such expected growing revenues make it much more difficult for me to form a *bona fide* belief that CarGurus' business is or may be being substantially affected by the Trader Conduct. As the financial evidence provided by CarGurus shows that actual revenues have been growing month after month since the inception of its business, and have continued to grow since the alleged refusal to deal and exclusive dealing practices are supposed to have affected its business, I am unable to find that the "substantially affected" requirement has been met.

[100] Finally, CarGurus claims that the difference between its Revised Projections and the Initial Projections reflects the impact of the Trader Conduct. The problem is that, when the limited evidence on CarGurus' actual revenues is looked at, it shows that the difference between the Initial Projections and the actual revenues posted until the end of March 2016 was of the same magnitude as the difference between the two sets of projections, even before the claimed effect of the Trader Conduct came into play. Looking at the November 2015 data reported by CarGurus (when CarGurus still enjoyed access to the Trader Vehicle Listings), actual revenues represented only 68% of CarGurus' Initial Projections, and that figure was 47% for the December 2015 revenues. It then stood at between 62% and 65% for the first three months of 2016. In other words, the gap between CarGurus' actual revenues and its Initial Projections is in the same range, before and after the Trader Conduct and the refusal to supply the Trader Vehicle Listings.

[101] This suggests that the differential (or claimed reduction in revenues) identified by CarGurus may well originate from inaccurate projections of its revenue stream rather than from a decrease attributable to the loss of the Trader Vehicle Listings. This evidence also undermines CarGurus' assertion that the drop in anticipated revenues (and the alleged substantial effect on CarGurus' business) could be attributed to the Trader Conduct. Stated otherwise, the difference between the actual revenues and the forecast appears to be independent from the supply of the Trader Vehicle Listings or absence thereof.

c. Conclusion regarding Sections 75 and 77

[102] In light of the foregoing, I am not persuaded that, when all the evidence adduced by CarGurus is considered, it constitutes sufficient credible evidence to allow the Tribunal to reasonably believe that CarGurus may be directly and substantially affected in its business by the Trader Conduct. It is not sufficient that the evidence shows a mere possibility that the business may be substantially affected. The standard of proof requires the "existence of reasonable grounds for a belief" (*National Capital News Canada v Milliken*, 2002 Comp Trib 41 at paras 9-10). A baldly asserted decrease in the anticipated growth of revenues, compared to an earlier unsupported projection, does not rise to the level of providing the basis for a *bona fide* belief of an actual or likely substantial effect in the assessment of applications for leave under subsection 103.1(7) (*Audatex* at paras 80-84).

[103] In addition, on the particular facts of this case, the fact that CarGurus' own projections show a continuous growth in its business notwithstanding its revised figures attributable to the Trader Conduct instead suggests that CarGurus expects to be able to find supplies of Vehicle Listings from sources other than Trader.

[104] This finding is fatal to CarGurus' application under both sections 75 and 77 and is dispositive of the leave application with respect to those two provisions of the Act. Since CarGurus has failed to meet the requirement of "directly and substantially affected in the applicant's business", it is not necessary to consider whether CarGurus has adduced sufficient evidence to meet the second part of the test for leave, namely whether each of the elements of subsection 75(1) or section 77 could be met and an order could be issued under the refusal to deal or exclusive dealing provisions.

C. CarGurus' Application under Section 76

[105] Turning to section 76 on price maintenance, subsection 103(7.1) governing applications for leave under that provision only requires that a party has been "directly affected" by the alleged reviewable conduct. For purposes of this application for leave, that requirement is clearly met.

[106] I must now turn to the second part of the leave test, which requires that I be satisfied that each of the elements of the price maintenance provision could be met. For the following reasons, I find that CarGurus has not made the case for leave to seek relief under section 76. In brief, I am not persuaded, based on the evidence before me, that all elements set out in section 76 could be met if the application is heard on the merits.

a. The Section 76 Elements

[107] The primary purpose of the price maintenance provisions contained in section 76 of the Act is to allow greater price competition among retailers/dealers by freeing them from pricing restraints which would otherwise be imposed by their suppliers. Section 76 sets out three distinct reviewable trade practices. The first is resale price maintenance (paragraph 76(1)(a)(i)). The second is refusal to supply because of a low pricing policy (paragraph 76(1)(a)(ii)). The third is inducing a supplier to refuse to supply because of a low pricing policy (subsection 76(8)). In all three cases, the conduct can only be subject to an order if it has had, is having or is likely to have, an "adverse effect" on competition in a market.

[108] CarGurus' application relates to the second and third trade practices covered by section 76. These each essentially contain five basic requirements. In order to constitute reviewable conduct, there needs to be: 1) a person engaged in the business of producing or supplying a product in Canada (or a person described in paragraphs 76(3)(b) or (c)); 2) a direct or indirect refusal to supply the product, or other discrimination, by such person; 3) a low pricing policy by the person being denied supply; 4) a refusal to supply or other discrimination which is motivated, at least primarily, by such low pricing policy; and 5) and an actual or likely adverse effect on competition in a market. In the case of subsection 76(8), there also needs to be an inducement to another supplier.

[109] Under the leave test, CarGurus carries the burden of demonstrating that each of these elements of the price maintenance practice could be met if the application were heard on the merits. The words "could be" connotes a probability, and not only a mere possibility (*Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 Comp Trib 1 ("***Barcode***") at para 13).

[110] I am not satisfied that CarGurus has met the threshold for leave under section 76 of the Act on at least three of the elements of section 76: the requirement that CarGurus has a low pricing policy, the requirement that the refusal to supply the Trader Vehicle Listings is due to CarGurus' low pricing policy, and the actual or likely adverse effect on competition in the downstream market for Digital Marketplaces where CarGurus compete.

b. The Low Pricing Policy

[111] First, I find that there is insufficient credible evidence of CarGurus' alleged low pricing policy and of CarGurus being a low-cost competitor.

[112] In order to support an application under section 76(1)(a)(ii) or 76(8), CarGurus must first provide evidence on its own low pricing policy. In this case, the evidence offered in that respect is limited, at best unclear and uncertain, and not convincing. CarGurus simply states in the Blue Affidavit and the Blue Copyright Affidavit that it offers its services either for free or for a lower cost than Trader. Surprisingly, no material evidence has been provided on the actual pricing offered by CarGurus, despite the fact that the existence of a low pricing policy is a key element of its application under section 76.

[113] Information regarding CarGurus' pricing is found in paragraphs 27 and 28 of the Blue Affidavit and at paragraphs 55 to 60 of the Blue Copyright Affidavit. At paragraph 27, Ms. Blue indicates that the amount charged by CarGurus varies based on the dealership size, the number the listings and the size of the market. In the following paragraph, Ms. Blue indicates that CarGurus had 39 customers and that their cost per month was "an average of $400".

[114] The low pricing policy contemplated by section 76 requires, at the very least, evidence of "low pricing" and of a "policy". Since subparagraph 76(1)(a)(ii) and subsection 76(8) refer to a "policy" rather than a "practice", I accept that an applicant's stated intent with respect to a future course of low pricing conduct may constitute a low pricing policy, even where that person has not yet engaged in the conduct. However, the "low pricing" element must be supported by evidence showing, for example, that an applicant's price is below a supplier's pricing suggestions, that it is less than the price the applicant charges for similar products elsewhere, or that it is lower than the price that other retailers typically charge for similar products. CarGurus has not provided such evidence.

[115] The only material evidence of pricing was in fact provided in the Dunbar Affidavit where Mr. Dunbar offered figures indicating that CarGurus' pricing was not lower than many of its competitors in the Digital Marketplaces business.

[116] This is a situation quite different from *Used Car Dealers* or *Stargrove* where the evidence provided clearly showed that the applicants in those cases were undoubtedly offering their respective products at a price lower than their competitors ($7 by listing in *Used Car Dealers*, and $5 per CD in the case of *Stargrove*).

[117] I am not persuaded that the evidence before me on the alleged low pricing policy of CarGurus constitutes sufficient credible evidence to allow the Tribunal to reasonably believe that CarGurus could meet this element of section 76 and that an order could be issued under that provision. It was CarGurus' burden to provide evidence on this element of section 76, and in fact

CarGurus was best positioned to demonstrate the existence of its own low pricing policy. It has failed to do so.

c. The Causation Element

[118] Second, I do not find that there is sufficient credible evidence that the alleged refusal by Trader to supply the Trader Vehicle Listings is due to or motivated by any low pricing on the part of CarGurus.

[119] Paragraph 76(1)(a)(ii) only applies to refusals to supply imposed "because of the low pricing policy" of a person or class of persons. There must therefore be a causal connection between the low pricing policy and the refusal to supply or the discrimination. Historically, in decisions issued under the former criminal price maintenance provision contained in the old section 61 of the Act, Courts have held that the sole and effective reason for the refusal to supply had to be the retailer's low pricing policy (*R v Griffith Saddlery & Leather Ltd.* (1986), 14 CPR (3d) 389 (Ont Prov Ct) at para 24; *R v Andico Manufacturing Ltd* (1983), 4 CPR (3d) 476 (MBQB) at para 47). However, some later decisions moved away from the requirement that the low pricing policy be the only real driving concern. Two decisions involving the real estate industry indeed suggested that the person's low pricing policy could be the main reason behind the refusal to supply or one reason incidental to it, or one of many reasons regardless of priority (*R v 41813 Alberta Ltd* (February 4, 1994), No 9201-13366 (ABQB); *R v Royal LePage Real Estate Services Ltd* (October 28, 1994), No 9201-14125 (ABQB)). In other words, the low pricing policy had to be a proximate cause of the refusal to supply, but other proximate causes could exist. This approach appears to have been retained by the Competition Bureau in its *Price Maintenance Guidelines* issued in 2014 (Canada, Competition Bureau, *Price Maintenance (Section 76 of the Competition Act)* (September 15, 2014) (the "**Guidelines**") at section 3.1.3).

[120] This is the first time that the Tribunal has to interpret the terms "because of" the low pricing policy in the context of the new civil price maintenance provision now described at section 76 of the Act. I note that the words "because of" are also used in section 75 on refusal to deal, where relief can be granted if a person is unable to obtain adequate supplies of a product "because of" insufficient competition among suppliers. In the context of section 75, these words have been interpreted by the Tribunal as meaning that insufficient competition needs to be the "overriding reason" for the refusal (*Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6, aff'd 2011 FCA 188 ("***Nadeau***") at paras 228-229 and 247; *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83 (Comp Trib) at para 83).

[121] A similar approach must prevail under section 76. I am therefore of the view that, in order to be successful in an application under paragraph 76(1)(a)(ii) or subsection 76(8), the applicant must demonstrate that the low pricing policy is the overriding reason for the refusal, even though it may not be the only reason. Stated differently, it must be a principal reason for the refusal.

[122] In this case, no direct evidence has been provided by CarGurus, such as correspondence from Trader or internal notes reflecting discussions to that effect with Trader, showing that Trader's refusal to supply the Trader Vehicle Listings is motivated or caused in any way by

CarGurus' low pricing policy. I would add that not only has CarGurus failed to provide direct evidence bearing on Trader's motives, but its claim in that respect has been squarely contradicted by Mr. Dunbar in the Dunbar Affidavit, where Mr. Dunbar denied that Trader was motivated in any way by CarGurus' low pricing policy.

[123] This, once again, is a situation different from *Stargrove* where the respondents in that application for leave had not produced any evidence in rebuttal and where the Tribunal found that Stargrove had itself provided some circumstantial evidence of motive on the part of the suppliers involved (*Stargrove* at paras 38-39).

[124] The Tribunal can of course consider circumstantial evidence when no direct evidence is available (*Used Car Dealers* at paras 44-48). However, such circumstantial evidence must still meet the "requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order" (*Used Car Dealers* at para 48). In *Used Cars Dealers*, efforts had been made by the applicant to provide evidence of concerns with the low pricing policy being the driving factor for the termination of the supply. The affidavit submitted in that case referred to circumstantial evidence on price differentials, the actions of a competitor and connections that provided to the applicant reasons to believe that the refusal to supply occurred because of its low pricing policy (*Used Cars Dealers* at paras 46-47). The affidavit submitted tried to provide evidence on the reasons for the refusal to supply and referred notably to the absence of other reasons for terminating supply. The applicant argued that, in the absence of an alternative reason, a reasonable adverse inference could be drawn from such silence and that the low pricing policy could be considered as the driving factor for the refusal.

[125] Even though there were some details in the affidavit to support the affiant's belief that the refusal may have been motivated by the low prices of the applicant, the Tribunal was nevertheless not convinced by such circumstantial evidence and could not conclude that there was sufficient credible evidence to show the possibility that the termination was due to a low pricing policy (*Used Cars Dealers* at para 61). The Tribunal thus dismissed the application for leave.

[126] In the current case, not only has CarGurus not provided any direct evidence on Trader's motivation but there is no circumstantial evidence on Trader's motives. No efforts or attempts have even been made to refer to circumstantial evidence supporting the proposition that Trader's refusal to supply the Trader Vehicle Listings was due to CarGurus' low pricing policy.

[127] It is worth citing the evidence provided by CarGurus in respect of that element of section 76. It is found at paragraphs 40 to 42 of the Blue Affidavit and reads as follows:

> 40. As noted in the First Affidavit at paragraph 110, I believe that Trader views CarGurus as its biggest competitive threat <u>because the CarGurus Website is</u> innovative and CarGurus drives considerable value to dealers and the public, as is proven by CarGurus' U.S. business. CarGurus' IMV ratings range drive consumer traffic and VDP views not only to the CarGurus' Website, but also dealers' websites based on CarGurus' rankings. This provides value to dealers that Trader cannot.

> 41. <u>Moreover</u>, CarGurus offers these services either for free or for a lower cost than Trader offers its own service. For example, CarGurus' basic package, which is offered to dealers free of charge, includes posting dealers' inventory on the CarGurus Website with up to 10 photographs, and allows CarGurus Website users to anonymously email such dealers about their available vehicles for sale.
>
> 42. I believe that Trader's different treatment of CarGurus and its refusal to deal with CarGurus on the usual terms with which it deals with other Digital Marketplaces <u>stems from CarGurus' low pricing policy and from Trader's concern that CarGurus' expansion in the Canadian market would force Trader to compete by providing more innovative products and services and by lowering its prices</u>.
>
> [emphasis added]

[128] Similar wording appears at paragraph 99 of CarGurus' Memorandum of Fact and Law and at paragraphs 107 and 108 of its Proposed Notice of Application. I observe that paragraph 110 of the Blue Copyright Affidavit refers to CarGurus' innovative features and how it allows it to expand into the marketplace, but does not contain any reference to CarGurus' low pricing policy.

[129] I point out that this is the whole extent of the evidence provided by CarGurus on this causation element of section 76. Indeed, in its Reply Memorandum, when referring to the evidence to support a *bona fide* belief on that issue, CarGurus strictly refers to paragraph 107 of its Memorandum and to paragraphs 41-42 of the Blue Affidavit. No further evidence has been provided to support CarGurus' statements on Trader's motives or on the causal relationship between CarGurus' low pricing policy and Trader's refusal to supply the Trader Vehicle Listings.

[130] More specifically, nowhere does the Blue Affidavit refer or allude to efforts or attempts made by CarGurus to obtain evidence of CarGurus' pricing policy being the cause or motivation of the Trader Conduct. Left with such limited evidence and assertions, I can only conclude that there is no credible evidence to support the causation element contained in section 76. True, these are factual issues that would be elaborated and developed in an application on the merits. However, an applicant still needs to provide at least a minimum level of credible evidence on this element of the practice to be granted leave. I am of course mindful that, at the leave stage, and prior to discovery, the means available to CarGurus to find such evidence are more limited. However, it is still a burden that it carries in order to be granted leave. Even at the leave stage, an applicant cannot simply repeat the wording of the Act, provide no evidence in support and expect that such orphaned statements can be sufficient to give the Tribunal the *bona fide* belief it needs to have.

[131] The statements contained at paragraphs 40 to 42 of the Blue Affidavit lead me to make two further observations.

[132] First, Ms. Blue states at paragraph 42 that she "believe(s)" that the Trader Conduct stems from CarGurus' low pricing policy. The belief of an affiant is not sufficient to establish the level of evidence needed under subsection 103.1(7) or 103.1 (7.1). The applicant has to provide sufficient credible evidence so that the Tribunal has the *bona fide* belief that an order could be made. But the Tribunal's belief cannot simply rely on the applicant's own belief. It has to rely on the applicant's evidence.

[133] In *Brandon Gray Internet Services Inc v Canadian Internet Registration Authority*, 2011 Comp Trib 17 ("***Gray***"), the Tribunal indeed stated that a "bald statement of belief" about adverse impact on competition in the market (such as simply stating that the termination of supply will result in reduced competition), without any supporting evidence, was not sufficient, and therefore leave was not granted (*Gray* at para 13).

[134] My second observation is this. I find it striking to note that paragraphs 40 to 42 of the Blue Affidavit, and all other references made by CarGurus to the reason for the Trader Conduct and its refusal to supply the Trader Vehicle Listings, never suggest that CarGurus' low pricing policy could be the overriding factor for the Trader Conduct. In fact, the Blue Copyright Affidavit, as the source of the Blue Affidavit, does not even mention CarGurus' low pricing policy. In addition, in every sentence where CarGurus refers to this issue in its evidence, it always alludes to both its low pricing policy and to CarGurus' superior innovative features. There is never a reference made solely to the primary role of CarGurus' low pricing policy. Indeed, paragraphs 40 to 42 of the Blue Affidavit first refer to CarGurus' innovative feature as being the apparent driver of the Trader Conduct and use the word "Moreover" to introduce the concern about the low pricing policy.

[135] This is a fundamental deficiency in CarGurus' evidence.

[136] Section 76 is the price maintenance provision of the Act. Its purpose is to provide relief in respect of refusals to supply or discriminatory practice motivated by a person's low pricing policy. It aims at reducing the restrictions that a supplier can put on the ability of resellers to compete on price, where those restrictions have, or are likely to have, an adverse impact on competition. The provision cannot be resorted to in order to sanction refusals by a supplier which may be driven by other motives. It may be that a supplier refuses to supply a product based on other behavior which could be found to be anti-competitive. It may be that a supplier would refuse to supply or discriminate against a person because of that person's disrupting innovative marketing practices or products. But this is not what section 76 aims to address. Section 76 applies to refusals or discrimination motivated primarily by the low pricing policy of a person. Had Parliament intended, in section 76, to prohibit refusals to supply primarily motivated by a person's innovative practices, it would have said so. It has not. Section 76 is strictly concerned with a low pricing policy. Other provisions of the Act, such as abuse of dominance, can be invoked to challenge an anti-competitive practice aimed at eliminating or disciplining an innovative new entrant. But that cannot constitute a ground to justify a section 76 application.

[137] The low pricing policy must be the overriding or principal cause of the supplier's refusal or discrimination. The Tribunal accepts, as stated by the Competition Bureau in the Guidelines, that a person's low pricing policy need not be the only reason for the refusal or discrimination. However, such low pricing policy has to be the *overriding* or *principal* reason informing and motivating the supplier's decision. Even if a number of other factors contributing to the refusal are present, there still must be evidence that the low pricing policy plays a material and principal role in the refusal to supply.

[138] In this case, I do not find evidence allowing me to reasonably infer that CarGurus' low pricing policy could be the overriding or principal cause of Trader's refusal to supply, as opposed to CarGurus' status as a disruptive innovator. By systematically linking its claimed low pricing policy and its innovative features as the motives allegedly driving the Trader Conduct, CarGurus does not allow me to conclude that the low pricing policy could be the main or principal cause of the Trader Conduct. In fact, CarGurus' own evidence suggests that the overriding reason for the Trader Conduct is CarGurus' innovating features rather than its low pricing policy.

[139] This is the wording that CarGurus chose to use in its evidence and in the Blue Affidavit. Considering the evidence submitted, I am therefore not satisfied that CarGurus has met the evidentiary threshold on the causation element of section 76. There is no sufficient credible evidence to give me a *bona fide* belief that CarGurus' low pricing policy, separate and distinct from other competing and innovative features it may have, could be the principal motivation and the overriding factor behind the Trader Conduct and its refusal to supply the Trader Vehicle Listings.

[140] I observe in closing that, in addition, there is also ample evidence on the record that the reason driving the Trader Conduct and its refusal to supply the Trader Vehicle Listings is in fact its claim of copyright infringement by CarGurus and the ongoing litigation it commenced against CarGurus in the Copyright Proceeding. It may be that Trader's claim could be denied by the Ontario Superior Court of Justice and that its allegations of copyright infringement relating to the Trader photographs are not upheld by the Court. However, at this stage and in light of the evidence before me in this application for leave, the existence of the Copyright Proceeding provides an objective business reason for the refusal to supply the Trader Vehicle Listings to CarGurus and is yet another factor pointing to an absence of sufficient credible evidence that Trader's refusal to supply is motivated by CarGurus' low pricing policy.

d. Adverse Effect on Competition

[141] Third, I am not convinced that there is sufficient credible evidence to form a *bona fide* belief that the Trader Conduct could have an actual or likely adverse effect on competition in a market.

[142] For the purposes of the adverse effect analysis (whether under paragraph 76(1)(b) on price maintenance or paragraph 75(1)(e) on refusal to deal), it is recognized that the relevant market is the market in which the applicant participates, namely the operation of Digital Marketplaces.

[143] In *B-Filer*, the Tribunal stated that paragraph 75(1)(e) "requires the assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal" (*B-Filer* at para 200). The Tribunal also considered the concept of "adverse effect on competition" in *Nadeau*. The Tribunal held that, in order to determine whether a refusal to deal would be likely to have an adverse effect, it was necessary to examine a series of indicators which could vary on a case-by-case basis. In *Nadeau*, these included factors such as market share and market concentration (requiring an assessment of the relevant product and geographic markets), barriers to entry, impact on prices, the effect on rivals' costs, the impact on the quality and variety of the product, possible foreclosure of supply to other processors in the market and the impact of the possible elimination of the applicant from the market.

[144] In each of *B-Filer*, *Visa* and *Nadeau*, the Tribunal stated that, in its view, even if the threshold for establishing an "adverse" effect on competition is lower than that for a "substantial" reduction, it still requires evidence that the refusal to deal or price maintenance would have the effect of creating or enhancing a supplier's "market power". For a refusal to deal to have an adverse effect on a market, the Tribunal stated that the "remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power" (*B-Filer* at para 208). In other words, "without market power there can be no adverse effect in a market" (*Nadeau* at para 369; *Visa* at para 350).

[145] An assessment of an adverse effect on competition thus requires a consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation and Research) v NutraSweet Co.* (1990), 32 CPR (3d) 1, the Tribunal noted that "[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period". In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers (*Nadeau* at para 368). Market power has also been defined in the jurisprudence alternatively in terms of "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms," and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*TREB* at para 165).

[146] In this case, there is very limited evidence in the Blue Affidavit on the issue of adverse effect of the Trader Conduct on competition. At paragraph 59 of the Blue Affidavit, Ms. Blue simply states that: "If Trader continues its current practices, the percentage of the market it controls will only increase with time as it enters into exclusive agreements with additional dealers and Feed Providers, shutting CarGurus out of the market." And there are the various references mentioned above relating to the alleged 42.5% market share of Trader. No specific assessment was made by CarGurus on the likely geographic or product market at stake.

[147] The Tribunal could conservatively assume that the relevant market in this case is the narrowest market in which CarGurus operates, namely the Canadian Digital Marketplaces. Assuming that is the case, the evidence on the record shows that there are at least 10 businesses or competitors in Canada offering Digital Marketplace services and competing in this downstream "market," including Kijiji and Trader as the two major and leading players. The evidence provided does not allow the Tribunal to clearly measure the size of the downstream market which CarGurus claims will be affected by Trader's refusal to supply, or the market power of participants absent CarGurus' participation. However, looking at Exhibit 10 to the Blue

Affidavit, the evidence indicates that the market for Digital Marketplaces is quite competitive, with two leading competitors (Kijiji and Trader) and a series of smaller ones.

[148] From the information on the number and size of competitors in Exhibit 10, it is apparent that CarGurus is a fairly minor competitor for the time being. There is also no evidence of the market share or relative size that CarGurus would likely achieve in the foreseeable future in the absence of the Trader Conduct. This is therefore not a situation where a major competitor would be eliminated by the Trader Conduct. In fact, CarGurus' own projections rather indicate that, even without access to the Trader Vehicle Listings, it will continue to expand and will arguably increase its presence and market share in the business, be it at a slower growth rate.

[149] I am therefore not satisfied that CarGurus has provided sufficient credible evidence that the refusal to supply the Trader Vehicle Listings could create, enhance or preserve market power of any entity in the Digital Marketplaces market. It is not a situation similar to *Nadeau* where evidence had been provided that the anticipated refusal to supply would displace a major competitor in the downstream market (Nadeau) and eliminate it as a main competitor of the leading players in the business.

[150] As the Tribunal indicated in *Audatex*, the requirement of an actual or likely adverse effect on competition is a key dimension of the private recourses available under sections 75 or 76 of the Act. The Tribunal stated the following at paragraph 50 of that decision:

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

[151] The requirement of an adverse effect on competition reflects the fact that the private application provisions of the Act are not there to arbitrate private contractual disputes relating to the supply of a product in circumstances where a refusal to supply does not have a market impact. The adverse competitive effect has to be more than an impact on CarGurus' business, as this is already captured by the requirement that the applicant be substantially affected by the refusal to supply. The evidence has to have a market dimension. As the Tribunal stated in *Nadeau* at para 368, the requirement that the practice is "likely to have" an adverse effect means that there is a requirement to establish the likelihood that an adverse effect is probable and not merely possible.

[152] Here, CarGurus is a new entrant. Evidence needed to demonstrate that there could be an adverse effect on competition in these circumstances is arguably more difficult to meet. But it is still the burden of the applicant to bring forward sufficient credible evidence to give the Tribunal a *bona fide* belief that this requirement of section 76 could be met. In light of the market structure for the operation of Digital Marketplaces in Canada, the presence of two leading competitors and numerous other smaller ones, and the relatively small, but growing, size of CarGurus, I am not satisfied that sufficient credible evidence has been produced by CarGurus to support a *bona fide* belief that holding CarGurus out of the Digital Marketplaces market or limiting its expansion could have an adverse effect on competition in the market.

e. Conclusion regarding Section 76

[153] For all these reasons, I conclude that the Tribunal "could" not make an order under section 76 requiring Trader to supply CarGurus when the application is heard on the merits, as insufficient evidence has been provided on at least three elements set out in the price maintenance provision.

IV. CONCLUSION

[154] For the reasons discussed above, CarGurus' application for leave is not supported by sufficient credible evidence to give rise to a *bona fide* belief that CarGurus may be or is substantially affected in its business by the alleged refusal to supply or exclusive dealing by Trader. Accordingly, CarGurus' application for leave to apply under section 75 and 77 of the Act is denied.

[155] Similarly, the Tribunal concludes that it could not make an order under section 76 of the Act as the evidence on at least three elements of the price maintenance provision is insufficient to give rise to a *bona fide* belief that CarGurus could meet them.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[156] The application seeking leave for relief under sections 75, 76 and 77 of the Act is dismissed.

[157] The respondent Trader is awarded costs against the applicant CarGurus, at the mid-point of Column III of the table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

DATED at Ottawa, this 14th day of October 2016.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

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Competition Tribunal Tribunal de la Concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 7
File No.: CT-2011-003
Registry Document No.: 385

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Toronto Real Estate Board
(respondent)

and

Canadian Real Estate Association
(intervenor)

Dates of hearing: 20120910 to 20120914, 20120918 to 20120919, 20120924 to 20120925, 20120927 to 20120928, 20121002 to 20121003, 20121009 to 20121010, and 20121017 to 20121018 (Initial hearing); 20150921 to 20150924, 20151005 to 20151007, and 20151102 (Redetermination hearing)
Before: P. Crampton C.J., D. Gascon (Chairperson) and Dr. W. Askanas
Date of reasons and order: April 27, 2016

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I. Executive summary

[1] The Commissioner of Competition (the **"Commissioner"**) has filed an application pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended (the **"Act"**), for an order prohibiting the Toronto Real Estate Board (**"TREB"**) from engaging in certain anti-competitive acts in connection with the supply of residential real estate brokerage services in the Greater Toronto Area (**"GTA"**).

[2] In brief, the Commissioner contends that, by restricting access to certain Multiple Listing Service (**"MLS"**) information on the password-protected virtual office websites (**"VOW"**) of its real estate brokers and salesperson members (the **"Members"**), and by restricting the manner in which its Members may display and use that information, TREB's conduct constitutes an abuse of dominant position under section 79. The Commissioner asks the Tribunal to remedy TREB's alleged substantial prevention of competition in two general ways: First, by prohibiting TREB from enforcing its current restrictions on the display and use of MLS data, and second, by requiring TREB to include certain data in an electronic data feed to its Members who use it for display on their password-protected VOWs. TREB responds that it opted to exclude the disputed information from its VOW data feed after careful consideration of privacy and copyright issues, and that its VOW policy does not substantially lessen or prevent competition. Among other things, it maintains that any incremental impact that its VOW policy may have on competition is not substantial.

[3] For the reasons that follow, the Tribunal has decided to partially grant the application brought by the Commissioner. The terms of the Tribunal's order (the **"Order"**) will primarily address certain restrictive aspects of the rules and policy that TREB has adopted with respect to VOWs, which are defined below as the VOW Restrictions. The specific terms of the Order will be determined after the parties have provided written submissions addressing this issue of remedy and have had an opportunity to make oral submissions. A Direction to that effect will be issued by the Tribunal shortly following the issuance of these reasons.

[4] In the course of reaching its decision, the Tribunal determined that the Commissioner has established, on a balance of probabilities, that the three elements of section 79 have been satisfied. The Tribunal first concluded that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA, within the meaning of paragraph 79(1)(*a*) of the Act. The Tribunal then found that TREB has engaged in, and continues to engage in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). In essence, that practice is comprised of the enactment and maintenance of the VOW Restrictions. In addition, the Tribunal concluded that the VOW Restrictions have had, are having and are likely to have the effect of preventing competition substantially in a market, as contemplated by paragraph 79(1)(*c*). The Tribunal reached that conclusion after finding, among other things, that the VOW Restrictions have substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services in the GTA, relative to the degree that would likely exist in the absence of those restrictions. Most importantly, this includes a considerable adverse impact on innovation, quality and the range of residential real estate

brokerage services that likely would be offered in the GTA, in the absence of the VOW Restrictions.

[5] The Tribunal observes that the Commissioner's application raised particular challenges for several reasons: (i) it involved an assessment of dynamic competition and innovation, (ii) significant developments have occurred in the relevant market since this application was initially filed in May 2011, and (iii) limited quantitative evidence was adduced regarding the impact of changes in certain local markets in the United States and in Nova Scotia, relative to other local markets where similar changes did not occur.

[6] Among other things, the remedy to be imposed on TREB under the Tribunal's Order will remove important restrictions on the ability of innovative, Internet-based brokerages and other competitors in the GTA residential real estate brokerage services market to offer new products and services to consumers, in competition with brokers and agents who rely on more traditional products and services.

II. Introduction and overview

A. *Procedural history*

[7] The Tribunal's decision in this proceeding follows a long procedural history going back to May 2011 when the Commissioner first filed a Notice of Application (the **"Initial Application"**) for an order against TREB under the abuse of dominance provisions of the Act.

[8] In the fall of 2012, the Tribunal held an initial hearing over a period of six weeks (the **"Initial Hearing"**). In April 2013, the panel dismissed the Commissioner's application (*The Commissioner of Competition v The Toronto Real Estate Board*, 2013 Comp. Trib. 9 (**"*TREB CT*"**)). However, in February 2014, the Federal Court of Appeal set aside the Tribunal's order dismissing the application and referred the matter back to the Tribunal for a reconsideration on the merits (*Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29 ("***TREB FCA***"), leave to appeal to SCC refused, 35799 (24 July 2014)).

[9] The Commissioner's application was reconsidered on the merits by a differently-constituted panel, and a redetermination hearing was held by the Tribunal in the fall of 2015, over a period of eight days (the **"Redetermination Hearing"**).

B. *The parties' pleadings*

[10] In May 2011, the Commissioner had applied to the Tribunal for an order under subsection 79(1) of the Act, prohibiting TREB from directly or indirectly enacting, interpreting or enforcing certain rules, policies and agreements (the **"MLS Restrictions"**) that allegedly have excluded, prevented or impeded the emergence of innovative business models and service

offerings in respect of the supply of residential real estate brokerage services in the GTA. Those business models and service offerings involve the use of a particular Internet-based data-sharing vehicle known as a VOW to offer new products and services to home buyers and home sellers.

[11] The Commissioner also sought an order under subsection 79(2), directing TREB to take certain actions to overcome the effects of its alleged practice of anti-competitive acts.

[12] The Commissioner's Initial Application focused on MLS Restrictions that exclude or prevent TREB's Members from innovating by using certain information in TREB's MLS system to operate a VOW. However, the relief sought by the Commissioner was cast in language that appeared to extend beyond the MLS Restrictions. In this regard, the statement of relief sought was couched in terms of "any restrictions, including the MLS Restrictions" that have the alleged anti-competitive effects. Other passages of the Initial Application expressed a concern about the impact of such effects on brokers who operate VOWs or other innovative business models, or who offer services similar to VOWs.

[13] That wording remained in the Amended Notice of Application (the **"Application"**) filed by the Commissioner in July 2011. That version of the Application augmented the initial version primarily by addressing the VOW policy proposed by TREB and the provisions that were added to TREB's MLS rules in respect of VOWs (collectively, the **"VOW Policy and Rules"**) and that TREB sent to its Members a few weeks after the Initial Application was filed. The Application was not modified for the Redetermination Hearing.

[14] As it turned out, the Commissioner's focus in this proceeding was primarily on the restrictive aspects of TREB's VOW Policy and Rules and terms included in TREB's VOW Data Feed Agreement (the **"Data Feed Agreement"**) (collectively, the **"VOW Restrictions"**). These restrictions notably exclude certain types of information from the VOW data feed (the **"VOW Data Feed"**) that TREB makes available to its Members. This excluded information concerns data with respect to: sold and "pending sold" homes; withdrawn, expired, suspended or terminated listings (the **"WEST"** listings); and offers of commission to brokers who represent the successful home purchaser, known as "cooperating brokers" (collectively, the **"Disputed Data"**). Two other principal aspects of the VOW Restrictions include prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

[15] Nevertheless, at the end of his closing submissions at the Redetermination Hearing, the Commissioner confirmed that the relief being sought extends beyond a request for an order requiring TREB to include the Disputed Data in its VOW Data Feed, and to eliminate the above-mentioned prohibitions. The Commissioner maintained that his overarching objective is to ensure that there is no discrimination between the modes in which information is delivered by TREB to its Members.

[16] Accordingly, in addition to requiring the Disputed Data to be included in the VOW Data Feed, the order being sought by the Commissioner would reflect this general non-discrimination principle, as well as ensuring that the VOW Data Feed includes all MLS information that is available in other ways to TREB's Members, and that there are no restrictions on how VOW operators or other Members may use MLS information on the VOW portions of their websites.

[17] In brief, the Commissioner seeks an order that would, in his view, ensure a level playing field between more traditional "bricks and mortar" brokers and those who wish to provide new products and services based on MLS information in the manner that they think is appropriate, and in particular over the Internet.

[18] The Commissioner also acknowledged in his closing submissions at the Redetermination Hearing that no relief is being sought in this proceeding in respect of TREB's conduct prior to 2011. Accordingly, these reasons will not assess whether any of that conduct constituted a practice of anti-competitive acts that prevented or lessened competition substantially, or was likely to do so.

[19] In the Application, the Commissioner alleges that each of the three elements that must be satisfied under paragraphs 79(1)(*a*), (*b*) and (*c*) of the Act, respectively, before an order may be made by the Tribunal under section 79, are met. More specifically, the Commissioner contends that:

a. TREB substantially or completely controls the supply of residential real estate brokerage services in the GTA;

b. The MLS Restrictions constitute a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's Members who use more traditional business methods; and

c. The MLS Restrictions have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. In particular, the Commissioner asserts that by restricting brokers' use of VOWs, the MLS Restrictions discourage entry and expansion by brokers wishing to offer innovative services, with the result that the positions of more traditional brokers are entrenched, their market power is maintained, and innovation is inhibited.

[20] In its Response, TREB asserts, among other things, that the Commissioner has ignored its copyright in the MLS database and that, under subsection 79(5) of the Act, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived from the *Copyright Act*, RSC 1985, c C-42 is not an anti-competitive act for the purposes of section 79.

[21] Moreover, TREB maintains that none of the three elements set forth in subsection 79(1) is met. Specifically, TREB submits that:

a. It does not substantially or completely control the supply of residential real estate brokerage services in the GTA, primarily because it has no market power in that market and has no motivation to exercise any market power, due to the fact that it is not itself a supplier of residential real estate brokerage services;

b. Neither the VOW Policy and Rules nor any of the other conditions that TREB places on its Members' access to and use of the MLS system have the purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary. Instead, they have been implemented for a number of legitimate purposes. These include preserving the value of the MLS system for the benefit of its Members, and safeguarding the privacy rights of its Members and their customers by ensuring that its Members are compliant with their respective obligations under privacy legislation and the *Code of Ethics*, O Reg 580/05 (the **"*Code of Ethics*"**) established by the Real Estate Council of Ontario (**"RECO"**), pursuant to the *Real Estate and Business Brokers Act, 2002,* SO 2002, c 30, Sched C (**"*REBBA*"**); and

c. There is no basis for the Commissioner's allegation that, "but for" TREB's impugned conduct, there would likely be greater innovation, enhanced quality of service or increased price competition in the supply of residential real estate brokerage services in the GTA. TREB contends that the VOW Policy and Rules do not create, maintain or enhance market power. Furthermore, in the context of the broader competition that is occurring in the supply of real estate brokerage services to buyers and sellers of homes in the GTA, TREB submits that the incremental negative effect of its VOW Policy and Rules, if any, is not significant.

[22] In the Reply filed in September 2011, after the VOW Policy and Rules were formally adopted by TREB and its Members, the Commissioner rejects TREB's above-mentioned positions.

[23] With respect to TREB's alleged substantial or complete control of the supply of residential real estate brokerage services in the GTA, the Commissioner submits that TREB's position that it does not compete with brokers ignores the reality that TREB enacts and enforces its rules, policies and agreements for the benefit of its Members, most of whom pursue a traditional business model. The Commissioner maintains that the enactment of the VOW Policy and Rules demonstrates TREB's substantial or complete ongoing control of the relevant market, and that brokers cannot realistically compete without access to TREB's MLS system.

[24] With respect to TREB's alleged practice of anti-competitive acts, the Commissioner states that the purpose and effect of TREB's MLS Restrictions is to discipline and exclude innovative brokers who would otherwise compete with TREB's traditional member brokers using their VOWs. The Commissioner adds that by preventing its Members from providing certain MLS data through a VOW, including "highly valuable information" pertaining to the sold prices of homes, TREB discriminates against innovative brokers. This is because TREB imposes

no corresponding restrictions on traditional brokers who provide the very same MLS information to consumers by means other than a VOW. The Commissioner submits that the ultimate effect of the MLS Restrictions is to exclude potential competitors who are not yet in the market as well as those innovative member brokers who are eager to compete using a VOW.

[25] The Commissioner further submits that TREB's business justifications for the MLS Restrictions should be rejected. Regarding privacy, the Commissioner argues that TREB's position is belied by the fact that the information at issue in this proceeding is currently and freely distributed by traditional brokers to consumers on a regular basis by means other than a VOW.

[26] Regarding TREB's copyright, the Commissioner asserts that the exception in subsection 79(5) of the Act does not apply because TREB has not established a copyright in the MLS database (including the Disputed Data) and because, even if it had, the MLS Restrictions go well beyond a mere exercise of any rights that TREB may have under the *Copyright Act*.

[27] Finally, the Commissioner maintains that the MLS Restrictions, and in particular the narrower VOW Restrictions, have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. The Commissioner affirms that this is so because, "but for" those restrictions, consumers would benefit from substantially greater competition in that market. Specifically, the Commissioner states that the MLS Restrictions effectively protect and perpetuate the static traditional brokerage model for the delivery of residential real estate brokerage services. The impugned restrictions on innovative, Internet-based business models such as VOWs thus have negatively affected the range and quality of services being offered over the Internet by brokers to their customers and have denied consumers the benefits of downward pressure on commission rates that would otherwise exist.

[28] Given that the parties' submissions and the evidence filed in this case centered almost entirely on the VOW Restrictions, those specific restrictions are the focus of this decision. However, the Tribunal will remain open to considering the inclusion of terms in its Order that go beyond the VOW Restrictions, after it has reviewed the parties' written submission on remedy and has considered the oral submissions that will be made during the hearing that will be scheduled with respect to the specific issue of the remedy to be imposed in this case.

C. *Section 79 of the Act*

[29] Pursuant to subsection 79(1) of the Act, the Tribunal may make an order prohibiting all or any of the persons described in paragraph 79(1)(*a*) from engaging in a practice described in paragraph 79(1)(*b*), where it finds, on a balance of probabilities, that the three elements described in that subsection have been met. Those are 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.

[30] It is important to note that section 79 specifies three distinct elements that must each be determined independently. In *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 (**"*Canada Pipe FCA*"**), leave to appeal to SCC refused, 31637 (10 May 2005), the Federal Court of Appeal stressed that, in abuse of dominance cases, the Tribunal must avoid "the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests" (*Canada Pipe FCA* at para 28). However, the same evidence can be relevant to more than one element (*Canada Pipe FCA* at paras 27-28).

[31] Pursuant to subsection 79(2), if an order is not likely to restore competition, the Tribunal may, in addition to or in lieu of making an order under subsection 79(1), make an order directing any or all of the persons against whom an order is sought to take such actions as are reasonable and necessary to overcome the effects of the practice in a market in which the Tribunal has found the three above-mentioned elements to have been met.

[32] In determining whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, subsection 79(4) further requires the Tribunal to consider whether the practice is a result of superior competitive performance.

[33] An exception to the Tribunal's order-making powers under subsections 79(1) and (2) of the Act is provided by subsection 79(5), which stipulates that for the purposes of section 79, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, is not an anti-competitive act.

[34] The Commissioner bears the burden of establishing the three elements of subsection 79(1), and the Tribunal must make a positive determination in respect of each of those elements before it may issue an order. The burden of proof with respect to each element is the civil standard, that is, on the balance of probabilities.

[35] The full text of section 79 of the Act, and of section 78, which sets forth a non-exhaustive list of anti-competitive acts, is reproduced in Schedule "A" to this decision.

D. *The Tribunal's initial decision*

[36] In *TREB CT*, the initial panel of the Tribunal dismissed the Commissioner's Application.

[37] In brief, the panel concluded that the Commissioner had not met the requirements of paragraph 79(1)(*b*) for three reasons. First, it relied on its interpretation of *Canada Pipe FCA* at paragraph 68, where the Federal Court of Appeal held that "to be considered 'anti-competitive' under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor." The panel found that, because TREB does not compete with its Members, the MLS Restrictions could not have the negative effect on a competitor required by *Canada Pipe FCA*, as interpreted by the panel. It found that *Canada Pipe FCA* served as a binding precedent.

[38] Second, the panel found that the Application was inconsistent with the guidelines entitled *The Abuse of Dominance Provisions*, issued in September 2012 by the Commissioner (the **"*Guidelines*"**). The panel noted that while the *Guidelines* state, at section 3.2, that "certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose," the *Guideline*s do not clearly stipulate that a dominant firm's conduct might fall within the purview of section 79, even though that firm may not compete in the relevant market.

[39] Third, the panel stated that the language of subsection 79(4), which requires the Tribunal to consider whether an impugned practice is a result of superior competitive performance, makes it clear that paragraph 79(1)(*b*) applies only if the dominant firm in question is a competitor.

[40] The panel therefore concluded that the Application did not meet the requirements of paragraph 79(1)(*b*). The panel also observed, with respect to paragraph 79(1)(*a*), that even if it could be established that TREB had market power, the requirements of that paragraph would not be met because that market power would not be exercised by a firm that competes in the relevant market identified by the Commissioner, namely, the supply of residential real estate brokerage services in the GTA. Finally, the panel also observed that the requirements of paragraph 79(1)(*c*) had not been met, as there were no anti-competitive acts under paragraph 79(1)(*b*).

E. *The Federal Court of Appeal's decision*

[41] In February 2014, the Federal Court of Appeal set aside the Tribunal's order dismissing the Commissioner's Application and referred the matter back to the Tribunal for reconsideration (*TREB FCA*).

[42] In reaching its conclusion, the Court acknowledged that, in the passages of *Canada Pipe FCA* relied upon by the Tribunal, the panel interpreted the word "competitor" to mean "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order." Speaking for the Court, Sharlow JA stated that there was "nothing in the language or context of the *Competition Act* to justify the addition of those qualifying words" (*TREB FCA* at para 17). She added that the addition of those qualifying words also could not be justified by

the facts as found in *Canada Pipe FCA*. With respect to the dispute between the Commissioner and TREB, Sharlow JA stated that she did not accept that the Court intended its decision in *Canada Pipe FCA* to preclude the application of subsection 79(1) to TREB in respect of a rule that it makes binding on its Members (*TREB FCA* at para 18).

[43] In further discussing that conclusion, Sharlow JA referred to paragraph 78(1)(*f*) of the Act. That specific provision describes one type of act that is deemed to be anti-competitive for the purposes of section 79. It appears as part of a non-exhaustive list of other acts contained at subsection 78(1) that are also deemed to be anti-competitive. Paragraph 78(1)(*f*) refers to the "buying up of products to prevent the erosion of existing price levels." Sharlow JA observed that, in *Canada Pipe FCA*, the Court recognized that this paragraph 78(1)(*f*) describes an act that is not necessarily taken by a person against that person's own competitor. She proceeded to note that the Court in that case did not reconcile this with its view that "to be considered 'anti-competitive' under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*TREB FCA* at paras 15 and 19, referring to *Canada Pipe FCA* at paras 64-68). In expressing disagreement with the interpretation given to *Canada Pipe FCA* by the Tribunal, Sharlow JA stated that "paragraph 78(1)(*f*) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case" (*TREB FCA* at para 20). She added that if the Court had intended to adopt the contrary interpretation as a general rule, she "would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons)" (*TREB FCA* at para 20).

[44] Sharlow JA then proceeded to briefly address two other points identified by the Tribunal in its reasons for dismissing the Commissioner's Application.

[45] With respect to the *Guidelines*, she simply mentioned that they provide no useful guidance to the Court in interpreting section 79 (*TREB FCA* at para 21). With respect to subsection 79(4), she agreed with the Commissioner that it only applies for the purpose of assessing whether a practice has had, is having or is likely to have the effect of preventing or lessening of competition substantially in a market, as contemplated by paragraph 79(1)(*c*) of the Act. In other words, this provision does not support the view that, "as a matter of law, a subsection 79(1) order cannot be made against [TREB] simply because it does not compete with its members" (*TREB FCA* at para 22).

III. Parties and intervenors

[46] The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

[47] TREB is a not-for-profit corporation that was incorporated in 1920 pursuant to the laws of Ontario. It is Canada's largest real estate board and serves approximately 42,500 Members. Its core purpose is to advance the continuing success of its Members. To that end, it provides a range of services to those Members, including access to and use of the MLS system. TREB's

activities are guided by a 16-member Board of Directors elected by TREB's Members from among their ranks. Additional information regarding TREB's operations will be provided later at various points in these reasons.

[48] The Canadian Real Estate Association (**"CREA"**) and Realtysellers Real Estate Inc. (**"RRE"**) were granted leave to intervene in this proceeding.

[49] Prior to the Initial Hearing, the Tribunal was advised that RRE was no longer represented but was reserving its intervention rights. However, no one appeared for RRE throughout that hearing and no submissions were made on its behalf. Subsequently, the Tribunal issued an order quashing its prior order granting RRE leave to intervene (*The Commissioner of Competition v The Toronto Real Estate Board*, 2014 Comp. Trib. 5). Accordingly, no further references will be made to RRE as an intervenor.

[50] CREA is a not-for-profit trade association that represents over 110,000 real estate brokers and agents working through approximately 90 real estate boards and associations across Canada, including provincial and territorial associations. Among other things, it describes itself as the national voice for the Canadian real estate industry, including on competition law and technological issues. Membership in CREA is open to real estate boards and associations, as well as to their members in good standing, provided that they agree to be bound by, among other things, CREA's Realtor Code, and by various rules, by-laws and policies that it has issued.

IV. Industry background

A. *Provincial legislation*

[51] Each province/territory in Canada regulates and licenses the brokers and agents within its jurisdiction. In Ontario, brokers and agents are regulated by the *REBBA*. Among other things, the *REBBA* provides that no one may trade in real estate in Ontario unless they are registered under that legislation.

B. *The Real Estate Council of Ontario*

[52] RECO is responsible for administering the *REBBA* and the regulations promulgated thereunder, on behalf of the provincial government. One such regulation is RECO's *Code of Ethics*.

C. *The Ontario Real Estate Association*

[53] According to information on its website, the Ontario Real Estate Association (**"OREA"**) was founded in 1922 to organize real estate activities across the province. It represents approximately 65,000 real estate broker and salesperson members of Ontario's 40 real estate

boards. In addition to serving its members through a wide variety of publications, educational programs and special services, it apparently provides all real estate licensing courses in Ontario.

D. *Brokers, agents, realtors and salespersons*

[54] Real estate brokerages are businesses that are registered under the *REBBA* to trade in real estate. Brokerages can be independent but are often franchisees, operating one or more offices under the banner of a corporate franchise, such as RE/MAX, Royal LePage, Sutton Group or Century 21.

[55] Brokerage franchisees pay fees to their franchisor in exchange for the use of the latter's corporate brand.

[56] Each brokerage must have a broker of record. Among other things, that individual is responsible for all of the trading activities of a registered brokerage.

[57] The terms "broker" and "salesperson" are defined in the *REBBA* as persons who have the prescribed qualifications to be registered as such under the *REBBA* and who are employed by a brokerage to trade in real estate. A broker is subject to additional requirements under the legislation, typically supervises salespersons and may be the owner of the brokerage.

[58] The term "agent" is not defined by the *REBBA*. However, the Tribunal understands the term to mean a person who is registered as a salesperson and who is employed by a brokerage to trade in real estate.

[59] "REALTOR" is a certification trade-mark that is indirectly jointly owned in Canada by CREA and the National Association of Realtors (**"NAR"**). The NAR is essentially the equivalent of CREA in the United States.

[60] The Tribunal understands that a broker, salesperson or agent becomes a "realtor" in Canada when he or she becomes a member of CREA and agrees to be bound by CREA's Realtor Code, its by-laws, its rules and its policies.

[61] Although the terms "broker", "salesperson", "agent" and "realtor" appear to have been used interchangeably throughout these proceedings, the term "agent" will typically be used in these reasons when referring to individuals who trade in real estate.

E. *The home purchase and sale process*

[62] Although the involvement of an agent is not required in order for real estate transactions to be completed in Ontario, the majority of buyers and sellers choose to work with agents.

[63] Most agents routinely deal with both categories of clients, and sometimes represent both the seller and the buyer in the same real estate transaction.

[64] A home seller who retains an agent ordinarily will enter into a contractual arrangement known as a "listing agreement" with the agent's brokerage. Among other things, the standard listing agreement prepared by OREA (the "**Listing Agreement**") and recommended by TREB for use by its Members authorizes the brokerage to market and sell the home on behalf of the owner.

[65] Services typically provided by agents to home sellers include: (1) educating the seller about the real estate market; (2) assisting the seller to determine the asking price for his or her home; (3) preparing the listing; (4) marketing the home to potential buyers; (5) representing the seller in negotiations on behalf of the seller; and (6) finalizing the transaction.

[66] As with home sellers, residential buyers will often retain an agent to assist them with the purchase of a house. As noted earlier, the agent representing a buyer is known as a "cooperating broker."

[67] In most circumstances, and at the recommendation of TREB, the agent and buyer will enter into either OREA's standard Buyer Representation Agreement (the **"BRA"**) or OREA's Buyer Customer Service Agreement (the **"BCSA"**). Services typically provided to home buyers by agents include: (1) educating the buyer about the real estate market; (2) assisting the buyer to determine the characteristics and price of the home he or she wishes to purchase; (3) identifying and showing homes which meet the buyer's objectives; (4) assisting the buyer to determine the price to be offered; (5) negotiating a purchase on the buyer's behalf; and (6) finalizing the transaction.

[68] In determining a recommended asking or offer price for a client, an agent usually conducts a comparative market analysis (**"CMA"**). A CMA typically compares a property which is listed or is about to be listed with nearby properties that have recently sold. This assists in determining the market value of the subject property. CMAs vary widely, and can involve a simple or a very detailed analysis.

[69] Agents typically receive compensation in the form of a commission payment calculated as a percentage of the sale price. Generally, home sellers pay a commission to the listing brokerage, which then offers a portion of that commission to the cooperating brokerage. Among other things, this encourages the cooperating broker to show the home.

F. *The MLS system*

[70] An important service provided by TREB to its Members is access to the MLS system. The MLS system is a cooperative selling system which allows agents to share information and provide maximum exposure of properties listed for sale. The MLS system is not accessible to

members of the general public. TREB's Members access the MLS system by way of a secure log-in intranet website.

[71] CREA owns the Multiple Listing Service trade-mark, the MLS trade-mark and the associated logos, each of which is licensed to TREB and the other real estate boards that are members of CREA.

[72] In addition to providing agents with information about available properties listed for sale and the list prices of homes, the MLS system provides agents with a broad range of other information, including interior and exterior photographs, the time a property has been on the market, and historical and other data regarding the property. OREA's standard forms (including its Listing Agreement, its BRA and its BCSA) are also available on the MLS system.

[73] Not all residential properties that are for sale can be found on a MLS system. For example, information regarding exclusive listings, properties that are "for sale by owner" (**"FSBO"**) and many newly constructed properties such as condominiums is not available to agents through a MLS system.

[74] To obtain and maintain access to the MLS system, TREB Members must execute and agree to be bound by the terms of an Authorized User Agreement (**"AUA"**), as well as TREB's MLS rules and policies (the **"MLS Rules and Policies"**).

[75] Properties listed on the MLS system are included in an extensive database (the **"MLS Database"**) that contains both current active listings and an archive of inactive listings on properties. TREB's MLS Database is a searchable repository of real estate listings that have been provided to the MLS system by its Members throughout the GTA and is accessible over an intranet on a Member-to-Member basis.

[76] Active listings include properties that have not been sold and are still available for sale. Inactive listings include sold listings, "pending sold" listings and WEST listings. Though the term is not always defined consistently, the Tribunal understands that "pending sold" refers to a sold property that has not yet closed and is "firm," in the sense that it does not have or no longer has any conditions to closing. Where there are such conditions to closing, the sale is considered to be a "sold conditional" home as opposed to a "pending sold," and the sale price is then not available in the MLS Database. A sale is conditional when the buyer and seller have executed an agreement of purchase and sale with conditions precedent. WEST listings are listings of homes that did not sell and, as such, there is no sale price associated with these inactive listings in the MLS Database.

[77] Pursuant to the MLS Rules and Policies, Members are obliged to report to TREB the existence of a conditional sale, but not the final selling price, within two business days of the execution of the agreement of purchase and sale. Two days after any stipulated conditions have been satisfied, the sale price must then be provided, along with the potential closing date.

[78] The listing information that is inputted in the MLS Database is collected by way of an "MLS Data Information Form" filled out by the seller and the agent. Certain fields are mandatory, including the address of the property, its list price, the number of rooms, the municipal taxes, the seller's name, information about the interior and exterior of the home, the cooperating brokerage commission, and whether permission has been given to display the address on the Internet. The form also has other fields that are optional, such as the approximate age of the building, estimated square footage information, and open house dates.

G. *Stratus Data Systems Inc.*

[79] The MLS Database is provided to TREB's Members through a platform operated by Stratus Data Systems Inc. ("**Stratus**"). Members can search for information about both unavailable and available properties on the MLS Database. The Stratus software can also generate a report which can be used to prepare CMAs, provide information to clients regarding listings, conduct market research, etc. The public has no access to the Stratus system. However, Members can arrange to have their clients automatically receive emails about new or changed listings in the neighborhoods in which they have expressed interest and that have been uploaded to the TREB MLS Database. Stratus also has a specific application to permit agents to conduct CMAs for consumers.

H. *The U.S. antitrust investigation and 2008 settlement*

[80] The Tribunal understands that TREB first began considering adopting a policy on VOWs in approximately 2003, when it obtained a copy of the draft VOW policy that NAR proposed to adopt in the United States at that time (the **"2003 Draft NAR Policy"**).

[81] In 2005, the United States Department of Justice (the **"U.S. DOJ"**) began proceedings against NAR in relation to NAR's then existing VOW policy. That version of NAR's VOW policy permitted individual listing agents in the United States to withhold their listings from display on VOWs, by means of an opt-out right. The U.S. DOJ alleged, among other things, that such an opt-out discriminated against VOWs and was anti-competitive.

[82] In late 2008, the U.S. DOJ and NAR settled their litigation. That settlement was ultimately embodied in a final judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division, to which was appended an amended NAR VOW policy (the **"2008 NAR VOW Policy"**).

[83] The Tribunal understands that, among other things, the 2008 NAR VOW Policy effectively no longer allowed listing agents to opt-out or to otherwise refuse to share their MLS listings with operators of VOWs, or with real estate boards. It also effectively prohibited discrimination against VOWs by imposing requirements on them that were not imposed on agents accessing the MLS system through other means, including with respect to the Disputed Data.

I. *The Commissioner's investigation*

[84] Following the announcement of the possible settlement between the U.S. DOJ and NAR in mid-2008, the Competition Bureau (the **"Bureau"**) approached TREB about implementing a similar VOW policy based on the principles of non-discrimination.

[85] Among other things, this led CREA to establish a VOW task force (**"CREA's VOW Task Force"**), as TREB believed that the VOW issue had national implications and should therefore be dealt with at a national level.

[86] However, CREA's VOW Task Force stalled after reaching a point of impasse with the Bureau in approximately 2010.

[87] In July 2010, TREB conducted a strategic planning exercise with its newly elected Board of Directors and decided to establish its own VOW task force (**"TREB's VOW Task Force"**). TREB did not actually begin to set up its task force until March of 2011.

[88] In the meantime, in November 2010, the Commissioner sent a voluntary information request to TREB concerning VOWs. That action appears to have spurned TREB to prepare a draft VOW policy, dated May 18, 2011, which tracked to a considerable extent the 2008 NAR VOW Policy. However, TREB eliminated from its draft VOW policy the provisions in the 2008 NAR VOW Policy that prohibited listing agents from discriminating against VOW operators, and added certain other provisions that are the subject of dispute in this proceeding.

[89] For example, whereas the 2008 NAR VOW Policy permitted the restriction on the display of certain information by VOWs *only* if the restriction applied to other delivery mechanisms (such as fax and telephone), TREB's draft VOW policy contained no restriction upon how its Members could communicate the Disputed Data through other delivery mechanisms.

[90] Nine days later, on May 27, 2011, the Commissioner filed the Initial Application with the Tribunal.

[91] In the wake of that action by the Commissioner, TREB made further revisions to its draft VOW policy in June 2011. However, that policy continues to prohibit VOWs from displaying the Disputed Data at all. Indeed, as discussed below, TREB also does not include the Disputed Data in its VOW Data Feed and prohibits the use of any information included in the VOW Data Feed for purposes other than display on a website.

[92] Following a 60-day period during which Members were invited to comment on the draft VOW policy, the VOW Policy and Rules were approved by TREB's Board of Directors in late August 2011. The VOW Data Feed discussed below then went "live" in mid-November 2011.

J. *TREB's VOW Policy and Rules*

[93] The term "virtual office website" is somewhat incongruous, as it refers neither to a website nor to a virtual office. Rather, the term is used to describe an area of a brokerage's website where MLS information is made available to potential home sellers and buyers in a particular searchable format. In the GTA, that information is received by TREB's Members over the VOW Data Feed. The fact that a VOW Data Feed is received does not reveal anything about the principal nature of an agent's office arrangements. Those arrangements may be based on the traditional "bricks and mortar" business model or they may simply be based on a model where a brokerage's agents log-in from home or other locations.

[94] The Tribunal will use the term VOW simply to describe a password-protected area of a brokerage's website where consumers can access and search a database containing MLS information.

[95] TREB's VOW Policy and Rules govern how Members can operate a VOW in the GTA. For the purposes of this proceeding, the key provisions of the VOW Policy and Rules include the following:

1. A member of the public may only access MLS information on a Member's VOW if: (1) the Member has first established a broker-consumer relationship; (2) the Member obtains the name and a valid email for a consumer; (3) the consumer has agreed to prescribed "terms of use"; and (4) the consumer creates a user name and password for the Member's VOW (Rules 800 and 805);

2. A Member's VOW may provide other features, information, or functions in addition to the display of TREB's MLS information (Rule 803);

3. A Member, whether through their VOW or by any other means, may not make available for search by, or display to, consumers the following MLS data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO rules:

    a. Expired, withdrawn, suspended or terminated listings, and pending solds or leases, including listings where sellers and buyers have entered into an agreement that has not yet closed;

    b. The compensation offered to other Members;

    c. The seller's name and contact information, unless otherwise directed by the seller to do so;

    d. Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property; and

e. Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO rules and applicable privacy laws (Rule 823).

K. *The VOW Data Feed*

[96] TREB Members receive data for their VOWs *via* TREB's VOW Data Feed. The VOW Data Feed is an electronic connection over the Internet between a Member's website and TREB's MLS third party database (the "**Third Party Database**"). The Third Party Database is a copy of TREB's MLS Database that TREB uses to transmit data to third parties pursuant to various agreements. The VOW Data Feed appears to contain all of TREB's MLS active listing data, except for cooperating broker commissions, listings which the seller has elected to withhold from the Internet, information that cannot be distributed by any mechanism of delivery, the seller's name and contact information (unless otherwise directed by the seller), and instructions or remarks intended for cooperating brokers only. For greater certainty, none of the Disputed Data is included in the VOW Data Feed, which is offered to TREB's Members at no charge.

[97] TREB's MLS data is transmitted to the VOW operator in a raw data format, to enable the Member to present the data to a customer in whatever manner the Member chooses, subject to the certain restrictions.

[98] Use of the VOW Data Feed is governed by the VOW Policy and Rules as well as by TREB's VOW Data Feed Agreement.

[99] To have access to TREB's VOW Data Feed, Members (and Affiliated VOW Partners (**"AVPs"**), where applicable) must sign the Data Feed Agreement. An AVP is an entity or person designated by a Member to operate a VOW on behalf of the Member, subject to the Member's supervision, accountability and compliance with the VOW Policy and Rules. For the purposes of this proceeding, an important provision of the Data Feed Agreement is the following:

> **4.1 Services and Licence.** Subject to the terms and conditions of this Agreement and the VOW Policy and Rules, TREB will provide to Member or AVP, if operating Member's VOW(s) on behalf of Member, a VOW Data Feed to Member or AVP, <u>solely and exclusively for the Purpose</u> ("Services"). Subject to the terms and conditions of this Agreement, TREB hereby grants to Member and AVP, if operating Member's VOW on behalf of Member, a non-exclusive, non-transferable, non-sublicensable, revocable limited license to use such Listing Information as may be provided to Member or AVP through the VOW Data Feed <u>solely and exclusively for the Purpose</u>.
>
> (Emphasis added)

[100] The term Purpose is defined as follows in the Data Feed Agreement:

> "Purpose" means to permit a Member to display on the Member's VOW given Listing Information which is transmitted through a VOW Data Feed to the Member for the sole purpose of use by Consumers that have a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through Member's VOW.
>
> (Emphasis added)

[101] The Data Feed Agreement also provides that access to the VOW Data Feed may be suspended or terminated if a Member or AVP breaches the Data Feed Agreement or TREB's MLS Rules and Policies.

V. Evidence – Overview

A. *Lay witnesses*

(1) For the Commissioner

[102] The Commissioner led evidence from the following lay witnesses:

a. William McMullin: Mr. McMullin is the Chief Executive Officer (**"CEO"**) of ViewPoint Realty Services Inc. (**"ViewPoint"**). ViewPoint is an Internet-based, technology-driven, residential real estate brokerage based in Halifax, Nova Scotia that offers a broad variety of services through its website, www.viewpoint.ca. Those services include tools and features that make extensive MLS information available to potential home sellers and purchasers, as well as analyses of that information.

b. Urmi Desai: Ms. Desai is a co-founder of Realosophy Realty Inc. (**"Realosophy"**), a full-service brokerage in the GTA which provides services through two websites as well as a storefront office in the Leslieville area of Toronto. Ms. Desai is responsible for Realosophy's strategy and marketing.

c. John Pasalis: Mr. Pasalis is a co-founder and broker of record of Realosophy. In addition to working as a broker, he provides analytics and real estate commentary for Realosophy's website and in the public media.

d. Scott Nagel: Mr. Nagel is the CEO of real estate operations for Redfin Corporation (**"Redfin"**). Redfin is an Internet-based real estate brokerage based in the United States that operates in approximately 74 metropolitan areas throughout the United States.

e. Shayan Hamidi: Mr. Hamidi is a co-founder and a former CEO of TheRedPin.com Realty Inc. (**"TheRedPin"**). He left the company in 2014. TheRedPin is an online brokerage based in the GTA that operates through its website www.TheRedPin.com.

f. Tarik Gidamy: Mr. Gidamy is a co-founder and the broker of record of TheRedPin. He has been licensed to practice in real estate in Ontario and has been a Member of TREB since 1997. Since Mr. Hamidi left the company in 2014, Mr. Gidamy has shared the duties of TheRedPin's CEO with two other individuals.

g. Joel Silver: Mr. Silver is the Managing Director of Trilogy Growth, LP (**"Trilogy Growth"**), which strategically invests in early stage, innovative companies. In 2012, Trilogy Growth invested in TheRedPin. Mr. Silver is a member of TheRedPin's Board of Directors and has shared the duties of TheRedPin's CEO with Mr. Gidamy and another individual.

h. Mark Enchin: Mr. Enchin is a Guelph-area real estate agent with a history of developing technology-based tools for use by agents. He is a sales representative with Realty Executives Plus Ltd. **("Realty Executives"**) who has an interest in expanding into the GTA by licensing his VOW, which appears to be still in development, to agents located there. Prior to a development in 2007 that will be discussed later in these reasons, Mr. Enchin developed a VOW that was licensed to approximately 1,000 realtors, including many in the GTA.

i. Sam Prochazka: Mr. Prochazka is the founder and CEO of Sam & Andy Inc. (**"Sam & Andy"**), a real estate software company (also known as an AVP) that built websites for real estate professionals in Western Canada, the United States and the GTA prior to its sale to Ubertor, a Vancouver-based firm, in May 2015.

[103] Messrs. McMullin, Pasalis, Nagel, Gidamy and Prochazka testified at both the Initial Hearing in 2012 and the Redetermination Hearing in 2015, whereas the other witnesses identified above only testified at the Initial Hearing. The Tribunal generally found Messrs. McMullin, Pasalis, Nagel, Gidamy and Prochazka to be credible and forthright. Given that none of the members of the redetermination panel participated in the Initial Hearing, the Tribunal will refrain from making such observations regarding Ms. Desai, Mr. Hamidi, Mr. Silver and Mr. Enchin, who testified only at that hearing.

[104] The Tribunal pauses to note that further to an order issued in April 2014 (*The Commissioner of Competition v The Toronto Real Estate Board*, 2014 Comp. Trib. 4), all witness statements, expert reports, exhibits, transcripts, and opening and closing submissions from the Initial Hearing form part of the record of the Redetermination Hearing. The Tribunal's order further provided that the pleadings of the parties would not be amended and that opening and closing statements could refer to evidence given at both the Initial Hearing and the Redetermination Hearing.

(2) For TREB

[105] TREB led evidence from the following lay witnesses:

a. Donald Richardson: Mr. Richardson was TREB's CEO for approximately 14 years prior to his departure from TREB in 2014. He is now partially retired and currently holds the position of consultant for TREB. Before joining TREB as its CEO, he worked for approximately 20 years at OREA in a variety of roles, including CEO for the last six of those years.

b. Tung-Chee Chan: Mr. Chan has been the sole owner and broker of record of Tradeworld Realty Inc. ("**Tradeworld**") since 1985. Tradeworld is a brokerage with four offices in the GTA.

c. Pamela Prescott: Ms. Prescott is the owner and a broker at Century 21 Heritage Group Ltd. (**"Century 21 Heritage"**), an independently-owned brokerage with several offices in the northern part of the GTA and approximately 475 real estate agents. Century 21 Heritage operates under the Century 21 banner. Ms. Prescott served as a Director of TREB for a period of three years in the early 2000s.

d. Evan Sage: Mr. Sage is a Vice President and Sales Representative at Sage Real Estate, which describes itself as "Toronto's most philosophically and technologically advanced boutique brokerage." He was a member of TREB's VOW Task Force.

e. Timoleon (Tim) Syrianos: Mr. Syrianos is the principal owner, President and broker of record of Ultimate Realty Inc. (**"Ultimate Realty"**), a RE/MAX franchisee with two offices in the GTA and approximately 235 salespersons. Mr. Syrianos has been a Director of TREB since July 2012 and was previously a member of its VOW Task Force and of its MLS committee (the **"MLS Committee"**).

[106] Messrs. Richardson, Sage and Syrianos, as well as Ms. Prescott, testified at both the Initial Hearing in 2012 and the Redetermination Hearing in 2015, whereas Mr. Chan only testified at the Initial Hearing. For the reason explained at paragraph 103 above, the Tribunal will refrain from making observations regarding the testimony of Mr. Chan during the Initial Hearing. With respect to the Redetermination Hearing, the Tribunal generally found Messrs. Sage and Syrianos to be credible, forthright, helpful and impartial. The Tribunal found Ms. Prescott to be somewhat less impartial and helpful. The Tribunal also had concerns about the reliability of certain aspects of Mr. Richardson's testimony, which are discussed at paragraphs 355 and 356 below. In addition, the Tribunal found some of his testimony on cross-examination to have been evasive in nature. Where Mr. Richardson's testimony was inconsistent with other evidence, the Tribunal therefore generally found such other evidence to be more reliable.

(3) For CREA

[107] Mr. Gary Simonsen testified on behalf of CREA. Mr. Simonsen is CREA's CEO. Prior to assuming that position in July 2011, he was CREA's Chief Operating Officer. The Tribunal generally found Mr. Simonsen to be credible and forthright.

B. *Expert witnesses*

(1) For the Commissioner

[108] Dr. Greg Vistnes testified on behalf of the Commissioner. Dr. Vistnes is an economist specializing in the fields of industrial organization and the economics of competition. He holds a Ph.D. in economics from Stanford University. He is a Vice President in the Washington, DC office of Charles River Associates. The Tribunal generally found Dr. Vistnes to be credible, forthright and more willing to concede weaknesses/shortcomings in his evidence or in the Commissioner's case, than was the case for Dr. Jeffrey Church, TREB's expert witness. Where his evidence was inconsistent with that provided by Dr. Church or by Dr. Fredrick Flyer (CREA's expert witness), the Tribunal found his evidence to be more persuasive, objective and reliable than that of the latter individuals. However, the Tribunal accepts TREB's position that Dr. Vistnes did not have a good understanding of the legal test for what constitutes a "substantial" prevention or lessening of competition, as contemplated by paragraph 79(1)(*c*) of the Act. For this reason, the Tribunal refrained from accepting Dr. Vistnes' evidence on that particular issue.

(2) For TREB

[109] Dr. Jeffrey Church testified on behalf of TREB. Dr. Church is a Full Professor in the Department of Economics at the University of Calgary. He holds a Ph.D. in economics from the University of California, Berkeley. The Tribunal found Dr. Church to be less forthright, objective and helpful than Dr. Vistnes or Dr. Flyer. The Tribunal also found Dr. Church to be evasive at several points during his cross-examination and to have made unsupported, speculative assertions at various points in his testimony and in his written expert reports.

(3) For CREA

[110] Dr. Fredrick Flyer testified on behalf of CREA. Dr. Flyer is an economist holding a Ph.D. in economics from the University of Chicago and an M.S. in labour and industrial relations from the University of Illinois. He is an Executive Vice President at Compass Lexecon. The Tribunal generally found Dr. Flyer to be objective and forthcoming. However, it also found that his testimony often remained general and high-level, and that he did not immerse himself in the details of the Canadian real estate industry and in the specific evidence and matters at issue in this proceeding to the same degree as Dr. Vistnes and Dr. Church.

C. *Documentary evidence*

[111] Attached at Schedule "B" is a list of the exhibits that were admitted in this proceeding.

VI. Issues

[112] The following broad issues are raised in this proceeding:

a. What is or are the relevant market(s) for the purposes of this proceeding?;

b. Does TREB substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?;

c. Were the VOW Restrictions adopted for an exclusionary or disciplinary purpose, as contemplated by paragraph 79(1)(*b*) of the Act, or was their adoption motivated by legitimate business justifications? If so, does that continue to be the case?;

d. Have the VOW Restrictions had the effect of preventing or lessening competition substantially in the relevant market(s), or are they having or likely to have that effect, as contemplated by paragraph 79(1)(*c*) of the Act?;

e. Does TREB have a copyright over the MLS Database and, if it is the case, do the VOW Restrictions constitute the "mere" exercise of TREB's intellectual property rights?; and

f. What is the appropriate remedy, if any?

[113] Each of these issues will be discussed in turn.

VII. Analysis

A. *What is or are the relevant market(s) for the purposes of this proceeding?*

[114] The first issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons detailed below, the Tribunal concludes that the relevant market is the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

[115] The ultimate focus of the analysis contemplated by subsection 79(1) of the Act is upon whether a practice of anti-competitive acts by a dominant firm has had, is having or is likely to have the effect of preventing or lessening competition substantially in a *market*. The market in

question is the market in which the practice in question is alleged to have had, to be having, or to be likely to have such an impact.

[116] Where the firm that is the focus of an application under section 79 is alleged to substantially or completely control a different market, it will be necessary to define that *other* market *for the purposes of paragraph 79(1)(a)*. This is further discussed below, in section VII.B.(3) of these reasons, including at paragraphs 203-207.

[117] In defining relevant markets in proceedings brought under section 79 of the Act, the Tribunal has focused upon whether there are close substitutes for the product "at issue" (*Commissioner of Competition v Canada Pipe*, 2005 Comp. Trib. 3 (**"*Canada Pipe CT*"**) at para 68). In the cases that it has considered to date, that product has been the same for the purposes of the Tribunal's analysis of both paragraph 79(1)(*a*) and paragraph 79(1)(*c*).

[118] In turn, "close substitutes" have been defined in terms of whether "buyers are willing to switch from one product to another in response to a relative change in price, i.e., if there is buyer price sensitivity" (*Canada (Commissioner of Competition) v Canada Pipe*, 2006 FCA 236 (**"*Canada Pipe FCA Cross Appeal*"**), leave to appeal to SCC refused, 31637 (10 May 2005) at paras 12-16, and *Canada (Commissioner of Competition) v Tele-Direct Publications Inc* (1997), 73 CPR (3d) 1 (Comp. Trib.) (**"*Tele-Direct*"**) at p. 35, both citing the test adopted by the Federal Court of Appeal in *Canada (Director of Investigation and Research) v Southam Inc*, [1995] 3 FC 557, 63 CPR (3d) 1 (CA) (**"*Southam*"),** rev'd on other grounds [1997] 1 SCR 748, a merger case).

[119] Essentially the same approach has been adopted with respect to assessing whether supply at one geographic location is a close substitute for supply at another location.

[120] However, an objective benchmark for assessing "a relative change in price" or "buyer price sensitivity" was not provided in any of those cases.

[121] More recently, in merger cases, the Tribunal embraced the hypothetical monopolist approach, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines* (the **"*MEGs*"**) (*Commissioner of Competition v CCS Corporation,* 2012 Comp. Trib. 14 (**"*CCS*"**) at para 94). That approach has been defined as follows in the *MEGs*:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would impose and sustain a small but significant and non-transitory increase in price ("SSNIP") above levels that would likely exist in the absence of the merger.

[122] This is the approach adopted by the Commissioner in this case and in the Bureau's *Guidelines*. It is also essentially the analytical framework adopted by the economic experts who testified on behalf of both the Commissioner and TREB, namely, Dr. Vistnes and Dr. Church, respectively.

[123] In *CCS* at paragraph 94, the Tribunal noted that in applying the "small but significant and non-transitory" components of the hypothetical monopolist approach, the Tribunal will typically use a test of a five percent price increase lasting one year. In other words, if sellers of a product or of a group of close substitute products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a five percent price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power. Essentially the same approach is applied to identify the geographic dimension of relevant markets.

[124] The Tribunal considers that the time has come to recognize that this analytical framework can make a conceptually helpful contribution to market definition in the context of proceedings under section 79 of the Act. This is in no small part because it supplies objective benchmarks (five percent, one year and the "smallest group" principle) that have been missing from the approach adopted in past abuse of dominance cases brought before the Tribunal under section 79. In the absence of such objective benchmarks, the exercise of assessing whether one product is a close substitute for another product can be highly subjective in nature.

[125] However, it must be recognized that the practical challenges associated with applying the hypothetical monopolist framework will often be greater in an abuse of dominance proceeding brought under section 79 than in the merger area. This is because of the difficulty associated with determining the "base price" for the purposes of that framework (**"Base Price"**).

[126] In a proceeding brought under section 79 of the Act, the Base Price is the price that would likely have existed "but for" the alleged practice(s) of anti-competitive acts. It is the Commissioner's burden to demonstrate that price. Determining such a price in a section 79 proceeding will often be more difficult than determining the Base Price in a merger context, i.e., the price that would likely exist in the absence of a merger. This may be so notwithstanding that it is not necessary for the Commissioner to demonstrate the Base Price with precision (*CCS* at para 59).

[127] This is because, if a merger has not yet been completed, the Base Price frequently will simply be the prevailing price, especially if it is being alleged that the merger is likely to *lessen* competition. In addition, direct recent evidence of substitutability, for example in the form of evidence of competitive responses to recent price changes or promotional activities, will often be available.

[128] Even where it is being alleged that the merger is likely to *prevent* competition, there will often be direct evidence, for example in the form of one of the merging parties' business plans, regarding the likely future price in the absence of the merger. Alternatively, there may well be

sufficient direct evidence to demonstrate a range over which the likely future price would have fallen (*CCS* at para 59).

[129] In a proceeding under section 79 of the Act, such direct evidence with respect to the Base Price will often not be available. This is especially so where, as in the present proceeding, the principal allegation is that the impugned conduct is *preventing* competition, or will prevent competition in the future. However, even in a case in which the principal allegation is that the impugned conduct is *lessening* competition, or has already lessened competition, the practical challenges associated with applying the iterative exercise contemplated by the hypothetical monopolist approach may be insurmountable. This is in part because products that may appear to be close substitutes at the prevailing price may not be close substitutes at the Base Price level, i.e., at the price that likely would have prevailed in the absence of the impugned conduct.

[130] Accordingly, it should be recognized that market definition in section 79 proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; physical and technical characteristics; and price relationships and relative price levels (*Canada Pipe FCA Cross Appeal* at paras 15-16; *Tele-Direct* at pp. 36-82). In assessing such indirect evidence, functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market (*Tele-Direct* at p. 38).

[131] In the geographic context, transportation costs and shipment patterns, including across Canada's borders, should also be assessed.

[132] In carrying out such assessments of indirect indicia of substitutability, it should be recognized that it will often neither be possible nor necessary to define the product and geographic dimensions of the relevant market(s) with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(*c*) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition to the products and locations that have been included in the market (*CCS* at paras 59-60 and 92; *Director of Investigation and Research v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp. Trib.) (***"NutraSweet"***) at p. 20).

(2) The product dimension

[133] The Commissioner submits that the product dimension of the relevant market is the supply of residential real estate brokerage services that provide MLS accessibility.

[134] In his 2012 written closing submissions, the Commissioner recognized that sellers of homes require different services than purchasers of homes and that therefore, from a demand-side perspective, it might be more appropriate to define distinct relevant markets consisting of each of those distinct categories of purchasers of real estate brokerage services. This was also the position advanced by Dr. Vistnes.

[135] However, given that brokers and agents generally provide both sell-side and demand-side MLS-based services, and given that consumers sometimes retain the same agent or broker to sell their home and then to purchase another home, the Commissioner advanced, and continues to advance, a single relevant market comprised of both sell-side and buy-side residential real estate brokerage services. Dr. Vistnes also sometimes referred to essentially the same single relevant market in his expert reports.

[136] TREB acknowledges that the ultimate focus of the Tribunal's assessment should be upon the supply of residential real estate brokerage services. However, it alternately refers to both the "market" and the "markets" for real estate brokerage services in its written submissions.

[137] In discussing the relevant market, CREA generally used the same "residential real estate brokerage services" language used by the Commissioner. The same is true of Dr. Flyer, who explicitly declined to accept Dr. Vistnes' position that there are separate relevant markets for sell-side and buy-side real estate brokerage services.

[138] For the purposes of this proceeding, it does not appear to matter whether there is a single relevant market for the supply of MLS-based real estate brokerage services, or two separate relevant markets, consisting of the supply of real estate brokerage services to home sellers and home buyers, respectively. In brief, it appears to be common ground between the parties and CREA that competitive conditions in respect of the supply of real estate brokerage services to home buyers and home sellers are highly similar.

[139] Accordingly, for ease of reference, the Tribunal will define a single relevant market for the supply of MLS-based residential real estate brokerage services to home sellers and home buyers, respectively.

[140] The Tribunal is satisfied that this is a relevant market, for the following reasons.

[141] First, the evidence suggests that home buyers and sellers generally enter into contracts for the supply of a bundle of MLS-based residential real estate brokerage services, rather than paying separately for unbundled services. Although there is evidence that some home buyers and sellers may prefer to contract for smaller bundles of such services if offered at a discount, the Tribunal accepts Dr. Vistnes' view that discount and limited-service brokerage services are in the same relevant product market as full-service brokerage services. The Tribunal notes that this view was not contested by TREB or CREA.

[142] Second, home buyers have not switched away from MLS-based services to a significant degree, despite the fact that the average absolute level of money they indirectly pay in commissions to purchase a home in the GTA increased by more than 20% (in nominal and adjusted terms) over the period 2008 to 2011, and has increased even further since that time. This, according to Dr. Vistnes, has occurred as a result of the increase in home prices, and not as a result of an increase in the commission rates.

[143] Dr. Vistnes testified that, between 2007 and October 2014, the percentage of home purchasers who have chosen to use MLS-based residential real estate brokerage services increased from approximately 89.7% to approximately 90.9 % of all home buyers. The Tribunal was not provided with evidence to suggest that home sellers have switched away from MLS-based real estate brokerage services in recent years, at a rate proportionate to the increase in total brokerage commissions paid. Indeed, Dr. Vistnes' uncontradicted testimony was that he is aware of no such evidence.

[144] Third, there is no readily available substitute for the full range of information and services that are provided to home buyers and sellers by suppliers of MLS-based residential real estate brokerage services. Although some of that information is available separately or in much smaller bundles on the Internet or from some of the other sources discussed in the next section below, home purchasers and sellers have not switched away from MLS-based services to those other sources of supply. To the extent that the evidence suggests that home buyers and home sellers may be sourcing information that they value on the Internet, they are doing so *in addition to* procuring MLS-based real estate brokerage services, as confirmed by the figures immediately above. The same is true with respect to the complementary services offered by home appraisers, home inspectors, mortgage specialists and real estate lawyers. In other words, those services are used as *complements*, not substitutes, for the MLS-based real estate brokerage services.

[145] Fourth, the evidence provided in this proceeding by agents and brokers supports the view that their customers require access to a broad range of the information available on TREB's MLS system, and that those customers would not likely seek or be able to readily obtain that information from alternative sources.

[146] Fifth, industry documentation reflects a view that industry participants consider that there is a single and distinct market for MLS-based residential real estate brokerage services.

[147] Finally, TREB did not contest Dr. Vistnes' view, which the Tribunal accepts, that there would likely be significant substitution from agents' services to the services offered by brokers, if the price of agents' services were to rise relative to brokers' services, and *vice versa*.

[148] Dr. Church suggested that a market defined in terms of the supply of MLS-based residential real estate brokerage services may be too narrow. For example, he suggested that "exclusive listings" tend not be listed on the MLS system and that it is now much easier for alternatives to the MLS system, such as FSBO offerings, to meet consumers' demands for the range of services that they desire. He further suggested that Dr. Vistnes' evidence that substitution away from MLS-based brokerage services has not increased while the absolute level of money charged for commissions has increased in recent years, is undermined by his failure to take account of rising income levels during that period. He made a similar critique of Dr. Vistnes' failure to take account of substitution at the margins between rentals and home purchases, and between purchases of existing homes and new homes.

[149] The Tribunal takes Dr. Church's point regarding rising income levels. However, the fact remains that home purchasers appear to have increased their usage of MLS-based residential real estate brokerage services over a period of time when the absolute level of commissions (in dollar terms) rose substantially, including in the years prior to both of the Tribunal's hearings in this proceeding. Moreover, no evidence was tendered by Dr. Church or TREB to suggest that there is a material degree of substitution at the margins between rentals and home purchases, or between purchases of existing homes and new homes. Likewise, no evidence was adduced to suggest that "exclusive listings" account for a significant percentage of overall listings in the GTA. Indeed, Mr. Syrianos suggested the contrary and indicated it was not a very high number of Ultimate Realty's business.

[150] Dr. Church also asserted that, in a proceeding under section 79 of the Act, the relevant markets for establishing dominance and competitive effects must be informed by the nature of the alleged exclusionary practices.

[151] Dr. Church's position with respect to the market contemplated by paragraph 79(1)(*a*) will be discussed in the next section below. The relevant market in which to assess competitive effects is the market referred to in paragraph 79(1)(*c*). The Tribunal is satisfied that an assessment of the alleged exclusionary practices in this case would not alter the conclusions that it has reached with respect to the product dimension of that market. Dr. Church's positions regarding the relevant market are discussed further below in section VII.B.(3) as well as at paragraphs 208-212 of these reasons.

[152] In conclusion, the Tribunal is satisfied, based on the considerations discussed above and the evidence on the record in this proceeding, that the product dimension of the relevant market contemplated by paragraph 79(1)(*c*) should be defined in terms of the supply of MLS-based residential real estate brokerage services.

(3) The geographic dimension

[153] It is common ground between the parties that the geographic scope of the relevant market for the supply of residential real estate brokerage services is local and likely is no broader than the GTA, which is comprised of the city of Toronto and the regional municipalities of Halton, Peel, York and Durham. This was not disputed by CREA. Indeed, the local nature of the market was acknowledged by its expert, Dr. Flyer. Dr. Church, on behalf of TREB, also agreed with this position.

[154] The local nature of the relevant market is generally supported by the following evidence.

[155] Dr. Vistnes' analysis of MLS data for the period of January 2010 to February 2012 indicates that approximately 76% of sell-side transactions and approximately 69% of buy-side transactions occurred within 10 kilometres of agents' principal bases of operations. At 20 kilometres from those bases, the corresponding figures are approximately 92% and 89%. At 30 kilometres, they increase to approximately 97% and 96%.

[156] The testimony of several agents, including Messrs. Gidamy, Pasalis and Enchin, as well as Ms. Prescott, confirms that agents tend to specialize at the local level, to meet consumer demand for local expertise. This appears to be confirmed by Dr. Vistnes' analysis, which indicates that even where there are differences in commissions between adjacent local areas, the geographic range within which agents conduct their business does not materially increase.

[157] However, Ms. Prescott also stated that since the Initial Hearing, agents are increasingly competing for business across the entire city of Toronto. No evidence was adduced to suggest that home buyers or home sellers in the GTA retain the services of agents whose principal base of operations is located outside the GTA.

[158] Although the foregoing evidence suggests that there may be several local relevant markets within the GTA, nothing in this proceeding turns on whether there is a single relevant geographic market that extends throughout the GTA, or several separate and discrete geographic markets within the GTA.

[159] Given that the focus of this proceeding is upon certain of TREB's practices, and given that TREB's focus and activities extend throughout the GTA, the Tribunal is of the view that it is appropriate to define a single geographic market consisting of the GTA. This will simplify the discussion and analysis below, without adversely impacting upon the interests of either party or CREA.

[160] The Tribunal observes in passing that the Commissioner confirmed in his closing argument at the Redetermination Hearing that he is not seeking relief that goes beyond the GTA, except to the extent that TREB's MLS data can be accessed outside the GTA, including through inter-board agreements that allow agents located outside the GTA to access that data.

(4) Conclusion

[161] For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of MLS-based residential real estate brokerage services in the GTA (the **"Relevant Market"**).

B. *Does TREB substantially or completely control a class or species of business in any area of Canada?*

[162] The Tribunal now turns to the second issue to be determined in this proceeding, namely, whether TREB substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on the balance of probabilities, that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

[163] Paragraph 79(1)(*a*) deals with the "dominance" dimension of section 79. It requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.

[164] The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions of the relevant market in which the respondent is alleged to have "substantial or complete control" (*Canada Pipe CT* at paras 65-67). This position was upheld by the Federal Court of Appeal in *Canada Pipe FTA Cross Appeal* at paragraphs 16 and 44.

[165] The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power. In turn, it has defined market power using various formulations, in particular "the ability to set prices above competitive levels for a considerable period" (*Canada Pipe CT* at para 122, aff'd *Canada Pipe FCA Cross Appeal* at paras 6 and 23-25; *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp. Trib.) (**"*Nielsen*"**) at pp. 232 and 254); "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms" (*Tele-Direct* at p. 82); and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp. Trib. 3 at para 7, aff'd 2003 FCA 131, leave to appeal refused [2004] 1 SCR vii). This latter definition was embraced by the Supreme Court of Canada in *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (**"*Tervita*"**) at paragraph 44.

(a) *The degree of market power required*

[166] The jurisprudence to date leaves unanswered the question of what constitutes a "competitive level" of prices. It also does not appear to recognize that, except in perfectly competitive markets, firms often have *some* market power. Indeed, if paragraph 79(1)(*a*) simply requires a demonstration of some market power, even to a *material* degree, it would arguably be redundant. This is because an ability to exercise materially greater market power than in the absence of the impugned anti-competitive practice must be established to satisfy the requirement in paragraph 79(1)(*c*) that the impugned practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

[167] Fortuitously, the Supreme Court of Canada has shed some light upon the issue. Specifically, in *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 (**"*PANS*"**), the Court contrasted the level of market power required by former paragraph 32(1)(*c*) of the *Combines Investigation Act*, RSC 1970, c C-23 with the level required by what is now paragraph 79(1)(*a*). Paragraph 32(1)(*c*), which subsequently became paragraph 45(1)(*c*) of the Act, before it was repealed, made it an offence to conspire, combine, agree or arrange with another person to prevent or lessen competition unduly.

[168] In defining the degree of market power necessary to trigger the application of that criminal offence, the Supreme Court stated that it was less than what is contemplated by paragraph 79(1)(*a*). The Court held that the degree of market power required to trigger the application of paragraph 32(1)(*c*) was simply "the capacity to behave independently of the market, in a passive way" (*PANS* at p. 654). It characterized this as requiring a moderate degree of market power, and contrasted this with the greater degree of market power required to "influence the market" under paragraph 79(1)(*a*).

[169] Having a degree of market power that is more than "moderate" to trigger the application of paragraph 79(1)(*a*), and that is higher than the degree of increased or maintained market power generally required to demonstrate a substantial prevention or lessening of competition, would therefore appear to be required to give effect to the Supreme Court's observations in *PANS* and to avoid an interpretation of paragraph 79(1)(*a*) that arguably renders that provision redundant.

[170] Such an approach would also be more consistent with the view that subsection 79(1) is intended to apply to firms with dominant positions, as reflected in the jurisprudence (*Canada Pipe FCA* at para 21; *Canada Pipe CT* at para 7) and in the heading above section 78 ("Abuse of Dominant Position") (*Commissioner of Competition v Visa Canada Corporation*, 2013 Comp. Trib. 10 at para 112). The Tribunal observes that similar wording appears in the marginal notes above section 79, although it recognizes that, pursuant to section 14 of the *Interpretation Act*, RSC 1985, c I-21, marginal notes form no part of the enactment and are inserted for convenience of reference only. In brief, given that non-dominant firms often have *some* degree of market power, a firm with a "dominant" position should be considered to be a firm that has more than merely "some" market power, and more than the "material" degree of market power contemplated by paragraph 79(1)(*c*).

[171] Requiring a level of market power that is more than "moderate", and more than what is contemplated by paragraph 79(1)(*c*), would also be broadly consistent with the Tribunal's prior observation that "no *prima facie* finding of dominance would arise" when it is determined that the respondent's share of the relevant market is below 50% (*Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp. Trib.) (**"*Laidlaw*"**) at p. 317).

[172] This approach would also make good sense, because having an intervention threshold under paragraph 79(1)(*a*) for single firm conduct that is higher than the threshold for mergers and agreements among competitors would avoid chilling potentially pro-competitive single firm behaviour.

[173] With all of the foregoing in mind, the Tribunal considers that the degree of market power contemplated by paragraph 79(1)(*a*) is a *substantial* degree of market power. This is greater than the *material* degree of increased or maintained market power (compared to the "but for" world) that is required to demonstrate a substantial lessening of competition under paragraph 79(1)(c) (*Tervita* at paras 50 and 80-81; *CCS* at para 377).

[174] In the Tribunal's view, a *substantial* degree of market power is a degree of market power that confers upon an entity considerable latitude to determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market. This roughly approximates the degree of market power that is used to measure whether a firm has a "dominant position" under Article 82 of the *Treaty Establishing the European Community* (2002/C 325/01), namely, an ability to behave to an appreciable extent independently of its competitors (Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking (2009/C 45/02) at para 10; Case 27/76 *United Brands Company and United Brands Continental v Commission*, [1978] ECR 207 at para 65; Case 85/76 *Hoffman – La Roche & Co v Commission*, [1979] ECR 461 at para 38; Case COMP/C-3/37.792 *Microsoft* at para 428).

(b) *Exclusionary behaviour and market power*

[175] The Commissioner and TREB dispute whether market power includes the ability to restrict the output of one's rivals. The Commissioner submits that market power includes the power to engage in exclusionary behaviour such as preventing rivals from introducing products to the market. However, TREB disputes that position, and maintains that the power to exclude is not a cognizable form of market power under the Act. It states that this is so because the power to exclude is not captured by the definition of market power articulated by the Supreme Court in *Tervita* at paragraph 44, namely, "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition."

[176] The Tribunal disagrees with TREB's position. To the extent that the power to exclude comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price, it falls squarely within the definition of market power articulated in *Tervita*. Indeed, it is often the exercise of the power to exclude that facilitates a dominant firm's ability to profitably influence the dimensions of competition referred to in *Tervita*.

[177] TREB further maintains that it cannot "profitably" influence price because it is a not-for-profit entity that does not participate in the relevant market for MLS-based residential real estate brokerage services. Rather, it is an input supplier to that market, and has no stake in who wins or who loses in that market. Contrasting the situation in which a dominant upstream supplier may exercise market power for the benefit of its downstream affiliated entity, TREB maintains that it has no "horse in the race."

[178] The Tribunal disagrees.

[179] To begin, the Federal Court of Appeal explicitly determined, in setting aside the Tribunal's initial decision in this proceeding, that the words used in paragraph 79(1)(*a*) are sufficiently broad to apply to a firm that does not compete in the market that it allegedly substantially or completely controls. This includes a firm that controls a significant input to

competitors in the market, or that makes rules that effectively control the business conduct of those competitors (*TREB FCA* at para 13).

[180] The Court in that case proceeded to find that subsection 79(1) is sufficiently broad to be applicable to TREB in respect of a rule that it makes binding on its Members (*TREB FCA* at para 18). That is to say, "Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case" (*TREB FCA* at para 20). In making those findings, the Court refrained from determining whether TREB in fact substantially or completely controls any market. However, it recognized that the rule at the heart of this case is "a rule prohibiting members from posting historical data on a virtual office website" and that "[t]he effect of that rule is that a member who operates through a virtual office website cannot enable clients to access the historical data online" (*TREB FCA* at para 5). The statement that the Court made at paragraph 18 of *TREB FCA* must be read with that in mind.

[181] It follows from the foregoing statements of the Court that a trade association that does not participate in a market with its members can nevertheless be found to have market power, particularly when it acts on behalf of the majority of its members.

[182] Trade associations can exercise such market power in a broad range of ways, including by establishing or mandating product standards or other rules, by-laws or practices that insulate all or some of its members from one or more sources of actual or potential competition. To the extent that a trade association has such an ability, it has market power. To the extent that its actions can enable or facilitate the ability of its members to maintain higher prices, or to maintain lower levels of service, product quality, variety or advertising levels than would otherwise prevail in the absence of those actions, they meet the definition of market power set forth by the Supreme Court in *Tervita*. The same is true where a trade association has the ability to forestall the entry and expansion of innovative products and services.

[183] In such circumstances, trade associations can be said to have the ability to *profitably* influence price, quality, variety, service, advertising or innovation, within the meaning of *Tervita*, on behalf of some or all of their members. In this context, it is the members whose profits would be increased or maintained by the actions of their trade association.

[184] In the Tribunal's view, the definitions of market power set forth in *Tervita* and the other authorities on the meaning of market power mentioned at paragraph 165 above are sufficiently broad to encompass trade associations that act on behalf of some or all of their members, and in the manner described above. This was clearly the view of the Federal Court of Appeal in *TREB FCA*. Although that decision pre-dated *Tervita*, there is nothing in *Tervita* or any of the other authorities mentioned above to suggest that the definitions of market power that they articulated were intended to preclude their application to trade associations that do not directly participate in the relevant market.

[185] The Tribunal considers that such a result would be perverse, as it would enable competitors to do indirectly what they may be prohibited from doing directly, namely, agreeing or arranging among themselves to take action that prevents or lessens, or is likely to prevent or

lessen, competition in a market. Trade associations often do indeed have “horses in the race,” namely, members of the associations whose interests they may be endeavouring to protect from competition.

[186] Such a result would also be inconsistent with the various objectives set forth in the purpose clause of the Act (section 1.1), namely:

to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	de préserver et de favoriser la concurrence au Canada dans le but de stimuler l’adaptabilité et l’efficience de l’économie canadienne, d’améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d’assurer à la petite et à la moyenne entreprise une chance honnête de participer à l’économie canadienne, de même que dans le but d’assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[187] In the alternative, TREB submits that even if a respondent has market power, it cannot be said to substantially or completely control a market within the meaning of paragraph 79(1)(*a*) if it is a not-for-profit entity with no incentive to exercise market power against its members.

[188] The Tribunal disagrees. To the extent that a respondent trade association has the ability to exercise substantial market power to insulate all or some of its members from competition, and thereby enable them to maintain significantly higher prices, or significantly lower levels of non-price competition, than would otherwise be the case, it can be found to come within the purview of paragraph 79(1)(*a*).

[189] It bears underscoring, as a general proposition, that it is the *ability* to exercise the required degree of market power, not whether in fact a dominant firm finds it to be in its interest to exercise that power from time to time, that is relevant for the purposes of paragraph 79(1)(*a*), and indeed of paragraph 79(1)(*c*).

[190] Of course, where a trade association *actually exercises* substantial market power, this would demonstrate that it has that requisite degree of market power. The same is true of any entity alleged to have substantial market power.

(2) Measuring market power

[191] Market power can be measured either directly or indirectly. The direct approach focuses upon whether profits are indicative of substantial market power. The indirect approach considers other indicia such as market share, entry barriers or the countervailing power of customers. However, neither approach is easy to apply in practice (*Canada Pipe CT* at para 122; *Canada Pipe FCA Cross Appeal* at para 52).

[192] To date, the Tribunal has only been able to establish market power pursuant to the direct approach on two occasions. The first was in *Tele-Direct* at page 101, where it concluded that evidence of economic rents in the form of consistent payments by the respondent to its parent company of 30% - 40% of its collective revenues provided a direct indication of the respondent's market power. The second was in *Canada Pipe CT* at paragraph 161, where the Tribunal found that the evidence of high margins on certain products and an ability to lower prices selectively indicated supra-competitive pricing.

[193] In the absence of direct evidence of market power, the Tribunal has endeavoured to measure market power indirectly. In so doing, it has invariably assessed market shares and barriers to entry and has sometimes concluded that the respondent substantially or completely controlled a market largely on the basis of those two factors (*NutraSweet* at pp. 28-31; *Tele-Direct* at pp. 85-96; *Nielsen* at pp. 254-255). However, it has also assessed other factors such as the excess capacity of other firms (*Laidlaw* at p. 327), pricing practices and accounting profits (*Laidlaw* at pp. 327-330), the limited penetration of competitors (*Canada Pipe CT* at para 161) and the limited growth potential of the market (*Canada Pipe CT* at para 161).

[194] With respect to market shares, the Tribunal has suggested that a *prima facie* finding of substantial control of a market will be made with a large market share exceeding 50% (*Laidlaw* at pp. 317 and 325; *Nielsen* at pp. 254-255; *Canada Pipe CT* at para 138). Such a presumption would become stronger as the disparity between the market share of the respondent and the market shares of the other firms in the market increases, or if the respondent's share is fairly stable over time. Of course, a high market share of another rival could indicate joint dominance, particularly as the market share of that rival rises above 25%, or if the shares of the top two firms remain stable over time. Relatively stable shares of the top three or four firms could also be an indicator of joint dominance.

[195] With respect to barriers to entry, the Tribunal has noted that, in the absence of barriers to entry, even a very large market share will not support a finding of market power (*Canada Pipe CT* at para 138) and even a single seller cannot exercise market power (*Tele-Direct* at p. 85).

[196] As a practical matter, a finding that the respondent has substantial market power would ordinarily be justified where the evidence demonstrates that prices were, are or likely would be *significantly* higher, or that non-price benefits of competition such as quality, service, variety or innovation were, are or likely would be *significantly* lower, than they would have been or would be in the absence of the impugned practice of anti-competitive acts.

(3) Class or species of business

(a) *Overview*

[197] The Commissioner submits that, for the purposes of paragraph 79(1)(*a*), the "class or species of business" or product market that TREB controls is the relevant market that is the ultimate focus of this proceeding under section 79. That market is the market for MLS-based residential real estate brokerage services.

[198] The Commissioner asserts that TREB controls that relevant market because it controls how its Members compete through its rule-making ability. It controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the *status quo*.

[199] The Commissioner maintains that the foregoing enables TREB to dictate who can and cannot compete, and on what terms, and can prevent an entire class of competition from emerging in the relevant market. He adds that TREB is horizontally integrated by virtue of its structure as an association and joint venture between competitors and that TREB's control over the market is reinforced by its vertical and horizontal integration with its Members. He suggests that such integration is a practical reality because TREB is controlled by a Board of Directors, all 16 members of which are licensed and practising realtors, who assume their board duties on a volunteer basis.

[200] For its part, TREB submits that the assessment of market power for the purposes of paragraph 79(1)(*a*) must take into consideration the conduct that is at issue in a particular case. In this case, that would primarily be its withholding of the Disputed Data from its VOW Data Feed, its prohibition of the display of the Disputed Data on a VOW, and its imposition of restrictions on an agent's ability to use the data in its VOW feed for purposes other than mere display to the public.

[201] The Tribunal does not accept the proposition that an assessment of market power at the paragraph 79(1)(*a*) stage of its analysis must always take into consideration the conduct that is at issue in a particular case. As the Federal Court of Appeal has noted, the three elements of subsection 79(1) of the Act are distinct. Although certain evidence may be considered in the assessment of more than one of those elements, the three elements themselves must remain conceptually distinct (*Canada Pipe FCA* at para 28).

[202] The conduct that is at issue in any particular case is the principal focus of the assessment at the second step of the three-step assessment contemplated by subsection 79(1), namely, the assessment of whether the respondent has engaged in or is engaging in a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). The actual or likely effects of such conduct are then the focus of the third stage of the analysis, as contemplated by paragraph

79(1)(*c*), although they may also be relevant at the second stage, as discussed in the next section of these reasons. However, at the first stage of the analysis, the focus is upon the existence of dominance and whether the respondent substantially or completely controls throughout Canada or any area thereof, any class or species of business. At that stage of the analysis, the conduct "at issue" in a proceeding is not necessarily relevant.

[203] In this particular case, TREB submits that there is one or more relevant market(s) for the purposes of the analysis contemplated by paragraph 79(1)(*a*), namely, the market(s) for the supply of the principal components of the Disputed Data. That is to say, TREB submits that, for the purposes of paragraph 79(1)(*a*), there may be distinct relevant markets for the supply of information with respect to solds, "pending solds," WEST listings and the commissions of cooperating brokers. In any event, a separate assessment of the close substitutes for each of those types of information is required.

[204] In the Tribunal's view, it does not particularly matter for the purposes of the assessment contemplated by paragraph 79(1)(*a*) whether TREB controls what it characterizes as an "upstream input" to brokers, or the downstream market for the supply of MLS-based residential real estate brokerage services. If it controls or substantially controls either an upstream market or a downstream market, that is sufficient for the purposes of paragraph 79(1)(*a*).

[205] Nothing turns on this particular issue in this proceeding, as the Tribunal is satisfied, for the reasons explained below, that (i) there are no close substitutes for the supply of any of the principal components of the Disputed Data, (ii) TREB therefore controls the supply of those inputs to agents in the GTA, and, in any event, (iii) TREB controls the market for the supply of MLS-based residential real estate brokerage services.

[206] TREB submits that it would have to be dominant in one or more "upstream markets" for it to be dominant in the downstream market for the provision of residential real estate brokerage services.

[207] The Tribunal disagrees. If it is established that TREB has substantial or complete control of either an upstream market or the downstream market for the supply of MLS-based residential real estate services, that is the end of the matter, for the purposes of the assessment contemplated by paragraph 79(1)(*a*).

[208] Dr. Church proposed the "essential facilities" framework as being conceptually useful to determine the question of whether TREB substantially or completely controls a relevant market. In his view, one of the remedies sought by the Commissioner (i.e., the inclusion of the Disputed Data in TREB's VOW Data Feed) amounts to a mandated access to what the Commissioner must consider is an essential upstream input.

[209] Accordingly, he submitted that the framework advanced by the Bureau in the past with respect to essential facilities should be applied. As a first step in that framework, it must be established that the respondent is dominant in both the upstream and downstream markets

(*Submission by the Commissioner of Competition Before the Canadian Radio-Television and Telecommunications Commission – Telecom Notice of Consultation CRTC 2013-551 – Review of Wholesale Services and Associated Policies*, at footnote 7, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03655.html).

[210] The Tribunal questions whether it is necessary to establish, in an "essential facilities" case, that the respondent is dominant in both an upstream and a downstream market. The Tribunal does not wish to preclude the possibility that a demonstration could be made, in a particular case, that the respondent substantially controls a market for an upstream input, that it has engaged in a practice of anti-competitive acts in respect of that input, and that such practice has had, or is having the effect of preventing or lessening competition in a downstream market. This could include a downstream market in which the respondent is a new entrant or, in any event, a competitor that is not yet able to exercise market power in that market.

[211] It is not necessary to resolve this issue in this proceeding, because the Tribunal agrees with the Commissioner, Dr. Vistnes and Dr. Flyer that this is not an "essential facilities" case.

[212] In brief, this is not a case in which an upstream input supplier is denying customers *access* to an input. TREB's Members already have access to the Disputed Data through TREB's Stratus system. Rather, the withholding of that information from TREB's VOW Data Feed, and the rules that restrict the manner in which TREB's Members can use and display that and other information, are what is at issue in this case. As Dr. Vistnes testified, TREB is simply saying to its Members "who have always had the information, you're not allowed to compete with it in this way" (Transcript, October 5, 2015, at p. 578).

[213] Accordingly, access is not the issue. As CREA recognized in its closing submissions, the issue is how the Disputed Data is made accessible to TREB's Members.

(b) ***The supply of the Disputed Data***

[214] Dr. Church's focus for the purposes of paragraph 79(1)(*a*) was upon the upstream supply of the Disputed Data. He submitted that the Tribunal's focus ought to be on whether there are close substitutes for the Disputed Data. He then proceeded to identify several potential substitutes for the Disputed Data.

[215] For Dr. Church, the analysis of substitution depends upon whether the consumer is in the search phase or the valuation/offer phase of the home selling/buying process.

[216] He suggested that, at the search phase, consumers become informed about the market for homes. Among other things, they assess factors such as the relative characteristics of different communities, the relative values of homes in those communities, the relative values of different home characteristics, and price trends.

[217] By contrast, at the valuation/offer phase, home sellers and purchasers are much more advanced in their thinking and require information to, among other things, set the actual price of their home, or establish the price they are willing to offer for a home.

[218] By the time they reach that more advanced phase of the process of selling or purchasing a home, the vast majority of home sellers and buyers will have retained the services of an agent, who is able to supply them with the Disputed Data, which the agent will have obtained from TREB through the Stratus system. (As discussed at paragraph 364 below, there is persuasive evidence that there is a widespread practice among TREB's Members of providing Disputed Data to consumers in various ways other than through a VOW, such as in person, by fax or by email). Therefore, Dr. Church and TREB maintain that, at the valuation/offer phase, the existing source of the Disputed Data (i.e., TREB's Stratus system) provides a close substitute for potential purchasers and sellers of homes, as they are easily able to obtain that information from their agent.

[219] TREB and Dr. Church therefore submit that making the Disputed Data available over TREB's VOW Data Feed would, at most, only be useful to *potential home sellers and home buyers* at the initial search phase, when they are seeking a general ballpark sense of the value of a home.

[220] At this search phase, Dr. Church maintains that there are many substitutes for the Disputed Data, even though those substitutes do not necessarily provide entirely the same data that would be available through TREB's VOW Data Feed, if the Disputed Data were included in that data feed. These substitutes allegedly include list prices, and information available from Teranet Inc. (**"Teranet"**), the Municipal Property Assessment Corporation (**"MPAC"**), brokers, appraisers and other innovative data-sharing vehicles.

(i) List prices

[221] Dr. Church submitted that list prices are very good substitutes for sold and "pending sold" listings because they incorporate market information relevant to the search phase and there is a very stable relationship between list prices and sales prices. Based on an analysis that Dr. Church conducted of GTA area data, he found that list prices maintain a relationship of an average of 95% of sold prices over time. He inferred from this that the distribution of list prices is a good substitute for the distribution of sold prices. Accordingly, he suggested that list price information provides essentially the same information that consumers would extract at the search phase from the Disputed Data if it were available on an agent's VOW. In other words, information regarding the average list prices of homes in particular communities would enable potential purchasers and sellers of homes to obtain a good sense of the relative values of homes in those communities, the relative values of different home characteristics, and price trends.

[222] The Tribunal does not accept that list prices of homes in any particular community are a good substitute for information pertaining to "solds" and "pending solds" in that community. Among other things, while information pertaining to the *average* list prices of homes in the GTA or even in a community within the GTA, having a particular set of characteristics, may enable

potential purchasers and sellers of homes to estimate the *average* selling prices of homes in that area that have those characteristics, such information will not assist buyers and sellers to estimate the value of the specific homes in specific neighbourhoods that they may find to be of potential interest. This is particularly so where the homes that are in their initial set of comparators have materially different characteristics from each other (as can frequently be the case), where communities have different types of homes (e.g., detached/semi-detached, three bedroom/four bedroom, homes near busy streets/quiet streets, etc.) or where sellers deliberately undervalue their home, in an effort to generate a "bidding war."

[223] More importantly, data with respect to average list prices in the GTA or in specific communities therein isn't a good substitute for "solds" or "pending solds" for innovative *agents* who want to be able to better compete with traditional agents, e.g., by preparing innovative forms of analysis or more accurate estimates of home prices than can be obtained by using a statistic such as 95% of the average list prices of homes in the GTA or a particular community.

[224] Similarly, the fact that *consumers* are able obtain information with respect to "solds" and "pending solds" directly from an agent, either in person, by fax or by email at the valuation/offer phase does not assist innovative *agents* who would like to be able to access such information over TREB's VOW Data Feed, and then provide it to their customers through products and services offered over the Internet.

(ii) Teranet, MPAC, brokers and appraisers

[225] Dr. Church also suggested that historical and current data with respect to sold prices is available from other sources, such as Teranet; MPAC; large real estate brokerages like Royal LePage, Century 21 and RE/MAX; and firms that provide appraisal services, such as Zoocasa and Centract Settlement Services (now Brookfield RPS).

[226] According to Dr. Church, Teranet is in the business of selling reports and analysis derived from Ontario's Land Registration System. In this regard, he noted that it runs a service called GeoWarehouse, which describes itself as a "web-based, centralized, property information source that provides state-of-the-art mapping and research tools, as well as professional reports." Based on information that it is able to access from the Land Registration System, GeoWarehouse has the potential to offer real estate agents and others access to sold information on particular homes, dating back many years. This includes sold prices of homes that were sold as recently as 60-90 days ago. In his 2012 expert report, Dr. Church hypothesized that there is nothing to suggest that any industry participant cannot contract with Teranet to be able to obtain and use information with respect to the sold prices of homes. He maintained this position at the Redetermination Hearing.

[227] Likewise, Dr. Church noted that MPAC's mandate includes providing property owners and business stakeholders with consistent and accurate property assessments, based on the recent sales prices of comparable properties. In his testimony, he maintained that MPAC is an alternative to MLS information with respect to sold prices. While acknowledging that the "raw

data" may not be the same, he maintained that the content is sufficiently similar to constitute a good substitute for the supply of the Disputed Data from TREB.

[228] Dr. Church added that TREB currently provides its Members with access to Teranet and MPAC information through "portals" that it has specifically purchased for TREB's Members. However, neither Dr. Church nor TREB referred to any evidence which demonstrates that any agents actually source sold information from Teranet or MPAC, particularly as a substitute for MLS information.

[229] Dr. Church also suggested that there is a *potential* for large brokerages and corporate franchisors to self-supply information with respect to sold prices. In his 2012 expert report, he estimated that the top five such brokerages/franchisors collectively accounted for over 70% of the transactions in the GTA in 2011, and he speculated that such entities *could* compile or *might be able to* provide data that is statistically representative of the MLS sold data that is more broadly available through Stratus. To ascertain whether an agent might be able to make reasonable price estimates based only on **[CONFIDENTIAL]** internal data, relative to using the full MLS Database, he estimated two sets of simple hedonic price regressions on data for detached homes that sold between January 2007 and December 2011. He concluded that his analysis implied that **[CONFIDENTIAL]** data are a good substitute to the "full" MLS data, not just for **[CONFIDENTIAL]** own listings, but for all listings in the communities in question.

[230] However, based on the following evidence, which the Tribunal accepts, the Tribunal is satisfied that information available from Teranet/GeoWarehouse, MPAC and large brokerages/franchisors cannot be considered to be a good substitute for MLS sold information that the Commissioner submits should be available over TREB's VOW Data Feed.

[231] After assessing each of the above-mentioned potential substitutes for the Disputed Data, Dr. Vistnes concluded that none of them are good substitutes for the Disputed Data, and that there is no other alternative source for this information.

[232] With respect to Teranet/GeoWarehouse, Dr. Vistnes noted the following:

a. It does not currently allow the data that it makes available to TREB's Members to be "republished" by brokers, whether on their VOWs or otherwise;

b. It has demonstrated an unwillingness to enter into new contracts with brokers that would allow "republication" of that information on brokers' websites. This was corroborated by Mr. Enchin, who referred to his request to obtain square footage information, and stated that Teranet left him with "the clear impression that they were very reluctant to sell [him] this information" (Exhibit A-021, Reply Witness Statement of Mark Enchin dated August 17, 2012, at para 11);

c. It has not made its sold listings available to others in the real estate industry, such as ZooCasa;

d. The fact that Teranet charges TREB **[CONFIDENTIAL]** per year for its Members' access to the very limited scope of data available through its GeoWarehouse product, suggests that brokers might incur substantial costs to gain access to Teranet's sold data. This is further corroborated by the fact that Teranet's representatives apparently told Mr. Enchin that one or two data fields could cost as much as $5 per property, which would work out to approximately $37,500 per month (or $450,000 per year) to display information on 7,500 new sold listings per month;

e. The data available on GeoWarehouse is not as up-to-date as the information available on the MLS system. In addition to the medium time lag of over seven weeks from the time a home is sold to the time the sale agreement closes, it takes an additional 10-14 days before sold data is available to users of GeoWarehouse;

f. Even if Teranet had comprehensive sold data that it was willing to provide at minimal cost, brokers would still face costs associated with integrating that data into their VOWs; and

g. Teranet does not have the same extent of information that appears in the MLS system (e.g., days on the market, original price and price changes).

[233] With respect to MPAC, Dr. Vistnes noted that Dr. Church provided no evidence that MPAC can provide comprehensive information, that it would be willing to provide such data, that it would be willing to do so at a price brokers pay for the same information from the MLS system, or that the data would be timely, reliable and capable of being integrated into brokers' VOWs. He added that because much of MPAC's data appears to be derivative of Teranet's data, many of the same reasons that Teranet/GeoWarehouse would be a poor substitute for the information available from TREB's MLS system, would apply to MPAC.

[234] Dr. Vistnes' evidence with respect to Teranet/GeoWarehouse and MPAC is consistent with the evidence provided by several of the Commissioner's lay witnesses, who also maintained that there are no good substitutes to TREB's MLS system for information regarding sold listings or other Disputed Data, whether from Teranet/GeoWarehouse, MPAC or elsewhere. This includes the following evidence:

a. Mr. Hamidi indicated that Stratus and GeoWarehouse are weak and inflexible technologies that require agents to perform a lot of work in order to make sense of the information. He stated that with a complete data feed from TREB, TheRedPin "could put all of the information from several sources together, seamlessly and in innovative ways for [its] agents and [its] customers and not be limited by the information and pre-packaged format of Stratus and Geowarehouse" (Exhibit A-013, Witness Statement of Shayan Hamidi dated June 22, 2012 (**"2012 Hamidi Statement"**), at para 51);

b. **[CONFIDENTIAL]** Elsewhere, Mr. McMullin stated that there is no comprehensive source of information for residential properties for sale and sold, other than TREB's MLS system. He noted that, among other things, Teranet does not even have information with respect to sold data (except for sold prices, though Mr. McMullin understands that there is a time lag), "pending solds," WEST listings, and other status changes that are vital to

ViewPoint's value proposition. At the Redetermination Hearing, he added that Teranet representatives "were not willing to license the sales data they had or have in their possession" (Transcript, September 22, 2015, at p. 102);

c. In addition to the evidence discussed at paragraphs 232-233 above, Mr. Enchin stated that Teranet and MPAC do not have information with respect to "pending solds" and that their sold information is not as up to date and therefore not as useful to realtors and their customers as data in a real estate board's MLS system; and

d. Mr. Prochazka testified that he attempted to obtain information from Teranet on at least two occasions but never heard back from them.

[235] With respect to the potential for large brokerages and corporate franchisers to "self supply" sold data, Dr. Vistnes once again disagreed with Dr. Church. In this regard, he noted that even the largest franchises and brokerages would have only limited sold listings, i.e., only their own sold listings. By way of example, he estimated that by relying solely on sold information from its own listings, **[CONFIDENTIAL]** would lose access to approximately 70 percent of sold listings in the GTA. Smaller brokerages would have even less coverage of the market. He further observed that this possibility of "self supply" was mere speculation.

[236] Turning to appraisers, Dr. Vistnes noted that they do not collect all of their own information, but instead rely on the same data sources that brokers rely upon, including the MLS system, Teranet and MPAC. Insofar as the MLS system is concerned, it is not realistic to believe that appraisers would be able to obtain the same Disputed Data that TREB is prohibiting its Members from displaying on their VOWs. Likewise, there is no reason to believe that appraisers would be any more successful than brokers/agents have been at obtaining sold information from Teranet/GeoWarehouse and MPAC.

[237] With respect to the possibility that the websites operated by brokers offering FSBO services might be a possible source of supply of sold information to other brokers/agents, Dr. Vistnes appropriately noted that FSBO sales appear to constitute a small share of all sales in the GTA, and thus would be unable to provide much coverage of the market.

[238] In summary, based on the evidence discussed above, the Tribunal accepts Dr. Vistnes' conclusion that Teranet's GeoWarehouse, MPAC, large brokerages and other sources are not good substitutes for the sold information that is available on TREB's MLS system. Moreover, if Teranet's GeoWarehouse or MPAC were acceptable substitutes for the sold information that is available on TREB's MLS system, one would expect to see at least some brokers sourcing sold information from one or both of those sources, instead of sourcing exclusively from the MLS system. TREB provided no evidence that this is occurring or ever has occurred to any meaningful degree in the GTA. The same is true with respect to the potential for brokerages to self-supply, or to share their "sold data" between themselves, and with respect to the proposition that sold information available on the websites of brokerages offering FSBO services are an acceptable substitute for the MLS sold information that is available from TREB.

[239] Dr. Church also observed that innovative agents can obtain information with respect to "solds" the same way that other agents obtain that information. However, the Tribunal accepts the evidence provided by Dr. Vistnes and certain innovative agents, who stated that there are no good substitutes for obtaining the Disputed Data, whether over the Stratus system or otherwise. Specifically:

a. Mr. Pasalis stated that the information that TREB currently makes available to its Members (including over the Stratus system) requires agents to engage in a time consuming and costly manual process of assembling and uploading sold information to their websites. He added that this process is prone to human error, and that this can undermine the reliability of the analysis produced. If sold information were available in TREB's VOW Data Feed, Realosophy "could automate the assembly of the information, reduce [its] costs, eliminate human error, and ensure that the information [its] agents are relying on is as up-do-date as possible" (Exhibit A-120, Second Witness Statement of John Pasalis dated February 2, 2015, at para 11);

b. Mr. McMullin stated that the VOW Data Feed offered by TREB lacks content and that without an ability to access all of the MLS data through an efficient means, ViewPoint has "no realistic basis for competing effectively" in the GTA (Exhibits A-100 and CA-099, Second Witness Statement of William McMullin dated February 5, 2015 (**"2015 McMullin Second Statement"**), at paras 49-50). Mr. McMullin testified that ViewPoint, "to do [its] business, [requires] the data in both real-time through a data feed which use [sic] as [sic] protocol known as RETS, Real Estate Transaction Standard, and also in the bulk format" (Transcript, September 11, 2012, at pp. 246-247); and

c. Dr. Vistnes stated that "since brokers cannot practically turn to other equivalent sources of information regarding the excluded data fields, brokers are effectively prevented from providing that information on their VOWs." He added that "to the extent that substitution is possible, it would be to an inferior, more costly, alternative" (Exhibits A-136 and CA-137, Reply Expert Report of Dr. Greg Vistnes dated August 4, 2015 (**"2015 Vistnes Reply Expert Report"**), at pp. 9 and 13). Elsewhere, he observed that by being unable to offer the Disputed Data over a VOW, "brokers must incur the costs of serving as an information intermediary in which consumers ask for particular information, the broker conducts the necessary search, and then the broker transmits the information via a phone call, email or fax to the consumer" (Exhibits A-138 and CA-135, Expert Report of Dr. Greg Vistnes dated February 6, 2015, at p. 6).

(iii) Other innovative vehicles

[240] TREB also submitted that it has a demonstrated history of innovation and that VOWs are simply one tool that real estate professionals can use to deliver real estate services over the Internet. CREA makes a similar argument. According to TREB, another effective tool is the centralized Internet Data Exchange (**"IDX"**) program that it launched in January 2010. That program enables brokers who participate in the IDX to advertise each other's listings on their respective websites. This effectively creates a large pool of shared listings. Participation is optional and reciprocal and, according to TREB, over 90% of its Members have subscribed to its IDX program, which is quicker, easier and less expensive to operate than a VOW.

[241] However, the Tribunal understands that IDXs cannot show *any* of the Disputed Data fields.

[242] The same is also true for other Internet-based data-sharing vehicles such as CREA's IDX, realtor.ca (a public website operated by CREA), or CREA's data distribution facility (**"DDF"**). Realtor.ca was developed by CREA and displays for free active listings from across the country. The information found on realtor.ca is a subset of listing content from MLS systems across the country. The website does not display the Disputed Data and does not require registration. Likewise, the Tribunal understands that the information available through DDF does not include the Disputed Data.

[243] Dr. Church further suggested that any attempt by TREB to exercise market power in respect of the Disputed Data might elicit a supply-side response similar to what has occurred in the United States. He noted that there are three suppliers of national assessor and recorder bulk data in that country (CoreLogic, RealtyTrac and Black Knight), as well as several additional regional suppliers, which have commercialized their real estate data, including by licensing data to provide automated valuation models, home price indexes, or to power consumer-facing tools. He suggested that the popularity of valuation tools and information on search portals suggests that MLS-sourced "sold" price information is unlikely to be *uniquely* useful.

[244] In this latter regard, Dr. Church noted that the most visited real-estate websites in the United States are search portals, namely, realtor.com, Zillow and Trulia. He observed that the latter two entities obtain their data on sold prices from non-MLS sources, including public records, and display that data to the public on their websites. He asserted that there is no evidence that any of these websites are perceived by *consumers* to be less valuable or useful than VOW sites using MLS-sourced information such as the Disputed Data.

[245] The Tribunal finds three principal shortcomings with these submissions. The first is that they are speculation. They are simply assertions that are not supported by any evidence that any of these U.S. entities has ever considered expanding into Canada, notwithstanding that TREB has consistently refused to provide the Disputed Data over its VOW Data Feed for several years. The second shortcoming is that Dr. Church did not indicate where those potential entrants would obtain information with respect to the sold prices of homes in the GTA. Finally, Dr. Church's

arguments are focused on consumers, rather than agents, particularly innovative agents who would like to be able to disrupt the market by offering the Disputed Data over a VOW.

[246] Dr. Church further maintains that concrete conclusions regarding the availability of substitutes to MLS information, including the Disputed Data, cannot be based on what can be currently witnessed in the market, because MLS information "may actually be priced at an infra-competitive level, consistent with TREB's non-profit status on non-commercial pricing" (Exhibits R-079 and CR-080, Expert Report of Dr. Jeffrey Church dated July 27, 2012, at para 222). He refers to this as a "reverse cellophane problem." In this regard, he notes that TREB's Members pay an annual membership fee that provides access to many resources and benefits, only one of which is access to the MLS system. According to Mr. Richardson, TREB's brokers and salespersons pay annual membership dues of $611.80, as well as an initiation fee ($4,960 for businesses and $460 for individuals) that, in part, reflects the fact that new Members gain access to the information that has been "built up over years" in TREB's MLS Database (Exhibits R-141 and CR-142, Updated Witness Statement of Donald Richardson (**"2015 Richardson Statement"**), at paras 11-12).

[247] In this context, Dr. Church observes that the marginal access price of the MLS system is zero. He suggests that other potential suppliers of sold information *might* begin to make that information available to agents, if TREB were to increase the price of MLS access beyond a competitive level.

[248] The Tribunal does not consider it necessary or appropriate to speculate upon what might happen if TREB were to exercise a different form of market power (increasing the price of MLS access) than those alleged in this application (i.e., withholding of the Disputed Data over its VOW Data Feed, restrictions on how the data from the VOW Data Feed may be used, and the prohibition of the display of Disputed Data). The question is whether the latter conduct constitutes a practice of anti-competitive acts that has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market for the supply of MLS-based residential real estate brokerage services. For the purposes of answering that question, it is not necessary to engage in the exceptionally difficult exercise that would be required to ascertain what the economically "competitive" price of access to MLS information is or should be.

[249] Dr. Church also speculates that the fact that commercial supply of sold information does not currently exist *could* reflect a lack of *consumer demand* for such data. However, once again, this fails to recognize that the focus of this application is upon whether there is significant *agent demand* for this information, and, if so, whether TREB's withholding of that information from the VOW Data Feed, together with the other VOW Restrictions, meets the requirements of paragraphs 79(1)(*b*) and (*c*) of the Act. Moreover, the evidence in the record suggests that wherever sold information is not arbitrarily restricted from display over the Internet, that information is obtained by brokers and made available to potential home buyers and sellers over the Internet. For example, this is the case in the Halifax Regional Municipality (**"HRM"**) of Nova Scotia, where ViewPoint has availed itself of this opportunity. The same is true in a large number of U.S. states, where Redfin has done the same. Mr. Prochazka's AVP also used the sold data provided by the boards in Edmonton and three jurisdictions in British Columbia before its

access to such information was discontinued around 2008-2010. He testified that he "pressed them for a long time, for over a year, to give [the sold data] back to [them]" (Transcript, September 18, 2012, at p. 933).

[250] In summary, for the reasons discussed above, the Tribunal concludes that there are no acceptable substitutes for the sold information in the MLS system. In addition, neither Dr. Church nor TREB provided any persuasive evidence to demonstrate that there are acceptable substitutes for the other components of the Disputed Data, namely, "pending solds," WEST listings and cooperating broker commissions.

[251] Accordingly, even if, as suggested by Dr. Church, it were necessary to define markets in which the Disputed Data, or the distinct components thereof, is supplied, the Tribunal would conclude there are no acceptable substitutes for the Disputed Data, in aggregate or individually, and that therefore TREB substantially or completely controls one or more markets for the supply of those inputs.

[252] However, it is not necessary to define such markets, because as discussed below, the Tribunal is satisfied that TREB controls the market for the supply of MLS-based residential real estate brokerage services.

(c) *The supply of MLS-based brokerage services*

[253] As noted at paragraph 198 above, the Commissioner submits that TREB controls the market for the supply of MLS-based residential real estate brokerage services because it controls how its Members compete through its rule-making ability. In brief, the Commissioner contends that TREB controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the *status quo*.

[254] The Tribunal agrees for the following reasons:

a. To obtain and maintain access to the MLS system, TREB's By-Laws (the **"By-Laws"**) prescribe that TREB's Members must execute and agree to be bound by TREB's MLS Rules and Policies as well as its AUA (By-Laws at Article 2, s. 3.01(a));

b. In the event that a Member breaches the terms of the AUA and its breach is not cured within two weeks after receipt of a notice from TREB, the latter may terminate the AUA pursuant to s. 12(a) of the AUA;

c. Such action would effectively terminate a Member's access to the MLS system;

d. Members' access to the MLS system, and indeed their membership in TREB, can also be terminated if they breach TREB's MLS Rules and Policies (By-Laws at Article 3, s. 4.02(f));

e. TREB's MLS Rules and Policies establish a detailed code "for the orderly, competitive and efficient operation of TREB's MLS System" (MLS Rules and Policies, Introduction, at p. 1). Among other things, that code establishes rules that: regulate the solicitation of home buyers and sellers who have signed exclusive agreements with another Member; mandate the type of information that must or may be uploaded to the MLS system and when information must be posted to that system; mandate when listings on the MLS system must be available for showings, inspections and registration of offers; regulate and limit certain aspects of property advertising that are not covered by RECO's rules pertaining to advertising; regulate the reporting of transactions; limit when offers of commissions to cooperating agents can be altered; and restrict what information may be displayed on a Member's VOW, as well as the conditions under which a consumer may search for or retrieve any listing information on a Member's VOW;

f. Pursuant to the AUA, TREB's Members agree, among other things, to access and use the MLS Database and other services provided by TREB in accordance with the AUA and only in the manner and for the purpose expressly specified in the AUA;

g. Messrs. Pasalis, McMullin and Enchin testified that access to the MLS system is critical to providing residential real estate brokerage services. This was not disputed by TREB, although it represented that an unspecified number of agents/brokers in the GTA are not Members of TREB, which now has approximately 42,500 Members;

h. TREB has described the MLS system as "one of the most important tools used by virtually every REALTOR" (Exhibit A-004, Document 382, at p.1);

i. Dr. Vistnes noted that a board's MLS system was described on a CREA-sponsored website as "the single most powerful tool for buying and selling a home" (Exhibits A-030 and CA-029, Expert Report of Dr. Greg Vistnes dated June 22, 2012 (**"2012 Vistnes Expert Report"**), at para 148);

j. In 2006, CREA reported that approximately 87% of home buyers and 89% of home sellers in Toronto used the services of a realtor during their last home transaction in 2005 or 2006 (Exhibit A-004, Document 869, at pp. 42 and 50);

k. Dr. Vistnes, whose testimony on this point the Tribunal accepts, stated: "Without access to the MLS the broker effectively cannot compete in the market." Dr. Vistnes added that "because [TREB] controls access to the MLS … it's effectively dictating the rules under which brokers are allowed to compete and not compete. It's dictating whether they can compete and it's dictating the forum in which they can compete" (Transcript, October 5, 2015, at pp. 458-459);

l. Dr. Vistnes also stated: "Consumers expect their broker to have access to the MLS: absent MLS access, buy-side brokers will be unable to show prospective clients the full range of homes available for sale or provide all the information about those homes, and sell-side brokers will be unable to expose the seller's home to the full range of buyers" (Exhibits A-032 and CA-031, Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012 (**"2012 Vistnes Reply Expert Report"**), at para 23);

m. TREB has demonstrated its willingness to terminate a Member's access to the MLS. For example, in 2007, it terminated the access of Mr. Fraser Beach, who was the broker of record for BNV Real Estate Inc. ("**BNV**"); and when BNV later partnered with RRE, TREB terminated the latter's access. This was not disputed by TREB. More recently, in October 2014 and February 2015, TREB threatened to stop providing MLS access to Members who were violating its VOW Policy and Rules or its AUA; and

n. TREB has effectively prevented some innovative brokers who wish to enter or expand within the market for MLS-based supply of residential real estate brokerage services, based on an innovative VOW-based business model, from doing so.

[255] The Tribunal observes that the Ontario Superior Court of Justice reached a similar conclusion as Dr. Vistnes in 2009 when it noted that it was a "practical reality of the market that a realtor who wishes to trade in resale residential properties in the GTA requires access to the MLS Database to carry on an effective business and, therefore, needs to be a member of TREB" (*Beach v Toronto Real Estate Board*, [2009] OJ No 5227 (**"*TREB OSCJ*"**) at para 10). On appeal, the Ontario Court of Appeal noted that without access to TREB's MLS system, the appellant "was not able to carry on business as a real estate broker" (*Beach v Toronto Real Estate Board*, [2010] OJ No 5541 (**"*TREB OCA*"**) at para 3).

[256] TREB maintains that it does not substantially or completely control the Relevant Market for several reasons. These include a number of legal arguments that were addressed and rejected at paragraphs 175-190 of these reasons.

[257] In addition to those arguments, TREB states that it has no financial or other interest in how competition occurs among its Members. In oral argument, this was put in terms of TREB having no "horse in the race" (Transcript, November 2, 2015, at p. 1270). TREB adds that its governance structure provides a constraint on the exercise of any market power that TREB could have or might otherwise wish to exercise against its Members.

[258] However, TREB's mission is to act for the benefit of its Members. This includes acting in ways that its Board of Directors, all of whom are licensed and practising brokers/agents in the GTA, direct it to act, whether it be to insulate them from new and disruptive forms of competition, or otherwise.

[259] In this context, the Tribunal is satisfied that TREB does indeed have an interest in how competition occurs among its Members, and does indeed have a "horse in the race," namely, the Members whose success TREB pursues as its "core purpose" (2015 Richardson Statement, at para 5). The Tribunal is also satisfied that TREB can and does exercise the substantial market power that it derives from its control over access to the MLS system, as well as under the terms of the By-Laws, the MLS Rules and Policies, and the AUA, for the benefit of its traditional

brokers, who comprise the vast majority of TREB's membership. As noted by Dr. Vistnes, TREB's control of the MLS system "gives TREB the opportunity to dictate who can compete and who cannot compete, and that provides it with significant market power" (Transcript, October 5, 2015, at p. 458).

[260] The Tribunal also agrees with the following observation made by Dr. Vistnes:

> As long as TREB serves as a vehicle through which its members can act to promote their own self-interest, TREB's conduct can be expected to largely mimic those members' collective preferences. Thus, from an economic perspective, it does not matter that TREB uses its market dominance to benefit its members rather than itself (…).
>
> (2012 Vistnes Reply Expert Report, at para 28)

[261] TREB asserts that paragraph 79(1)(*a*) of the Act "is directed at determining whether a firm has substantial or complete control over a market, not whether a firm controls *how competition occurs* in a market" (TREB's 2012 Closing Submissions, at para 199). The Tribunal disagrees. The wording in paragraph 79(1)(*a*) is sufficiently broad to bring within its purview situations where a firm controls *how* competition occurs in a market. There is nothing in that wording, or in the scheme of the Act, to suggest otherwise.

[262] TREB also maintains that it cannot substantially or completely control the Relevant Market because it does not have the ability to set prices above competitive levels therein. However, the Tribunal finds that, through its ability to exclude disruptive innovators, including those who would like to become full-information VOWs, TREB has the ability to indirectly influence important non-price dimensions of competition in the supply of real estate brokerage services.

[263] TREB further suggests that it cannot substantially or completely control the Relevant Market because there are insignificant barriers to entry into the market, as evidenced by the large number of brokers who become Members of TREB each year.

[264] However, this misses the point. The source of TREB's substantial market power is its control over its MLS system and how information on that system can be used. As noted above, TREB's control over that system is reinforced by the By-Laws, by TREB's MLS Rules and Policies, and by the terms of the AUA. In this context, the potential entry that is relevant is the entry of a competing MLS system, not the potential entry of new Members. The Tribunal accepts Dr. Vistnes' evidence that, due to the important network effects associated with TREB's MLS system, the entry of a competing MLS system "is extremely unlikely" (2012 Vistnes Reply Expert Report, at para 23). The Tribunal also accepts that even in a market with a large number of competitors, a dominant firm can engage in conduct that "results in a market that is less competitive than it would have been otherwise" (2015 Vistnes Reply Expert Report, at p. 6).

[265] Finally, TREB submits that its ability to exercise market power is constrained by innovative forces in the Relevant Market. In this regard, TREB notes that its Members “are eager adopters of new technology generally, and of VOWs in particular” (TREB’s 2015 Closing Submissions, at para 210). It adds that hundreds of member firms, representing the substantial majority of its salespersons and broker Members, are subscribed to its IDX feed and that over 300 Members have subscribed to its VOW Data Feed.

[266] However, notwithstanding these developments in the market, the Tribunal is satisfied that the evidence demonstrates, on a balance of probabilities, that TREB substantially or completely controls the Relevant Market through its control over its MLS system and how information on that system can be used.

(4) Area of Canada

[267] As noted at paragraph 164 above, the Tribunal has consistently interpreted the words “throughout Canada or any area thereof” to mean the geographic dimension of the relevant market in which the respondent is alleged to have “substantial or complete control.” For the reasons discussed at paragraphs 153-161 above, the Tribunal considers it appropriate to define the geographic dimension of the market as extending throughout the GTA.

(5) Conclusion

[268] For the reasons set forth above, the Tribunal thus concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*a*) are met and that TREB substantially or completely controls, throughout Canada or any area thereof, a class or species of business, namely, the market for the supply of MLS-based residential real estate brokerage services in the GTA.

C. *Has TREB engaged in, or is it engaging in, a practice of anti-competitive acts?*

[269] The Tribunal will therefore turn to the third issue to be determined in this proceeding. This is whether TREB has engaged in, or is engaging in, a practice of anti-competitive acts, as contemplated by subsection 79(1)(*b*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that TREB has engaged and continues to engage in a practice of anti-competitive acts, namely, the VOW Restrictions. In that regard, the Tribunal concludes that the evidence of TREB’s subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the evidence provided in support of its asserted legitimate business justifications.

(1) Analytical framework

(a) *The purpose-focused assessment*

[270] The second element of the Canadian abuse of dominance provision is the "abuse" dimension of the conduct contemplated by section 79. Pursuant to paragraph 79(1)(*b*), this is expressed in terms of whether the person or persons in question have engaged or are engaging in a "practice of anti-competitive acts."

[271] Almost two decades ago, the Tribunal observed that "distinguishing between competition on the merits and anti-competitive conduct … is not an easy task" (*Tele-Direct* at p.179). That remains as true today as it was then. However, an analytical framework has gradually emerged.

[272] The Federal Court of Appeal dealt extensively with this element in *Canada Pipe FCA*. As a result, it is now settled law that the focus of the assessment under paragraph 79(1)(*b*) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).

[273] The term "practice" in paragraph 79(1)(*b*) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a "practice" (*NutraSweet* at p. 35).

[274] In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the "reasonably foreseeable or expected objective effects" of the conduct, in attempting to discern the "overall character" of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).

[275] It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competitor, as opposed to on competition. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(*b*). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis, contemplated by paragraph 79(1)(*c*) (*Canada Pipe FCA* at paras 74-78).

[276] To the extent that past pronouncements of the Tribunal may have suggested that it is *necessary* for an adverse impact on competition be demonstrated before it can be concluded that impugned conduct is anti-competitive within the meaning of paragraph 79(1)(*b*), (e.g., *Canada Pipe CT* at para 171; *Nielsen* at p. 257; *Laidlaw* at p. 333), they should be disregarded. However, to the extent that those cases held that an adverse impact on competition can be relevant to the assessment of the overall character or objective purpose of an impugned practice, they remain good law (*Canada Pipe FCA* at paras 74-79).

[277] Likewise, although past jurisprudence may have suggested that it is necessary to demonstrate the requisite negative impact on a direct competitor of the respondent, it is now clear that this is not the case. The meaning of the word *competitor* in the phrase "predatory, exclusionary or disciplinary negative effect on a *competitor*" means *a person who competes in the relevant market, or who is a potential entrant into that market*. It does not mean *a competitor of the respondent* (*TREB FCA* at paras 17-20).

[278] Accordingly, a trade association may be found to have engaged in a practice of anti-competitive acts if those acts are found to have been intended, subjectively or objectively, to have a predatory, exclusionary or disciplinary negative effect on one or more persons who compete in the relevant market, or who would like to enter that market. The same is true of an entity situated upstream or downstream from the relevant market.

[279] However, before a practice engaged in by a respondent who does not compete in the relevant market can be found to be *anti-competitive*, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible *competitive interest* in the market.

[280] In the case of a trade association, this may be as straightforward as demonstrating that it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market. In such circumstances, the complete or partial exclusion of potential or actual competitors or new products will be assessed in essentially the same way as similar conduct engaged in by a joint venture (see, for example, Herbert Hovenkamp, "Exclusive Joint Ventures and Antitrust Policy," (1995) *Columb Bus L Rev* 1 at pp. 64-66).

[281] In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(*b*).

[282] For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its

practices generally will not be found to fall within the purview of paragraph 79(1)(*b*). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.

[283] In any event, there must be evidence linking an impugned practice to the requisite subjectively or objectively intended negative effect on a competitor. Where such an effect has already occurred, it must be demonstrated that the practice caused or contributed to those effects (*Canada Pipe FCA* at para 78).

[284] However, the required anti-competitive purpose can also be demonstrated from evidence establishing that there was a subjective intent to engage in predatory behaviour against, to completely or to partially exclude or to discipline one or more competitors; or that one of these types of effects was a reasonably foreseeable consequence of the conduct.

(b) *Weighing evidence of anti-competitive purpose and legitimate business justifications*

[285] In considering all of the relevant circumstances relating to the purpose of the impugned practice, a critical part of the Tribunal's assessment involves evaluating any legitimate business considerations that may be advanced by the respondent, and then *weighing* them against any predatory, exclusionary or disciplinary negative effects on firms participating in the market that it finds were subjectively intended or reasonably foreseeable (*Canada Pipe FCA* at para 67).

[286] The Tribunal emphasizes the weighing aspect of the assessment to underscore that the demonstration of a legitimate business justification does not necessarily provide an absolute defence to an allegation that an impugned practice is anti-competitive, within the meaning of paragraph 79(1)(*b*). Instead, "a business justification is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(*b*)" (*Canada Pipe FCA* at para 88).

[287] Where any predatory, exclusionary or disciplinary motivations are found to have played a more important role in the respondent's overall subjective intentions than one or more asserted legitimate business justifications, the overall character of the impugned practice typically will be found to have the anti-competitive purpose contemplated by paragraph 79(1)(*b*). Likewise, where it is determined that any predatory, exclusionary or disciplinary effects that are objectively deemed to have been intended outweigh one or more legitimate business justifications, the impugned practice typically will be found to have an anti-competitive purpose.

[288] As is the case for all components of section 79 of the Act, in conducting this balancing exercise, the Tribunal assesses the evidence on the "balance of probabilities" standard. The Tribunal notes that, in *FH v McDougall*, 2008 SCC 53 (**"*McDougall*"**), the Supreme Court held that there is only one civil standard of proof in Canada, a balance of probabilities. Speaking for a unanimous Court, Mr. Justice Rothstein further stated in his reasons that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46). He concluded by saying that, in all civil cases, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49). The Supreme Court reaffirmed this in *Tervita*, at paragraph 66.

[289] Therefore, in assessing the balancing test under paragraph 79(1)(*b*), the Tribunal must determine whether sufficiently clear, convincing and cogent evidence exists to demonstrate that the overriding purpose of the impugned practice was anti-competitive. If it is not satisfied that such evidence has been adduced, the Tribunal will conclude that this element has not been demonstrated by the Commissioner. The Tribunal considers this to be particularly important in section 79 cases, to avoid chilling unilateral conduct that is primarily motivated by legitimate business justifications, but may also be objectively expected to have some adverse impact on competition. That being said, while "sufficiently clear, convincing and cogent" evidence is required to meet the evidentiary burden on this weighing test, it is still the balance of probabilities standard of proof that applies.

[290] It is implicit in the foregoing that the existence of *some* business justification will not shield conduct that was principally motivated by predatory, exclusionary or disciplinary objectives, or that has predatory, exclusionary or disciplinary effects that are deemed to have been intended by the respondent.

[291] The Tribunal further observes that the balancing exercise contemplated above is not the type of quantitative assessment contemplated by the efficiency exception in section 96 of the Act. No similar exception or defense exists in section 79, for good reason: it would be much more difficult, and perhaps even completely intractable, in the section 79 context.

[292] Rather, the weighing exercise under paragraph 79(1)(*b*) involves determining whether there is clear and convincing evidence, quantitative or otherwise, that establishes that the actual or reasonably foreseeable predatory, exclusionary or disciplinary effects and/or subjective intent outweigh the efficiency or pro-competitive rationales of the respondent (*Canada Pipe FCA* at paras 73 and 88). In this exercise, the efficiency or pro-competitive benefits actually obtained or likely to be realized by the respondent can provide helpful and relevant evidence bearing on the respondent's intentions.

[293] In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by

subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were more important to the respondent than the desire to achieve efficiencies or to pursue other pro-competition goals.

(c) *Defining and identifying legitimate business justifications*

[294] To be considered “legitimate” in the context of paragraph 79(1)(*b*), a business justification must involve more than a respondent’s self-interest. Rather, it “must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts” (*Canada Pipe FCA* at paras 73 and 90-91). The business justification must also be independent of the anti-competitive effect of the practice concerned. Of course, there may be legal considerations, such as privacy laws, that legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations.

[295] The Commissioner has interpreted this test for what constitutes a “legitimate business justification” to include cost reductions in production or other aspects of a firm’s operations, improvements in technology or production processes that result in innovative new products, and improvements in product quality or service (*Guidelines* at section 3.2). The Tribunal typically would be inclined to consider these types of business justifications to be legitimate. However, all of the circumstances must be considered. For example, the cost reductions that might be contemplated or realized by driving one’s rivals from the relevant market would not suffice to shield conduct that was primarily motivated by a predatory, exclusionary or disciplinary purpose.

[296] Insight into the requirement that there be a credible efficiency or pro-competitive rationale that is attributable to the respondent, and that goes beyond the respondent’s self-interest, can be provided by considering the two business justifications that were advanced by the respondent in *Canada Pipe CT*. First, the respondent asserted that the uniform rebates that it offered through its impugned stocking distributor program (**“SDP”**) encouraged competition by creating a level playing field between small and large distributors. Second, it claimed that the SDP permitted it to achieve the high volume of sales necessary to enable it to maintain a full line of cast iron drain, waste and vent (**“DWV”**) products. Put differently, the respondent maintained that, to be able to continue to offer distributors a complete line of DWV products, including less frequently sold items, it needed to ensure a high volume of sales on other (higher volume and higher margin) DWV products (*Canada Pipe CT* at paras 208-210).

[297] The Tribunal rejected the first of the respondent's justifications on the basis that competition between distributors in the downstream market was not at issue, and had no bearing on whether the respondent was exercising its market power in a way that precluded competition between suppliers of DWV products (*Canada Pipe CT* at para 209). However, the Tribunal accepted the second business justification, on the basis that maintaining smaller, less profitable, but nevertheless important products in inventory served the interests of distributors, contractors and ultimately consumers (*Canada Pipe CT* at para 212). The Federal Court of Appeal rejected this reasoning, on the ground that "improved consumer welfare is *on its own* insufficient to establish a valid business justification" (*Canada Pipe FCA* at para 90 (emphasis added)). The Court elaborated by stating:

> In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(*b*).
>
> (*Canada Pipe FCA* at para 91)

[298] The Tribunal does not understand the Court, in making the above-quoted statement, to have put into question the conventional view that, absent an anti-competitive purpose, a desire to gain competitive advantage by offering something new and of value to consumers constitutes legitimate competition on the merits. Indeed, the Court appeared to recognize this when it observed that "[t]he effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification" (*Canada Pipe FCA* at para 79). This recognition is also arguably reflected in the Court's observation that a "valid business justification must provide a credible efficiency or pro-competitive explanation, *unrelated to an anti-competitive purpose*, for why the dominant firm engaged in the conduct alleged to be anti-competitive" (*Canada Pipe FCA* at para 90 (emphasis added)).

[299] The very essence of competition involves finding new and innovative ways to make one's products more attractive to one's customers. So long as such practices are unrelated to an anti-competitive purpose, whether subjective or deemed, they are pro-competitive in nature and constitute legitimate competition on the merits. However, where this is not obvious, an explanation needs to be provided as to how an impugned practice assists or is likely to assist the respondent to better compete in the relevant market.

[300] The Federal Court of Appeal appears to have rejected the second business justification asserted by the respondent in *Canada Pipe CT* on the basis that the Tribunal's rationale for accepting that justification did not provide the requisite link between the interests of "distributors and contractors … and ultimately … the consumer" (*Canada Pipe CT* at para 212), on the one hand, and the respondent, on the other hand (*Canada Pipe FCA* at paras 90-91). In reaching that conclusion, the Court did not comment on the fact that, earlier in the same paragraph of the Tribunal's reasons, the Tribunal noted that the respondent had asserted that it needed the

additional sales volume expected to result from the SDP, to ensure efficiencies and to lower its cost of production. The Tribunal also noted that the Commissioner had not challenged that assertion.

[301] It thus appears that the Court interpreted the Tribunal's failure to mention these facts again, in explaining why it accepted the respondent's second business justification, as indicating that its sole rationale for accepting the justification was the fact that the SDP "serves the interests of distributors and contractors … and ultimately benefits the consumer." Without any stated link between this and the respondent, the Court concluded that there was no acceptable, credible, efficiency or pro-competitive rationale for the SDP. In addition, the Court may have concluded, on the particular facts of that case, that the sole rationale identified by the Tribunal could not be said to be "unrelated to an anti-competitive purpose" (*Canada Pipe FCA* at paras 90-91).

[302] It follows from the foregoing that to be acceptable under paragraph 79(1)(*b*), a business justification for an impugned practice must not only provide either a credible efficiency or a credible pro-competitive rationale for the practice, it must also be linked to the respondent (*Canada Pipe FCA* at paras 90-91). This is subject to the important caveat that legal considerations, such as privacy, may provide a legitimate justification for an impugned practice.

[303] For efficiencies to be linked to the respondent, they must have been intended to be attained, at least in part, by the respondent itself. In other words, there must be persuasive evidence that the respondent intended that the impugned practice would likely result in the attainment of efficiencies *by the respondent*. These efficiencies may include cost reductions in production or other aspects of its operations, improvements in technology or production processes that result in innovative new products or product enhancements, or improvements in quality or service.

[304] Likewise, for other types of pro-competitive rationales, the respondent must provide a credible and persuasive explanation of how the impugned practice was intended to enable it to compete on the merits. While it will often be the case that a practice intended to benefit consumers will assist a firm to compete on the merits, that is not necessarily always the case. Indeed, examples of anti-competitive practices that may have benefited consumers, at least in the short-run, can be found in the Tribunal's jurisprudence (e.g., some of the impugned practices in *NutraSweet* at pp. 38-43; and the inducements paid to retailers in *Nielsen* at pp. 263-264 and 266). Accordingly, an explanation should be provided as to how an impugned practice assists, or is likely to assist, the respondent to better compete in the relevant market.

[305] In determining whether a practice was intended to have this result, the Tribunal ordinarily will focus on determining whether the practice was intended to assist the respondent to compete more effectively with its rivals, whether in terms of prices or of non-price competition. To the extent that a practice may eliminate rivalry altogether, it cannot be "pro-competitive" (*CCS* at para 120), unless the practice is a manifestation of superior competitive performance, or what might more aptly be called "decisive" competitive performance.

[306] In determining the overall character of a practice, the Tribunal will also assess the extent to which anti-competitive effects and justifications based on benefits to consumers will be manifested beyond the short-term. This is because practices, such as targeted practices that exclude new competitors, may have ambiguous effects in the short-term, but may be likely to harm consumers and competition in the longer term (*Tele-Direct* at p. 199).

[307] Competing on the merits is one thing. Pre-empting meaningful competition from emerging over a sustained period of time may be quite another thing, particularly where the respondent faces little present competition.

[308] Nevertheless, targeted practices that merely "meet" the competition, as opposed to "beating" it, typically will be considered to constitute "competition on the merits," and be legitimately justified. Likewise, the introduction of a new or better quality product typically will be considered to constitute competition on the merits, even if that initiative can be said to "beat" the competition.

[309] This is not intended to imply that other practices that involve "beating" the competition will necessarily be considered to be anti-competitive, if they have a predatory, exclusionary or disciplinary negative effect on a competitor. It bears underscoring that the Tribunal will assess and weigh all of the relevant factors, including the reasonably foreseeable effects of the conduct, in attempting to discern the overall character of an impugned practice.

[310] In considering arguments based on "competition on the merits," the Tribunal does not apply a safe-harbour for practices which a non-dominant firm would likely have undertaken in similar circumstances. On the contrary, any conduct that is subjectively intended or deemed to have been intended to have a predatory, exclusionary or disciplinary negative effect on a competitor can be found to be anti-competitive within the meaning of section 79, even if the same conduct would be considered to constitute "competition on the merits" if pursued by a non-dominant firm (*Tele-Direct* at pp. 180-181).

[311] In assessing the overall character of a practice that has reasonably foreseeable anti-competitive effects on one or more competitors, the Tribunal may consider whether the practice has involved or would likely involve a sacrifice of short-term profits that would not likely be recouped by the respondent, "but for" such effects. As an alternative, the Tribunal may consider whether the practice would make economic sense, "but for" such anti-competitive effect. The Tribunal is aware that the latter approach has been advocated by the U.S. DOJ in several proceedings under § 2 of the *Sherman Antitrust Act*, 15 USC §§ 1-7 (Gregory J Werden, "Identifying Exclusionary Conduct under Section 2: the 'No Economic Sense' Test" (2006) 2:73 *Antitrust LJ* 413).

[312] In considering whether a practice has involved or would likely involve a sacrifice of short-term profits that would not likely be recouped by the respondent "but for" any reasonably foreseeable anti-competitive effect, the Tribunal will attempt to determine and weigh the avoidable costs incurred in pursuing the practice as well as the cognizable benefits likely to be obtained by the firm as a result of the practice. Cognizable benefits can include any cost savings

or other efficiencies attained or likely to be attained by the firm, as well as revenues from additional units of products sold as a result of the practice, plus increased revenues that may be attributable to quality improvements.

[313] In conducting this latter assessment of cognizable benefits, the hypothetical "but for" world will be the one in which there were no predatory, exclusionary or disciplinary effects on competitors. For greater certainty, if actual or future competition likely would have driven down the price of the relevant product "but for" the impugned practice, the relevant price in the assessment will be that lower future price, rather than the price that prevailed immediately prior to the commencement of that practice.

[314] The alternative approach of assessing whether a practice made economic sense "but for" any actual or reasonably foreseeable anti-competitive effects may be more helpful and straightforward to apply than the profit-sacrifice approach in a range of circumstances. This is in part because the former approach does not require a determination that there has been, or is likely to be, a sacrifice of short-term profits. Instead, the Tribunal would simply assess whether it made economic sense to incur the costs associated with the practice, "but for" the anti-competitive effects in question.

[315] In other words, the Tribunal would attempt to determine whether the respondent likely would be able to recover the costs incurred in pursuing the practice, solely with profits that do not depend on the actual or reasonably foreseeable anti-competitive effects in order to be realized. If those costs are such that it would not have made economic sense for the respondent to have engaged in the practice absent the profits or other benefit obtained by excluding or disciplining one or more established competitors or new entrants, then the Tribunal likely would conclude that the objective purpose of the practice was anti-competitive in nature.

[316] For greater certainty, as with the profit-sacrifice approach, in assessing whether an impugned practice made economic sense, the Tribunal will consider in its assessment profits that do not depend on anti-competitive effects in order to be attained. However, in contrast to the profit-sacrifice approach, no adverse conclusion would be drawn where there may appear to have been a profit sacrifice, if the conduct otherwise made economic sense.

[317] In assessing whether an impugned practice made economic sense, the Tribunal would attempt to determine the reasonably anticipated impact of the challenged conduct at the time it was initiated, rather than focusing upon the actual impact of the conduct. Among other things, this would assist to avoid unwarranted conclusions being drawn in situations where there have been unforeseen, unfavourable developments for the respondent or its rivals in the intervening period. Nevertheless, the Tribunal would also consider the actual impact of the conduct in assessing what the reasonably anticipated impact of the conduct would have been, at the time it was initiated.

[318] Inquiring into whether a practice made economic sense at the time it was initiated is helpful even where the costs associated with pursuing the practice are minor or trivial. Even in such circumstances, this analysis may assist to reveal that it would have made no economic sense

to engage in the practice, "but for" its predatory, exclusionary or disciplinary negative effects on one or more established competitors or new entrants.

(2) Did TREB have a subjective intention to exclude actual or potential participants in the relevant market(s) by adopting the VOW Restrictions, or were those restrictions motivated by legitimate business justifications?

[319] The Commissioner submits that TREB had a subjective intention to exclude, through the VOW Restrictions, potential entrants into the relevant market and existing TREB Members who were poised to disrupt the traditional residential brokerage business model that is followed by TREB's other Members in the GTA. The Tribunal agrees.

[320] The Commissioner asserts that the VOW Restrictions comprise at least three acts that individually and collectively constitute a practice. These are:

i. The exclusion of the Disputed Data from TREB's VOW Data Feed;

ii. Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and

iii. Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs, notwithstanding that, in practice, there is no similar limitation on the Members' ability to share essentially the same information with consumers, when Members access such information through the Stratus system, or otherwise. This prohibition is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the AUA that applies to Members using the Stratus system. Among other things, the Commissioner maintains that those terms severely restrict the ability of VOW operators to use certain MLS data to improve the efficiency of their operations and to provide enhanced services to their customers and clients through their VOWs.

[321] TREB maintains that it ultimately decided to exclude the Disputed Data from its VOW Data Feed *because* of concerns about consumer privacy. It asserts that those concerns were central to the decision-making process that it followed in discussing and implementing its VOW Policy and Rules. However, this is not borne out by the evidence.

[322] The Tribunal finds that each of the above-mentioned acts challenged by the Commissioner is in fact anti-competitive and that, individually and collectively, they constitute a practice. In carefully calibrating the parameters of its VOW Policy and Rules, in deliberately eliminating provisions from the corresponding U.S. VOW policy that served as a "good starting point for the development of a TREB policy," and in ultimately implementing the VOW Restrictions, TREB was motivated primarily by a desire to insulate its Members from disruptive competition.

(a) *Background and development of the VOW Policy and Rules*

[323] Mr. Richardson states that TREB first became aware of, and began monitoring, the VOW concept as early as 2002. Around that time, TREB sent some of its Members to attend conferences in the United States to stay up to date on developments there. However, TREB appears to have been content to let CREA take the lead with respect to the study of VOWs.

(i) The EDU Task Force

[324] Roughly contemporaneously, CREA established its Electronic Data Usage Task Force ("**EDU Task Force**"), which included two Members of TREB, namely, Mr. DiMichele, TREB's then Chief Information Officer (**"CIO"**) (now TREB's CEO) and Mr. Silver, who was president of TREB in 2011-2012. (This is a different Mr. Silver from the Commissioner's lay witness mentioned earlier in these reasons.)

[325] In early 2003, two of the members of the EDU Task Force were deputized to review the 2003 Draft NAR Policy and to make recommendations to the rest of the group. Shortly afterwards, CREA obtained a copy of the 2003 Draft NAR Policy and sent it to the members of the EDU Task Force. Two weeks later, they circulated a revised draft of the policy to the full group. It appears that the one noteworthy change they made to the draft document was to remove the ability of local real estate boards to choose whether to permit VOWs to display sold data.

[326] Specifically, the following language from the 2003 Draft NAR Policy was deleted from the "proposed guidelines" that were circulated to the EDU Task Force:

> An MLS may permit Participants to make "Sold" data available on a VOW for search by Registrants. If "Sold" data is made available, the MLS may establish reasonable limits on the number of listings that Registrants may retrieve or download in response to an inquiry.
>
> (Exhibit CA-003, Document 1124, at p. 5)

[327] Subsequent email exchanges between the members of the EDU Task Force reflected ongoing concerns. For example, one member reported back that he had received "the distinct feeling that clear guidelines [were] wanted by everyone who [had spoken to him] but [had] a feeling from some that [they] should not tolerate any kind of VOW" (Exhibit CA-003, Document 10026, at p. 1). Another member suggested that "[b]rokers must have the choice of opting in or out and full disclosure to the VOW visitor is also very important" (Exhibit CA-003, Document 10026, at p. 1). A third person observed: "I see that NAR is proposing fairly extensive restrictions on VOW's [sic]. We would be advised to do the same" (Exhibit A-004, Document 865, at p. 1). Another person mentioned that "no matter what type of rules we put in for VOW's [sic]- the second they are adopted - many people will try to find a way around the rules. Has the idea of not allowing VOW's [sic] been set aside?" (Exhibit A-004, Document 10033, at p. 1).

[328] Ultimately, revisions were made to the draft guidelines that were prepared by the EDU Task Force which contained two important restrictions. First, VOWs were limited to displaying active listings – the same data available on CREA's website (MLS.ca, which was later renamed realtor.ca). One EDU Task Force member appears to have been referring to this provision when he observed: "Why would anyone use a password and jump through hoops when he can get the same information directly from mls.ca without going through it" (Exhibit CA-003, Document 52, at p.1).

[329] Second, the guidelines permitted any agent to opt out of having its listings displayed on a VOW. As a result, VOWs would not be as useful or attractive as they were in the United States.

[330] The purpose of the guidelines proposed by the EDU Task Force was stated to be as follows:

> This discussion paper is for the purpose of developing guidelines for the effective, efficient and beneficial use of electronic data for Boards, Associations and REALTORS.
>
> There is a legitimate fear on one hand of capitulating to misuse of REALTORS' hard-earned data banks, and on the other hand of being left behind in an electronic revolution moving at the speed of light.
>
> *The objective always is to ensure the REALTOR remains central to the real estate transaction and that efforts to guide the use of MLS® data are to that end*.
>
> (EDU Task Force Report, Exhibits IC-084 and CIC-085, Witness Statement of Gary Simonsen dated August 3, 2012 (**"2012 Simonsen Statement"**), Exhibit 18, at p. 494)
>
> (Emphasis added)

[331] The italicized words in the foregoing statement of purpose essentially reflect a concern about "disintermediation." That concern was reflected later in the report of the EDU Task Force, as follows:

> We have heard dire predictions of disintermediation, which basically implies removal from involvement in the transaction. We have heard wild projections of financial windfalls. These have not come to pass. Nonetheless, the Internet has had a profound effect on us.
>
> The threat of disintermediation has certainly affected other industries. Travel agents and stock brokers have been heaviest hit. Bankers are scrambling to change with the new technologies.

> Others offering homogeneous products have and will continue to be affected as well. The major determination of disintermediation seems to be the type of product and the degree of complication in the transaction. If the consumer can be sure of getting exactly the same thing from various sources, like an airline ticket or even an automobile, the likelihood of using the Internet increases dramatically.
>
> (EDU Task Force Report, 2012 Simonsen Statement, Exhibit 18, at pp. 495-496)

[332] Rather than concerns about privacy, it was this concern about disintermediation and, more broadly, the unknown disruptive impact of being unable to control how the MLS data might be utilized, that appears to have been of principal concern to the EDU Task Force and to other Members of TREB who expressed their views on this matter during that period.

(ii) Development of TREB's VOW Policy and Rules

[333] In the following years, TREB opted not to make a VOW Data Feed available to its Members. Instead, to display MLS listings on their websites, TREB's Members were required to sign data transfer agreements (**"DTAs"**) with each brokerage whose listings the Member wished to have appear on their website. Mr. Hamidi testified that this proved to be very labour intensive and difficult, and created a practical barrier to making a complete set of listings available on TheRedPin's website.

[334] During that period, Mr. Enchin continued to develop a VOW product that included an appraisal feature that used MLS data sourced from TREB's MLS Database. After he presented his product to Mr. DiMichele, the latter informed him that "politics" likely would prevent him from pursuing his vision for his product. Mr. Enchin was subsequently informed by TREB's then President, Ms. Cynthia Lai, that she doubted she would have time to "put this through with all the other things that were on her mandate to do" (Transcript, September 14, 2012, at p. 758).

[335] In the years following the U.S. DOJ's initiation of proceedings against NAR in 2005 in relation to NAR's then existing VOW policy, TREB monitored that dispute and was reluctant to proceed with its own VOW policy pending its resolution.

[336] One of the contentious issues in the U.S dispute was the provision in NAR's then existing VOW policy that permitted individual agents to opt out or withhold their listings from display on VOWs.

[337] In 2007, while the dispute was ongoing in the United States, TREB disabled a bulk download feature that had previously enabled its Members to download a large volume of listing information in a single transfer from TREB's MLS system. This action was taken after two brokerages allegedly "scraped" TREB's MLS Database to create their own online databases, in violation of the AUA. Among other things, this led to the termination of those brokers' access to

the MLS system. TREB asserts that its position that such scraping violated the AUA was upheld by the Ontario Superior Court in *TREB OSCJ*.

[338] The DOJ and NAR ultimately settled their dispute in November 2008 after NAR agreed to make certain changes to its VOW policy. Those changes included eliminating the requirement for VOW operators to seek the permission of listing brokers to display information on a VOW (Exhibit A-004, Document 233, NAR VOW Policy attached to Final Judgment (**"Proposed Final Judgment"**), at p. 14 of 26). As a practical matter, this effectively precluded agents from opting-out or otherwise refusing to share their MLS listings with VOW operators.

[339] Equally importantly, NAR's amended VOW policy included principles of non-discrimination. In brief, operators of MLS systems could only prohibit VOWs from displaying certain listing information if that prohibition applied equally to non-VOW operators:

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

    a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

        i. Expired, withdrawn or pending listings.

        ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

        iii. The compensation offered to other MLS Participants.

        iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

        v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

        vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

(Proposed Final Judgment, at pp. 20-21 of 26)

[340] This non-discrimination principle was reinforced in Part IV of the Proposed Final Judgment, which, among other things, prohibited NAR from adopting, maintaining or enforcing any rule, or entering into or enforcing any agreement or practice, that directly or indirectly:

a. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

b. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery.

(Proposed Final Judgment, at p. 5 of 26)

[341] As discussed further below, notwithstanding that TREB used the 2008 NAR VOW Policy as a "good starting point" for its own policy, it made important modifications to the language above.

[342] In July 2008, following the announcement of the possible settlement between NAR and the U.S. DOJ, the Bureau approached TREB to discuss the adoption of a similar VOW policy. However, TREB believed that this was a national issue that should involve CREA, which then established its own CREA's VOW Task Force. TREB therefore waited to see what would come out of that initiative.

[343] Even before that time, references to VOWs, which had appeared in TREB's 2004 and 2005/2006 Strategic Plans, disappeared from TREB's Strategic Plan, beginning with its 2006/2007 Strategic Plan.

[344] Shortly after being approached by the Bureau in July 2008, CREA's then President, Mr. Calvin Lindberg, described forced data sharing with VOWs as a "line in the sand" and predicted a backlash if brokerages were forced to "open what they have spent years creating to just any REALTOR to frame on their VOW, and not offer them an opt out." Among other things, he observed that:"[This] is not something I could accept in my business and neither could my company agree to change their [sic] business model, and I believe there are numerous companies across the country that have spent hundreds of thousands of dollars creating their very successful niche market" (Exhibit A-004, Document 1148, at p. 1).

[345] Mr. Lindberg's concerns appear to have been shared by at least some of the members of CREA's VOW Task Force. Ultimately, that group's work "stalled after reaching a point of impasse with the Bureau" in approximately 2010, "around the same time that the Commissioner commenced a proceeding against CREA regarding a different matter" (Exhibits R-039 and CR-040, Witness Statement of Donald Richardson dated July 27, 2012 (**"2012 Richardson Statement"**), at para 116; Exhibit IC-177, Updated Witness Statement of Gary Simonsen (**"2015 Simonsen Statement"**), at para 75). The minutes of the third meeting of CREA's VOW Task Force reflect that "opt-outs and sold data" were the most contentious issues (Transcript, October 10, 2012, at p. 2329; Exhibit A-087, Minutes from CREA's VOW Task Force, December 1-2, 2008, at p. 4).

[346] In the meantime, Mr. Hamidi met with Mr. DiMichele of TREB to discuss the website platform that he and his business partners had developed. He was told by Mr. DiMichele that TREB did not have a policy to permit Mr. Hamidi's brokerage to receive MLS data in an electronic data feed, as he had hoped. Instead, he would have to collect signatures "from each and every individual brokerage" to be able to display their listings on his website. After he and his partners tested their platform using a data feed transfer from two brokerages, they realized that "it would take a lot of work trying to get other brokerages to provide [them] with listings in a data feed format." Without "all the resale home listings data in a feed from the TREB MLS," they decided to abandon the home resale business and focus on new condominiums (2012 Hamidi Statement, at paras 18-22).

(iii) TREB's VOW Task Force

[347] According to Mr. Richardson, TREB revived its own efforts to establish its VOW Task Force in July 2010, during a strategic planning exercise with its newly elected Board of Directors. Names of potential task force members were subsequently submitted to the TREB Board in March 2011 for ratification. Mr. Richardson, who was then TREB's CEO, acted as the staff liaison to the task force, while Mr. DiMichele, its CIO (and now CEO) acted as the group's advisor. The mandate of TREB's VOW Task Force was "to investigate and recommend to the Board of Directors, the feasibility of TREB adopting a VOW Policy" (2012 Richardson Statement, at para 458).

[348] During that period (July 2010 – March 2011), no action was taken by TREB in connection with VOWs.

[349] However, it appears that the impetus for action increased after the Commissioner sent TREB a voluntary information request concerning VOWs, in November 2010.

[350] TREB's VOW Task Force met for the first time on March 31, 2011. The minutes of that meeting reflect that the group's members were supplied with a copy of the 2008 NAR VOW Policy that was appended to NAR's settlement agreement with the U.S. DOJ, and that the members of TREB's VOW Task Force agreed that the NAR Policy "was a good starting point for the development of a TREB policy rather than starting from scratch" (2012 Richardson Statement, Exhibit CC, at p. 495).

[351] According to Mr. Richardson, it was also agreed that "the NAR VOW Policy would need to be modified in light of Canadian laws, including *PIPEDA* [*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5], and RECO's code of ethics" (2012 Richardson Statement, at para 125). However, that is nowhere reflected in the minutes of that meeting.

[352] TREB's VOW Task Force met three more times in 2011, on April 21, May 12 and May 20. The minutes of those meetings reflect that the group agreed upon a need for "Terms of Use for VOW Operators" and for VOW "Visitors." Among other things, it was recommended that website visitors be required to register, validate, agree to terms of use and then enter the VOW area of the website with a time-limited password. The minutes reflect that other issues addressed

included: the nature of information that could be provided to a “consumer” as opposed to a “client;” whether advertisements could be included in a VOW; whether brokers and home sellers could be given the option to “opt-out” of providing information to a VOW operator (this was considered to be “essential” for home sellers); whether CMAs could be provided online, and if so, on what conditions; whether brokerages could have their own policies regarding their agents’ use of VOWs; and whether universal participation by all brokers would be required – subject to an opt-out for home sellers.

[353] In the minutes of the May 20 meeting, it was also noted that the VOW “[i]ssue is reminiscent of “white label” ATMs – In the end, they were in [the] best interest of Consumers – VOWs are an “extra” service for Members to offer Consumers” (2012 Richardson Statement, Exhibit GG, at p. 538).

[354] In addition, for what appears to be the first time in the documentation on the record in this proceeding, there was a reference in the minutes of the May 12 meeting to the need to ensure that information with respect to “solds” was treated “in accordance with RECO and PIPEDA requirements” (2012 Richardson Statement, Exhibit EE, at p. 507). In this regard, it was noted that ““pending solds” were not appropriate for VOW display”, that there were “consents issues” with regards to “other solds” (2012 Richardson Statement, Exhibit EE, at p. 508) and that “information or systems which did not identify specific properties should be ok” (2012 Richardson Statement, Exhibit EE, at p. 507).

[355] The minutes of the May 20 meeting noted that concerns continued to exist with respect to “solds” and that “clarification under PIPEDA and RECO Rules [was] necessary,” and that, while consistency in treatment between “bricks and mortar” and Internet operations was desirable, the Internet “is a little more ‘out there’ re: Privacy” (2012 Richardson Statement, Exhibit GG, at pp. 537-538). According to Mr. Richardson, privacy law concerns were also raised at the April 21 meeting of TREB’s VOW Task Force. However, there is no reference to such discussions in the minutes of that meeting, which address a broad range of other issues. This inconsistency, together with the corresponding inconsistency regarding whether privacy issues were discussed at the initial meeting of TREB’s VOW Task Force on March 31, gives the Tribunal significant doubts regarding the reliability of Mr. Richardson’s evidence in respect of this issue. Those doubts are reinforced by the fact that Mr. Richardson stated that TREB’s VOW Task Force also discussed concerns regarding WEST listings, at its final meeting on May 20. However, while the minutes of that meeting reflect a desire to obtain greater clarification regarding the potential application of the *PIPEDA* and RECO’s rules to “solds,” they do not mention WEST listings.

[356] The Tribunal’s concerns regarding the reliability of Mr. Richardson’s evidence in respect of TREB’s motives in relation to its VOW Policy and Rules are further reinforced by the fact that he initially strongly denied that TREB’s Members were concerned about having to share TREB’s MLS information with VOW operators. In cross-examination, he stated that he was “sure” of his position in this regard. However, when confronted with emails addressed to him reflecting such concerns, Mr. Richardson admitted that his memory was not accurate on this point (Transcript, September 27, 2012, at pp. 1683-1685). That said, he maintained that such concerns were not widespread within TREB’s membership.

[357] On May 19, 2011, prior to the final meeting of TREB's VOW Task Force, Mr. Richardson circulated a draft of the VOW policy to its Members and to TREB's Board of Directors. That draft was in the form of a blackline against the 2008 NAR VOW Policy, so that readers could readily ascertain the differences between what was being proposed by TREB and NAR's VOW policy. Among other things, that draft removed the language that prohibits NAR's MLS members from discriminating against VOW operators, by refusing to make available information that is provided to brokers in other formats, and by restricting what can be done with certain MLS data. As a result of that change, TREB's Members would not be able to make certain information, including the Disputed Data available for search by, or display to, consumers, and it was made clear that the Disputed Data was "intended exclusively for other Members and their brokers and salespersons" (2012 Richardson Statement, Exhibit FF, at p. 521).

[358] This change from the 2008 NAR VOW Policy is reflected immediately below:

~~1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants'use of MLS listing data in providing brokerage services via all other delivery mechanisms:~~

a. A ~~Participant's~~ Member's VOW may not make available for search by or display to ~~Registrants~~ Consumers the following data intended exclusively for other ~~MLS Participants~~ Members and their ~~affiliated licensees~~ brokers and salespersons:

i. Expired, withdrawn, suspended or ~~pending~~ terminated listings.

ii. Pending solds or sold data unless the method of use of actual sales price of completed transactions is ~~readily publicly accessible. from public records.~~ in compliance with RECO Rules and Privacy Laws.

iii. The compensation offered to other ~~MLS Participants~~ Members.

iv. ~~The type of listing agreement, i.e., exclusive right to sell or exclusive agency.~~

v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

(2012 Richardson Statement, Exhibit FF, at p. 521)

[359] It is also noteworthy that although the issue of "privacy laws and consents" was mentioned in the May 18, 2011 Task Force Report to TREB's Board of Directors, it was simply noted in that report that this issue was "of particular concern" and that the "Task Force felt some

additional legal research would be appropriate on both the PIPEDA and RECO requirements" (2012 Richardson Statement, Exhibit FF, at p. 512).

[360] There does not appear to be any evidence on the record as to whether that legal research or any legal advice regarding privacy law and the adequacy of the existing consents signed by home sellers and buyers was ever sought and provided, although Ms. Prescott subsequently provided the Tribunal with her interpretation of those consents. Likewise, there is no evidence that the advice of the Privacy Commissioner was ever sought and obtained prior to the finalization of the VOW Policy and Rules. (The Tribunal acknowledges that TREB explained that it was subjected to pressure by the Commissioner to act very quickly during that timeframe).

(iv) Events surrounding the adoption of the VOW Policy and Rules

[361] On May 27, 2011, the Commissioner filed the Initial Application seeking relief under section 79.

[362] Three days later, **[CONFIDENTIAL]** a member of TREB's Board of Directors, sent an e-mail to **[CONFIDENTIAL]** colleagues on the Board stating: "This is worse than a knee replacememt [sic] … I say let them start their own VOW.. [sic] let them get their own information and show us how great it is.. [sic] never mind all the privacy issues […] and what type of mess would we all be in if they have their way …" (Exhibit CA-056, **[CONFIDENTIAL]** RE: Competition Bureau and TREB- Notice of Application, at p. 1; Transcript, September 27, 2012, at pp. 1689-1694).

[363] On June 1, 2011, after both TREB's VOW Task Force and TREB's Board of Directors approved a draft of the VOW Policy and Rules, TREB's MLS Committee met to initiate the process necessary to change TREB's MLS Rules and Policies to permit the use of VOWs. The minutes of that meeting reflect that the draft was adopted for recommendation to TREB's Board of Directors, after some apparently minor changes were made. Although those minutes reflect that the proposal would be "sent for legal review and to CREA to ensure that these are in adherence to the Competition Law," they did not refer to privacy issues or to the *PIPEDA*. The same is true of the minutes of the meeting of the MLS Committee that took place on June 13, 2011, as well as the meetings of TREB's Board of Directors, which took place on June 9, 2011 and June 23, 2011, at which the VOW Policy and Rules, as amended, were endorsed once again. The latter minutes reflect that a "legal review and CREA input with respect to competition law" occurred during the in camera portion of that meeting. However, there was no reference in the minutes to privacy issues or to the *PIPEDA*.

[364] Following the June 13, 2011 meeting of the MLS Committee, changes were made to what is now Rule 823 of the VOW Policy and Rules as part of the review with the MLS Committee, and after input was received from legal counsel. Specifically, the opening language of that Rule was changed to include the words "or by any other means," as well as the words "subject to applicable laws, regulations and the RECO rules." While the first of those changes ostensibly addressed the discriminatory nature of the VOW Policy and Rules, the evidence on the record makes it abundantly clear that it is commonplace among TREB's Members to share sold data

with their clients in person, by fax and by email on a fairly widespread basis, and that this practice is at least tolerated by TREB. The Tribunal notes that TREB and CREA have referred to some evidence to the contrary, but it is satisfied that the practice exists (Transcript, September 13, 2012, at pp. 638-641; Transcript, September 25, 2012, at pp. 1452-1455; Transcript, October 6, 2015, at pp. 750-751; Exhibits R-079 and CR-080, Expert Report of Dr. Jeffrey Church dated July 27, 2012 at paras 15, 179 and 263; Exhibits IC-182 and CIC-183, Expert Report of Dr. Fredrick Flyer dated June 2, 2015 at paras 10-11 and 14-17; 2015 Vistnes Reply Expert Report at page 3, footnote 3; Exhibit IC-088, Expert Report of Dr. Fredrick Flyer dated August 13, 2012 at para 25; and 2012 Vistnes Expert Report at paras 268-270).In addition, TREB tools such as *Toronto MLS Contacts & CMA* (Exhibit A-004, Document 1348) and *Appraisal for Superior Sales and Listings* (Exhibit A-004, Document 1345) teach TREB Members how to use sold and other MLS data to create CMAs for actual and potential clients. In their testimony, Messrs. Richardson and Syrianos confirmed that CMAs containing sold information can and are provided by TREB's Members to their clients, provided that the appropriate consent has been obtained. As to the second change, one is left to speculate as to what specifically it was intended to address.

[365] TREB notes that the press release that it issued on June 24, 2011 to launch a 60-day consultation process with its Members stated that its new VOW policy gave "due consideration to TREB's legal responsibility to ensure the protection of consumer data" and that TREB "took great sensitivity and care" in balancing this consideration with its desire to avoid "restricting Members' ability to provide the highest level of service to their customers." However, this does not appear to be borne out by the minutes of the meetings discussed above, or by TREB's prior history with the VOW issue, dating back to 2003. There is also no mention of privacy concerns or *PIPEDA* in the minutes of the meeting of TREB's Board of Directors dated August 25, 2011, following the expiry of the 60-day consultation period with TREB's Members. Those minutes simply reflect that, after legal counsel "entertained [a] round table Q&A regarding TREB's VOW Policy and Rules," TREB's Board of Directors approved the final VOW Policy and Rules and commenced the process of developing the technological infrastructure to implement the VOW Data Feed, which ultimately was launched on November 15, 2011.

[366] Indeed, in a report entitled "MLS Focus Group Report," dated June 27, 2011, which was considered by TREB's MLS Committee at its meeting of September 13, 2011, it was noted that rulings from the Privacy Commissioner and from RECO were still needed in respect of VOWs (Exhibit CA-003, Document 1304, at p. 6). Mr. Richardson confirmed that such a ruling from RECO was never sought or obtained. Mr. Richardson also confirmed that TREB's VOW Task Force did not obtain any additional information about the *PIPEDA* or RECO, even though the minutes of the May 12, 2011 meeting stated that the task force "felt some additional legal research would be appropriate on both PIPEDA and RECO requirements" (Transcript, September 27, 2012, at pp. 1667-1668). There is no evidence on the record to suggest that such a ruling from the Privacy Commissioner was ever sought or obtained. Nevertheless, TREB argued that the decision to exclude the Disputed Data from the VOW Data Feed was "prudent given the requirements of PIPEDA, and in particular given the 2009 decision from the Office of the Privacy Commissioner, which was known to and considered by the Task Force in its deliberations" (TREB's 2015 Closing Submissions, at para 239).

[367] That same MLS Focus Group Report also reflected a concern that data "should be safeguarded and consumers should not be allowed to copy and paste into other sites." This suggests that a "display only" form of the Disputed Data on VOW operators' websites might well have satisfied TREB's Members, and that their concerns related more to *the uses* to which the data might be put, than to privacy.

[368] In fact, when the Tribunal asked Mr. Richardson whether allowing the Disputed Data to be seen on a VOW operator's website in a "read only" manner would be a possible solution to TREB's concerns, he replied that every time a compromise such as that was offered to the Commissioner, it was rejected. He added: "If there is a technological solution to things like CMAs and demonstrating sold information that does not involve data transfer over to another computer, it's worthwhile pursuing" (Transcript, October 6, 2015, at pp. 748-751).

[369] This makes it very apparent to the Tribunal that TREB's real concern, at least as understood by TREB's CEO during the relevant period, was with *losing control* over the Disputed Data, rather than with that data being simply *displayed* to anyone who might visit a VOW operator's website. Stated differently, to the extent that there was any concern about safeguarding the Disputed Data, the evidence indicates that such concern related more to the loss of control over the data, rather than to privacy.

[370] When pressed during the Initial Hearing as to why TREB's Members appeared to be so concerned about the emergence of VOW brokerages in the GTA, Mr. Richardson simply responded that "[s]ome may be a little fearful of new technology" (Transcript, September 27, 2012, at pp. 1741-1742).

[371] On cross-examination, Mr. Sage admitted that some TREB Members were concerned that the "introduction of more and more technology will put pressure on commission rates" (Transcript, September 28, 2012, at pp. 1873-1874). This concern was also reflected in the Concise Statement of Economic Theory that was attached to TREB's Response in this proceeding. At paragraph 24 of that document, it is stated that "[u]nrestrained VOWs may create excessive incentives for price competition among buyers' brokers and divert the focus away from non-price competition," and that "[r]ather than compete over price (by offering a discount) to a buyer already in the market, sellers may prefer instead to provide incentives for finding new buyers by promising a large commission."

(v) Recent developments

[372] The Tribunal also considers it noteworthy that TREB did not take any action against two large, traditional brokerages that made sold information available on their websites for an extended period of time in 2014/2015. In particular, Bosley Real Estate Ltd. Brokerage (**"Bosley"**) and RE/MAX Hallmark Realty Ltd. Brokerage (**"RE/MAX Hallmark"**) displayed sold information on their respective websites for at least ten months in 2014/2015, in apparent violation of TREB's VOW Policy and Rules.

[373] This was particularly noteworthy because TREB's President, Marc McLean, has a management position with Bosley, and Bosley's President, Mr. Tom Bosley, is a former President and Director of TREB, CREA, RECO and OREA. It was not until Mr. Pasalis complained about this, while defending himself in the face of a threatened suspension of his MLS account for allegedly failing to comply with TREB's VOW Policy and Rules, and then reported this in his 2015 witness statement in this proceeding, that TREB eventually took action. Although there does not appear to be evidence of prior communications between TREB and the two brokerages in question, TREB sent a letter to all of its Members on February 4, 2015 reminding them that the use, distribution, and/or display of sold data in whatever form and on the Internet without all appropriate consents constitutes a violation of their obligations under their AUA with TREB, as well as violation of the *PIPEDA* and RECO's *Code of Ethics*. A short while later, **[CONFIDENTIAL]** sent an email message to **[CONFIDENTIAL]** at TREB, confirming that **[CONFIDENTIAL]** brokerage had pulled the offending sold information and expressing hope that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those who were posting such information. There was no reference whatsoever in **[CONFIDENTIAL]** email message to any concerns about privacy, and no mention of TREB's position that such information might violate the *PIPEDA*.

[374] The Tribunal further notes that, according to the testimony of Ms. Prescott, and despite a decision of Century 21 Heritage to stop sending sold price information to the Century 21 website, the practice was still going on in 2015 and that more than 290 properties with sold prices were posted on the website of Century 21 Heritage at some point that year.

(vi) Alleged privacy concerns

[375] The Tribunal recognizes that TREB implemented privacy policies in 2004 in an effort to ensure that its and its Members' practices conformed with the requirements in the *PIPEDA*, and that TREB has a Chief Privacy Officer who is its designated representative under the *PIPEDA*. TREB also educates and provides resources and support to its Members on issues of privacy through a variety of methods. In addition, the Tribunal acknowledges that TREB sought input from the Office of the Privacy Commissioner (**"OPC"**) in August 2012 in respect of its "Questions and Answers" document, which addresses a variety of privacy-related topics, including the distribution of CMAs, the disclosure of sold prices, and the use of expired listings. However, TREB was informed by the OPC that it did not provide advance rulings regarding the statutes that it enforces, such as the *PIPEDA*, and that it was unable to comment on the accuracy of interpretations of that legislation by external parties.

[376] Those communications with the OPC post-dated the development of TREB's VOW Policy and Rules and, in any event, were not principally concerned with that policy. Moreover, there is no evidence that TREB's privacy policies received much, if any, consideration during the development of TREB's VOW Policy and Rules.

[377] While TREB led evidence from two of the members of its VOW Task Force, Mr. Sage and Mr. Syrianos, neither one was able to shed any light on reasons why important provisions in the 2008 NAR VOW Policy were eliminated from TREB's final VOW Policy and Rules.

[378] TREB similarly did not lead evidence from anyone who was on its Board of Directors during the relevant period, to testify and be cross-examined regarding what occurred at the meetings of the Board at which the VOW Policy and Rules were discussed on May 26, June 9, June 23 and August 25, 2011. (The Tribunal understands that, while he acted as the staff liaison to TREB's VOW Task Force, Mr. Richardson is not a Director of TREB, he did not attend the final hour-long discussion of the Board at which it discussed and voted on the final VOW Policy and Rules, he was not a member of TREB's VOW Task Force, and he did not vote on the issues discussed by the task force.)

[379] TREB also did not put forward Mr. Palmer, its Chief Privacy Officer, or Mr. DiMichele, who was TREB's CIO during the development of its VOW Policy and Rules, and who is now its CEO, to testify on this privacy issue.

[380] In short, TREB had ample opportunity to lead evidence to establish its alleged privacy justification for the VOW Restrictions. However, it failed to do so. Given that it was TREB's burden to establish that justification on a balance of probabilities, it is not necessary for the Tribunal to draw an adverse inference from this failure by TREB to adduce evidence from the persons mentioned in the two immediately preceding paragraphs, as the Commissioner requested.

[381] In any event, for the reasons explained at paragraphs 355-356 above, the Tribunal does not find Mr. Richardson's evidence regarding the intentions of the members of TREB's Board of Directors, its MLS Committee and its VOW Task Force to be persuasive or reliable. The Tribunal also agrees with the Commissioner that Mr. Richardson's testimony regarding such intentions is not particularly probative of such intentions.

[382] TREB also led evidence by Ms. Prescott, who is the owner and a broker at Century 21 Heritage, an independently owned real estate brokerage with offices in Thornhill, Richmond Hill, Newmarket and Bradford in the GTA. In her 2015 witness statement, Ms. Prescott states: "At the time of the initial hearing before the Competition Tribunal, Century 21 Heritage Group sales representatives obtained the consent of clients for th[e] sold information to be posted on the Century 21 website by way of schedule "B" to the agreement of purchase and sale. As I testified at the initial hearing, only about 5-10% of our brokerage's clients were giving consent to post sold price information on the Century 21 website" (Exhibits R-132 and CR-133, Updated Witness Statement of Pamela Prescott, at para 12). She added that since the Initial Hearing, her brokerage made a decision to stop sending sold price information to the Century 21 website and now has a standalone "Permission to Advertise the Sale of the Property" document that her sales representatives ask the parties to a residential real estate transaction to sign. Less than 5% of her brokerage's clients sign that form.

[383] However, there is no evidence that any of Century 21 Heritage's customers ever complained to Ms. Prescott or her colleagues, or otherwise communicated concerns regarding the privacy of their information, prior to when TREB's VOW Policy and Rules were finalized. Ms. Prescott also did not explain what information was and is given to her brokerage's clients at the time they were and are asked to sign the documents referred to immediately above.

[384] TREB mentions that Mr. Gidamy of TheRedPin testified that he didn't think that TREB was concerned about him expanding his share of the market. However, that is simply Mr. Gidamy's impression. It is not direct evidence of TREB's lack of subjective intent to exclude disruptive competitors such as TheRedPin.

[385] The Tribunal also observes that Mr. Richardson testified that TREB typically receives two complaints per year from members of the public throughout the GTA regarding the privacy of the information that they provide to TREB's Members, including sold information that is subsequently shared extensively, as described in paragraphs 395-398 below.

[386] This evidence of an absence of significant consumer concern about privacy issues is supported by Mr. McMullin, who testified in 2012 that there had only been nine occasions when a person had contacted ViewPoint to request that information be removed from the website. Mr. McMullin testified at the Redetermination Hearing that, since June 2012, ViewPoint had received a "couple of dozen a year" privacy complaints (Transcript, September 23, 2015, at p. 171). He explained that "most of the complaints that [ViewPoint gets] are about information that is readily available on many websites." He added that "[i]t just so happens that because ours is really popular we get more complaints" (Transcript, September 23, 2015, at p. 172). Mr. McMullin further explained the few number of complaints relative to the utilization of www.viewpoint.ca by stating that there is a "give-and-take", and that "most consumers […] believe that it's necessary [for ViewPoint to have the information that they provided] there because someday they are going to be on the other side of the trade and that this information is imperative to enable them to make a quality decision" (Transcript, September 22, 2015, at p. 98). He added that there was one complaint made to the OPC by an individual who alleged that ViewPoint had disclosed personal information without consent by publishing the purchase price of the person's home on www.viewpoint.ca for view by registered users. The complaint was resolved during the course of the investigation and ViewPoint was advised that no further action would be taken. ViewPoint did not take any action and was not asked by the OPC to remove any information from the website.

[387] The evidence that few consumers have complained regarding the privacy of the Disputed Data extends to the United States where sold information is widely available. According to Mr. Nagel, Redfin receives only "limited complaints about privacy concerns about information displayed on redfin.com" and those "usually revolve around taking photos of sold homes down from Redfin's website" (Exhibits A-129 and CA-130, Second Witness Statement of Scott Nagel dated February 5, 2015 (**"2015 Nagel Statement"**), at para 32(a)).

[388] Finally, TREB asserts that its decision to exclude the Disputed Data from the VOW Data Feed was prudent given the requirements of the *PIPEDA* and a 2009 decision of the OPC which essentially held that the publication of an advertisement stating that a property had sold for 99.3% of the asking price contravened the *PIPEDA*, because it enabled the public to calculate the sold price. Although the sold price of the home was available on the public property register, the OPC held in that decision that the exception for public information in paragraph 7(3)(h.1) of the *PIPEDA* did not apply because the information in question was obtained pursuant to the

purchase agreement to which the salesperson was privy, and was not actually collected from a publicly available source.

[389] Mr. Richardson testified that this decision influenced the ultimate recommendation by the members of TREB's VOW Task Force regarding sold and "pending sold" information. However, this is not borne out by the minutes of the task force's meetings. More importantly, the evidence as a whole suggests that privacy considerations were not a principal motivating factor behind TREB's VOW Policy and Rules.

[390] In summary, the Tribunal has determined that the evidence on the record in this proceeding demonstrates that TREB's motivations in initially resisting the emergence of VOWs in the GTA, and then in adopting and maintaining a more restrictive and discriminatory policy than what is reflected in the settlement reached between NAR and the U.S. DOJ, were primarily to limit or at least restrict a potentially disruptive form of competition in the GTA, and to retain full control of TREB's MLS data. Among other things, TREB appears to have been concerned that VOWs could lead to increased price and non-price competition, to reducing TREB's and its Members' control over MLS data, and to reducing the role played by TREB's Members in residential real estate transactions. Privacy played a comparatively small role, and only towards the end of TREB's process. Based on the evidence adduced, the Tribunal has concluded that the privacy concerns that have been identified by TREB were an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW Restrictions.

[391] To insulate its Members from the full force of the disruptive competition posed by VOW operators, TREB deliberately modified in a number of ways the 2008 NAR VOW Policy that had served as "a good starting point" for its own policy. It did so by modifying that policy to include the VOW Restrictions, which include: (i) excluding the Disputed Data from its VOW Data Feed; (ii) prohibiting its Members from using the information included in the VOW Data Feed for any purpose other than display on a website (Rules 802 and 824), notwithstanding the fact that, in practice, there is no similar *de facto* limitation on its Members' ability to make available or use in other ways the exact same information when it is obtained from TREB in other ways, such as over the Stratus system; and (iii) prohibiting its Members from displaying certain information, (including sold, "pending sold," WEST listings and cooperating broker commissions) on their VOWs (Rule 823), again, notwithstanding that in practice, there is no similar limitation on its Members' ability to share essentially the same information with consumers, when Members access such information through the Stratus system, or otherwise.

[392] The Tribunal is satisfied that these changes from the 2008 NAR VOW Policy were crafted primarily for an exclusionary purpose, and not out of privacy concerns.

(b) *TREB's approach to the consents used by its Members*

[393] TREB asserts that the consent clauses in the Listing Agreement, the BRA and the BCSA that it recommends be used by its Members, and that the Tribunal understands are typically used by TREB's Members, are not sufficient for the purposes of the *PIPEDA*.

[394] In brief, TREB's position appears to be that, while those consent clauses are sufficient to enable the confidential information of home buyers and home sellers to be disclosed to its Members and to their customers if done in person, by fax or by email, they are not sufficient to permit the wide display of that information on a VOW and over the Internet. In other words, TREB maintains that there is a "practical obscurity" of personal information that exists under TREB's current rules that would be lost with the vast reach of the Internet.

[395] The Tribunal acknowledges that making the Disputed Data available over the Internet through TREB Members' VOWs would result in that information being much more widely distributed than is currently the case. However, the Tribunal finds it difficult to reconcile the privacy concerns that TREB now expresses with the fact that TREB previously appeared to be unconcerned about privacy, as reflected by the fact that it made the Disputed Data available to:

a. Its 42,500 Members over its Stratus system;

b. The members of most other real estate boards in Ontario, through a data sharing program known as CONNECT, which was available to approximately 92% of Ontario realtors in August 2012 and to 98% in June 2015;

c. The clients of its Members and the clients of members of those real estate boards mentioned immediately above (provided such information is disclosed to those clients in person, by fax or by email); and

d. Certain appraisers.

[396] TREB also admitted in 2012 that it was aware of the fact that one of its Members had a practice of providing an email subscription service that sent emails with current MLS sales data, the day following its posting on TREB's MLS system. Moreover, one of TREB's witnesses, Mr. Sage, acknowledged that his brokerage sends monthly reports to its customers by email that include very detailed transaction information, including sold prices, which can be forwarded by their customers to whomever they choose. Although the address of sold homes is now redacted, those addresses are provided upon request to customers, and in any event can often easily be deduced if a customer knows what the list price of a home was or approximately how long it was on the market.

[397] The Tribunal further notes that TREB makes all or part of the Disputed Data available to various third parties, such as CREA (for statistical purposes), Altus Group Limited (for the purposes of preparing a House Price Index), the CD Howe Institute (as part of a research project on the impact of the Toronto Land Transfer Tax), and Interactive Mapping Inc. (for the purpose of its MLS Data Verification System known as ICHECK). However, it appears that the information disclosed to those parties does not wind up being available to the public in a manner that would allow the confidential information of an individual home buyer or seller to be ascertained.

[398] Moreover, TREB's own intranet system enables TREB's Members to forward by email up to 100 sold listings at a time to anyone.

[399] The Tribunal agrees with the Commissioner that if TREB were truly concerned about privacy, it would, at a minimum, have taken steps to ensure that the Disputed Data is not distributed beyond its Members. It has not done so.

[400] TREB asserts it would contravene the *PIPEDA* to create a tie between buying or selling a house on the MLS system, and a mandatory consent to the wide dissemination of sold information over the Internet. However, TREB's past actions with respect to consents reinforce the Tribunal's view that TREB's privacy justification is largely a pretext to attempt to legitimize its practice of anti-competitive acts. For example, in 2004, TREB refused a request by a home seller to remove the seller's MLS Listing Information from TREB's MLS system, on several grounds. For example, TREB maintained that the "retention of the MLS Listing history on the system is important and the retention of 'expireds' is just as important as retaining 'solds,' especially in a quick moving market and the option of 'exclusives' is available to those who do not wish to list on the MLS system." TREB added that, "due to the 'holdover' clause, it is important to keep track of and to retain 'expireds' on the MLS system for legal and other reasons which benefit the consumer." In addition, TREB stated that "the integrity of TREB over the years has been based on its ability to serve the public through a cooperative system and [it] cannot allow encroachment on a good service that has evolved to serve both Realtors and the public well, while respecting PIPEDA requirements" (Exhibit A-004, Document 89, at pp. 1-2).

[401] TREB's existing "Questions and Answers" on privacy issues reflects essentially the same position. The same is true of *Frequently Asked Privacy Questions* and answers that CREA developed for its members, which states: "Both current and historical data is essential to the operation of the MLS® system and by placing your listing on the MLS® system, you are agreeing to allow this ongoing use of listing and sales information" (2012 Simonsen Statement, Exhibit 8, at p. 350). The Tribunal observes that TREB's Policy 102 and Policy 103 add that, apart from inaccurate data: "No other changes will be made in the historical data" (2012 Richardson Statement, Exhibit D, at p. 168).

[402] In addition, when TREB received legal advice that the posting of interior home photos raised privacy issues, TREB's MLS Committee recommended to TREB's Board of Directors that it "**[CONFIDENTIAL]"** (Exhibit CA-003, Document 1192, at p. 2). Subsequent versions of that consent provision contained express language to address the retention and use of interior photos in TREB's MLS system. However, there is no evidence that TREB ever considered taking similar action to address the privacy concerns that it now advances with respect to sold and "pending sold" information.

[403] The Tribunal observes in passing that interior photos and other highly personal information, including virtual tours, are not only available on the websites of TREB's Members, but are also available on popular and frequently visited websites, such as realtor.ca, which not only display such information, but also allow it to be emailed to "a friend."

[404] TREB also appears to have obtained legal advice with respect to its Members' ability to provide CMAs containing sold data to their clients. That advice seems to be reflected in the "Questions and Answers" document that it has prepared for its Members. Among other things, that document states as follows:

> Although it cannot be said with absolute certainty given the lack of precedents or case law on the ultimate interpretation of many aspects of PIPEDA, a strong argument can be made that the words "conduct comparative market analyses" contained in the consent clause of the OREA standard form listing agreement can be interpreted broadly enough to include the essential part of "conducting a CMA", that is, providing that information to a prospective seller or prospective buyer.
>
> (2015 Richardson Statement, at p. 494)

[405] Notwithstanding TREB's lack of certainty regarding the privacy law issues related to the display of the Disputed Data on a VOW, it admitted that no written legal opinion was ever received on this point. (The Tribunal recognizes that TREB's admissions related to the time frame "prior to June 24, 2011.") Moreover, in contrast to the action it took to reinforce the consent language in the Listing Agreement to cover the posting of interior home photos, there is no evidence that such action was ever considered to address the privacy issue that TREB now raises as a justification for the restrictive aspects of its VOW Policy and Rules.

[406] In summary, the approach that TREB has taken with respect to the consents in the standard Listing Agreement that it recommends its Members sign, and in the agreements typically signed by home buyers (namely either the BRA or the BCSA), suggests that TREB has not in the past been concerned about privacy. On the contrary, it has resisted attempts by consumers to have their information removed from the MLS system or even altered, unless such information is inaccurate; it has sought to expand its consents when it has received advice that they might not be sufficiently broad to include highly personal and confidential information such as pictures of the inside of homes; and it interprets its existing consents as being sufficiently broad to enable sold information to be provided to potential customers.

[407] Indeed, Mr. Richardson testified that the existing language in Section 11 of the Listing Agreement likely is sufficiently broad to permit the disclosure of WEST listings, even though there are some concerns or sensitivities from homeowners about such information, and that the existing language in the BRA is also sufficient to permit the disclosure of sold information to a prospective purchaser. Mr. Richardson also acknowledged that other solutions, such as using a separate consent form, are available to permit "pending sold" and sold listings to be included in the VOW Data Feed.

(c) *RECO's advertising policy*

[408] TREB maintains that, as with the *PIPEDA*, RECO's *Code of Ethics* requires informed consent to be obtained by TREB's Members before they advertise the "sold" price of a client's home, or other confidential information. TREB asserts that because one of the central functions of a VOW is to help to generate "leads" for VOW operators, a VOW is by definition an advertising tool. For greater certainty, TREB submits that the fact that a VOW might also be a method of delivering real estate services does not necessarily imply that it is not an advertising vehicle.

[409] At the time of the Initial Hearing, "advertising" was defined in RECO's 2011 Advertising Guidelines (see Exhibit R-083, at p. 450) in the following terms:

> Any notice, announcement or representation directed at the public that is authorized, made by or on behalf of a registrant and that is intended to promote a registrant or the business, services or real estate trades of a registrant in any medium including, but not limited to, print, radio, television, electronic media <u>or publication on the internet (including websites and social media sites)</u>. Business cards, letterhead or fax cover sheets that contain promotional statements may be considered as "advertising."
>
> (Emphasis added)

[410] Pursuant to subsection 36(8) of RECO's *Code of Ethics*, a registrant shall not include anything in an advertisement that could reasonably be used to identify specific real estate unless the owner of the real estate has consented in writing. Pursuant to subsection 36(9), a registrant shall not include anything in an advertisement that could reasonably be used to determine any of the contents of an agreement that deals with the conveyance of an interest in real estate, including any provision of the agreement relating to the price, unless the parties to the agreement have consented in writing.

[411] The Commissioner notes that the Ontario Superior Court of Justice decided in 2009 that the publication of MLS listing information on a website did not constitute advertising in contravention of TREB's Rule R-430 or subsections 36(8) or (9) of RECO's *Code of Ethics* (*TREB OSCJ* at paras 109 and 112).

[412] Be that as it may, it is not immediately apparent to the Tribunal how the inclusion of sold information on a VOW would constitute advertising, irrespective of how that sold information is displayed (including in the form of a CMA), when providing that same information in a "conventional" CMA would not constitute advertising. It is also not clear why the provision of sold information would constitute "advertising," when the provision of other MLS information regarding a home would not. The Tribunal observes that the minutes of TREB's VOW Task Force which are discussed at paragraph 352 above drew a distinction between "advertisements" and other information that would be included in a VOW, presumably including raw data.

[413] As discussed at paragraphs 354-355 and 359 above, TREB's VOW Task Force identified the need to ensure that information with respect to "solds" was treated in accordance with RECO's requirements and noted that clarification in that regard should be sought.

[414] However, Mr. Richardson confirmed in cross-examination that no one on TREB's VOW Task Force requested RECO's position on whether posting any of the Disputed Data on a VOW would constitute advertising.

[415] There is no other evidence that TREB's VOW Policy and Rules may have been adapted from the 2008 NAR VOW Policy, or were otherwise crafted, to ensure compliance with RECO's *Code of Ethics*. The Tribunal notes that TREB did not lead evidence from TREB's Director and former President Ms. Cynthia Lai, even though she was a member of RECO's Board of Directors at the time of the Initial Hearing. (The Tribunal also notes that TREB sought to have RECO's CEO, Mr. Wright, attend the Initial Hearing and produce certain decisions made by RECO's disciplinary tribunal as well as certain interpretations that RECO had adopted in respect of the *Code of Ethics*. After Mr. Wright retained counsel to quash the subpoena served by TREB's counsel, the Commissioner and TREB agreed to permit those documents to be introduced without the need for them to be proved by Mr. Wright or another representative of RECO.)

[416] The Tribunal further observes that Bosley disclosed sold prices on its website for approximately one year in 2014/2015, in apparent violation of TREB's VOW Policy and Rules, notwithstanding that its President and co-founder, Mr. Bosley, is a former RECO Chairperson, and notwithstanding that another Bosley broker, Keith Tarswell, is also a former RECO Chairperson and has been a member of its Board of Directors for several years. In fact, as mentioned at paragraph 373 above, when **[CONFIDENTIAL]** agreed to stop posting sold information on its website, **[CONFIDENTIAL]** informed Mr. Richardson that he hoped that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those who were posting such information. This suggests that Messrs. Bosley and Tarswell did not think that their brokerage was violating RECO's *Code of Ethics* or its advertising policy.

[417] Moreover, although RECO investigated a number of agents at Sage Real Estate when they sent daily email communications containing sold information for approximately one year to anyone who provided an email address, its investigation was confined to the failure of those agents to include the Sage logo on their website. That investigation did not concern the daily communication of sold information. Likewise, Mr. Enchin stated that although he was contacted by a representative of RECO after a realtor complained that he advertised listings on his VOW without permission, RECO did not pursue any disciplinary action after he explained that his VOW had a registration and password requirement and that he did not advertise MLS listings to the public at large.

[418] TREB maintains that the Tribunal should accord significance to the fact that RECO has since taken action to clarify that VOWs constitute advertising. However, the support that it provides for this assertion is a RECO Publication entitled *For The RECOrd*, which was published in the Winter of 2013, and which simply states that RECO's Advertising Guidelines

apply to all forms of advertising, including electronic media, websites and social media sites. That document proceeds to add that VOW operators have an obligation to ensure that their VOWs are compliant with those guidelines. It is far from clear that RECO has clarified that providing sold information or other Disputed Data over a VOW would constitute advertising, in contravention of its *Code of Ethics*.

[419] In any event, the fact that RECO may have adopted this position in 2013 does not help to persuade the Tribunal that the principal motivation, or even a principal motivation, of TREB at the time that it developed and finalized its VOW Policy and Rules in 2011, including by adapting them from NAR's 2008 VOW Policy, was, or now is, to ensure compliance with RECO's *Code of Ethics*.

[420] The same applies to the fact that TREB took the position in a notice sent to its Members in February 2015 that the use, distribution, and/or display of sold data in whatever form and on the Internet without all appropriate consents is in violation of their obligations under their AUA and in violation of the *PIPEDA* and RECO's *Code of Ethics*. The Tribunal further notes that TREB's own Rules and documentation do not suggest that it considers VOWs to constitute advertising.

(d) *Other business justifications*

[421] TREB states that, in addition to privacy, there are several other justifications, which it labels "efficiency justifications," for the VOW Restrictions. However, there is no persuasive evidence that any of these other justifications played a principal role in the development and implementation of TREB's VOW Policy and Rules, let alone the VOW Restrictions. Indeed, for some of them, there is no evidence that they played any role whatsoever. Moreover, those alleged justifications appear to relate solely to TREB's restrictions on the display of individual sold and "pending sold" prices.

[422] First, TREB asserts that its VOW Policy and Rules promote the liquidity of the MLS system in three ways: by protecting privacy, by preventing strategic advantage, and by preventing potential interference with contractual relations.

[423] With respect to the protection of privacy, TREB suggests that if the use of its MLS system to sell a property is tied with automatic inclusion of sold information on its VOW Data Feed, consumers may choose to sell their homes through non-MLS channels. However, TREB provided no evidence to suggest that this has occurred to any meaningful degree in Nova Scotia or in areas of the United States where MLS sold information is available on VOWs. Indeed, a recent survey conducted by NAR reflects that the percentage of consumers in the United States who retain the services of a realtor to sell their home has increased from 84% in 2008 to 88% in 2014. This happened notwithstanding the growth of VOWs displaying sold information since the release of the 2008 NAR VOW Policy (Exhibit IC-140, NAR 2014 Profile of Home Buyers and Sellers (**"NAR 2014 Profile"**), at pp. 92-93 and 117). In the absence of any persuasive evidence

to support this justification put forward by TREB, the Tribunal concludes that it is simply a speculative assertion.

[424] Concerning the protection of strategic advantage, TREB states that the disclosure of WEST and "pending sold" listings on a VOW would provide sensitive information to purchasers that could be used to the disadvantage of sellers. For example, if a purchaser knew what price a seller had conditionally accepted, the purchaser would know the seller's "reserve" price and be able to use that to the seller's disadvantage, if the conditional sale fell through. However, the only evidence that this was a concern for TREB at the time it was developing its VOW Policy and Rules is a brief statement contained in the minutes of one of the four meetings of TREB's VOW Task Force during which the VOW Policy and Rules were developed. Specifically, the minutes of the May 12, 2011 meeting state: "It was the consensus of the Task Force that 'pending solds' were not appropriate for VOW display …" The same statement was included in the VOW Task Force's draft report, dated May 18, 2011, to TREB's Board of Directors. Those documents however do not elaborate upon the reasons why TREB's VOW Task Force concluded that "pending sold" listings were not appropriate for display on a VOW. (The Tribunal notes that there is a difference between a conditional sale and a "pending sold," and that the sale price of conditional sales is not available on the MLS system at all. It is only once the conditions have been met that the sale price will be entered into the MLS Database.)

[425] Even if the Tribunal were to give TREB the benefit of the doubt on this point, the Tribunal remains persuaded, considering the totality of the evidence, that TREB's principal motivation for not including any of the Disputed Data in its VOW Data Feed was to prevent potential and existing TREB Members from being able to make sold information and various innovative offerings derived from that information available on their VOWs.

[426] The same is true with respect to TREB's assertion that the VOW Restrictions promote the liquidity of the MLS system by preventing potential interference with contractual relations. However, the Tribunal accepts TREB's claim that the display of "pending sold" information would expose home sellers to being targeted by unsolicited approaches by other service providers, or even unsolicited offers by other purchasers.

[427] In addition, TREB maintained that the VOW Restrictions preserve the incentives of its existing Members to invest in its MLS database, by continuing to contribute listings. It suggested that, if, as the Commissioner appears to contemplate, the inclusion of the Disputed Data in its VOW Data Feed were to have the effect of assisting VOW-based brokers to gain market share at the expense of its traditional Members, large traditional brokerages and franchise groups would have an incentive to leave TREB's MLS system to establish a rival MLS. However, once again, TREB provided no evidence to support the proposition that this was a concern for TREB at the time it developed its VOW Policy and Rules. In addition, there is no evidence that this has occurred in Nova Scotia, where information on "solds" and other components of the Disputed Data has been available for several years. With respect to the United States, Dr. Church acknowledged in cross-examination that there was only one example of real estate agents leaving a MLS system to establish a rival one, and that was in 2004, before NAR's existing VOW policy came into effect. There is no evidence as to why those agents took that action.

[428] Finally, in its Concise Statement of Economic Theory, at paragraph 24, TREB further asserted that its VOW Policy and Rules may be pro-competitive, in part because they reduce the scope for VOW operators to “free ride” on the efforts of full-service brokers “because they do not contribute appropriately to the cost of maintaining the TREB MLS® and because they do not contribute to the number of listings.” However, Mr. Richardson confirmed in questioning from the Tribunal during the 2012 hearing that TREB is not suggesting that new Members should not have access to all of the information in TREB’s MLS system on the ground that they did not contribute to the MLS system in the past. He also acknowledged that the initiation fee paid by all new Members, including new VOW-based operators, essentially represents a purchase of the equity in the MLS system, or a payment “for the work that has been done [in the past] and the service that has been generated …” (Transcript, September 27, 2012, at pp. 1740-1741).

(e) *Conclusion*

[429] In summary, it was TREB’s burden to establish that there were legitimate business justifications for the restrictive aspects of its VOW Policy and Rules and that those justifications were at least as important as any subjective or deemed anti-competitive intent that it is demonstrated to have had. The Tribunal’s review of TREB’s subjective motivations alone leads it to conclude that TREB did not meet that burden.

[430] Indeed, the Tribunal concludes, on a balance of probabilities, that TREB’s principal motivation in implementing the VOW Restrictions was to insulate its Members from the disruptive competition that innovative, Internet-based brokerages such as ViewPoint wished to bring to the Relevant Market. The Tribunal is satisfied that the business justifications TREB now advances are without persuasive evidentiary support.

[431] The Tribunal’s conclusion in this regard is reinforced by its view that, “but for” the exclusionary effects on disruptive competitors that were intended by TREB, the VOW Restrictions did not make economic sense. In this regard, the Tribunal was not provided with any persuasive evidence to demonstrate that, “but for” the anti-competitive effects of the VOW Restrictions on VOW-based rivals or others who might otherwise challenge the traditional approaches to business adopted by the vast majority of TREB’s Members, the VOW Restrictions conferred any other benefit on those Members. That is to say, there is no persuasive evidence before the Tribunal that TREB’s Members benefitted from the VOW Restrictions, except to the extent that those restrictions insulated them from the new forms of competition.

(3) Was it reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on one or more competitors?

[432] TREB submits that it was not reasonably foreseeable that the VOW Policy and Rules would have a predatory, exclusionary or disciplinary negative effect on its Members, or on potential entrants who wished to operate brokerages offering a VOW. On the contrary, it maintains that the reasonably foreseeable consequence of the VOW Policy and Rules was that

brokerages would be able to offer VOWs in the GTA; and that this is exactly what actually happened.

[433] The Commissioner replies that it was reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on VOW-based competitors. The Tribunal agrees.

[434] Notwithstanding that TREB's VOW Task Force was well aware of the 2008 NAR VOW Policy, and indeed considered it to be a "good starting point" for TREB's VOW policy, it intentionally modified important provisions, including with respect to "sold" data, that NAR included in its VOW Policy to reach a settlement with the U.S. DOJ.

[435] TREB's Board of Directors can be presumed to have been well aware of the significance of these modifications when they met to discuss the draft VOW Policy and Rules in June and August 2011, because TREB had been closely monitoring the U.S. dispute and the Commissioner's detailed Initial Application in this proceeding was filed on May 27, 2011.

[436] In any event, as noted at paragraph 328 above, after the EDU Task Force modified the 2003 Draft NAR Policy to limit VOWs to displaying active listings – the same data that is available on realtor.ca –, one EDU Task Force member observed: "Why would anyone use a password and jump through hoops when he can get the same information directly from mls.ca without going through it" (Exhibit CA-003, Document 52, at p.1).

[437] In the Tribunal's view, this statement reflects that the EDU Task Force member who made the statement was well aware that limiting the information available on TREB's VOW Data Feed to largely the same information that was already generally available on the Internet, and imposing limitations on how information displayed on VOWs can be accessed by potential home buyers and sellers, would make it difficult for VOW-based competitors to attract potential home buyers and sellers to their websites.

[438] A key provision of the VOW Policy and Rules is paragraph 24, which is essentially duplicated in Rule 823. The most relevant changes between the final text of that Rule and the corresponding provision in the 2008 NAR VOW Policy were mentioned above and are reproduced below for convenience:

> ~~An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants'use of MLS listing data in providing brokerage services via all other delivery mechanisms:~~
>
> A <u>Member</u>, <u>whether</u> through a Member's VOW <u>or by any other means</u>, may not make available for search by, or display to, Consumers the following MLS® data intended exclusively for other Members and their brokers and salespersons, <u>subject to applicable laws, regulations and the RECO Rules</u>:

a. Expired, withdrawn, suspended or terminated Listings, and pending solds or leases, including Listings where sellers and buyers have entered into an agreement that has not yet closed;

b. Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO Rules and applicable privacy laws;

c. The compensation offered to other Members

d. The seller's name and contact information, unless otherwise directed by the seller to do so; and

e. Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property.

[439] These changes that were made to the language in the 2008 NAR VOW Policy effectively removed the principle that local real estate boards could not discriminate against VOW operators by preventing them from displaying or making available for search information described in paragraphs (a), (b) and (c) above, while allowing that same information to be communicated to actual and potential home buyers and sellers by alternative means, including in person, by fax or by email. As discussed at paragraph 364 above, the Tribunal is satisfied that although TREB's VOW Policy and Rules prevent TREB's Members from displaying and making available that information for search on a VOW, TREB does not in fact prevent its Members from communicating such information to actual home buyers in person, by fax or by email. The Tribunal acknowledges that both Rule 823 and Policy 24 prevent TREB's Members from making certain information, including the Disputed Data, available for search by or display to consumers (subject to applicable laws, regulations and RECO's Rules). However, the evidence demonstrates that the practice of the Disputed Data being available to potential home purchasers and sellers remains commonplace in the GTA.

[440] TREB further discriminated, and continues to discriminate, against VOW operators by excluding the Disputed Data from its VOW Data Feed. This appears to be effected pursuant to Policies 15 and 17. Members who wish to provide that information to their actual or potential customers must continue to do so in the traditional manner, namely, in person, by fax or by email. This exclusion, together with the elimination from the VOW Data Feed of information on a home as soon as it becomes a "sold" or a "pending sold," will be discussed in section VII.D of these reasons.

[441] In addition, the VOW Policy and Rules prohibit TREB's Members from using the information included in the VOW Data Feed for any purpose other than display on a website, notwithstanding the fact that, in practice, there is no similar limitation on its Members' ability to make available or use the exact same information when it is obtained from TREB in other ways, such as over the Stratus system. For example, pursuant to Rule 802, TREB's Members are limited to displaying MLS information supplied by TREB, in accordance with the VOW Policy and Rules. The Tribunal understands that this prevents Members from using the information

obtained over the VOW Data Feed to provide statistical analyses or other innovative services that are based on such information.

[442] This restriction is reinforced by section 4.1 of TREB's VOW Data Feed Agreement, which specifies that the VOW Data Feed is provided by TREB to a Member or an AVP that operates a Member's VOW on the Member's behalf, "solely and exclusively for the Purpose." In turn, "Purpose" is defined in terms of "permit[ing] a Member to display on Member's VOW given Listing Information which is transmitted through a VOW Data Feed to Member for the sole purpose of use by Consumers that have a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through Member's VOW."

[443] The Tribunal understands that this language operates to prevent TREB's Members from doing more than simply displaying on their VOWs the MLS information received from TREB over the VOW Data Feed. This was also Mr. Richardson's understanding. In addition, Mr. Pasalis testified that his understanding is that Members cannot use that information to perform statistical analysis and share that analysis online with potential home buyers and sellers. This general restriction is further reinforced by section 6.2(f) of the VOW Data Feed Agreement, which explicitly prohibits TREB's Members from directly or indirectly duplicating, altering, modifying or transferring any information transmitted through a VOW Data Feed. That provision also prohibits TREB's Members from merging such information with other data; and from publishing any Listing Information in any form, or creating any derivative work(s) or adaptations(s) based on such information.

[444] Such restrictions do not apply to Members wishing to use MLS information in these or other ways, so long as the information is used "for the purpose of and directly related to the [Member's] ordinary carrying on if its business" (AUA, section 2). For greater certainty, Members who obtain access to MLS information pursuant to the AUA are simply restricted from using that information "in any manner not directly related to the business of real estate," as defined in the *REBBA* (AUA, section 4(a)). The Tribunal understands that this effectively leaves TREB's Members free to perform and share with potential home sellers and purchasers sophisticated analysis of MLS information obtained over TREB's Stratus system, as Sage Real Estate does.

[445] The Tribunal is satisfied that any person acquainted with the residential real estate brokerage market in the GTA would have been able to foresee the objective impact that the VOW Restrictions, as reinforced by the VOW Data Feed Agreement, would have on VOW operators. That is to say, such persons would have reasonably foreseen that the VOW Restrictions, as reinforced by the VOW Data Feed Agreement, likely would have an exclusionary effect on VOW operators, by severely restricting their ability to differentiate themselves from traditional brokers, and by raising their costs of doing business.

[446] As a direct consequence of the more restrictive nature of the VOW Policy and Rules, as reinforced by the VOW Data Feed Agreement, relative to the 2008 NAR VOW Policy, potential competitors such as ViewPoint have not entered the Relevant Market in the GTA. The evidence demonstrates that TREB was very aware of many of the innovations that ViewPoint had

introduced to the residential real estate brokerage market in the HRM and elsewhere in Nova Scotia, and that TREB recognized the impact that its VOW Restrictions would have on ViewPoint and other VOW-based operators.

[447] The VOW Restrictions are also having a significant adverse impact on Redfin's ongoing assessment of potentially entering the GTA, **[CONFIDENTIAL]**.

[448] In addition, the VOW Restrictions have prevented other competitors, such as the TheRedPin and Realosophy, from expanding by offering new and innovative products and have effectively imposed higher costs of doing business on them.

[449] Moreover, two AVPs, Sam & Andy (which was sold in May 2015) and Mr. Enchin, were not able to offer brokerages the website and VOW products that they would have been able to provide, but for the VOW Restrictions. As a result of those restrictions, Sam & Andy focused its efforts on other markets and ultimately sold its business. However, its co-founder Mr. Prochazka testified that if the Commissioner obtained the relief he is seeking in this proceeding, he would contact people such as Mr. McMullin, with a view to assisting them to offer the products that they have been prevented from offering in the GTA as a result of TREB's VOW Policy and Rules.

[450] Furthermore, the VOW Restrictions have resulted in increasing the costs of doing business for those who are attempting to offer new products and services over their websites. As Mr. Pasalis testified, assembling sold information manually from the MLS system is a time consuming and costly process. It is also prone to human error, which can undermine the reliability of the analysis produced. In addition, Mr. Enchin stated that he was able to show approximately 30% fewer homes, and spend less time responding to client requests, during the period of time, between 2001 and 2007, when he was able to download data from the MLS system in bulk and was able to display sold and "pending sold" listings on his VOW. He added that having to manually enter new TREB listings was too time consuming, costly and inefficient, once the option of downloading MLS data in bulk was no longer available. Mr. Nagel indicated on his part that his VOW-based model saves customers and agents lots of time and effort.

[451] Based on all of the foregoing, the Tribunal is satisfied that the exclusionary impacts of VOW Restrictions were reasonably foreseeable. They can therefore be deemed to have been intended by TREB.

(4) Does the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweigh the evidence of legitimate business justifications?

[452] For the reasons set in sections (2) and (3) immediately above, the Tribunal concludes that the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the very limited evidence that was adduced in support of the alleged legitimate business justifications that TREB claims underpinned the development and implementation of the VOW Restrictions.

[453] The Tribunal further concludes that the VOW Restrictions, as reinforced by the VOW Data feed Agreement, constitute ongoing, sustained and systemic acts that individually and collectively amount to a practice of anti-competitive acts, within the meaning of paragraph 79(1)(*b*) of the Act (*Canada Pipe FCA* at para 60).

(5) Conclusion

[454] Based on the foregoing, the Tribunal concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*b*) are met and that TREB has engaged in, and continues to engage in, a practice of anti-competitive acts.

D. *Have the VOW Restrictions prevented or lessened competition substantially, or are they likely to have that effect?*

[455] The Tribunal will now turn to the fourth issue to be determined in this proceeding. This is whether TREB's VOW Restrictions have prevented or lessened competition, or are preventing or lessening competition, substantially in the Relevant Market, or are likely to have that effect, as contemplated by paragraph 79(1)(*c*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that they have indeed had such effect and that, in the absence of an order of the Tribunal, they are likely to continue to do so.

(1) Analytical framework

(a) *Overview*

[456] Paragraph 79(1)(*c*) deals with the third component of the abuse of dominance provision, the anti-competitive effect of the impugned conduct.

[457] Paragraph 79(1)(*c*) has two distinct and alternative branches. The first requires the Tribunal to find that an impugned practice has had, is having or is likely to have the effect of *preventing* competition substantially in a market. The second requires the Tribunal to find that

the practice has had, is having or is likely to have the effect of *lessening* competition substantially in a market.

[458] The test in assessing cases brought under each of those two branches is essentially the same. In brief, paragraph 79(1)(*c*) contemplates an approach that emphasizes comparative and relative considerations of past, present and future time frames, as opposed to absolute ones (*Canada Pipe FCA* at para 44).

[459] In conducting this assessment, the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita* at paras 45 and 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess whether it extends throughout a “material” part of the market (*CCS* at paras 375 and 378).

[460] With respect to the degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise *materially* greater market power than in the absence of the practice (*Tervita* at paras 50-51 and 54). In brief, a practice that enables a firm to exercise a materially greater degree of market power than it otherwise have been able to exercise, is a practice that prevents or lessens competition substantially. What constitutes “materially” greater market power will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. When the respondent is a trade association, the Tribunal’s focus will include whether the impugned practice has enabled the association’s members to exercise materially greater market power in the relevant market than in the absence of the practice.

[461] As discussed at paragraph 165 above, market power has been defined in the jurisprudence alternatively in terms of “the ability to set prices above competitive levels for a considerable period,” “an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms,” and “the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition.” In the first two variations of these tests, the term “price” is considered to be shorthand for all of the dimensions of competition mentioned in the third variation.

[462] These price and non-price dimensions of competition are assessed because they are generally reliable proxies for the intensity of rivalry. In the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong. It is therefore the process of rivalry that ordinarily prevents or constrains the exercise of market power, as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in competition with other firms.

[463] In turn, the competitive prices, non-price offerings and innovations that result from that process of rivalry generally serve to increase aggregate economic welfare in an economy, the economy’s international competitiveness and the median standard of living of people in the economy. This is particularly true of the innovations that result from the competitive process.

[464] When assessing whether competition with respect to *prices* has been, is or is likely to be prevented or lessened *substantially*, the test applied by the Tribunal is to determine whether prices were, are or likely would be, materially higher than in the absence of the impugned practice. With respect to *non-price* dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita* at para 80; *CCS* at paras 123-125 and 376-377).

[465] With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita* at para 80; *CCS* at para 123).

[466] Where it is alleged that future competition has been, is, or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, *likely* to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met.

[467] To be *likely* to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated, but must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question. The farther into the future predictions are made, the less reliable and more speculative in nature they will be (*Tervita* at paras 68-74). This demonstration can be made with respect to either identified or unidentified potential or actual competitors, although it may be easier to adduce the requisite evidence with respect to identified potential or actual competitors (*Tervita* at paras 61-63). In any event, it must be demonstrated that the future competition that was, is or is likely to be prevented by the impugned practice would have been sufficiently important to have a substantial impact on competition in the relevant market (*Tervita* at para 78).

[468] In addition to all of the foregoing, in assessing whether the degree or magnitude of a prevention or lessening of competition is sufficient to be considered “substantial,” the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. For example, the Tribunal may conclude that a large price increase, or a large reduction in non-price benefits of competition, constitutes a substantial prevention or lessening of competition, even if that anti-competitive effect is likely to last less than two years, relative to the level of price or non-price competition that likely would have prevailed in the absence of the practice.

[469] "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence. CREA contends that a qualitative assessment of the anti-competitive effects is only appropriate when these effects cannot be quantitatively estimated, and that the Commissioner has the burden to demonstrate that the effects cannot be quantified before turning to qualitative evidence. The Tribunal disagrees. In contrast to merger cases in which the efficiency exception is invoked by the respondent(s), there is no obligation on the Commissioner to quantify the anti-competitive effects of an impugned practice of anti-competitive acts (*Tervita* at para 166). In *Tervita*, the Supreme Court clearly distinguished between the measurement of anti-competitive effects under section 92 and the balancing exercise under section 96 on efficiencies. Quantification is only mandatory for the latter. In the context of a merger, the Court found that the "the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantity deadweight loss" (*Tervita* at para 166). The Tribunal is of the view that such analysis similarly applies to a finding of substantial prevention of competition in the context of an abuse of dominant position.

[470] Therefore, in order to meet the requirements of paragraph 79(1)(*c*), the Commissioner can resort to either quantitative or qualitative evidence, or both. However, the Commissioner must always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition is likely to be prevented or lessened substantially (*Tervita* at paras 65 and 76). The Tribunal recognizes that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence, in part because quantitative evidence can be more probative to demonstrate the presence or absence of anti-competitive effects. In any event, the Tribunal will be entitled to draw an adverse inference if evidence that would or could be available has not been adduced.

[471] The Tribunal also recognizes that there may be a greater need for the Commissioner to rely on qualitative evidence in innovation cases like this one. This is because dynamic competition is generally more difficult to measure and to quantify. Indeed, when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct. Such evidence can take the form of business documents, witness statements and testimonies, industry analyses, etc. As long as such qualitative evidence collectively meets the requirements of the applicable standard of proof of balance of probabilities, it can be sufficient to support an application, even with limited quantitative evidence, or indeed none at all. In other words, no particular type of evidence is necessarily required. However, it bears repeating that the Commissioner ultimately bears the burden of proof and the Tribunal must be convinced on a balance of probabilities (*Canada Pipe FCA* at para 46).

[472] Despite the similarity in the general focus of the Tribunal when considering the two branches of paragraph 79(1)(*c*), there are nevertheless important differences in its assessment of the "lessen" and "prevent" dimensions of competition (*Tervita* at para 55).

[473] Specifically, in assessing whether competition has been or is likely to be *lessened*, the more particular focus of the assessment is upon whether the impugned practice has facilitated, or is likely to facilitate, the exercise of new or increased market power by the respondent. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry has been, or is likely to be, diminished or reduced, as a result of the impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be lessened at all, let alone substantially. This is subject to the caveat discussed below regarding a trade association respondent.

[474] By contrast, in assessing whether competition is likely to be *prevented*, the Tribunal's more particular focus is upon whether the impugned practice has preserved, or is likely to preserve, any existing market power enjoyed by the respondent, by preventing or impeding new competition that otherwise likely would have materialized in the absence of the impugned practice. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry likely would have increased, "but for" the implementation of that practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented at all, let alone substantially. Once again, this is subject to the caveat regarding a trade association respondent.

[475] Where the respondent is a trade association, the Tribunal will consider whether the impugned practice is likely to facilitate the exercise of new or increased market power by some or all of the members of the association, or to preserve their market power, relative to the situation that would likely have prevailed in the absence of the respondent's impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented or lessened at all, let alone substantially.

[476] Finally, where a respondent with a high degree of market power is found to have engaged in a practice of anti-competitive acts, smaller impacts on competition resulting from that practice will meet the test of being "substantial" (*Tele-Direct* at p. 247).

(b) *The "but for" approach*

[477] In comparing the level of competition in the presence of the impugned practice with the level of competition that likely would have prevailed in the absence of the impugned practice, the Tribunal typically asks what likely would have occurred "but for" the impugned practice (*Tervita* at paras 50-51; *Canada Pipe FCA* at paras 44 and 58).

[478] Where the practice has been in place for a significant period of time and its effects have already been fully manifested, the Tribunal will begin its assessment by comparing the state of competition that prevailed before the implementation of the practice, with the state of competition at the time the Tribunal hears the application. The Tribunal may also compare the former state of competition with that which existed at a particular time prior to the hearing of the application, if that is relevant to its consideration of the Commissioner's application and the relief sought. However, where the state of competition was in any event likely to change,

regardless of the implementation of the impugned practice, the Tribunal will compare the state of competition at the time of its hearing with the state of competition that likely would have prevailed "but for" the implementation of the practice.

[479] Similarly, where the effects of the practice on competition have not yet fully manifested themselves, the Tribunal will compare the state of competition that existed prior to the implementation of the practice, with the state of competition that likely will exist once the effects of the practice on competition have been fully manifested (*Canada Pipe FCA* at para 55). Once again, this assessment may be adjusted where the state of competition was in any event likely to change, regardless of the implementation of the impugned practice.

[480] As is apparent from the foregoing, the Tribunal's analysis under paragraph 79(1)(*c*) is *relative* in nature. That is to say, the Tribunal compares, on the one hand, the level of competition that exists, or would likely exist, after the implementation of the impugned practice, and on the other hand, the level of competition that likely would have existed "but for" the impugned practice. As stated in the preceding section of these reasons, the test contemplated by this paragraph is whether the difference between those two levels of competition is, was, or would likely be, *substantial*; and this test is met when the price of the relevant product is likely to be materially higher, or the level of one or more significant dimensions of non-price competition is likely to be materially lower, than in the absence of the impugned practice.

[481] It follows from the foregoing that the *absolute* level of competition in, or entry into, the relevant market, is not the focus of the Tribunal's assessment. Stated differently, the issue is not whether competition continues to be intense, or whether *some* new entry continues to occur. The issue typically is whether competition likely would have *even been more intense*, perhaps as a result of *even more* entry or innovation, "but for" the implementation of the impugned practice (*Canada Pipe FCA* at paras 36-37, 53 and 57-58).

[482] It also follows from the foregoing that the failure of the Commissioner to provide historical data comparing the competitiveness of the relevant market in the past with its competitiveness at the time of the hearing (or other relevant intermediate time), is not necessarily fatal to the Commissioner's application. The Commissioner can also succeed by adducing evidence to establish a substantial difference between the level of actual or likely competition in the relevant market in the presence of the impugned practice and the level of competition that likely would have prevailed in the absence of that practice (*Tervita* at paras 50-51; *Canada Pipe FCA* at paras 55 and 58). However, it bears emphasizing once again that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras 107-108).

[483] Although the Tribunal ordinarily applies this "but for" approach, it maintains the right to adopt a different approach in appropriate cases (*Canada Pipe FCA* at para 44).

(2) The alleged anti-competitive effects

(a) *Summary and commentary*

[484] In his Concise Statement of Economic Theory, the Commissioner submits that TREB's practice of anti-competitive acts constitutes *a significant barrier to entry and expansion* for brokers who would like to offer brokerage services over the Internet. He asserts that, by limiting the degree to which TREB's Members compete with one another, the positions of TREB's traditional brokers are entrenched and their market power maintained.

[485] More specifically, the Commissioner maintains that the VOW Restrictions *negatively affect the range of brokerage services* being offered to consumers by VOWs and other innovative business models in the Relevant Market.

[486] In addition, he maintains that the VOW Restrictions *reduce the overall level of innovation* in the Relevant Market, including the development of more efficient business models by brokers who would otherwise offer new forms of competition to traditional "bricks and mortar"-based brokerages. Among other things, he asserts that this has prevented innovative brokers from increasing their efficiency and productivity, for example, by reducing their costs, working with more customers at a time and specializing in providing a subset of brokerage services in respect of which they have a comparative advantage.

[487] In his Application, the Commissioner elaborates by stating that TREB's practice of anti-competitive acts prevents agents from providing over the Internet information that otherwise would be labour-intensive to assemble for clients. In the absence of that anti-competitive practice, agents would be freed up from those labour-intensive tasks, and would therefore be able to focus on providing additional value to consumers.

[488] The Commissioner adds that the exclusion of VOWs and other innovative business models *denies consumers the benefits of the downward pressure on commission rates* that would likely otherwise exist. For example, he maintains that, by preventing increases in efficiency and productivity, TREB is preventing VOW-based operators and other innovative brokerages from passing the cost savings that would be realized from such efficiencies on to their customers through reduced commission rates or through increased rebates, as is being done by some VOWs operating in the United States.

[489] Moreover, the Commissioner submits that, in the absence of the VOW Restrictions, *the quality of services* in the Relevant Market would be substantially greater, and consumers would benefit from *substantially greater choice*.

[490] In his 2015 Closing Submissions, the Commissioner added that the adverse impact of those restrictions on non-price competition have *reduced the total output* of residential real estate brokerage services in the GTA, relative to what it would otherwise be "but for" those restrictions.

[491] Finally, the Commissioner's expert, Dr. Vistnes, asserts that TREB's refusal to permit VOW operators to display the Disputed Data on their VOWs helps to *maintain agents' incentives to steer consumers into inefficient matches*, at the expense of the home buyer, the seller or both. Stated differently, he maintains that with the better information that full-information VOWs would provide regarding a home's market value, buyers would be less vulnerable to being encouraged to offer an excessive price, and sellers would be less vulnerable to being encouraged to accept too low a price.

[492] In its Response, TREB begins by stating that it has no market power in the Relevant Market, that the VOW Restrictions do not create, enhance or maintain any market power for TREB and that, in any event, TREB has no motivation to exercise any market power that it may have. For the reasons discussed in section VII.B.(3) of these reasons above, including at paragraphs 256-266, the Tribunal disagrees with these propositions.

[493] In its written and oral submissions, TREB also maintained that its Members do not have market power. Among other things, it asserted that competition in the Relevant Market has only intensified since the Initial Hearing.

[494] With respect to the range of brokerage services being offered in the Relevant Market, TREB states that its policies do not materially reduce the broad array of services that continue to be offered, including new services that continue to be introduced over the Internet and otherwise.

[495] Regarding price competition, TREB maintains that its VOW Policy and Rules do not prescribe the commission structures that must be adopted by its Members, and that in any event, there is clear evidence of price competition among participants in the Relevant Market. In this regard, TREB notes that negotiations can and routinely do occur regarding the level of commissions on both the "sell" and the "buy" side of residential real estate transactions, and that agents often give rebates or other consideration that effectively reduces the level of their commission.

[496] Turning to innovation, TREB maintains that a VOW is only one type of a wide range of innovation initiatives that are ongoing in the Relevant Market, as manifested by a plethora of new service offerings that continue to be introduced by new and existing market participants on an ongoing basis.

[497] Regarding the total output of brokerage services in the Relevant Market, Dr. Church testified, in response to questioning from the Tribunal, that demand for residential real estate brokerage services is inelastic, because it is derived from the demand for buying and selling homes, and that therefore any change in the quality of such services probably has no impact on that demand for buying and selling homes. More generally, TREB objected to the fact that this allegation of the Commissioner was raised too late in the proceeding to permit it (TREB) to fully respond.

[498] Finally, with respect to buyer steering, TREB submits, among other things, that the Commissioner has not demonstrated that this behaviour occurs in the Relevant Market, or that it has harmed competition.

[499] CREA supported many of the positions taken by TREB. It also raised concerns regarding the potential effect of the remedy requested by the Commissioner on its trade-marks (which include the Multiple Listing Service trade-mark, the MLS trade-mark and the associated logos), as well as on the REALTOR trade-mark, REALTORS trade-marks and the associated logos that CREA indirectly co-owns with NAR.

[500] The Tribunal acknowledges that individual real estate brokers and agents in the Relevant Market do not have market power. However, that is not the issue raised by this proceeding. The issue is whether the VOW Restrictions have insulated, are insulating, or are likely to insulate TREB's Members from new forms of rivalry that, in aggregate, would likely substantially increase competition in their absence, as reflected in materially lower prices or in materially greater non-price benefits of competition. When a group of rivals, whether through their trade association or otherwise, insulates itself from increased competition, they are in essence exercising a cognizable form of market power. In brief, to prevent a material increase in quality, variety or innovation, or a material reduction in price, is to prevent a material reduction in one's market power, whether such market power exists at the individual or group level. For the reasons discussed in section VII.D.(3) of these reasons below, the Tribunal is satisfied that TREB has exercised, and continues to exercise, such market power on behalf of its Members who sought to be insulated from innovative forms of competition.

[501] The Tribunal also acknowledges that there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data-sharing vehicles.

[502] However, as noted at paragraph 481 above, the absolute level of competition in, or entry into, a relevant market is not the focus of the Tribunal's assessment. Instead, that focus is upon whether competition likely would have been substantially even more intense "but for" the VOW Restrictions. The fact that other aspects of the VOW Policy and Rules might increase competition, for example, by virtue of the fact that they now enable VOWs to operate in the GTA, albeit in a limited way, is irrelevant.

[503] Nevertheless, the Tribunal agrees with TREB and CREA that the appropriate focus of assessment under paragraph 79(1)(*c*) of the Act should be upon the *incremental* effect of the VOW Restrictions on competition. More specifically, the specific focus of this stage of the assessment is upon whether competition would likely be substantially greater in the absence of the VOW Restrictions than it is at the present time, or is likely to be in the future, if they remain unchanged.

[504] For the reasons discussed below, the Tribunal concludes that the incremental adverse effect of the VOW Restrictions on competition has been, is, and is likely to continue to be substantial, relative to the "but for" world in which those restrictions did not exist. These anti-competitive effects take the form of increased barriers to entry, increased costs for VOWs, reduced range and quality of brokerage services, and reduced innovation.

(b) *Increased barriers to entry and expansion*

[505] In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58). This factor has played a central role in several cases that the Tribunal has dealt with under section 79 of the Act (*NutraSweet* at pp. 27 and 47-48; *Laidlaw* at pp. 347-348; *Nielsen* at p. 277).

[506] The Commissioner submitted that TREB's MLS Restrictions, including the VOW Restrictions, constitute a significant barrier to entry or expansion for brokers who would like to be able to operate a full-information VOW in the Relevant Market.

[507] TREB acknowledged that an assessment of whether an impugned practice impedes entry or expansion in a market can assist the Tribunal to determine whether market power has been or is likely to be created, enhanced or preserved by an impugned practice. However, it submitted that there are no significant barriers to entry into the Relevant Market, and this is confirmed by the fact that its membership grew from approximately 35,000 to approximately 42,500 in the period between the Initial Hearing and the Redetermination Hearing in this proceeding.

[508] In the absence of evidence that some of TREB's new Members have entered the Relevant Market as full-information VOWs, the fact that TREB's membership continues to grow does not significantly assist the Tribunal to determine whether the VOW Restrictions constitute a significant barrier to entry or expansion for brokers who would like to be able to operate a full-information VOW in the Relevant Market. Moreover, the Tribunal notes that data provided by Dr. Church suggests that approximately 30% of those who register for access to TREB's MLS system cease accessing that system within three years.

[509] TREB further submitted that VOW technology has been popular with "brand name" affiliated brokerages, and can be easily adopted by any TREB Member. In this regard, TREB stated that its VOW Data Feed has been adopted by 322 brokerages, including by several that are affiliated with large franchise-affiliated brokerages.

[510] However, once again, this evidence does not significantly assist the Tribunal to address whether the VOW Restrictions have had, are having or are likely to have an exclusionary effect on brokers who would like to be able to operate a full-information VOW in the GTA. By contrast, several of the Commissioner's witnesses provided credible and persuasive evidence

regarding the exclusionary impact that the VOW Restrictions have had on them. This evidence includes the following.

(i) ViewPoint

[511] Mr. McMullin stated in 2012 that ViewPoint would like to expand into the GTA but could not do so in a commercially viable way due to TREB's VOW Restrictions, including the lack of certain content in TREB's VOW Data Feed. Specifically, he stated that ViewPoint requires data about properties that have sold (including recently sold properties) and other Disputed Data that are provided in "real time," in order to compete effectively using its brokerage model. He added that if ViewPoint could access all of the MLS data that is currently available to brokers through non-VOW channels, it would have a basis for competing in the GTA. Without such information, he stated that ViewPoint has no realistic basis for competing effectively in that market. In his updated 2015 witness statement, Mr. McMullin confirmed that the above statement remains true.

[512] Mr. McMullin elaborated on the foregoing as follows:

> In the case of both potential buyers and potential sellers, convenience and transparency are key ingredients in being able to use viewpoint.ca to attract customers. We have to be able to compete for consumers' business with traditional brokerages. Unless we can provide the same MLS information through our website as those traditional brokerages can through conventional means (in person, by phone, email, etc.), then we will rarely succeed to convince a customer to list or buy with ViewPoint. Without a full dataset from the MLS system, we would be unable to compete effectively. With access to the same information and the ability to display it on our website, the consumer can compare and choose between the convenience and transparency of using our website to obtain information about their potential purchase or sale, and the personal relationship of a traditional Realtor to obtain that same information.
>
> (Exhibits A-002 and CA-001, Witness Statement of William McMullin dated June 18, 2012 (**"2012 McMullin Statement"**), at para 78)

[513] Mr. McMullin added that without the ability to provide innovative products and services based on the MLS system and other property-related information over the Internet, it would have required "years of work [to] overcome the advantages of the incumbent traditional brokerages" and to gain the amount of business that ViewPoint has achieved in Nova Scotia (2012 McMullin Statement, at para 28).

[514] ViewPoint's interest in the GTA dates back to December 2010, about a year after it launched its website in Nova Scotia, in January 2010. At that time, Mr. McMullin sent a lengthy email to Mr. DiMichele, who was TREB's CIO, to express his interest in the GTA market. After failing to receive a response to that communication and after several subsequent unsuccessful attempts to meet with Mr. DiMichele, ViewPoint became a Member of TREB in August 2011. Contemporaneously, Mr. McMullin wrote an email to TREB's President at the time, Mr. Richard Silver. Among other things, Mr. McMullin requested a meeting with Mr. Silver. After further unsuccessful attempts to reach Messrs. Silver and DiMichele by email or by telephone, Mr. McMullin went to TREB's offices in November 2011, where he had an unproductive meeting with TREB's Chief Privacy Officer, Mr. Von Palmer.

[515] Shortly after TREB's VOW Data Feed became available in November 2011, ViewPoint executed TREB's Data Feed Agreement. However, in the absence of the Disputed Data, ViewPoint still has not entered the GTA.

[516] In the six years of its existence, ViewPoint has grown to become the largest independent real estate brokerage in Nova Scotia, with 22 agents in the field. (The term "independent" in this sense means that it is not part of one of the large franchise systems, such as RE/MAX or Royal LePage.) Its gross revenues have risen from $**[CONFIDENTIAL]** in 2012 to $**[CONFIDENTIAL]** in 2013, and then to $**[CONFIDENTIAL]** in 2014, including revenues from advertising (which went from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]** between 2012 and 2014). It continues to register approximately **[CONFIDENTIAL]** new users each day. Over that same period, the number of total page views on www.viewpoint.ca rose from approximately **[CONFIDENTIAL]** million in 2012 to **[CONFIDENTIAL]** million in 2013 and then **[CONFIDENTIAL]** million in 2014. Since the launch of www.viewpoint.ca in January 2010, registered and unregistered visitors have viewed more than **[CONFIDENTIAL]** million pages of property and listing information. The Google Analytics reports attached to the 2015 McMullin Second Statement indicate that, in 2014, there were **[CONFIDENTIAL]** sessions, **[CONFIDENTIAL]** users (Google's estimate of the number of persons who accessed www.viewpoint.ca), and **[CONFIDENTIAL]** page views on www.viewpoint.ca.

[517] According to Mr. McMullin, registered users account for approximately 90% of the traffic on ViewPoint's website. ViewPoint had **[CONFIDENTIAL]** new registered users in 2012; **[CONFIDENTIAL]** in 2013; and **[CONFIDENTIAL]** in 2014. It participated in **[CONFIDENTIAL]** brokered transactions in the HRM in 2012, **[CONFIDENTIAL]** in 2013, and **[CONFIDENTIAL]** in 2014. This represented growth in its share of total brokered transactions in the HRM from **[CONFIDENTIAL]** to **[CONFIDENTIAL]** over that period, notwithstanding overall yearly declines in the total number of brokered transactions in the region of 12.9% in 2013 and a further 3% in 2014. During the Redetermination Hearing, Mr. McMullin estimated that ViewPoint was on track to realize growth of approximately 25-28% in the total number of its brokered transactions (for the whole of Nova Scotia) in 2015.

[518] The foregoing figures were not disputed by TREB or CREA.

[519] Mr. McMullin further testified that if the VOW Restrictions were eliminated, ViewPoint would enter the Relevant Market within three to four months. The Tribunal accepts that this would be a likely result of the elimination of the VOW Restrictions.

(ii) TheRedPin

[520] TheRedPin evolved out of an entity known as Realty Teller, which started operations in 2008. In 2009, TREB's refusal to make resale home listings data available in an electronic data feed led Realty Teller to focus its efforts on the new condominium market, by creating an online platform to connect builders and developers with potential buyers. In September 2010, the Realty Teller website was launched publicly.

[521] In June 2011, soon after TREB launched its 60-day consultation process in relation to its VOW Policy and Rules, Mr. Hamidi and his partners decided to move forward with their original Realty Teller vision from 2008, by becoming an official brokerage and a Member of TREB. TheRedPin was launched later that month and was, according to Mr. Hamidi, one of Canada's first online brokerages at that time.

[522] In December 2011, shortly after TREB launched its VOW Data Feed, TheRedPin became the first brokerage to launch a website using TREB's VOW Data Feed.

[523] Since its initial launch, TheRedPin has focused on being a web-based brokerage oriented towards meeting customer desires and needs, all in a single user-friendly website. In particular, TheRedPin endeavours to provide a single online source of information that home buyers and sellers value. In addition to simply displaying that information, TheRedPin seeks to innovate with the MLS data and other information that it is able to obtain.

[524] However, the VOW Restrictions have limited TheRedPin's ability to "get better traction as a brokerage." Among other things, TheRedPin believes that obtaining access to the Disputed Data would enable it to offer better and more services to attract a greater number of people to its brokerage. Mr. Gidamy elaborated as follows:

> Because potential customers already have access to current listing information online on realtor.ca, TheRedPin has to offer potential customers more than just current listings to attract them to TheRedPin.com over realtor.ca, and to convert them into clients of our brokerage. Having sold information in the VOW datafeed and the innovative tools we expect to develop using it, would provide powerful new ways of first attracting and then of converting website visitors into clients. For example, on the listing side, heatmaps and other neighbourhood-specific sold information could help us show home sellers how TheRedPin's technology can help them value and ultimately sell their home.

(Exhibits A-113 and CA-114, Second Witness Statement of Tarik Gidamy dated January 30, 2015 (**"2015 Gidamy Statement"**), at para 21)

[525] Mr. Gidamy also stated that the VOW Data Feed remains critical to his ability to generate traffic on TheRedPin website and use it to generate leads, since "TREB's VOW data feed enables website users to see 100% of current MLS® listings on TheRedPin.com" (2015 Gidamy Statement, at para 7). Mr. Gidamy however admitted that realtor.ca does post or show the current MLS listings from real estate boards across the country.

[526] Mr. Gidamy also stated that, with access to the Disputed Data, and the freedom to use it in innovative ways, TheRedPin would be in a much better position to prepare accurate and in-depth advice and CMAs; and to more generally better distinguish TheRedPin from its competitors by putting MLS data to its best and highest use for home sellers and buyers. By contrast, without that data and freedom, he believes that TheRedPin is at "a serious competitive disadvantage" with other brokerages, which are able to provide the Disputed Data such as sold information to their clients in conventional ways (Exhibit A-015, Witness Statement of Tarik Gidamy dated June 22, 2012, at para 22). He added that if TheRedPin is not able to achieve greater efficiencies such as those that would flow from the innovations described below, and to achieve the increased brand recognition that it believes would be generated by its new products, it will have to scale down its business and operate at a much smaller size to remain in operation. Mr. Silver added that the likely effect of providing brokerages with a data feed containing more key information held closely by the real estate industry would be to allow brokerages to compete more effectively in providing real estate brokerage services.

(iii) Realosophy

[527] Mr. Pasalis asserted that the absence of sold, "pending sold," status change and geomapping data in TREB's VOW Data Feed is constraining Realosophy's growth.

[528] Mr. Pasalis explained that Realosophy's business model depends on having access to data, particularly from TREB's MLS system. As a result, its inability to obtain a data feed with sold and "pending sold" data limits Realosophy's ability to provide services to consumers online and to its clients.

[529] Among other things, he asserted that the limitations in TREB's VOW Data Feed are impeding Realosophy's ability to provide more advanced analytics and commentaries online and through the media, and to engage with clients more frequently by providing more updates of information. In addition, Ms. Desai and Mr. Pasalis stated that the registration requirement in the VOW Policy and Rules is having a significant chilling effect on potential clients who are reluctant to register to access the innovative services provided by Realosophy. Although Mr. Pasalis has less objection to requiring potential home buyers and sellers to register on his website to access specific sold and "pending sold" data on an individual listing basis, he believes that there should be no need to register to access aggregated information about sold property prices.

(iv) Redfin

[530] According to Mr. Nagel, Redfin is the leading real estate brokerage website in the United States. Between early February 2015, when he signed his second witness statement, and the end of September 2015, when he testified at the Redetermination Hearing, Redfin expanded from 48 metropolitan areas in 24 states to 74 metropolitan areas in 35 states. In addition, it expanded from 1,102 agents to approximately 1,800 agents, and from approximately 1,600 partner agents to over 2,300 partner agents, during that same period. However, it is not clear from the evidentiary record what this growth translates into, in terms of Redfin's share of brokered residential real estate transactions in any given urban market. The Tribunal was left with the sense that Redfin may remain well under 5%. Nevertheless, over the first nine months of 2015, Redfin had approximately 1,045,000 registrations on its website.

[531] In 2012, Mr. Nagel stated that Redfin had been considering expanding into Canada because it has "several metropolitan areas with strong housing markets and a tech-savvy population." In particular, Redfin was considering expanding into Vancouver, Toronto and possibly Calgary (Exhibit A-008, Witness Statement of Scott Nagel dated June 20, 2012, at para 56). However, it had not yet done a detailed analysis in respect of such potential expansion. Mr. Nagel added that the lack of available sold, recently sold and other current information about specific properties would have a significant impact on whether Redfin enters a market.

[532] In his 2015 witness statement, Mr. Nagel stated that **[CONFIDENTIAL]** (2015 Nagel Statement, at paras 26-28).

[533] When pressed by the Tribunal on this issue during his testimony, Mr. Nagel explained that Redfin decided "to take an active look again" at expanding into Toronto after the Commissioner's Application was remitted to the Tribunal. He reiterated that one of the factors that is relevant to Redfin's decision regarding a potential expansion into Toronto is whether it will be able to provide information with respect to "sold" properties, which is required "to provide our full customer experience in Canada." He added that one of the reasons why he was participating in the Tribunal's proceedings "is because [Redfin would] prefer to provide everything, just like [it does] in the vast majority of U.S. jurisdictions" (Transcript, September 24, 2015, at pp. 429-430).

[534] Based on Mr. Nagel's evidence, the Tribunal cannot conclude that the VOW Restrictions have prevented Redfin from expanding into the GTA, or that Redfin *likely would expand* into the GTA "but for" those restrictions. Accordingly, the Tribunal will not consider the adverse effect that the VOW restrictions appear to be having on Redfin's decision in this regard, in determining whether those restrictions have prevented or lessened, or are preventing or lessening competition substantially in the Relevant Market, or are likely to have that effect.

[535] However, the Tribunal observes in passing that those restrictions are having a deterring effect on Redfin, and that if they were eliminated, the potential for Redfin to expand into the GTA would increase.

(v) Other full-information VOW operators

[536] Two witnesses representing AVPs gave evidence on behalf of the Commissioner, namely, Mr. Prochazka, one of the founders of Sam & Andy, and Mr. Enchin, a sales representative with Realty Executives.

[537] Sam & Andy was an AVP that operated turnkey websites, including with VOWs, for agents in various cities in Canada and the United States, prior to its sale to Ubertor, a Vancouver-based firm, in May 2015.

[538] The VOW product that Mr. Prochazka provided was called Platinum Clicksold. For $45 per month, clients were provided with an unlimited number of active listings, photos per listing and custom domains as well as some additional technical features.

[539] As of February 2015, Sam & Andy had 90 Platinum Clicksold customers in the GTA. However, by the time Sam & Andy was sold to Ubertor in May 2015, this number may have been reduced by approximately half.

[540] Between 2005 and 2011, Sam & Andy contacted TREB up to twice per year to explore obtaining access to its MLS data, so that it could begin offering its services to realtors in the GTA. However, it was not until TREB issued its VOW Policy and Rules, and began to provide a VOW Data Feed, that Sam & Andy was able to obtain access to TREB's MLS data. In Mr. Prochazka's words, it was not until "this case was launched that TREB kind of started to play ball a little bit, give us a little bit of access to VOW and IDX data" (Transcript, September 23, 2015, at p. 306).

[541] However, the information provided in TREB's VOW Data Feed fell short of what Sam & Andy was able to obtain from MLS entities in the United States, which provided historical listing information (including sold data), mapping coordinates, status changes and identification codes in their data feeds.

[542] Moreover, various terms in TREB's VOW Policy and Rules increased Sam & Andy's operating costs and created barriers for agents who wished to purchase its products and services. For example, the VOW Data Feed did not contain fields with listing changes, mapping coordinates or agent identification codes to link agents with their listings agents. In addition, agents who wished to obtain a website with a VOW were required to obtain a signed agreement from their supervising broker. Mr. Prochazka testified that TREB is the only MLS entity with which he has dealt which imposes this requirement. At the time of the Initial Hearing, supervising brokers had refused to permit approximately 20 agents from obtaining a Clicksold website. By the time of the Redetermination Hearing, the requirement that agents obtain a signed agreement from their supervising broker had "arrested [Sam & Andy's] growth in the GTA" (Transcript, September 23, 2015, at p. 307).

[543] After concluding that "there really was no big opportunity for expansion and that [they] had run into too many barriers" in the GTA and other areas of Canada (Transcript, September 23, 2015, at p. 318), the majority shareholders of Sam & Andy sold the firm to Ubertor. As a result of those barriers, the GTA had become Sam & Andy's "worst-performing market" (Transcript, September 23, 2015, at p. 324).

[544] When Mr. Prochazka evaluated the potential to open a web-based brokerage in Edmonton and Calgary, he determined that it was necessary to provide sold data to be able to assist the public to gain insights into the property market, for example, through statistical tools such as price trends and sales velocity. This is because a web-based brokerage must be able to provide something more than what is already available on realtor.ca. He testified that it is "impossible to compete" as a web-based brokerage based on what is currently in TREB's VOW Data Feed (Transcript, September 23, 2015, at p. 311).

[545] Mr. Prochazka testified that if the Commissioner were to obtain what he is seeking in his Application, he would seek an opportunity to invest in, and sit on the board of, a web-based brokerage such as ViewPoint.

[546] Turning to Mr. Enchin, he created his first VOW in 2001, which he licensed to approximately 1,000 other realtors. That VOW was created at a time when TREB permitted its Members and certain others, including Mr. Enchin, to download its MLS listings in bulk. Mr. Enchin's VOW displayed MLS listing data, including sold and pending sold information, until TREB disabled its Members' ability to download TREB's MLS data in large quantities in 2007. He then sold his software and contracts with brokers to another company.

[547] In the summer of 2011, after becoming aware of TREB's VOW Policy and Rules, Mr. Enchin contacted TREB to obtain more details about its VOW policy and data feed. He then began to develop a new VOW and retained the assistance of a third-party, Adpioneers, which specialized in website development. He and his partners committed to a $100,000 contract to complete the initial version of his 2012 VOW. At the time of the Initial Hearing, he had demonstrated his 2012 VOW to five large brokerages in the GTA, who had all committed to adopting it for their approximately 4,000 agents once it became available. Smaller brokerages, representing approximately 1,000 agents, had also expressed interest in or committed to adopting Mr. Enchin's 2012 VOW, once it became available. Mr. Enchin stated that he believed his 2012 VOW would have been more popular with realtors and their clients if he could have offered the appraisal feature, which required sold and "pending sold" data.

[548] Unfortunately for Mr. Enchin, Adpioneers admitted in October 2012, after Mr. Enchin testified at the Initial Hearing, that it lacked the expertise to complete the VOW. Mr. Enchin and Adpioneers then terminated their relationship. After investing additional time and money to develop his VOW with the assistance of another third-party (who was also unable to complete the task), Mr. Enchin paused the development of his VOW for a period of time. In February 2015, he stated that he was working with a new software developer and hoped to have a trial version of his VOW completed by the end of that month.

[549] The Tribunal was not provided with any update regarding Mr. Enchin's efforts to launch his new VOW, as he did not appear at the Redetermination Hearing. As a result, the Tribunal cannot conclude that it is more probable than not that Mr. Enchin will actually launch that VOW and begin making it available. With respect to the VOW Restrictions, the Tribunal cannot conclude that they have had any adverse impact on the development of Mr. Enchin's current VOW or that, "but for" those restrictions Mr. Enchin likely would launch that VOW and begin making it available to agents in the GTA. In other words, any impact that those restrictions may have had on Mr. Enchin's re-entry into the GTA will not be considered by the Tribunal in assessing whether they have prevented or lessened, or are preventing or lessening, competition substantially in the Relevant Market, or are likely to have that effect.

(vi) Conclusion

[550] Based on the foregoing, the Tribunal concludes that the VOW Restrictions have had a significant adverse impact on entry into, and expansion within, the Relevant Market by web-based and other brokerages that would like to offer full-information VOWs in the GTA. Stated differently, "but for" those restrictions, such entry and expansion likely would have been faster or more significant (*Canada Pipe FCA* at para 58).

[551] In summary, those restrictions have prevented ViewPoint, a very disruptive and substantial potential competitor, from entering into the Relevant Market; and have prevented two additional disruptive brokerages, TheRedPin and Realosophy, from expanding within that market. Those restrictions also prevented Sam & Andy from expanding within the market, and prevented their brokerage customers from doing the same.

(c) *Increased costs imposed on VOWs*

[552] The Commissioner also submitted that the VOW Restrictions undermine the ability of full-information VOWs to compete because they have the effect of raising their costs. TREB replied that the evidence does not demonstrate that the VOW Policy and Rules have had, or are likely to have, the effect of raising these costs at all, let alone substantially. The Tribunal disagrees with TREB.

[553] With respect to ViewPoint, TREB noted that Mr. McMullin testified that his agents complete approximately 20 to 22 transactions per year, as compared with what he characterized as being a "provincial average" of 10 to 12 transactions per year per agent. Among other things, Mr. McMullin mentioned that while the traditional brokerage model is based on recruiting agents who will then go out and find customers, his model is based on minimizing, rather than on maximizing, the number of agents, and then using ViewPoint's website to attract prospects who are then connected with its agents. However, TREB and CREA pointed out that Mr. McMullin's calculations were given during the Redetermination Hearing for the first time and were not adequately supported or proven. TREB added that the Tribunal was not provided with any evidence to demonstrate that ViewPoint's agents complete more transactions per year than the average number completed by brokerages operating in the Relevant Market under TREB's existing VOW Policy and Rules. The Tribunal accepts this latter point.

[554] The Tribunal nonetheless also accepts Mr. McMullin's testimony that the costs associated with having to manually upload information with respect to price or other listing status changes would be prohibitive. In addition, the Tribunal accepts his testimony that ViewPoint uses its website www.viewpoint.ca as a lead generating device and that this frees up time for its agents to complete other tasks.

[555] Turning to TheRedPin, TREB and CREA noted that Mr. Gidamy stated that the inclusion of sold information in TREB's VOW Data Feed would enable TheRedPin to develop automated CMA tools that would save its agents time. Mr. Hamidi also testified to the time saving aspect. Nonetheless, TREB and CREA estimated that this time saving would be less than five hours per month per agent. On cross-examination, Dr. Vistnes did not dispute this particular estimate, and he agreed that this specific cost saving was not substantial.

[556] What TREB and CREA omit to mention, though, is that Dr. Vistnes was careful to confine his agreement on this point to this particular example of cost saving that Mr. Gidamy had identified. He did not resile from his broader point that the VOW Restrictions have the effect of raising the operating costs and reducing the productivity of VOW-based competitors in various ways.

[557] Each of TheRedPin's representatives who testified stated that the VOW Restrictions are imposing higher costs on TheRedPin, or are preventing it from reducing its costs. Generally speaking, Messrs. Hamidi, Gidamy and Silver supported the Commissioner's position that empowering the customer to do more assists the brokerage in becoming more efficient, in part because less time is spent generating leads in the time-consuming manner that is adopted by traditional brokerages, thereby freeing agents up to focus on work that adds value to customers. In addition, TheRedPin could provide more automated and other tools to make its agents more efficient and responsive. Mr. Gidamy further noted that such automated tools would not be confined to CMAs.

[558] With respect to Realosophy, TREB observed that Mr. Pasalis testified on cross-examination that the "dashboard" tool recently launched by Realosophy had already enabled Realosophy to achieve considerable time saving for its agents by automating the assembly and display of certain information. However, TREB failed to note that Mr. Pasalis also testified that because that information is manually uploaded, it must be double checked before its agents make any offers on a home, to ensure that important information was not missed. Therefore, Realosophy's agents end up duplicating much of the work that is required to produce the existing dashboard, at least for the particular property that its customer decides to make an offer on.

[559] More broadly, Mr. Pasalis stated that, with access to sold, "pending sold," live update and other information in TREB's VOW Data Feed, Realosophy's agents would need to spend less time merely gathering data for their clients, which would free them up to assist clients to understand the data and reports they are getting, and to better understand the options available to them. In addition, he maintained that much of the preparatory and education work required to prepare CMAs could be automated if sold and "pending sold" data were included in the VOW Data Feed.

[560] In addition to the foregoing, as discussed at paragraph 542 above, Mr. Prochazka stated that certain aspects of TREB's VOW Policy and Rules increased Sam & Andy's operating costs. For example, the absence of agent identification codes in TREB's VOW Data Feed forced Sam & Andy to create a workaround solution that required its clients to manually associate themselves with their listings.

[561] Mr. Enchin also testified that his ability to provide home buyers with access to sold and "pending sold" data through his VOW prior to 2007, when TREB stopped permitting its Members and others such as Mr. Enchin to download its MLS listings data in bulk, contributed to him showing approximately 30% fewer homes to his clients and assisted him to spend less time responding to client requests. During the Initial Hearing, he added that having access to sold information contributed significantly to saving him a significant amount of time when preparing CMAs for his clients.

[562] Based on the foregoing, the Tribunal concludes that the VOW Restrictions have increased the costs of TheRedPin, Realosophy and Sam & Andy to a non-trivial degree in the Relevant Market, and have increased the costs that ViewPoint would have to incur to compete effectively in the GTA. Stated differently, "but for" those restrictions, their costs of doing business likely would have been lower.

[563] The Tribunal also accepts Dr. Vistnes' evidence that the VOW Restrictions discriminate against full-information VOW operators, place those brokerages at a significant competitive disadvantage, reduce their competitive viability and diminish the likelihood that they will succeed in the marketplace.

(d) *Reduced range of brokerage services*

[564] The Commissioner further submitted that the exclusion of full-information VOWs and other innovative business models has negatively affected the range of brokerage services being offered to consumers. In other words, he maintained that "but for" TREB's MLS Restrictions, including the VOW Restrictions, the range of real estate brokerage services offered in the Relevant Market likely would be substantially greater.

[565] CREA responded that VOWs do not and were never intended to replace brokers. They simply provide a means by which a broker can partially provide over the Internet one of the services a broker normally provides in person to a client, namely, the provision of relevant property information that a client needs or wants. VOWs do not physically show homes, negotiate prices, close a transaction or perform various other important functions that are performed by brokers and their agents, including the refinement of listing and offer prices at the final stages of the listing and offer process. Moreover, a lot of the content available on VOWs is readily available to consumers elsewhere, including on a broad range of websites operated by brokerages and others.

[566] The Tribunal agrees that VOWs do not, and were never intended to, replace brokers. Messrs. McMullin, Silver and Pasalis were very clear on this point, both to the Tribunal and to TREB.

[567] Indeed, the experience in the United States reflects that even as VOWs have become more popular since the 2008 NAR VOW Policy came into force, the percentage of home purchasers who use a real estate agent or broker had increased from 81% to 88% by 2014. The corresponding statistic for those who used the Internet at some point in their search for a home was 92% in 2014 (NAR 2014 Profile, at pp. 45, 53, 58 and 60).

[568] However, the question remains whether the VOW Restrictions are nevertheless materially reducing the range of brokerage services that would likely be offered in the Relevant Market, "but for" those restrictions, such that competition has been or is being prevented substantially, or is likely to be prevented substantially.

[569] TREB and CREA assert that brokerages in the GTA currently offer a broad array of services, including on the Internet. In addition to the services mentioned above and in the discussion on innovation below, they note that Realosophy's website already offers features such as geocoding, school ranking profiles, a "Neighborhood Match" product, public transit information, local business information, demographic information and "walk scores." **[CONFIDENTIAL]** In a similar vein, Sage Real Estate's website features videos and professional photographs, floor plans and 3D tours, and a variety of information about properties, including asking price, neighbourhood information and proximity to shopping and schools.

[570] For the reasons discussed below, the Tribunal has concluded that, notwithstanding the broad array of brokerage services currently offered in the Relevant Market in the GTA, the range of such services available in that market likely would be considerably broader "but for" the VOW Restrictions.

[571] In understanding why this is so, it is important to keep in mind that those restrictions not only prevent TREB's Members from displaying the Disputed Data on a VOW in raw form, but also exclude this data from the VOW Data Feed and prevent them from using any data from the VOW Data Feed to create new features, tools and other services. This is readily apparent from a review of some of the services currently offered in other markets by ViewPoint and that TheRedPin and Realosophy would like to offer, which they are being prevented from offering in the Relevant Market by the VOW Restrictions.

(i) ViewPoint

[572] ViewPoint launched its website in January 2010. That website included detailed information on MLS listings across Nova Scotia, although ViewPoint only had agents in the HRM. It currently provides services to three different types of users:

a. *Unregistered users*, who are anonymous visitors who are able to access basic information such as the lot size and assessment value of every property in Nova Scotia, as well as current listing information on those MLS listings which are part of the IDX program;

b. *Registered users*, who are visitors who have created a user account by providing their name and email address and then verifying their email address. In addition to being able to view all of the information that may be seen by unregistered users, they are able to view all active MLS listings, as well as important information that TREB's VOW Restrictions prohibit in the GTA, including sold prices, WEST listings information, other historical information pertaining to sold properties, such as price and other listing status changes, and number of days on the market;

c. *Client Advantage users*, who are able to receive additional information, if they are willing to make a soft commitment to using a ViewPoint agent, and then provide more detailed information regarding their needs (such as when they intend to buy and sell), as well as their contact information. Among other things, these users have access to additional information that cannot currently be made available in the GTA, including:

    i. a professional valuation tool that, among other things, incorporates information pertaining to recent "sold" listings, thereby enabling the client to prepare a more accurate CMA than can be prepared without such information, and to do so *before* they meet with a broker, so that they have a better understanding of the market going into that meeting;

    ii. land registry information; and

    iii. property reports that provide detailed information summarizing real estate and click activity around a subject property.

[573] In addition, ViewPoint also offers a popular "Followed Properties" feature, which allows its registered users to ask to be alerted whenever there are any changes to the status of one or more properties, such as a change in price, a new or updated listing, or a delisting.

[574] Furthermore, for agents, ViewPoint has streamlined the process of booking showings, providing feedback to listing agents after a showing, and settling a transaction on closing. When they receive a showing request, buying agents no longer have to look up information to initiate contact with the listing agent, because ViewPoint's software immediately dispatches that information to the buyer's agent. And following a showing, the buyer's agent can initiate feedback with the click of a mouse, without having to enter any of the contact information for the listing agent. If the client proceeds to purchase the property, the agent simply has to enter the property identifier (or MLS number), and ViewPoint's software will bring up a wealth of information to pre-populate the transaction documentation. Mr. McMullin's sales coordinators have informed him that this latter innovation has led to a dramatic increase in efficiency.

[575] Mr. McMullin stated that in the absence of the VOW Restrictions, the website services that ViewPoint would offer in the GTA would be cutting-edge and would include many of the same features already available on www.viewpoint.ca.

(ii) TheRedPin

[576] Messrs. Gidamy, Hamidi and Silver each testified that, "but for" the VOW Restrictions, the TheRedPin would likely offer many new brokerage services on its website.

[577] For example, Mr. Hamidi stated that with access to the Disputed Data, TheRedPin would be able to provide better and more services, including automatic notifications to customers of price reductions in neighbourhoods of interest and information regarding trends in the relationship between sold and list prices, including aggregates to show trends to users in different formats. He added that TheRedPin would also provide more tools for its agents to make them more efficient, more responsive and able to provide better information to the brokerage's clients. Mr. Gidamy added that he expects that having sold information in TREB's VOW Data Feed would enable TheRedPin to develop "powerful new ways of first attracting and then of converting website visitors into clients" (2015 Gidamy Statement, at para 21). This includes by supplementing its existing potential client nurturing programs with various automated tools and other innovations. On the listing side, those tools would include heat maps, graphs, charts and other neighbourhood specific information on sold properties, as well as automated and tailored prospect matches or neighbourhood analyses that could be sent to potential buyers to make them more knowledgeable about neighbourhoods that might be a good fit for them. Mr. Gidamy mentioned creating a tool which would pull out home prices in areas that typically have bidding wars. Some of the above-mentioned tools are already being used by TheRedPin for non-MLS new home and condominium sales. These include heat maps of condominiums, and tools that enable potential investors to ascertain which views would sell better than other views and which floors offer a better return on money. In addition, TheRedPin would like to be able to provide greater transparency regarding commissions, better information regarding whether a pending sale is likely to become a firm sale, and whether there is a pattern or trend of conditions not being fulfilled in a particular neighbourhood.

[578] Although the heat maps and some of the other neighbourhood specific tools and analyses mentioned by Mr. Gidamy may already be offered by Realosophy, as suggested by CREA, the Tribunal accepts, based on the evidence provided, that the VOW Restrictions are preventing TheRedPin from offering the enhanced variations of those innovations that it would like to introduce to the Relevant Market, and from offering them in a more timely manner through a VOW. They are also preventing the greater variety of service offerings that would exist if the VOW Restrictions did not prevent such innovations from being introduced to the Relevant Market.

(iii) Realosophy

[579] Mr. Pasalis stated that, with access to more data, including sold and "pending sold" information, Realosophy could provide a more complete and precise picture of the particular

property by aggregating all information in much the same way as it has done with its neighbourhood profiles. It would likely also provide automatic updates of its neighbourhood profiles on a monthly or more frequent basis, automatic updates of changes in particular listings, innovative price trend and comparable home tools, and more accurate price trend analyses. This was confirmed by Ms. Desai, who stated: "[Realosophy] has the business model, technology, and skill set to be able to use additional data such as solds, pending solds, and price changes in a way that allows us to generate more original content to attract and educate consumers" (Exhibit A-007, Witness Statement of Urmi Desai dated June 20, 2012, at para 30).

[580] In addition, Mr. Pasalis noted that with access to that information, Realosophy would be able to determine and better advise customers with respect to price changes in the market, the percentage of homes selling for more than list price, how "hot" a neighbourhood area might be, when the property last sold, what it was listed for that time, how long it sat on the market, how many times it has been listed in the last year, recent comparable sales and how their homes are doing from an investment perspective.

[581] More broadly, he stated that Realosophy would be able to provide more advanced analytics and commentaries online and through the media. Among other things, this would allow customers to educate themselves better about property prices and market trends in neighbourhoods, and would permit Realosophy to engage with its clients more frequently.

(iv) Sam & Andy

[582] Mr. Prochazka testified that if historical listing data had been available in TREB's VOW Data Feed prior to Sam & Andy's exit from the market in May 2015, Sam & Andy would have offered its clients more products and services for their websites, including statistical neighbourhood analysis, listing price history and automatic property valuations. In addition, he testified that his firm would have been able to offer performance metrics for agents so that, for example, agents could be alerted if a listing had performance metrics that fell outside of certain parameters. He added that, in the United States, his firm provided trending tools and graphs similar to what ViewPoint provides on its website, and tools based on price history and historical transaction rates.

(v) Conclusion

[583] Based on all of the foregoing, the Tribunal concludes that, notwithstanding the broad array of brokerage services currently offered in the Relevant Market in the GTA, the range of such services likely would be considerably broader "but for" the VOW Restrictions.

[584] Although the information contained in the Disputed Data appears to be widely available to home sellers and home buyers from brokers in the Relevant Market today (in person, by fax, by email or by phone), the evidence demonstrates that "but for" the VOW Restrictions, firms such as ViewPoint, Realosophy and TheRedPin likely would have offered by now, and likely would offer in the future, a range of additional innovative and value-added tools, features and other services on a VOW based on that information. As Mr. Gidamy testified: "[It's] not about

the piece of data itself, it's how you display and how you engage and how you create stickiness …" (Transcript, September 23, 2015, at p. 293).

(e) *Reduced quality of brokerage service offerings*

[585] The Commissioner also submitted that "but for" TREB's MLS Restrictions, including the VOW Restrictions, the quality of various real estate brokerage services that are currently offered in the Relevant Market would be substantially greater.

[586] CREA maintained that there is no evidence before the Tribunal that the quality of services is suffering because of TREB's VOW Restrictions. TREB added that any alleged substantial increase in quality of service would be manifested in more customers hiring a brokerage, which is not borne out by the evidence. This is discussed in section VII.D.(3) below.

[587] TREB further asserted that the majority of the content displayed on a website with a VOW comes from sources other than the VOW Data Feed, and that the "real value of these websites is not the provision of information itself, but rather in the analysis of that information." TREB maintains that "the facilitation of some additional data analysis" by full-information VOWs would not represent a significant increase in quality of service. It states that this is particularly so given that brokerages in the GTA already provide analysis based on sold data, as does TREB through its Market Watch publication. In this regard, TREB referred to Sage Real Estate's Market Report newsletter, which provides statistical trends over the previous month for a variety of neighbourhoods in Toronto, aggregated statistics for the neighbourhood, and some individual transaction-level information about properties that sold in the neighbourhood. Those statistical trends include average sold prices for homes in the neighbourhood, trend lines depicting the relationship between sold prices and list prices, and a chart comparing the average number of days on the market each month over a three-year period. TREB also referred to various analytics provided by Realosophy on its blog, including a comparison of buyers' purchasing power across Toronto neighbourhoods. In addition, TREB noted that its Market Watch publication includes aggregated statistics on transactions processed through TREB's MLS system for the month, as well as a statistical break-down of sold house prices by type and by various regions of the city that appear to approximate large neighbourhoods. That publication also contains year-to-date statistics and year-over-year statistical comparisons.

[588] However, the Tribunal agrees with the Commissioner that the *additional* data analysis which TREB acknowledges would be provided by full-information VOW operators is an important part of what full-information VOWs likely would introduce to the Relevant Market, in the absence of the VOW Restrictions. Another important part of what those VOW operators would introduce would be other innovative service offerings that would be based on manipulation of the Disputed Data and that would be quickly accessible through the VOW. For example, full-information VOW operators would be in a position to provide the type of information that is available in TREB's Market Watch and in Sage Real Estate's Market Report much more quickly than is currently the case. (The Tribunal understands that this is monthly.)

[589] Moreover, the Tribunal disagrees with TREB's position that the additional data analysis that full-information VOWs would likely introduce to the Relevant Market in the absence of the VOW Restrictions would not likely represent a significant increase in quality.

[590] The Tribunal has discussed in section VII.D.(2)(d) above some of the additional innovative services that the Commissioner's witnesses have testified they would likely offer in the absence of the VOW Restrictions. In addition to those new services, those witnesses testified that, in the absence of the VOW Restrictions, they would likely be able to provide better quality versions of existing services, such as better, more accurate and more complete CMAs; more timely and automated notifications of price reductions; and more accurate, timely and complete other information regarding homes with particular characteristics in a specific neighbourhood, or other matters. Such other information includes detailed historical MLS listing information (including with respect to "solds," "pending solds," and WEST listings), dating back many years; statistical analysis tools that, among other things, would assist buyers to determine how long a property might take to sell, or what the sales price-to-listing price ratios are in a particular neighbourhood; and "live" status-change or other information that would enable customers to react quickly to developments in the market. The Tribunal considers the enhancement of CMAs to be particularly significant, as the evidence suggests that it is one of the more valuable sales tools used by agents.

[591] TREB also submitted that if sold data were to become available on its VOW Data Feed, it would be relatively easy for any brokerage in the GTA to display that data on its website. It therefore suggested that in examining the significance of the potential availability of that information to full-information VOWs, the Tribunal should focus on the incremental value that such information would have for full-information VOWs, by virtue of the value added that they would provide to that sold information.

[592] Once again, the Tribunal disagrees. In assessing whether TREB's practice of withholding sold data from its VOW Data Feed and prohibiting the display of sold data on its Members' websites is preventing competition, it is relevant to consider the incremental value that this would have for the Relevant Market as a whole, not just for full-information VOWs. To the extent that other brokerages, in addition to full-information VOWs, can be expected to respond to the enhanced quality offerings of the full-information VOWs, that is a further effect that must be taken into account in the Tribunal's assessment. For example, the Tribunal considers it likely that many other brokerages in the Relevant Market would respond to the more accurate CMAs mentioned above, by offering more accurate CMAs of their own. A failure to do so would make it more difficult for them to effectively compete. In any event, the Tribunal considers it reasonable to infer that many of the 322 brokerages that are already offering VOWs in the GTA likely would respond to the enhanced service quality offerings of ViewPoint, Realosophy and TheRedPin, with improved service offerings of their own. In brief, if the Disputed Data were included in TREB's VOW Data Feed, it is reasonable to expect that at least some of those brokerages would use that information on their VOWs to compete with those who will be using that information.

[593] TREB asserts that a brokerage website with the Disputed Data on its VOW would not provide a significant increase in quality at either the search phase or the valuation/offer phase of the home sale and purchase process, which are discussed at paragraphs 215-220 of these reasons. Although TREB acknowledges that the Disputed Data is valuable to potential home sellers and purchasers during the latter phase, TREB insists that there is no significant incremental value associated with that data being available on a VOW versus other delivery mechanisms, including orally or by hand from an agent, particularly since a consumer must in any event work with an agent in person at that stage. TREB adds that the Disputed Data is much less valuable to consumers during the search phase, because home buyers at that stage are just generally attempting to learn about the home buying market.

[594] TREB's position is contradicted by the testimony of several of the Commissioner's witnesses, whose testimony the Tribunal finds persuasive and credible.

[595] For example, Mr. McMullin testified that registered users on www.viewpoint.ca view the sales history of a property more often than anything else and have confirmed in surveys and verbally that they consider the sales history of a home, including with respect to sold and WEST listings information, to be the information that is most important to them. Among other things, this information enables them to make more informed decisions and to better understand the marketplace before they contact a broker or an agent. As an indication of the level of interest of ViewPoint's registered users in sales history, Mr. McMullin stated that ViewPoint's analysis of user activity on www.viewpoint.ca indicated that about **[CONFIDENTIAL]** of the distinct users who had accessed the website over a 30-day period had reviewed the sales history of at least one sold property; and that this percentage increased to **[CONFIDENTIAL]** over a 90-day period. Similarly, Mr. Nagel stated that the sold listings pages on Redfin's website are one of the most viewed types of pages, ranking only after the main home page, the main map for each metropolitan area and current listings.

[596] In addition, Mr. Gidamy stated that having the Disputed Data available in TREB's Data Feed would significantly improve the accuracy, timeliness and quality of service that TheRedPin provides to its customers. A similar point was made by Ms. Desai.

[597] Mr. Enchin observed that, prior to 2007, when TREB disabled the download function that allowed him to download MLS listings in bulk form from its MLS system, he offered a sophisticated appraisal tool on his VOW that, among other things, used sold and "pending sold" data to predict the actual selling price of homes within $1,000-$2,000. Mr. Enchin testified that this tool assisted home sellers to determine if their homes were listed at the appropriate price. He added that having access to sold information also helps people to determine how long a home might take to sell and to estimate sales to listing ratios. In addition, he stated that this tool was of value in assisting home purchasers to determine the appropriate price to offer for a home.

[598] Based on the foregoing, the Tribunal concludes that, "but for" the VOW Restrictions, the quality of some important service offerings in the market likely would be significantly greater (*Canada Pipe FCA* at para 58).

[599] For example, CMAs likely would be based on more comprehensive information, and therefore would be more helpful and accurate. Mr. Hamidi indicated it would be possible to create a CMA with sold data on homes with indoor swimming pools or certain school, neighbourhood or lifestyle information. Furthermore, interactive maps and other features that may currently exist in the Relevant Market would reflect sold prices and other updates (including with respect to WEST listings, and the fact that a conditional offer has been placed on a home), and would do so in "real time."

[600] In addition to the foregoing, having access over the Internet to the Disputed Data, and to analyses incorporating that information, would provide value to those home sellers and purchasers who prefer to have that information *prior to* meeting with a broker; or who may wish to choose between the convenience and transparency of obtaining that information over a full-information VOW and obtaining it directly from an agent in the traditional manner.

(f) *Reduced innovation*

[601] The Commissioner submitted that TREB's MLS Restrictions, including its VOW Restrictions, have stifled innovation or shielded its Members from innovative forms of competition, by excluding innovative brokerage models from the Relevant Market and by preventing existing brokerages from offering innovative hybrid or mixed-model services to consumers.

[602] In response, TREB and CREA maintained that there is and will continue to be a high degree of innovation in the Relevant Market, and that the overall extent of innovation in the market has not been materially reduced by the VOW Restrictions. They insisted that this is particularly so with respect to the Internet, which they stated has become and will remain an intensely competitive arena for brokers and agents.

[603] Among other things, TREB noted that its Members use technology for a variety of purposes, including: promoting individual listings through property-specific and general brokerage websites; using social networking in promoting listings; automating real estate transaction paperwork; and providing "live chat" capability with the brokerage over the Internet.

[604] TREB added that not all "innovative brokerages" choose to implement a VOW Data Feed within their brokerage website. For example, Sage Real Estate was recognized in the media as "the most philosophically and technologically advanced brokerage in the city of Toronto" despite not using a VOW Data Feed in its website. Using TREB's IDX feed and CREA's DDF feed, Sage Real Estate is turning its website into a home search portal for buyers not only in Toronto, but across Canada. Likewise, Ultimate Realty has four separate websites and two different mobile apps. Once again, its website that is geared towards residential real estate uses TREB's IDX feed and the DDF feed. (However, the mobile app that is geared towards residential real estate uses TREB's VOW Data Feed.) Between 75 and 125 leads are generated each month through these online tools. CREA noted that a number of other brokerages in the

GTA, including TheRedPin, Realosophy, Zolo and Spring Realty, are using their websites to distinguish themselves from their competitors and as their primary lead generation tool.

[605] More broadly, TREB noted that brokerages covering well over 90% of its membership are subscribed to its IDX feed; and that nationally, 73% of CREA's membership is subscribed to its DDF feed, notwithstanding that provincial regulation limits the participation of realtors in Québec, Manitoba and Saskatchewan. Among other things, the listing information available on the DDF is comparable to that found on realtor.ca, and therefore does not include the information included in the Disputed Data fields.

[606] For its part, CREA noted that its website realtor.ca is highly popular and, among other things, allows consumers to search active listings and obtain detailed information and photos about properties across Canada, without the need to call a broker or to provide their identity through a log-in requirement. In 2014 alone, realtor.ca provided approximately 1 million leads to Canadian realtors. Mr. Simonsen testified in September 2015 that year-to-date data indicated that this number was likely to approximately double in 2015. Moreover, for purchasers planning on making a real estate decision within three months, 60% of the people who responded to a survey on realtor.ca were using the website as their primary source for searching properties, 70% were working with a realtor and 72% planned to do so. Among other things, users of realtor.ca are able to keyword search or search using a map function, view listing information including up to 99 photographs for each listing (with more available by link), take virtual tours, compare properties, review neighbourhood demographic information, get directions to a property, assess the property's "walkability" by its "walk score," email the listing to others and contact an agent. CREA plans to add additional innovations in the near future.

[607] The Tribunal acknowledges that TREB and its Members have developed various Internet-based and other innovations that provide new and valuable offerings to home sellers and buyers. However, the question is not whether there are highly innovative participants in the Relevant Market, a high degree of acceptance of innovative technology, and offerings that are popular with consumers in the existing environment, notwithstanding the VOW Restrictions. The question is whether innovation would likely be, or have been, materially greater in the absence of those restrictions. In other words, notwithstanding that TREB and its Members continue to move along the innovation ladder, would the removal of the VOW Restrictions allow innovative residential real estate brokerages to move further or more quickly up on that ladder? The Tribunal is persuaded that this is likely to be the case.

[608] Several of the innovations that have already been developed by ViewPoint, and that representatives of Realosophy and TheRedPin have stated they would likely launch or would be able to launch in the Relevant Market with a full-information VOW and access to the Disputed Data, have been discussed at various points in these reasons above (see for example paragraphs 572-581 above).

[609] Another innovation that ViewPoint has introduced is the automation of its "trade accounting." According to Mr. McMullin, ViewPoint replaced what he described as the "legacy system" that is provided by a third party, Lone Wolf, and used broadly across the residential real

estate industry. Apparently, that system is not fully integrated with the MLS system. As a result, ViewPoint extended the capabilities of its platform to encompass all of the functionality that Lone Wolf had previously provided. The sales coordinators who are responsible for managing and entering trades have reported that this has resulted in a dramatic increase in efficiency because, for example, to begin the entry of a trade they simply have to enter the property identifier or the MLS number and it will bring up a screen with a wealth of pre-populated information fields that enables them to settle transactions much more efficiently.

[610] More generally, ViewPoint is an innovative company that the Tribunal expects will continue to develop innovative service offerings that likely would be, and likely would have been, made available in the Relevant Market "but for" the VOW Restrictions. The Tribunal bases its view in this regard not only on the impressive array of innovative products that were described in Mr. McMullin's initial witness statement, but also on those additional products that it launched between the time of that statement and the time of his two subsequent 2015 statements, some of which are described in the immediately preceding section above. The Tribunal recognizes that many of those products, some of which are identified in the paragraphs immediately below, would not be adversely affected by the VOW Restrictions *per se*. However, to the extent that those restrictions are preventing ViewPoint's entry into the Relevant Market, they are indirectly preventing ViewPoint from being able to introduce the full range of its existing innovations to the Relevant Market. Those restrictions are also preventing an important innovator from further disrupting the Relevant Market. In this regard, Mr. McMullin's uncontradicted testimony is that ViewPoint "continuously and from the outset until … this day look[s] for ways to use software, the internet and data to streamline and make more efficient the delivery of what we will call brokerage services. That's everything from acquiring customers to handling their inquiries to facilitating trade on the street in terms of showings and then, finally, through to actually accounting for trades that [it] assist[s] buyers and sellers in completing" (Transcript, September 22, 2015, at p. 71). The Tribunal is satisfied that ViewPoint would continue to behave in this manner if it were to enter the Relevant Market.

[611] Apart from some of the innovative offerings that have already been described at various points in these reasons, additional offerings currently available to one or more categories of users on www.viewpoint.ca include:

a. A "property rating" feature, which allows ViewPoint's clients to see comments that other visitors to the home have posted about the property;

b. Photographs of the home taken from a helicopter or a low flying aircraft and from the street, which provide more detail and are often more recent than those typically available, which are taken from a satellite;

c. Historical tax assessment information;

d. Colour coded identifiers on ViewPoint's local maps, that allow registered users to readily identify properties that have sold or are the subject of price changes – all of which are available in "real time," and in some cases depict changes that were made on that day;

e. A standard feature that places registered users on the map at the last place they were before they logged off;

f. A monthly mortgage calculator;

g. Extensive information from the province's land registration system;

h. A side-bar list of recent listings in chronological order, which gets automatically updated in "real time";

i. A feature that enables registered users to constrain the presentation of listings to only those ones that are in the map view, together with an accompanying side-bar of new or changed listings corresponding to that constrained area, which may be expanded or narrowed at the user's discretion;

j. A feature that allows registered users to follow developments with respect to a significant number of properties, including those that are not currently listed for sale; and

k. A "Property Clicks" tool that allows registered users and registered clients to track the number of followers and clicks on a property.

[612] In addition, ViewPoint offers its listing clients information about the number of web-based visitors who have looked at their property, as well as enhanced profile on its website. Its Full Service Listing service provides further features, including providing their properties with four distinct differences from other properties identified on its interactive map and a comprehensive weekly report regarding the website activity on their property.

[613] Another innovative offering currently available from ViewPoint is an optional $1,000 "flat fee" service that it offers to sellers who want to represent themselves and reduce their selling costs. As previously noted, Mr. McMullin stated that in the absence of the VOW Restrictions, the website services offered by ViewPoint would be cutting-edge and would include many of the same features already available on www.viewpoint.ca. The Tribunal acknowledges that some of these features could perhaps be developed or offered through Internet-based data-sharing vehicles other than VOWs. But the Tribunal is satisfied, based on the evidence before it, that without access to the Disputed Data, ViewPoint is not likely to enter the GTA and to offer such other features, whether on a full-information VOW or simply in the non-VOW area of its website.

[614] Turning to TheRedPin, Mr. Hamidi testified that TREB has been preventing him and his partners from innovating using TREB's MLS data for several years. In 2009, TREB's refusal to make resale home listing data available in a feed led them to focus their efforts on new condominiums. Although they subsequently entered the Relevant Market by launching TheRedPin shortly after TREB announced its VOW Policy and Rules in June 2011, he and Mr. Gidamy each stated that, "but for" the VOW Restrictions, TheRedPin would offer additional tools and services for their clients. Mr. Silver conveyed essentially the same view.

[615] In addition, as discussed at paragraphs 576-577 above, Messrs. Gidamy and Hamidi testified that if the VOW Restrictions were eliminated, TheRedPin would develop innovative new tools to assist its agents to be more efficient and serve potential customers.

[616] Based on all of the foregoing, the Tribunal concludes that "but for" the VOW Restrictions, there likely would have been, and likely would be, considerably more innovation in the Relevant Market, including as yet unidentified innovations that would be in addition to those described in these reasons above. Some of that innovation would be in the form of the additional brokerage services and enhance quality described in the two immediately preceding sections above. Additional innovation would be in the form described in this section. However, the Tribunal wishes to emphasize that it has been careful not to "double count" these anti-competitive effects in assessing whether, together, they constitute, or are likely to constitute, a "substantial" prevention of competition.

[617] The Tribunal also accepts Dr. Vistnes' evidence that VOWs represent an important form of dynamic competition, including innovation, that offer the potential to change the manner in which competition among real estate agents and brokers occurs.

[618] The Tribunal embraces the classical definition of dynamic competition offered by Joseph Schumpeter, who defined competition as a dynamic process wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers. Schumpeter added that, in this process, the basic instrument that allows firms to be ahead of their competitors is the introduction of informational asymmetries which result primarily from innovation. A framework for antitrust analysis that favors dynamic competition over static competition "puts less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities" (J Gregory Sidack & David J Teece, "Dynamic Competition in Antitrust Law" (2009) 5:4 *J Competition L & Economics* 581 at 581).

[619] The Tribunal is satisfied that, "but for" the VOW Restrictions, full-information VOWs likely would have an important impact on the manner in which such dynamic competition occurs. For this reason, and the reasons provided above in respect of the range and quality of brokerage services, the Tribunal also agrees with Dr. Vistnes that the VOW Restrictions have substantially reduced, and continue to substantially reduce, dynamic competition, including innovation. This will be discussed in section VII.D.(3) below.

(g) *Reduced pressure on commission rates*

[620] The Commissioner, supported by Dr. Vistnes, submitted that in the absence of TREB's MLS Restrictions, including the VOW Restrictions, customers in the Relevant Market would be more likely to be offered discounts or rebates on their commissions paid to brokers, as brokers use VOWs to deliver services more efficiently, reduce their costs, and then pass those cost savings along to home sellers and home buyers. The Commissioner maintained that the

aggregate savings to home sellers and buyers in the GTA would likely be very substantial over a period of years.

[621] TREB responded that the Commissioner has not demonstrated that full-information VOWs would likely offer materially lower commissions or increased discounts in the Relevant Market than VOWs currently competing there. The Tribunal agrees with TREB on this point.

[622] TREB notes that TheRedPin and Realosophy already offer discounts/rebates in the GTA with their current VOWs, and that there is no persuasive evidence that they would reduce their net commissions further, if the VOW Restrictions were prohibited by the Tribunal. Indeed, Mr. Gidamy stated that TheRedPin has been moving in the opposite direction, reducing its cash-back rebate from 25% to 15% effective June 1, 2014.

[623] TREB also notes that ViewPoint and some full-information VOWs in the United States have ceased their practice of offering discounts in recent years. With respect to ViewPoint, Mr. McMullin stated that it stopped offering rebates to buyers in recent years after determining that it was detrimental to ViewPoint's ability to attract new agents and that there was not a clear competitive advantage associated with offering such rebates. With respect to sellers, he added that they often fear that lower-priced brokerages do not provide the same level of sales and marketing exposure and that in a buyers' market, they may even wind up not selling their home.

[624] Likewise, the U.S. experience does not reflect that commission rates have decreased with full-information VOWs. ZipRealty stopped offering rebates in the United States after tests and focus-group studies revealed that its rebate program was not the primary driver of its business. A second U.S. full-service VOW that used to offer significant rebates (eRealty Inc.) was purchased by Prudential Financial Inc. which apparently ceased offering such rebates. In addition, Redfin reduced the level of its rebates/discounts in 2007 and then again in 2012. Mr. Nagel testified that he is not aware of whether commissions in the United States have been reduced since the 2008 settlement between the DOJ and NAR.

[625] Based on the foregoing evidence, and in the absence of any persuasive evidence supporting the Commissioner's position, the Tribunal concludes that it has not been demonstrated that the VOW Restrictions have had, or are *likely* to have, the effect of materially impacting in a negative way net commissions in the Relevant Market. Stated differently, the evidence does not establish on a balance of probabilities that, "but for" those restrictions, competition with respect to net real estate commissions likely would be more intense, and reflected in materially lower commissions or larger rebates for home sellers or home purchasers in the Relevant Market. Indeed, this appears to have been recognized by the Commissioner, who acknowledged in his 2015 Closing Submissions that the *focus* of the evidence in the Redetermination Hearing has been on non-price competition, even though he continued to maintain that the evidence of lower brokerage costs "is consistent with the expectation that lower costs will be passed on to home buyers and sellers in the form of lower prices over time" (Commissioner's 2015 Closing Submissions, at paras 168-169). Of course, to the extent that the elimination of the VOW Restrictions would lower the costs of participants in the Relevant Market, one would expect that this should ultimately lead to lower net commissions or lower fees

for accessing services on VOWs. However, that possibility will not be considered by the Tribunal in its assessment of whether the VOW Restrictions meet the test set forth in paragraph 79(1)(*c*) of the Act.

(h) *Reduced output*

[626] After the Tribunal raised a question at the Redetermination Hearing regarding the impact of TREB's impugned conduct on the output of residential real estate brokerage services, the Commissioner made submissions on this issue in closing argument. In brief, the Commissioner submitted that the VOW Restrictions likely have the effect of materially reducing the level of total output of brokerage services in the Relevant Market, relative to the level of output that likely would exist "but for" those restrictions.

[627] In response to questioning from the Tribunal, Dr. Church stated that he did not agree with that submission. He based his position on his view that the demand for residential real estate brokerage services in the Relevant Market is highly inelastic, because that demand is derived from consumer demand for buying and selling homes, and the latter demand is not likely going to change based on changes in price or non-price competition with respect to brokerage services.

[628] However, the evidence demonstrates that the amount of brokerage services consumed by home purchasers and sellers is not fixed to the number of underlying home purchase and sale transactions. This is corroborated by the evidence indicating that a very high percentage of persons consume brokerage services over the Internet and that a high percentage of such persons nevertheless ultimately retain the services of a different broker to assist them to consummate the purchase or sale of a home. In this latter regard, Mr. McMullin readily acknowledged that many consumers who visit www.viewpoint.ca retain someone other than ViewPoint to be their broker.

[629] Notwithstanding the foregoing, the Tribunal excluded this issue from its consideration of whether competition has been, is, or is likely to be prevented or lessened substantially. This is because this was not part of the Commissioner's Application and TREB did not have an opportunity to respond to the Commissioner's written submissions on this point. In addition, paragraph 16 of the Order issued by the Tribunal on April 23, 2014 expressly stipulated that "[t]he economic theory of the case will not change" for the Redetermination Hearing.

(i) *Maintenance of incentives to steer buyers away from inefficient transactions*

[630] In his initial report, Dr. Vistnes took the position that TREB's refusal to permit VOW operators to display the Disputed Data on their VOWs helps to maintain agents' incentives to steer consumers into inefficient matches, at the expense of the home buyer, the seller or both. In his view, buyers would be less vulnerable to being encouraged to offer an excessive price, and sellers would be less vulnerable to being encouraged to accept too low a price, if they had access

to the more comprehensive information that TREB's VOW Restrictions are preventing VOW operators from making available on their VOWs.

[631] Dr. Vistnes offered several examples of situations in which agents might have an incentive to steer potential home sellers or buyers into inefficient matches. For instance, he postulated that an agent may care less about a $10,000 difference in the selling price of a home, because this will only change the agent's commission by approximately $250, if the agent was splitting a 5% commission with another broker. As a result, the agent may encourage a seller to accept a lower offer (or to set a lower initial price), even if it might be in the seller's interest to wait for a higher offer to come along. Likewise, an agent might encourage a buyer to offer a higher price in order to close a sale, even if it might have been in the buyer's interest to keep looking.

[632] Another example provided by Dr. Vistnes in his 2012 expert report concerned the incentive for a buyer's agent to steer their client away from homes offering a lower buy-side commission rate, so as to protect their own commission. Using the hypothetical of two $500,000 homes on the market, offering cooperating broker commissions of 2.5% and 2.0%, respectively, he noted that the agent would earn an extra $2,500 by steering their buyer towards the higher commission home. Dr. Vistnes produced analysis which appears to provide some support for his view that this type of behaviour may be occurring in the GTA, because the frequency of different brokerages being used on both the sell-side and the buy-side of a transaction is greater when the buy-side commission exceeds 1% than when it is less than 1%.

[633] A third example provided by Dr. Vistnes concerned dual agency situations where an agent represents both buyers and sellers. Dr. Vistnes postulated that when agents have opportunities to produce dual agency outcomes, they have a strong incentive to do so, regardless of whether that may be in the interest of the buyer or seller. In this regard, Dr. Vistnes prepared a statistical analysis of sales by the five largest corporate brokerages in the GTA, which appears to show that dual-agency outcomes are more common than expected.

[634] While informative, the evidence provided by Dr. Vistnes with respect to steering does not assist the Commissioner to demonstrate that TREB's VOW Restrictions have prevented or lessened, or are likely to prevent or lessen, *competition between brokers* in the Relevant Market.

[635] The Tribunal notes that this theory was not mentioned in the Application, was not addressed to any material degree in the Commissioner's 2015 Closing Submissions, and was not supported by any significant additional evidence. For example, the Commissioner did not adduce evidence to demonstrate that full-information VOWs have ever competed in specific ways to reduce steering, let alone to demonstrate that such efforts have had a material impact on price or non-price dimensions of competition.

[636] As a practical matter, the Tribunal agrees with TREB's position that the scope for agents to act in the ways described by Dr. Vistnes is reduced, relative to what it once may have been, by the availability of substantially more information on the Internet and elsewhere regarding homes that are for sale or have sold in the Relevant Market.

[637] The Tribunal also notes that RECO's *Code of Ethics* appears to address the principal concerns raised by Dr. Vistnes. Specifically, section 19 states:

> If a brokerage has entered into a representation agreement with a buyer, a broker or salesperson who acts on behalf of the buyer pursuant to the agreement shall inform the buyer of properties that meet the buyer's criteria without having any regard to the amount of commission or other remuneration, if any, to which the brokerage might be entitled.

[638] For the foregoing reasons, the Tribunal thus concludes that the Commissioner did not demonstrate that the VOW Restrictions are preventing or lessening competition between brokers by maintaining steering incentives that would be materially diminished in the absence of those restrictions.

(j) *Conclusion*

[639] The Tribunal therefore concludes, on a balance of probabilities, that "but for" the VOW Restrictions, there likely would be a considerably broader range of services in the Relevant Market, the quality of some services in the Relevant Market likely would be significantly better, and there likely would be considerably more innovation in the Relevant Market. There would also be reduced barriers to entry and costs. However, the Tribunal is not satisfied that, "but for" the VOW Restrictions, commission rates, output or the incentive to steer buyers away from inefficient transactions would be reduced in the Relevant Market.

(3) Substantiality of anti-competitive effects

[640] The Tribunal must now determine whether the anti-competitive effects attributable to the VOW Restrictions and identified above raise to the level of "substantiality" required by paragraph 79(1)(*c*) of the Act.

[641] TREB and CREA submitted that the VOW Restrictions do not result in prices that are materially greater, or in levels of non-price competition that are materially lower, than the levels of price and non-price competition that would likely exist "but for" the VOW Restrictions. In taking this position, TREB emphasized that the Tribunal's assessment should be narrowly focused upon the incremental impact of an order requiring the Disputed Data to be made available for search and display on its Members' VOWs.

[642] The Tribunal's focus has indeed been upon the incremental impact of the VOW Restrictions. However, in determining whether the "substantiality" element is met, the Tribunal must assess the aggregate incremental impact of the three aspects of the VOW Restrictions that the Commissioner alleges constitute a practice of anti-competitive acts, namely (i) excluding the Disputed Data from TREB's VOW Data Feed; (ii) prohibiting TREB's Members from using the information included in the VOW Data Feed for any purpose other than display on a website;

and (iii) prohibiting TREB's Members from displaying certain information (including the Disputed Data) on their VOWs.

[643] For the reasons set forth in section VII.D.(2) above, the Tribunal has concluded that, "but for" that practice of anti-competitive acts, there would likely have been, and would likely be in the future:

- more and faster entry and expansion by new and existing competitors than is currently the case;
- lower costs for operating a VOW;
- a considerably broader range of brokerage service offerings;
- an increase in the quality of various product offerings; and
- a considerably greater degree of innovation.

[644] The question that therefore remains is whether, taking all these factors together (and regardless of whether they individually meet the "substantiality" threshold), the aggregate impact of these incremental anti-competitive effects of TREB's VOW Restrictions constitutes, or is likely to constitute, a *substantial* prevention of competition. It bears underscoring that, in addressing this question, the issue is not whether innovative brokers can compete without a VOW that includes the Disputed Data. Rather, the issue is whether the VOW Restrictions have prevented, are preventing, or are likely to prevent competition substantially in the Relevant Market. This "substantiality" is assessed in terms of magnitude and scope.

(a) *Magnitude and degree*

[645] TREB and CREA suggest that the issue of substantiality cannot be answered in the affirmative unless the evidence establishes that full-information VOW-based brokerages would likely be hired by significantly more clients as a real estate brokerage, as a result of being able to display the Disputed Data. TREB adds that it is not relevant for the Tribunal's analysis if a website becomes more popular with "real estate voyeurs" or consumers who are ultimately going to hire another brokerage.

[646] The Tribunal considers that the first of these propositions by TREB and CREA must be recast in terms of whether full-information VOW brokerages likely would be hired by significantly more clients as a real estate brokerage, "but for" the *aggregate impact* of the three components of TREB's practice of anti-competitive acts described at paragraph 642 above.

[647] Moreover, the Tribunal's analysis cannot be confined to the impact of that practice on full-information VOW-*based* brokerages. It is also important and relevant for the Tribunal to consider whether those existing TREB Members who wish to offer full-information VOWs, while also continuing to compete as traditional "bricks and mortar" brokerages would likely be

hired by significantly more clients as a real estate brokerage, as a result of being able to operate as full-information VOWs in addition to their more traditional offerings. (The Tribunal understands that to the extent that many of the 322 Members of TREB who are now offering VOWs continue to also conduct business in the traditional manner, they are not considered to be full-information VOW-*based* brokerages.)

[648] Turning to "real estate voyeurs," TREB submits that to the extent that those consumers proceed from a VOW to use another brokerage to complete their real estate transactions, the fact that they may have visited the VOW before that point in time is without competitive significance under paragraph 79(1)(*c*).

[649] The Tribunal disagrees. To the extent that such other brokerages likely would have to compete to a greater degree to prevent the consumers in question from becoming clients of the full-information VOW brokerages whose websites they have visited, the fact that the latter do not ultimately win the patronage of such clients is not irrelevant to the Tribunal's assessment. Stated differently, as a general principle, innovation is not only relevant to the Tribunal's assessment under paragraph 79(1)(*c*) to the extent that it assists the innovator to win business. It is also relevant to the extent that it prompts rivals in the relevant market to respond with competitive initiatives of their own, in order to retain such business or to win it away from either the innovator or another rival.

[650] A good example of this is the evidence that Bosley and RE/MAX Hallmark displayed sold information on their respective websites for at least ten months in 2014/2015. As discussed in paragraph 373 above, when requested by TREB to cease displaying sold information, Bosley's President, Mr. Tom Bosley, expressed the hope that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those other brokerages who were posting such information. Another example, on a much broader scale, is realtor.com's decision to begin posting sold information subsequent to the widespread posting of such information on other websites in the United States (see paragraph 700 below). A third example would be the approximately 322 brokerages that TREB has stated now operate VOWs in the GTA, as a result of the introduction of TREB's VOW Policy and Rules, which were pushed by a smaller number of innovators.

[651] To further buttress its position that the VOW Restrictions have had no material adverse impact on the Relevant Market, TREB noted that TheRedPin and Realosophy have continued to grow their business despite the VOW Restrictions, as confirmed by Messrs. Gidamy and Pasalis, and to expand their respective presence in the media.

[652] However, this is beside the point. What is pertinent for the Tribunal's analysis is the testimony of Messrs. Gidamy, Hamidi and Pasalis and Ms. Desai regarding the significant value of sold information, and how the ability to display and use such information would enable TheRedPin and Realosophy to offer a range of additional new services to their clients and agents. The Tribunal is satisfied that this ability to offer a range of additional new services to their clients and agents would assist TheRedPin and Realosophy to be able to better compete, and therefore to grow, materially more than they have been growing.

(i) The limited quantitative evidence

[653] TREB and CREA submitted that if full-information VOWs were as much of a disruptive technology as the Commissioner has suggested, the impact of their presence on residential real estate brokerage markets in the United States and in Nova Scotia would be observable. However, TREB and CREA noted that the Commissioner and Dr. Vistnes failed to conduct any empirical analysis of any of those markets, notwithstanding the fact that full-information VOWs have existed in the United States for over seven years and have existed in Nova Scotia for a number of years. TREB and CREA also stated that the Commissioner failed to adduce any quantitative analysis of the relative effectiveness of VOWs with sold data and VOWs without sold data in converting website users to clients. In other words, they asserted that the Commissioner failed to present empirical evidence of the incremental effect of sold and other Disputed Data in increasing a full-information VOW operator's ability to generate clients. TREB requested the Tribunal to draw an adverse inference from the Commissioner's failure to conduct such empirical analysis.

[654] TREB further argued that information comparing Redfin's conversion rates in local markets where it can display sold information on its website, with its rates in local markets where it cannot display that information on its website, was available to Mr. Nagel, yet was not provided. Once again, TREB requested the Tribunal to draw an inference that is unfavourable to the Commissioner, because Mr. Nagel was the Commissioner's witness.

[655] During the Redetermination Hearing, the Tribunal pressed Dr. Vistnes on the Commissioner's failure to conduct an empirical assessment comparing the nature and extent of competition in areas of the United States where sold data is available on VOWs, with the level of competition in areas where sold data is not available on VOWs. Dr. Vistnes explained that he advised the Commissioner against attempting to subpoena MLS information from real estate boards in the United States because, to conduct a legitimate study, it would have been necessary to obtain "a tremendous amount of data from a significant number of MLSes." Based on his experience with the dispute that led to the 2008 settlement between the U.S. DOJ and NAR, this would have required "a huge outlay of effort" that may not "have been particularly reliable or particularly informative," given the difficulty of having to properly control for all of the differences in the local markets in question. He therefore advised the Commissioner that he did not believe that that would be the best way in which to advance the case.

[656] The Tribunal acknowledges that, as a statutory authority, the Commissioner has to be prudent with, and make difficult decisions regarding the allocation of, the limited public funds available for administering and enforcing the Act at any given time. The Tribunal also accepts that Dr. Vistnes' experience with the dispute between the U.S. DOJ and NAR provided a legitimate basis upon which to draw conclusions about the costs and utility of a comparative analysis between local markets where sold information is available and other local markets where it is not available. Therefore, the Tribunal is not prepared to draw an adverse inference from the Commissioner's failure to conduct the empirical assessment in question regarding the U.S. experience. That said, the Tribunal notes that the Commissioner continues to bear the

burden of supporting his Application on the balance of probabilities, which may well be a more challenging task in the absence of quantitative evidence.

[657] However, the Tribunal is prepared to draw some adverse inference from the failure of Messrs. Nagel and McMullin to adduce evidence regarding the experience of Redfin and Viewpoint, respectively, in areas of the United States and Nova Scotia where sold information or the "pending sold" price is and is not permitted to be displayed on its website. That is to say, the Tribunal is prepared to infer that Redfin's and ViewPoint's conversion rates in areas where they are not permitted to display "sold" information or "pending sold" prices on their website are not lower than they are in areas where those entities are permitted to display that information on their websites. However, given that this may well be explainable by the local differences mentioned by Dr. Vistnes, the Tribunal does not accord great significance to this inference. The more significant points, in the Tribunal's view, are that both Mr. Nagel and Mr. McMullin persuasively testified that sold information is critical to potential home sellers and buyers (see discussion at paragraphs 595 and 675 of these reasons), and that being prohibited from providing that information to consumers in various innovative formats is significantly impeding them from distinguishing themselves from their rivals.

[658] That being said, the Tribunal observes that even a limited comparison between one local U.S. market where sold information is available and one local U.S. market where such information is not available may have been at least somewhat helpful. The same is true with respect to Nova Scotia and the HRM, with regards to "pending sold" prices. The Tribunal further notes that in other parts of his testimony, Dr. Vistnes confirmed that the U.S. experience since 2008 could be instructive, so long as the analysis controlled for differences that might exist between the markets being compared. The absence of any such comparison, including a quantitative comparison of markets with and without full-information VOWs, rendered much more difficult the Tribunal's assessment of the "substantiality" element of paragraph 79(1)(*c*), and resulted in this case being much more of a "close call," than it otherwise may have been.

(ii) Conversion rates

[659] In addition to the foregoing, both TREB and CREA raised the issue of the low "conversion rates" of full-information VOWs. The Tribunal pauses to note that this term was sometimes used to describe the conversion of website visitors to registered users on a VOW and sometimes used to describe the subsequent conversion of registered users on a VOW to actual clients of the brokerage.

[660] TREB and CREA maintained that the available evidence on "conversion rates" indicates that full-information VOWs have not had a substantial impact on competition in the United States or in Nova Scotia. While full-information VOWs have been successful in attracting a large number of visitors to their respective websites, they have been much less successful in converting those visitors to clients who retain them on actual purchase and sale transactions.

[661] TREB noted that Redfin and ViewPoint have "conversion" rates of only **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** respectively, whereas TheRedPin's conversion

rate is **[CONFIDENTIAL]** even though it does not have a full-information VOW. For Redfin, this figure represents the percentage of unique website visitors who registered on its website over the three-year period 2012-2014. For ViewPoint, it represents the number of transactions that it brokered during the period from January 1, 2015 to September 19, 2015 **[CONFIDENTIAL]** divided by the total number of new registered users during that period **[CONFIDENTIAL]**. However, if one were comparing "apples to apples," ViewPoint's "conversion" rate appears to have been **[CONFIDENTIAL]** in 2014, as there were **[CONFIDENTIAL]** new registrations out of **[CONFIDENTIAL]** users that year (Exhibit CA-103, ViewPoint Realty Business Metrics; 2015 McMullin Second Statement, at p. 28). For TheRedPin, the "conversion rate" represents the "current" percentage of registered users on its VOW who hired TheRedPin on a completed transaction, although the specific period in relation to which this percentage pertains was not provided. TREB observed from these statistics that TheRedPin is approximately **[CONFIDENTIAL]** times as successful in converting clients as Redfin, and over **[CONFIDENTIAL]** times as successful as ViewPoint.

[662] The Tribunal does not accord much significance to the fact that the low conversion rates of firms such as ViewPoint, Redfin and TheRedPin suggest that many consumers are evidently treating the information available on their websites as complements to the information available from the (different) broker they ultimately use to list or purchase their home. The fact remains that the innovative tools, features and other services available on those websites is assisting them to compete, and is forcing traditional brokerages to respond.

[663] TREB invited the Tribunal to conclude from this evidence on conversion rates that there is no causal relationship between having a full-information VOW and being able to convert website users into clients. TREB asked the Tribunal to draw a similar conclusion from the fact that technology-based competitors such as TheRedPin and Realosophy continue to grow, even though they do not have access to a VOW containing the Disputed Data.

[664] The Tribunal is not prepared to reach such conclusions. The Tribunal acknowledges that conversion rates are low and that the quantitative evidence provided by the Commissioner in this proceeding is limited. The Tribunal also recognizes that there is no quantitative evidence comparing markets where VOW operators have access to sold listings or other Disputed Data with markets where they do not. However, the Commissioner's case is focused on dynamic competition and innovation. In such cases, reliable quantitative evidence is often not available or cannot easily be obtained. In the absence of quantitative evidence comparing the performance of Redfin or ViewPoint in markets where, on the one hand, they are able to display and use the Disputed Data to offer services that are based on that information, and on the other hand, they are not able to display and use some or all of the Disputed Data, the Tribunal must make its determination on the basis of the available evidence, in this case primarily qualitative, on the record.

(iii) Qualitative evidence

[665] The qualitative evidence adduced by the Commissioner demonstrates six important things.

[666] First, as discussed in greater detail below, the Disputed Data is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. And being able to distinguish themselves from more traditional brokerages is an essential element to allow VOW operators like ViewPoint, TheRedPin or Realosophy to enter the Relevant Market, or to expand within it to the degree that otherwise likely would be the case.

[667] Second, home purchasers and sellers value being able to obtain information with respect to sold prices, the conditional sale status of homes in the market, firm "pending sold" information, WEST listings and cooperating broker commissions *prior to* meeting with their broker/agent, or in any event *prior to* finalizing the listing price of their homes or making an offer on a home.

[668] Third, an inability to display and use the Disputed Data to develop innovative products has been preventing, and is likely to continue to prevent, ViewPoint from entering the Relevant Market. This has also prevented Realosophy and TheRedPin from growing as much as they likely would have grown, and is likely continuing to prevent them from growing as much as they likely would grow, "but for" the VOW Restrictions. Moreover, this also prevented Sam & Andy from expanding within the Relevant Market, and prevented their brokerage customers from doing the same.

[669] Fourth, ViewPoint, Realosophy and TheRedPin are Internet-based innovative brokerages that, in aggregate, likely would have introduced a considerably broader range of brokerage services, increased the quality of some important services (such as CMAs), benefited from lower operating costs and considerably increased the overall level of innovation in the Relevant Market, "but for" the VOW Restrictions. The cumulative impact of these anti-competitive effects resulting from the VOW Restrictions is such that the level of non-price competition would likely be substantially greater in the absence of the impugned practice.

[670] Fifth, the VOW Restrictions have erected barriers to the entry and expansion of innovative brokers in the Relevant Market. ViewPoint's disruptive, innovative approach to its business has assisted it to become the largest independent brokerage in Nova Scotia, and to continue growing even during the downturn in the real estate business that has occurred in 2013 and 2014. Although the Tribunal cannot predict whether ViewPoint likely would achieve a share of the Relevant Market that is similar to what it has achieved in the HRM **[CONFIDENTIAL]**, the Tribunal is satisfied that, in the absence of the VOW Restrictions, ViewPoint likely would enter, grow and become an important competitor in the Relevant Market. To put ViewPoint's **[CONFIDENTIAL]** share into perspective, the Tribunal observes that Dr. Church reported in 2012 that the largest brokerage in the GTA at that time had a market share of approximately 4%. Dr. Vistnes estimated that even a 3% market share would make ViewPoint roughly the sixth or seventh largest firm in the GTA. The Tribunal notes that Mr. McMullin testified in September 2015 that ViewPoint was on track to finish the year with a 25-28% increase in its number of brokered transactions in Nova Scotia. The Tribunal is also satisfied that the VOW Restrictions are preventing TheRedPin and Realosophy from growing and becoming significantly more important competitors in the GTA.

[671] The Tribunal considers that its conclusion regarding the ability of these entities to enter into and expand within the GTA is supported by the experience of Redfin in the United States, which continues to expand and grow. Although its absolute share of the overall residential real estate brokerage business in the United States is small (i.e., well below **[CONFIDENTIAL]**% in the areas where it operates), it was ranked 13 out of the 500 top real estate brokerages in the United States in 2011, based on the number of closed transactions per sales associate. Redfin's continued growth and expansion demonstrates that its business model is successful.

[672] Sixth, the VOW Restrictions have stifled innovation in the supply of Internet-based real estate brokerage services in the GTA.

[673] The Tribunal is satisfied that that the qualitative evidence provided by the Commissioner in respect of the foregoing matters is not speculative and is specific enough to meet, on a balance of probabilities, the substantiality threshold set forth in paragraph 79(1)(*c*).

(iv) Importance of the Disputed Data

[674] Furthermore, the Tribunal accepts the qualitative evidence of several of the Commissioner's witnesses who testified regarding the importance of information pertaining to the Disputed Data (i.e., sold, "pending sold," WEST listings and cooperative broker commissions), both to them and to home sellers/purchasers.

A. Sold data

[675] Regarding sold information, Messrs. Nagel, McMullin, Pasalis, Gidamy, Hamidi and Enchin all testified that this information is very important to home sellers and buyers; and that being able to display and use that information on their VOWs would assist them to convert visitors to their VOWs into clients. The Tribunal also accepts Mr. McMullin's testimony that sold prices are "the single most reliable piece of evidence of market activity in the real estate business, because a listing price is nothing more than an advertisement, a solicitation, an aspiration of a seller, whereas a sold price is indicative of market value for a property" (Transcript, September 22, 2015, at p. 91).

[676] The Tribunal concludes that being able to obtain sold information from the VOW Data Feed, and to work with that data as they see fit, would likely enable full-information VOWs, including ViewPoint and those such as TheRedPin who would like to become full-information VOWs, to convert an increasing and significant number of website users into clients.

[677] Parenthetically, an important aspect of "sold" price data is information about the number of days that a sold home was on the market. Although days on the market (**"DOM"**) information is available in TREB's VOW Data Feed for current listings, it is not available for homes that have sold. Given that homes that have not yet sold sometimes spend more DOM on average than homes that have sold, Dr. Vistnes indicated that having access only to DOM information about *current* listings can give consumers a misleading sense of how long a home may spend on the

market. Moreover, not having access to DOM information for "sold" homes can deprive consumers of potentially very valuable information, particularly in a "hot" market.

B. Pending sold information and conditional sold status

[678] With respect to "pending sold" information, TREB noted that it is not available on Redfin's website, and that the Commissioner has not provided evidence to demonstrate that the lack of that information impedes Redfin's ability to compete in the United States at all, let alone substantially. It added that ViewPoint has not been able to display "pending sold" information outside the HRM since 2013, yet no evidence has been adduced that this has impeded ViewPoint's ability to compete outside the HRM in any manner.

[679] However, the Tribunal accepts Mr. McMullin's evidence that the fact that a conditional offer has been accepted on a home, together with "real time" access to the sold price of that home, is information that is "of enormous value" for home buyers and sellers, and therefore for ViewPoint. Among other things, this information gives consumers important information regarding the value of a comparable home at a particular moment in time, which can be extremely valuable in a market that is rising or falling. Mr. Enchin made essentially the same point during his cross-examination, and observed that "pending sold" information is "as important, if not more important, than actual sold data" (Transcript, September 14, 2012, at p. 779).

[680] Dr. Vistnes analyzed TREB's MLS data and determined that the median duration between the "sale date" and the "close date" for sold homes in the GTA from 2007 to 2011 was approximately seven weeks. Therefore, providing home sellers and home buyers with "pending sold" information eliminates an important information lag that would otherwise exist. Timely access to this information can be very important in a rising or declining market. In the GTA, the significance of a seven-week lag can perhaps best be appreciated by considering that, between June 2010 and June 2011, market prices in the GTA increased at an average annual rate of about 10%. Thus, prices in any given two-month period increased approximately 1.5%, on average, across the GTA, with some neighbourhoods experiencing even greater increases. On the price of $500,000 home, this works out to approximately $8,000 per two-month period.

[681] Mr. McMullin added that conditional sold information also permits agents and their clients to avoid spending their time seeing or further considering a property that is the subject of a conditional sale. In addition, knowing the date by which the conditions must be satisfied enables other potential buyers who are still interested in the home to check whether the deal actually went "firm" on that date, and to act accordingly.

[682] The Tribunal also accepts Mr. Gidamy's evidence that a buyer may well continue to be interested in a property that has just changed from an active listing to a conditionally sold listing; and that having information regarding the conditions of a purchase enables TheRedPin to better advise such buyers as to the likelihood of the conditions being met and whether there is a pattern or trend of conditions in a particular neighbourhood or building not being met.

[683] The Tribunal further notes that the NAR 2014 Profile reported that information with respect to "pending sales/contract status" was considered by 69% of those who participated in the study to be "very useful" or "somewhat useful" information to obtain on a website.

C. WEST listings

[684] With respect to WEST listings, TREB reiterated a number of the same arguments that it made with respect to "pending solds." However, once again, the Tribunal accepts Mr. McMullin's evidence that this information is very important to both ViewPoint and its users, and that this has been confirmed through surveys and discussions with its users. This is because it assists potential home sellers and buyers to make a well-informed decision. Stated differently, Mr. McMullin testified that this information assists clients to rationalize the marketplace and to possibly measure the motivations of the seller.

[685] In an attempt to estimate how much information a consumer would fail to see if his or her CMA excluded WEST listings and pending sales, Dr. Vistnes conducted an analysis of all past sales during the six month period preceding March 1, 2012, all WEST listings during that period, and all sales that were pending as of March 1, 2012 that had not yet closed. That analysis, set forth in his 2012 reply report, revealed that, for the top 100 communities in the GTA, consumers would lose information on approximately 46% of listings that they otherwise would be able to consider, "but for" the unavailability of the Disputed Data.

D. Cooperating broker commissions

[686] Turning to cooperating broker commissions, the Commissioner's submissions were largely focused on his buyer steering argument, which the Tribunal has concluded was not demonstrated on a balance of probabilities.

[687] However, the Commissioner also submitted that TREB's prohibition on the display of offers of commissions on a VOW and the exclusion of this information from its VOW Data Feed increases the costs of VOW operators and reduces their ability to distinguish themselves from their competitors. The Tribunal agrees.

[688] With respect to the impact of these restrictions on VOW operators' costs, Messrs. Gidamy and Hamidi testified that TheRedPin would like to use offer of commission data to calculate more tailored rebates. At the present time, TheRedPin advertises rebates based on an assumed 2.5% cooperating commission, because achieving greater precision would require manually entering the offers of commission for every active listing, which would be prohibitively time consuming.

[689] Regarding the ability of VOW operators to distinguish themselves, Messrs. McMullin, Silver, Hamidi and Pasalis each stated that being able to provide this information would enable them to increase transparency in the market. Mr. Silver added that this would improve the customer experience created on TheRedPin's website, while Mr. Pasalis observed that this would

improve consumers' trust and confidence in real estate agents. Mr. Enchin testified that educated customers would find this information to be valuable.

[690] To the extent that increasing transparency is an important aspect of their Internet-based business models, the Tribunal accepts that being able to display this offer of commission would assist full-information VOWs and other Internet-based brokerages to better distinguish themselves from traditional brokerages, who appear to prefer to disclose this information in person (to keep the broker/agent "at the centre of the real estate transaction"), if at all.

E. Conclusion

[691] The Tribunal concludes that information with respect to sold data, "pending sold," the conditional sale status of a home, WEST listings and cooperating broker commissions is very valuable to those Internet-based brokerages who testified in this proceeding and to home purchasers and sellers. The Tribunal accepts the evidence that this information is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. The Tribunal also finds persuasive the evidence that home purchasers and sellers value being able to obtain this information prior to meeting with their broker/agent, or in any event, prior to finalizing the listing price of their homes or making an offer on a home.

[692] CREA submitted that the Commissioner's witnesses consistently testified that their websites, and not their VOWs, were their principal source of lead generation or means of attracting customers. Upon reviewing the evidence, the Tribunal is satisfied that those witnesses, who are all web-based brokerages, were simply stating that they rely entirely or primarily on their websites to generate leads or attract customers. Those same witnesses made it also very clear that having a full-information VOW is or would be an important tool in assisting them to better compete with other brokerages.

(v) Other considerations

[693] In addition to the foregoing, TREB noted that some brokerages in Nova Scotia have stopped using VOWs. TREB appeared to suggest that the Tribunal should infer from this that VOW-based operators are not as competitively significant as the Commissioner has suggested. However, the Tribunal is satisfied, based on the above-mentioned evidence, that the elimination of the VOW Restrictions likely would result in at least some full-information VOWs collectively having a substantial positive impact on the level of non-price competition in the Relevant Market. The fact that some other market participants might try, and then abandon, full-information VOWs does not alter this conclusion.

[694] TREB and CREA further maintained that the display of the Disputed Data does not rank highly among the various types of information that consumers seek. In support of this position, CREA referred to statistics in the NAR 2014 Profile, which reported that detailed information about recently sold properties ranked eighth among website features that home purchasers who responded to NAR's survey found to be "very useful." Those same home purchasers ranked "pending sales/contract status" sixth. The five highest ranked features were photographs, detailed

information about properties for sale, interactive maps, virtual tours and neighbourhood information.

[695] TREB considers its position in this regard to have been corroborated by Mr. Hamidi, who testified that the straight provision of information to consumers (such as on a VOW) is at the lower end of importance, among the various services that consumers typically seek from a realtor. However, as discussed at paragraphs 595-597 and 675-677 above, the foregoing evidence was contradicted by Messrs. McMullin, Enchin, Nagel, Hamidi and Gidamy, as well as by Ms. Desai, all of whom testified that sold information is highly valued by home buyers and sellers.

[696] Moreover, activity data pertaining to visitors to ViewPoint's website indicates that, during the period December 20, 2014 to January 18, 2015 (30 days), approximately **[CONFIDENTIAL]** of the **[CONFIDENTIAL]** distinct users (by account ID) who accessed the site during that period reviewed the sales history of at least one sold property. Over a 90-day period, **[CONFIDENTIAL]** of users clicked on at least one sold property. Likewise, Mr. Nagel testified that Redfin's metrics indicate that pages showing sold listing information are among the most viewed pages on Redfin's website, ranking only behind the homepage, the map view and current listings. In addition, the NAR 2014 Profile reported that 75% of buyers considered detailed sold information to be somewhat or very useful on a website.

[697] In addition, TREB and CREA submitted that the Relevant Market is highly competitive and innovative, as reflected in part by the large number of very popular websites, the large number of active agents and brokers, the substantial number of agents and brokers who enter the GTA every year, and the high degree of technological innovation that is ongoing and widespread in the Relevant Market. The Tribunal does not dispute that the Relevant Market, as it currently exists, displays these various characteristics, to varying degrees.

[698] However, as noted elsewhere in these reasons, the focus of this proceeding is not on the absolute level of competition in the Relevant Market. It is upon whether, "but for" VOW Restrictions, the Relevant Market would likely be, or likely would have been, substantially more competitive. In the course of assessing this issue, the Tribunal has determined that information with respect to sold properties (including the selling price), "pending sold" properties, WEST listings and cooperating broker commissions is important, not only for full-information VOWs, but also for home sellers and purchasers.

[699] The Tribunal notes that wherever the display of sold information on brokers' websites is not prevented by a MLS system, it would appear to be displayed, not just by VOW operators, but by traditional brokers, such as Bosley and RE/MAX Hallmark. Ms. Prescott also testified that sold information is displayed on Century 21's website even if it is contrary to the office policy of her brokerage Century 21 Heritage. No persuasive evidence to the contrary was submitted.

[700] Indeed, in the United States, it would appear that the wide availability of sold information ultimately led realtor.com, which appears to be the official listing website of NAR, to make sold information available on its website. Although CREA took the position that there was insufficient evidence to prove the Commissioner's assertion that this development was caused by

competitive forces, the fact remains that realtor.com commenced displaying sold information after that information was being widely displayed by competitor websites, such as Zillow. The fact of sold information being available on realtor.com was recognized by each of Dr. Vistnes, Dr. Church and Dr. Flyer.

[701] The Tribunal is also satisfied that information with respect to the sold prices of homes, together with derivative analytical and statistical information, is made available by agents and brokers wherever they are not prevented by their local MLS system from doing so, because potential home purchasers value that information. The Tribunal accepts the Commissioner's submission that, if it were otherwise, one would expect that fewer brokers would provide that information on their websites, when free to do so.

(vi) Conclusion on magnitude

[702] For the reasons set forth above, the Tribunal concludes that the VOW Restrictions have adversely affected non-price competition in the Relevant Market to a degree that is material. Indeed, the Tribunal concludes that the aggregate adverse impact of the VOW Restrictions on non-price competition has been substantial, having regard to the considerable negative effect on the range of brokerage services, the negative effect on the quality of service offerings, and the considerable adverse impact on innovation in the Relevant Market. In the absence of an order, this substantial adverse impact is likely to continue. The Tribunal has reached this conclusion despite the fact that, the quantitative evidence on commission rates does not indicate that net commissions for real estate brokerage services were, are or likely would be, materially higher than in the absence of the VOW Restrictions.

(b) *Duration and scope*

[703] Regarding the time dimension of the anti-competitive effects discussed above, the Tribunal concludes that those adverse effects have been manifested since the implementation of TREB's VOW Policy and Rules in the fall of 2011. In brief, they have been manifested for a period longer than the two-year benchmark referred to in *Tervita*. Moreover, those adverse effects are likely to continue to manifest themselves in the absence of an order that appropriately addresses the VOW Restrictions. Stated differently, the Tribunal has concluded that the duration of those adverse effects on non-price competition is substantial.

[704] With respect to the scope of the adverse effects within the Relevant Market, the Tribunal is satisfied that the anti-competitive effects of TREB's VOW Restrictions are impacting, and in the absence of an order will continue to impact, competition throughout the GTA, and therefore are impacting a substantial part of the Relevant Market. Indeed, the fact that the VOW Restrictions extend throughout the GTA was acknowledged by TREB's expert, Dr. Church. In addition to the fact that a VOW is available to anyone throughout the GTA, the evidence indicates that VOWs typically offer information in respect of listings throughout the area covered by the local MLS system, in this case the GTA, and that VOWs target customers throughout that same area. This is consistent with evidence from Ms. Prescott that realtors are increasingly competing for business across the GTA, as opposed to staying put within a

neighbourhood or a part of the city. Further evidence that the VOW Restrictions are impacting a substantial part of the Relevant Market is that, as of May 8, 2015, there were approximately 322 brokerages that had signed up to receive TREB's VOW Data Feed.

(4) Conclusion

[705] For all the foregoing reasons, the Tribunal concludes, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met and that the VOW Restrictions have prevented, are preventing and, in the absence of an order, are likely to continue to prevent competition substantially in the supply of MLS-based residential real estate brokerage services in the GTA.

[706] In summary, those restrictions have resulted, are resulting and, in the absence of an Order, likely will continue to result, in a material, important and substantial incremental reduction in the degree of several non-price dimensions of competition in the Relevant Market, relative to the level of those dimensions of competition that likely would have prevailed, and that would likely prevail, "but for" the VOW Restrictions. These dimensions of competition include the range of brokerage services, the operating costs of VOWs, the quality of those services and the level of innovation. The qualitative evidence pertaining to the adverse effects of the VOW Restrictions on these dimensions of competition, as well as the barriers to entry and expansion, is sufficient to persuade the Tribunal that those restrictions have prevented, are preventing and, in the absence of an order, are likely to continue to prevent competition substantially in the Relevant Market.

[707] While the Tribunal acknowledges that demonstrating the anti-competitive effects caused by dynamic changes in the market raises more challenges and difficulty (*Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp. Trib.) at pp. 330-331), it is satisfied that, having considered the evidence as a whole, the Commissioner has met his burden under paragraph 79(1)(*c*) in this case.

[708] In addition, those anti-competitive effects have been occurring throughout the Relevant Market for a substantial period of time, namely, since the launch of TREB's VOW Policy and Rules in the fall of 2011. In the absence of an order from the Tribunal, those anti-competitive effects are likely to continue to manifest themselves throughout the GTA.

[709] The Tribunal observes that the scope of data covered by the VOW Restrictions may appear modest at first sight, given that they relate to Disputed Data forming only a small subset of all data available in TREB's MLS Database. However, to the extent that the VOW Restrictions insulate TREB's Members from increased competition from new entrants and from Members who would like to provide additional service offerings through their existing VOWs, or through new VOWs, those restrictions are maintaining what is in essence the collective market power that TREB's Members are able to exercise through their control of TREB and its rule-making functions. This collective market power is manifested in the form of materially less brokerage service offerings, innovation, quality and variety than would exist "but for" the VOW Restrictions.

[710] One of TREB's objections to the Commissioner's theory of market power maintenance is that the *Guidelines* state the following: "[v]igorous price and non-price rivalry among firms is an indicator of competitive markets. If the firms in the allegedly jointly dominant group are, in fact, competing vigorously with one another, they will not be able to jointly exercise market power" (*Guidelines* at p. 9).

[711] The Commissioner's *Guidelines* are not binding upon the Tribunal or the Courts, although they may assist them to determine the appropriate approach to adopt in general or in particular cases (*Canada Pipe CT* at para 66, aff'd, *Canada Pipe FCA Cross Appeal* at para 94; *Tele-Direct* at pp. 36-37). In any event, the Tribunal is satisfied that this statement was not intended to apply to a situation, such as here, where a trade association enacts rules and policies to shield its members from new forms of competition. This is so even if the members continue to compete "vigorously" on terms that they themselves have established through their trade association.

[712] In closing, the Tribunal notes that this case focuses on dynamic competition, including innovation, the most important type of competition. As observed by Dr. Vistnes, VOWs constitute an important new means by which brokers compete and an important way in which competition can provide consumers with better services. By shielding its Members from important forms of that disruptive competition, and thereby depriving consumers of the benefit of those enhanced services, TREB engaged in a discriminatory practice of anti-competitive acts that has prevented, and continues to prevent, competition substantially. In the absence of an Order from the Tribunal, that substantial prevention of competition is likely to continue.

[713] By preventing competition from determining how innovation should be introduced to the supply of residential real estate brokerage services in the GTA, TREB has substantially distorted the competitive market process and prevented innovative brokers such as Viewpoint, TheRedPin and Realosophy from considerably increasing the range of brokerage services, increasing the quality of existing services, and considerably increasing the degree of innovation in the Relevant Market.

[714] Although "organized real estate" recognizes that consumers are demanding "new ways of doing business, more choices, more flexibility, transparency, communication and more information quicker than ever before," and want to have greater control over the process of buying and selling homes, TREB has decided to limit what information can be disclosed by innovative brokerages who threaten the majority of its Members (2012 Vistnes Expert Report, at para 252, quoting "Exploring Possible Futures for Organized Real Estate in Canada: Insights from Cross-Canada Dialogues," CREA, 2011, at pp. 13-14).

[715] Markets are most efficient, and consumers best served, when competing firms are free to decide how to compete and whether to try to better compete by offering a new product or service. In the absence of legitimate regulatory concerns, the market and consumers, rather than competitors or their trade associations, are the best judge of whether new products or services are valued by consumers and whether such products should be offered in the market.

VIII. TREB's Copyright

[716] The fifth issue to be decided in his proceeding relates to TREB's copyright.

[717] TREB claims that it owns copyright in the TREB MLS Database and therefore holds valid intellectual property rights over the overall arrangement of the information in that database. Relying on subsection 79(5) of the Act, TREB submits that its VOW Policy and Rules are a mere exercise of that copyright, such that this is a complete defence to an application by the Commissioner alleging an abuse of dominance, even if the impugned practice is or is assumed to be exclusionary in effect. In other words, TREB contends that its VOW Restrictions do not constitute a practice of anti-competitive acts under section 79 because those restrictions are merely the exercise of its copyright in its MLS system, as contemplated by subsection 79(5). In any event, TREB maintains that the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence of its intellectual property in this proceeding.

[718] The Tribunal notes that TREB does not claim copyright in respect of the individual components of the MLS Database, including the Disputed Data.

[719] Subsection 79(5) of the Act states:

For the purposes of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.	Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

[720] The Commissioner responds that TREB's argument must fail for two reasons. First, TREB has not led sufficient evidence to establish copyright in the MLS Database. Second, even if the MLS Database is protected by copyright, TREB's conduct amounts to more than the "mere exercise" of its intellectual property rights under subsection 79(5).

[721] For the reasons detailed below, the Tribunal agrees with the Commissioner. Based on the evidence on the record, the Tribunal is not persuaded, on a balance of probabilities, that TREB has established the existence of copyright in the MLS Database**,** including the Disputed Data. In

any event, even assuming that such copyright exists, two of the three principal VOW Restrictions constitute more than the mere exercise of TREB's intellectual property rights, namely, the prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

A. *The Copyright Act*

[722] Copyright is a creature of statute. In Canada, the rights and remedies in that respect are set forth in the *Copyright Act*, which constitutes a comprehensive regime (*Compo Co v Blue Crest Music Inc*, [1980] 1 SCR 357 at pp. 372-373). "Copyright" refers to the bundle of rights conferred by the *Copyright Act* on the author of a work and owner of the copyright in the work. It provides protection for literary, artistic, dramatic or musical works and other subject-matter including performer's performances, sound recordings and communication signals. The owner of copyright has the sole right to produce or reproduce a work (or a substantial part of it) in any form, and has the sole right to exhibit the work in public (section 3). Furthermore, pursuant to subsection 13(4) of the *Copyright Act*, the owner of copyright has the right to assign or licence the copyrighted work. However, such assignment must be in writing to be valid. If a work is unpublished, copyright includes the right to publish the work or any substantial part of it.

[723] Copyright subsists in all original literary, dramatic, musical and artistic works, including paintings, drawings, maps, photographs, designs, musical compositions, sculptures and plans, provided the conditions set out in the *Copyright Act* have been met, namely: 1) the work must be original, in that it involves some intellectual effort or skill; and 2) the author was at the date of the making of the work a citizen of, or a person ordinarily resident in, Canada or some other countries to which rights under the *Copyright Act* extends.

[724] Under the *Copyright Act*, the term "every original literary, dramatic, musical and artistic work" is defined in section 2 to include "compilations." A compilation is defined in section 2 to mean "(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data."

B. *The existence of copyright in the MLS Database*

(1) TREB's submissions

[725] TREB submits that, as the author of the TREB MLS system, it owns the copyright in the TREB MLS Database. According to TREB, its copyright claim is based on its arrangement of real estate data. TREB further specifies that its copyright claim is in the MLS Database, not the MLS system itself.

[726] In the case of a compilation, the arranger may not have copyright in the individual components, but may have copyright in the overall arrangement of the components, if there is sufficient originality in that arrangement. TREB thus argues that it is this overall arrangement that must be considered, not the individual fragments that make up the compilation (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 (**"*CCH*"**) at para 33; *Tele-Direct (Publications) Inc v American Business Information, Inc*, [1998] 2 FC 22 (CA) (**"*Tele-Direct ABI*"**) at para 5).

[727] For a work to be sufficiently "original" to qualify for copyright protection, the work must have been the subject of at least a minimum degree of skill, judgment and labour in its overall selection or arrangement (*CCH* at para 16; *Tele-Direct ABI* at para 28). According to TREB, this threshold is an "incredibly low bar" to meet in respect of a compilation. In that regard, TREB refers to *ITAL-Press Ltd v Sicoli*, [1999] FCJ No 837 (TD) at para 110, where the Federal Court found that there was copyright in telephone listings in Italian-Canadian phone books, consisting of the names of people who appeared by their names to be of Italian origin. Mr. Justice Gibson found there to be an element of skill and judgment as well as labour, although not of the highest order, in the selection of Canadian residents who can reasonably be thought to be of Italian origin.

[728] TREB also relies on a series of U.S. decisions where courts have held that MLS operators own the copyright in their MLS databases, because the MLS database compilations in question met the test for originality in light of the efforts made by the MLS operator to oversee and control the quality and accuracy of the content of the database (*Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2012 US Dist LEXIS 121352 at pp. 22-23 (of Lexis) (**"*Metropolitan*"**); *Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2012 US Dist LEXIS 162111 at pp. 7-8 (of Lexis); *Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2013 US App LEXIS 14445 at pp. 10-11 (of Lexis); *Montgomery County Association of Realtors Inc v Realty Photo Master Corporation*, 1995 US Dist LEXIS 2111 at p. 7 (of Lexis)). TREB notes in particular that, in view of the *Metropolitan* decision, its MLS database compilation cannot be characterized as the mere entry of data on the computer. In *Metropolitan*, the argument to the effect that the MLS system is on "automatic pilot" was considered and rejected, and the U.S. Court instead found that the overall system, its structure and its rules ought to be considered in deciding the issue of copyright.

[729] TREB further asserts that in *TREB OSCJ* at paragraphs 100-101 and *TREB OCA* at paragraph 21, both the Ontario Superior Court of Justice and the Court of Appeal for Ontario alluded to TREB's copyright in the MLS Database, with the Court of Appeal describing TREB as having a "proprietary ownership interest" in the database.

[730] TREB also submits that the record in this proceeding is replete with evidence as to TREB's skill, judgment, and labour with respect to the MLS Database. TREB refers in particular to the following:

a. The use of TREB's MLS Database is governed by a comprehensive set of rules that are enacted and administered by TREB to ensure the accuracy and quality of the information and the orderly operation of the database, and to cover updating and uploading of data;

b. TREB provides its Members with a "MLS Data Information Form" to be used as part of the data entry process, to ensure that certain characteristics of properties are entered into the database for any listing, including some mandatory fields identified by TREB and which may differ from other MLS systems;

c. TREB ensures the accuracy of the listings in the MLS Database by way of proprietary software and encourages its Members to report any inaccuracies found in the listings;

d. TREB's AUA provides that the MLS Database is proprietary to TREB and that TREB's Members grant TREB a content licence with respect to the listings they upload into the database. Under the AUA, the user agrees to grant TREB a perpetual, worldwide, royalty-free, non-exclusive, sub-licensable and transferable right and license including all related intellectual property rights; and

e. TREB's software licence agreement with Stratus (the owner of the software that runs TREB's MLS Database) (the **"Stratus Licence Agreement"**) provides that TREB owns the intellectual property associated with the data inputted into the MLS system.

(2) Analysis

[731] The Tribunal is not persuaded that TREB owns copyright in the MLS Database, including the Disputed Data. In brief, the Tribunal has concluded that TREB has not led sufficient evidence to establish the level of skill, judgment and labour required for the MLS Database to benefit from copyright protection.

(a) General principles

[732] Copyright applies to a database only if the "selection or arrangement of data" is original. For a work (including a compilation of data) to be "original," it needs to be an intellectual creation (*Tele-Direct ABI* at paras 8-18). That is to say, the work must be the result of an exercise of "skill" and "judgment" (*CCH* at para 16). While the Tribunal acknowledges that the threshold is low, that threshold nonetheless does exist (*CCH* at para 16; *Tele-Direct ABI* at para 28). As stated by the Commissioner, in compilation situations, drawing a line between what signifies a minimal degree of skill, judgment and labour and what indicates an absence of creative element is not an easy task (*Édutile Inc v Automobile Protection Assn,* [2004] FC 195, 6 CPR (4th) 211 at para 13). But sufficient evidence must be adduced to convince the Tribunal, on a balance of probabilities, that such a determination can be made. This is especially the case here, since TREB does not benefit from the presumptions found at section 34.1 of the *Copyright Act,* which apply only to civil proceedings in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it.

[733] Simply capturing and compiling data supplied by real estate agents into the MLS Database does not suffice to produce a copyrighted work. To attract copyright protection, a work must add some non-trivial intellectual substance to the raw data. The test for originality in Canadian copyright law was extensively reviewed by the Supreme Court of Canada in *CCH*, where the Court found that skill and judgment are essential to a finding of originality (at para 16):

> For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.
>
> (Emphasis added)

[734] The assessment of such skill, judgment and labour is highly fact-specific and depends on the evidence provided. But there must be a meaningful degree of intellectual effort by the author in the work that is worthy of protection and reward (*Tele-Direct ABI* at para 29). The use of the word "auteur" in French conveys a sense of inventive labour, "creativity and ingenuity." A particular amount of labour is not in itself a determinative of originality (*Tele-Direct ABI* at para 29).

[735] In *Tele-Direct ABI,* the Federal Court of Appeal upheld the Federal Court's finding that Tele-Direct arranged its information, the vast majority of which was not subject to copyright, according to accepted, commonplace standards of selection in the industry. In doing so, it exercised only a minimal degree of skill, judgment and labour in its overall YellowPages arrangement, which was found to be insufficient to support a claim of originality in the compilation so as to warrant copyright protection (*Tele-Direct (Publications) Inc v American Business Information, Inc,* (1996) 74 CPR (3d) 72 (FC) at paras 52-54). The Court thus rejected Tele-Direct's assertion that the YellowPages directories were protected by copyright.

(b) *The evidence*

[736] The Tribunal agrees with the Commissioner that, like the YellowPages in *Tele-Direct ABI*, TREB's MLS Database is little more than information (the vast majority of which is not subject to copyright) arranged according to accepted, commonplace standards of selection in the real estate industry. Copyright cannot exist in these circumstances, neither in the manner in

which TREB has compiled the MLS Database nor in the manner of presenting or organizing the data on its website or on VOWs. The Tribunal is not persuaded that identifying certain mandatory fields or deciding what confidential information may be displayed on a VOW is sufficient to constitute the required degree of exercise of skill and judgment.

[737] The Tribunal recognizes that TREB takes the real estate listings data provided by its Members and presents the information on its intranet in a prescribed fashion. However, while TREB claims that the MLS Database is a compilation of data resulting from significant labour, as well as skill and judgment, the evidence suggests otherwise. More specifically:

a. None of TREB's witnesses testified about how TREB arranges the factual information that it receives from its Members, the effort that it takes, or the skill or judgment involved in determining what particular arrangement is appropriate;

b. Mr. Richardson simply testified that TREB contracts with a third-party to verify certain mandatory fields for errors. However, making sure that data is correct is not equivalent to exercising skill or judgment in its arrangement;

c. Mr. Richardson also testified on the functionality of TREB's intranet system and explained in his witness statement how to distinguish that system from the MLS Database. However, Mr. Richardson did not demonstrate to the Tribunal how TREB's MLS Database was constructed and works, but he rather discussed the software leased from Stratus and how it permits TREB's Members to interact with the MLS Database and retrieve information from it;

d. TREB's contracts with third parties refer to its copyright, but that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements;

e. The fact that third parties have acknowledged TREB's asserted copyright or proprietary work is not sufficient to demonstrate the existence of such copyright. For example, the recognition in the Stratus Licence Agreement that TREB owns the intellectual property associated with the data inputted into the MLS system, or that such information is proprietary, does not establish that the MLS Database is in fact subject to copyright;

f. Mr. Richardson testified that once Members upload information to TREB's MLS system by completing the Data Information Form, the listing appears on TREB's intranet system almost instantaneously. On the particular facts of this case, this suggests that there is little skill, judgment, labour or originality involved in arranging the information in the MLS Database;

g. Real estate boards across Canada operate MLS databases containing factual information on real estate listings. Far from being original, TREB also collects "home facts" in the same way that boards across Canada do, save for the mandatory fields which may vary between MLS systems. There is not sufficient evidence that TREB's MLS Database is original in comparison to those of other boards; and

h. The fact that TREB's MLS Database may be governed by a comprehensive set of rules enacted and administered by TREB to ensure the accuracy and quality of the information and the orderly operation of the database is not sufficient to confer copyright protection on what is subsequently displayed in the database. Ensuring the accuracy of the listings in the MLS Database and encouraging the Members to report any inaccuracies found in the listings does not amount to evidence reflecting the originality of the work.

[738] The process of inputting listings to the MLS system involves the listing broker directly inputting the listing information into the database through a fill-in-the-blank Data Information Form. The broker completes the form in consultation with the seller of the property, if the seller consents to having that property uploaded to TREB's MLS Database. The form has certain fields that are mandatory, such as the street name and number, the list price, and the number of rooms. The form also has other fields that are optional, such as the approximate age of the building, the approximate square footage, and open house dates. In addition, the form has a field for "remarks for brokerages," often containing information that is private or sensitive in nature, such as when the owner will be absent from the property. As stated by Mr. Richardson, the TREB MLS system "is set up to allow the listing broker, or office designate, to directly input the listing information into the database, as opposed to requiring TREB to centrally input all new listings into the database" (2012 Richardson Statement, at para 41).

[739] Merely aligning factual data in such a non-original way is not sufficient to attract copyright protection (*Distrimedic Inc v Dispill Inc*, 2013 FC 1043 at para 323). Further, where the information is arranged according to industry standards, the amount of skill, labour and judgment exercised is minimal and will not meet the originality threshold (*Denturist Group of Ontario v Denturist Assn of Canada*, 2014 FC 989 at para 65). Similarly, when an idea can only be expressed in a limited number of ways, the expression will not be protected (*Red Label Vacations Inc v 411 Travel Buys Ltd*, 2015 FC 18 at para 98). The Supreme Court of Canada has observed that, when determining what embodies the originality of a collective work (that is capable of attracting copyright), it is "whether a substantial part of a protected work has been reproduced, […] not the quantity which was reproduced that matters as much as the quality and nature of what was reproduced" (*Robertson v Thomson Corp*, 2006 SCC 43 at para 38).

(3) Conclusion

[740] Based on the foregoing, the Tribunal finds that, in essence, TREB's specific compilation of data from real estate listings amounts to a mechanical exercise that does not attract copyright protection. No evidence was adduced to demonstrate that the actual compilation of the database is more than a matter of simply assembling raw facts and routine elements from the listings in a mechanical fashion and posting them to the MLS system, without adding something original or creating elements unique to TREB's MLS system.

[741] Furthermore, the Stratus Licence Agreement suggests that, through that agreement, TREB is not protecting the specific form of selection or arrangement employed on its website, but the MLS data itself.

[742] The Tribunal acknowledges that some U.S. decisions, including *Metropolitan*, have recognized that, in light of the efforts made by the MLS operator in overseeing and controlling the quality and accuracy of the content of the database, MLS operators in the United States have been found to own the copyright in their respective MLS databases. These decisions were based on the evidence presented in these various cases. However, the Tribunal finds that the evidence provided in this proceeding does not allow it to conclude, on a balance of probabilities, that clear, convincing and cogent evidence has been provided to demonstrate the necessary degree of skill, judgment and labour required to support TREB's claim of copyright under Canadian law. In brief, TREB has not demonstrated the degree of intellectual effort required in this regard.

[743] TREB further contends that the Commissioner's submissions on the issue of copyright are completely inconsistent with his submissions on the issue of market power. According to TREB, the Commissioner is saying, on the one hand, that TREB's MLS Rules and Policy are sufficiently robust, comprehensive, and pervasive to grant them control over the market for residential real estate services in the GTA, while on the other hand the Commissioner takes the position that the MLS Database does not demonstrate sufficient skill and judgment to grant TREB copyright protection of that database. The Tribunal considers that these are two distinct issues and does not agree that this reflects an inconsistency or a contradiction.

[744] TREB rightly points out that the primary concerns expressed by the initial panel with the copyright argument revolved around the fact that the licence agreement between TREB and Stratus was not in the evidence at the time. The Tribunal acknowledges that TREB has since filed the most recently amended version of the licence agreement with Stratus. However, this Stratus Licence Agreement does not provide evidence of TREB's skill, judgment, and labour.

[745] Finally, the Tribunal observes that TREB's copyright argument is made in respect to the MLS Database as a whole, whereas TREB's practice of anti-competitive acts relates primarily to the VOW Restrictions, which concern only a small subset of the MLS Database. There is no evidence that the Disputed Data involve any degree of skill, judgment and labour on the part of TREB, and that a copyright claim could be made by TREB on this subset of the MLS Database.

C. *Mere exercise of intellectual property rights*

[746] TREB also contends that the provisions contained in TREB's VOW Policy and Rules are a mere exercise of its intellectual property rights. Given the Tribunal's conclusion on the absence of copyright, this issue does not need to be addressed. However, for completeness, the it will be briefly discussed below.

[747] Subsection 79(5) of the Act essentially states that the mere exercise of rights derived under the *Copyright Act* is not an anti-competitive act. Relying on the *Tele-Direct* decision of the Tribunal at paragraphs 60-70, TREB submits that something more than the mere exercise of statutory rights, even if such exercise is exclusionary in effect, must be present before there can be a finding of misuse of intellectual property. In *Tele-Direct*, the Tribunal found that inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to

determine whether or not, and to whom, to grant a licence. Selectivity in licensing is fundamental to the rationale behind protecting trade-marks, and this principle was applied to copyright by the Tribunal in *Director of Investigation and Research v Warner Music Canada Ltd*, [1997] CCTD No 53 (Comp. Trib.) (**"*Warner Music*"**) at paragraph 32.

[748] In *Warner Music*, the Commissioner (then known as the Director) brought an application against Warner Music Canada Ltd. and its affiliates (**"Warner"**) alleging that their refusal to grant copyright licences to BMG Canada to make sound recordings from their master recordings was an impermissible refusal to deal contrary to section 75 of the Act. Warner contracted with artists to make master recordings and had an exclusive copyright over these master recordings in Canada. In that decision, the Tribunal recognized that Parliament grants to copyright holders the right to exclude others from the use of the copyrighted work, and that this aspect is fundamental to copyright. The Tribunal found that it would be inconsistent to hold that Warner was engaging in anti-competitive practices by simply exercising a right that had been specifically granted by Parliament. Moreover, given the exclusive nature of the copyright enjoyed by Warner, it could not be considered a "product" that was in "ample supply," within the meaning of section 75.

[749] Relying on *Warner Music*, TREB further contends that its motivation for the decision to refuse to licence its intellectual property is irrelevant for the application of subsection 79(5). TREB submits that its decision not to licence the Disputed Data as part of the VOW Data Feed is squarely within the reasoning of the Tribunal in *Tele-Direct*.

[750] According to TREB, the licensing process includes choosing the mode of delivery of intellectual property rights, because intellectual property can be licensed to be used in different ways for different purposes. In support of that argument, TREB refers to *Eli Lilly and Co v Apotex Inc*, 2005 FCA 361 (**"*Eli Lilly*"**), where Eli Lilly Canada Inc. (**"Lilly"**) received the assignment of a patent from another company which, in combination with its own related patents, gave Lilly a monopoly in the antibiotic cefaclor. In that case, it was argued that patent assignments could lessen or prevent competition unduly within the meaning of section 45 of the Act, as it then was. The "something more" was found to be the increased power of Lilly in the market for bulk cefaclor, "as a result of [the addition of the assigned patents to] its existing ownership of the patents for the other known, commercially-viable processes for manufacturing the medicine" (*Eli Lilly* at para 18). In the current case, TREB argues that there is no similar "something more," as the conduct at issue here is the mere denial of access to intellectual property through a refusal to licence.

[751] TREB also maintains that the argument that TREB's conduct goes beyond the mere exercise of its intellectual property rights because its conduct creates, enhances, or maintains market power, if accepted, would render meaningless the defence in subsection 79(5) of the Act, because by definition the only conduct covered by subsection 79(1) is conduct that creates, enhances, or maintains market power. For the reasons set forth above, including at paragraphs 500 and 709, the Tribunal is satisfied that, by insulating its Members from important forms of increased non-price competition, TREB's VOW Restrictions have maintained, and are continuing to maintain, a form of market power that TREB and its Members collectively enjoy. Among other things, that market power is manifested in TREB's control of its MLS system and

its power to prevent innovative rivals from entering into, or expanding within, the Relevant Market.

[752] TREB also relies on the Bureau's *Intellectual Property Enforcement Guidelines* (September, 2000) (**"*IPEGs*"**), where the Bureau says at p. 7: "The unilateral exercise of the IP right to exclude does not violate the general provisions of the *Competition Act* no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, […] and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary."

[753] The Commissioner responds that even if the MLS Database or the Disputed Data was protected by copyright, TREB's conduct amounts to more than the "mere exercise" of its intellectual property rights. Subsection 79(5) of the Act does not state that "the exercise of those rights is not an anti-competitive act", nor does it exclude from the definition of anti-competitive act "the lawful exercise of intellectual property rights." The Commissioner maintains that only an act that is the mere exercise of a right, and nothing else, may fall within the statutory exception under subsection 79(5). He claims that TREB's conduct is more than a mere exercise of a copyright. He states that this is particularly so with respect to TREB's prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

[754] The Tribunal agrees with the Commissioner. Subsection 79(5) attempts to balance the extraordinary statutory monopoly rights conferred by intellectual property with the public interest in competition. To strike the right balance, the Tribunal and Federal Court of Appeal have interpreted that provision narrowly. In *Tele-Direct* at page 32, the Tribunal distinguished a refusal to licence. However, where a respondent attaches anti-competitive conditions to the use of its intellectual property, subsection 79(5) will not immunize it from scrutiny. In this case, the two prohibitions mentioned at the end of the immediately preceding paragraph above constitute anti-competitive conditions that TREB has attached to the use of intellectual property.

[755] TREB's VOW Restrictions do not simply restrict its Members' access to the Disputed Data. They instead control how TREB's Members display certain information sourced from the MLS Database, and how they use that information to deliver services to their customers. At the same time, TREB effectively permits or condones the dissemination of this information through more traditional means.

[756] Through its VOW Restrictions, TREB has used its control over the MLS Database to shield some of its Members from competition from innovators who would like to enter into, or expand within, the Relevant Market. Just as the respondent in *Eli Lilly* used its statutory rights to increase its market power beyond whatever initial power it may have enjoyed under its original patent rights, TREB is using its control over the MLS Database to insulate from innovative forces those of its Members who prefer to continue doing business in the traditional manner. This goes beyond a "mere exercise" of any intellectual property rights that TREB may have in the MLS Database.

[757] Put differently, the VOW Restrictions confer on TREB and its above-mentioned Members advantages beyond those derived from the *Copyright Act*.

[758] Based on all of the foregoing, the Tribunal concludes that, even if it were to assume that TREB owns a valid copyright on the MLS Database or on the Disputed Data, the VOW Restrictions are more than a mere exercise of its intellectual property rights. This is particularly the case with respect to the prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

D. *Jurisdiction*

[759] Finally, TREB claims that the Tribunal does not have the jurisdiction to order TREB to grant a compulsory licence with respect to its intellectual property. In that respect, TREB distinguishes between sections 32 and 79 of the Act. TREB contends that, in the absence of clear language in section 79, it would be wrong to conclude that the Tribunal has been given the power to order a respondent to grant what are, in effect, compulsory licences, when, pursuant to section 32, the Federal Court can make such an order only after the applicant meets a competition impact test and only after defences based on international treaty rights are considered (*Warner Music* at paras 26-28).

[760] The Tribunal considers that this case does not involve the imposition of a compulsory licence, as conventionally understood. TREB already makes each of the components of the Disputed Data available to its Members in other ways. More importantly, the VOW Restrictions go far beyond a refusal to include the Disputed Data in the VOW Data Feed, and include prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

[761] In any event, it is settled law that the Tribunal has the jurisdiction to order the supply of a proprietary product.

[762] In brief, outside the narrow context that was at issue in *Warner Music*, the Tribunal has not hesitated to exercise its jurisdiction to issue an order in respect of intellectual property.

[763] For example, in *NutraSweet*, the Tribunal found a number of the respondent's practices to have been anti-competitive, including trade-mark allowances offered by NutraSweet for displaying its swirl logo, exclusive supply and use clauses, cooperative marketing allowances, meet-or-release clauses and most favoured-nation-clauses. The Tribunal held that the trade-mark allowances and advertising discounts created an "all-or-nothing" choice for customers and were "essentially inducements to exclusivity" (*NutraSweet* at pp. 41-43). It therefore issued a broad remedial order prohibiting NutraSweet from enforcing, or entering into, contractual terms

relating to the exclusivity of supply or use of financial inducements for trade-mark display or other allowances, meet-or-release clauses and most-favoured-nation clauses.

[764] Likewise, in *Nielsen*, the respondent was found to have engaged in anti-competitive practices with respect to its historical scanner data. In the result, it was ordered, among other things, to provide that data to Information Resources Inc. (**"IRI"**) upon request, provided that IRI was willing to pay for 50% of the reasonable, documented expenses associated with gathering that data and 100% of the reasonable cost of making a copy and providing it to IRI (*Nielsen* at p. 282).

[765] Similarly, in *Southam*, a merger case, the remedial order issued by the Tribunal required the divestiture, at Southam's option, of either the North Shore News or the Real Estate Weekly newspapers, including the copyright in the newspapers and the trade-marks associated with those newspaper businesses.

[766] In addition, in *Director of Investigation and Research v Bank of Montreal.* (1996), 68 CPR (3d) 527 (Comp. Trib.) (**"*Bank of Montreal*"**), a consent order was issued under the abuse of dominance provisions of the Act requiring the charter members of an electronic banking network to "provide a commercially reasonable trade mark license without charge upon request to any member participating in the shared services that use the trade marks" (*Bank of Montreal* (Consent Order)).

[767] Finally, in *Director of Investigation and Research v AGT Directory Limited*, [1994] CCTD No 24 (Comp. Trib.), another consent order case under the abuse of dominance provisions, the respondents were prohibited from refusing to license the "Yellow Pages" trade-marks to certain companies for use in the sale of advertising in telephone directories, provided these companies entered into and maintained commercially reasonable standard form trade-mark licensing agreements.

[768] The Tribunal is satisfied that the *expressio unius* principle of statutory interpretation does not preclude it from exercising jurisdiction in respect of intellectual property rights, simply by virtue of the fact that section 32 of the Act sets forth specific provisions with respect to intellectual property. Among other things, this is because the language of section 32 is explicitly confined to the narrow situation of "where *use has been made of the exclusive rights and privileges conferred by*" the types of intellectual property protection mentioned therein (emphasis added). Situations that go beyond the use of the exclusive privileges *conferred by* one or more statutes creating intellectual property fall to be addressed by other provisions of the Act. Those include section 79 of the Act. In brief, where a dominant firm engages in a practice of anti-competitive acts that goes beyond the mere exercise of such rights and privileges, for example by imposing anti-competitive restrictions that materially increase or maintain any market power that would otherwise exist (having regard to intellectual property rights) "but for" those restrictions, the Tribunal has the jurisdiction to issue a remedial order to address that practice. The Tribunal is satisfied that there is nothing in the scheme of the Act to suggest otherwise. Indeed, if this were the case, firms would be free to extend any market power that may be conferred by a statute conferring rights over intellectual property beyond that which is

contemplated by the statute. In the absence of clear language curtailing the Tribunal's broad remedial jurisdiction to address abuses of dominant position, the Tribunal does not accept the suggestion that this is what Parliament intended.

IX. Remedy

[769] The Commissioner, in his final written submissions of 2015, seeks an Order that would:

a. Prohibit TREB from enforcing certain terms of its VOW Policy and Rules and its VOW Data Feed Agreement, related to the display and use of the MLS data;

b. Require TREB to include, in its VOW Data Feed, all unavailable listings in the MLS Database (including the data fields for sold listings, "pending sold" listings and WEST listings), and the data fields for offers of commission for available (current) listings, all for use by TREB's Members and to provide services over the Internet, including display of such listings on a VOW; and

c. Require TREB to amend certain of its rules and contract terms, to maintain and support its data feed and not to reverse course or exercise its rule-making powers to discriminate against its Members that use the data feed.

[770] At the Redetermination Hearing, counsel for the Commissioner re-emphasized its overarching concern that there should be no discrimination between the modes in which the information is delivered by TREB to its Members, and that what the Commissioner is seeking is a level playing field. He thus clarified that he is seeking the inclusion in the VOW Data Feed of all listing information on a non-discriminatory basis, and not just the Disputed Data. He also confirmed that he is not seeking any relief beyond the GTA. In other words, the Commissioner is not requesting an order against any other real estate board in the country.

[771] TREB asserts that the Tribunal should exercise care in crafting a remedy to ensure that the personal information of individuals is not widely disclosed on the Internet without their informed consent. It seeks the opportunity to make further submissions on the appropriate remedy.

[772] The Tribunal agrees that further submissions on the remedy are necessary in the present circumstances.

[773] As a result, the Tribunal will, shortly following the issuance of these reasons, issue a Direction providing a schedule for the filing of written representations by the parties and a date for a hearing on the remedy to be issued.

[774] That being said, the Tribunal nonetheless makes the following remarks regarding the remedy to be imposed further to its conclusions.

[775] CREA, in accordance with the terms of the Tribunal order granting it leave to intervene in these proceedings, has made submissions on the impact of the Commissioner's proposed remedies on CREA and its members, including its trade-marks (*Commissioner of Competition v Toronto Real Estate Board*, 2011 Comp. Trib. 22 (**"*CREA Intervention Order*"**) at para 40). CREA asserts that it has a significant concern about the negative effect of the remedy sought by the Commissioner on CREA's trade-marks and also asserts that the accessibility of the Disputed Data on a VOW may serve to diminish the credibility of a MLS system in the eyes of the consumer as well as the credibility of realtors. CREA further submits that the Tribunal's remedy should be expressly limited to the GTA.

[776] More specifically, CREA states that consumers are concerned about their property information being disclosed on a public website and adds that realtors who placed such information on the MLS system and who provide services using that system may negatively affect the credibility of CREA's trade-marks. However, as discussed at paragraphs 382-387 of these reasons, the evidence that consumers may be concerned about the display of the Disputed Data on VOWs was very limited and not persuasive. In any event, the Tribunal has not been persuaded that existing consents in the standard Listing Agreement that TREB recommends its Members to execute with their clients do not extend to the display of historical information such as the sold price of their home and WEST listings information, after their homes have been sold.

[777] CREA also submits that the Tribunal should assess both the likely benefits and the likely harm to consumers of the remedy that the Commissioner has requested. The Tribunal agrees with this approach. However, the Tribunal finds that CREA did not identify any significant harm, beyond the privacy-based concerns addressed in these reasons.

[778] The Tribunal further notes that VOWs are simply one part of one type of Internet-based data-sharing vehicles, being broker operated websites. The Tribunal agrees with CREA that any remedy resulting from this proceeding should not have the harmful effect of endorsing one type of innovative tool over another. The remedy to be imposed in this case will therefore not endorse one type of innovative tool over any other. It will simply address the restrictions applicable to VOWs, and participants in the Relevant Market will remain free to compete by offering whatever innovative services they deem appropriate, without any bias in favour or against full-information VOWs.

[779] TREB submits that conditional solds data should not be included in the VOW Data Feed because this would cause prejudice to home sellers who are parties to such "pending sold" transactions, based on the fact that it would disclose their reservation price to potential home purchasers. The Tribunal agrees that this is a very real and legitimate concern and will need to be addressed in calibrating the remedy.

[780] The Tribunal is also mindful of the fact that its orders pursuant to subsections 79(1) and 79(2) must only go as far as it considers necessary in order to restore competition in the relevant markets (*Laidlaw* at p. 351). The Tribunal will therefore look for the least intrusive remedy and determine what will be necessary to restore competition on the basis of the evidence put before it

as to how the Relevant Market operates and the effects the VOW Restrictions have had and are having.

[781] Finally, the Tribunal must also maintain the flexibility to modify the remedies proposed to it in order to achieve an order that it believes will be effective (*Nielsen* at p. 285).

X. <u>Costs</u>

[782] At the end of the Redetermination Hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions in due course on costs. The Tribunal observes that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs *before* they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further notes that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

[783] By way of letter January 28, 2016, counsel for the Commissioner and for TREB notified the Tribunal that they had reached an agreement with respect to Tariff B legal costs and a partial agreement with respect to disbursements. According to the agreement, if the Tribunal awards costs payable by TREB to the Commissioner, TREB shall pay to the Commissioner $215,000 in respect of Tariff B legal costs, and $113,000 in respect of disbursements other than those relating to expert witnesses. The Commissioner and TREB further agreed to consult with each other, after the release of the Tribunal's final decision, in order to agree upon the quantum payable by one to the other in respect of disbursements for expert witnesses. If no agreement can be reached, either party may seek the Tribunal's assistance or ruling.

[784] The Tribunal will therefore order TREB to pay to the Commissioner $215,000 in respect of Tariff B legal costs, and $113,000 in respect of disbursements other than those relating to expert witnesses. The Tribunal further directs the Commissioner and TREB to consult with each other in order to agree upon the quantum payable by TREB in respect of disbursements for expert witnesses. If no agreement can be reached within two weeks of this decision, the Commissioner and TREB are to file written submissions not exceeding five pages with the Tribunal

[785] The Tribunal understands that the Commissioner and CREA have had no discussions about costs since the Redetermination Hearing ended, and the Commissioner has reserved his position on this issue. The Tribunal, in its decision granting CREA leave to intervene, refused to order that CREA would not be liable for costs, as the Tribunal did not want to "fetter the discretion of the panel" should unforeseen circumstances develop (*CREA Intervention Order* at para 43). The Tribunal therefore directs the Commissioner and CREA to consult with each other in order to agree upon the quantum of costs payable by CREA, if any. If no agreement can be reached within two weeks of this decision, the Commissioner and CREA are to file with the Tribunal written submissions (not exceeding five pages) outlining their respective positions.

XI. Order

[786] For the reasons given above, the Tribunal partially grants the application brought by the Commissioner. The specific terms of the Tribunal Order will be determined and issued following the Tribunal's review of the parties' written submissions on remedy and the hearing at which they will be provided an opportunity to make verbal submissions on that issue.

[787] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement upon the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, May 13, 2016, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on Monday, May 16, 2016.

DATED at Ottawa, this 27th day of April, 2016.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J.
(s) Denis Gascon J. (Chairperson)
(s) Dr. Wiktor Askanas

Schedules

Schedule “A” – Relevant provisions of the *Competition Act*

78 (1) For the purposes of section 79, anti-competitive act, without restricting the generality of the term, includes any of the following acts:	78 (1) Pour l’application de l’article 79, agissement anti-concurrentiel s’entend notamment des agissements suivants :
(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;	a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d’empêcher l’entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;
(b) 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;	b) l’acquisition par un fournisseur d’un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l’acquisition par un client d’un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d’empêcher ce concurrent d’entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l’éliminer d’un marché;
(c) 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;	c) la péréquation du fret en utilisant comme base l’établissement d’un concurrent dans le but d’empêcher son entrée dans un marché ou d’y faire obstacle ou encore de l’éliminer d’un marché;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;	d) l’utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;
(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;	e) la préemption d’installations ou de ressources rares nécessaires à un concurrent pour l’exploitation d’une entreprise, dans le but de retenir ces installations ou ces ressources hors d’un marché;
(f) buying up of products to prevent the erosion of existing price levels;	f) l’achat de produits dans le but d’empêcher l’érosion des structures de prix existantes;
(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;	g) l’adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l’entrée de cette dernière dans un marché ou à l’éliminer d’un marché;
(h) 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	h) le fait d’inciter un fournisseur à ne vendre uniquement ou principalement qu’à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d’exiger l’une ou l’autre de ces attitudes de la part de ce fournisseur, afin d’empêcher l’entrée ou la participation accrue d’un concurrent dans un marché;
(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.	i) le fait de vendre des articles à un prix inférieur au coût d’acquisition de ces articles dans le but de discipliner ou d’éliminer un concurrent.
(j) and (k) [Repealed, 2009, c.	j) et k) [Abrogés, 2009, ch. 2,

2, s. 427]

art. 427]

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

79 (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

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

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

(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.

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une

divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

ou l’autre ou à l’ensemble des personnes visées par la demande d’ordonnance de prendre des mesures raisonnables et nécessaires dans le but d’enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d’éléments d’actif ou d’actions.

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

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

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

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

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

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

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

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

(b) the gross revenue from

b) le revenu brut provenant des

sales affected by the practice;

ventes sur lesquelles la pratique a eu une incidence;

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

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

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

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

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

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

(f) any other relevant factor.

f) tout autre élément pertinent.

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

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

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

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi*

Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

sur les marques de commerce, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

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

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

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

(a) proceedings have been commenced against that person under section 45 or 49; or

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

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

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

Schedule "B" – List of Exhibits

CA-001	Confidential Witness Statement of William McMullin dated June 18, 2012
A-002	Witness Statement of William McMullin dated June 18, 2012
CA-003	List of Confidential Documents submitted by the Commissioner on September 10, 2012
A-004	List of Public Documents Submitted by the Commissioner on September 10, 2012
IC-005	Nova Scotia visits January - May 2012
A-006	ViewPoint Demonstration Video
A-007	Witness Statement of Urmi Desai dated June 20, 2012
A-008	Witness Statement of Scott Nagel dated June 20, 2012
CA-009	Confidential Letter re Changes to the Vow Datafeed dated September 6, 2012
A-010	Witness Statement of John Pasalis dated June 20, 2012
R-011	Email of August 2, 2011, including blog post co-written by Mr. Pasalis, entitled "The end of Realtor.ca?"
A-012	Public version of CA-009 - Letter re Changes to the Vow Datafeed dated September 6, 2012
A-013	Witness Statement of Shayan Hamidi dated June 20, 2012
R-014	RedPin News Release
A-015	Witness Statement of Tarik Gidamy dated June 22, 2012
A-016	Witness Statement of Joel Silver dated June 22, 2012
A-017	Standard Form Seller Brokerage Agreement (NSAR and AVREB)
A-018	TheRedPin VOW Registration
CA-019	Confidential Witness Statement of Mark Enchin dated June 19, 2012
A-020	Witness Statement of Mark Enchin dated June 19, 2012
A-021	Reply Witness Statement of Mark Enchin dated August 17, 2012
A-022	Witness Statement of Sam Prochazka dated June 22, 2012

IC-023	Webpages from website of Paula Amaral
IC-024	REBGV Rules of 10 Cooperation: July 2010 – Complete
CA-025	Commissioner's Confidential Request to Admit
A-026	Commissioner's Request to Admit
CA-027	TREB's Confidential Response to the Commissioner's Request to Admit
A-028	TREB's Response to the Commissioner's Request to Admit
CA-029	Confidential Expert Report of Dr. Greg Vistnes dated June 22, 2012
A-030	Expert Report of Dr. Greg Vistnes dated June 22, 2012
CA-031	Confidential Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012
A-032	Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012
A-033	Presentation of Dr. Greg Vistnes (PDF)
CA-034	Confidential Percentage Component of Buy-Side Offered Commissions – Summary
IC-035	2011 Profile of Home Buyers and Sellers 2011
IC-036	Excerpt from 2012 National Association of REALTORS ® Member Profile
A-037	Public version of CA-038 - Letter from Scott Nagel [RedFin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012
CA-038	Confidential Letter from Scott Nagel [RedFin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012
R-039	Witness Statement of Donald Richardson dated July 27, 2012
CR-040	Confidential Witness Statement of Donald Richardson dated July 27, 2012
R-041	STRATUS Screenshots
R-042	Updated List of VOWs and AVPs
A-043	E-Mail from Von Palmer dated September 24, 2012 attaching two chains of emails
R-044	C21 and Zoocasa

R-045	Public Accessing Solds September 26, 2012
R-046	MPAC FAQs
R-047	Pricelist Catalogue
R-048	Teranet Services
A-049	Schedule B to Agreement of Purchase
A-050	Various News Articles
A-051	RECO Advertising Guidelines
A-052	MLS Rules and Policies Effective January 1, 2006
A-053	Sample CMA of TREB'S Residential Freehold Unavailable Sale
A-054	TREB Privacy Q & A for Approval
A-055	Office of the Privacy Commissioner of Canada
CA-056	Lydia RE: Competition Bureau and TREB - Notice of Application
CA-057	Re: Lydia RE: Competition Bureau and TREB - Notice of Application
R-058	Email from Marie-Michele Caux to Will Stewart re Toronto Real Estate Board
R-059	Privacy Compliance Material on www.torontomls.net
CR-060	Tung-Chee Chan Commission Tables
R-061	Witness Statement of Tung-Chee Chan dated July 27, 2012
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Appearances

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Sandra A. Forbes
Michael Finley
James Dinning

9

Competition Bureau statement regarding its inquiry into alleged anti-competitive conduct by Otsuka

GATINEAU, April 2, 2020—Today, the Commissioner of Competition announced that he has discontinued an inquiry after two months of active investigation into the conduct of Otsuka Canada Pharmaceutical Inc. ("**Otsuka**") after Otsuka took action to address the Commissioner's concerns. Specifically, the Competition Bureau's inquiry considered allegations that Otsuka restricted a generic drug manufacturer ("**Generic**") from accessing samples of its branded product, Jinarc (active ingredient "tolvaptan"), preventing or delaying the entry of competing generic drugs contrary to the abuse of dominance provisions of the *Competition Act* (the "**Act**"). This is the second time the Commissioner has found it appropriate to inquire into refusals to supply samples by branded pharmaceutical companies.

The Bureau previously considered refusals of brand samples to Generics as outlined in a position statement published in December 2018 [1], regarding the Bureau's investigation into alleged practices of other brand pharmaceutical manufacturers ("**2018 Position Statement**"). In the matter described in the 2018 Position Statement, the Bureau investigated policies and practices alleged to restrict Generics from accessing samples of brand name drugs, which are also known as Canadian Reference Products ("**CRPs**"). The Bureau cautioned that the alleged conduct could raise serious issues under the abuse of dominance provisions of the Act and that it would not hesitate to take immediate action in similar circumstances.

As discussed further in the 2018 Position Statement, without access to brand samples, a Generic cannot conduct bioequivalence testing, and therefore in many cases cannot receive the necessary regulatory approval to market the generic drug. As a result, if a branded drug manufacturer can prevent or delay Generics from accessing these samples, it can limit competition from Generics.

Generics generally rely on the clinical testing that the Brand had conducted to prove the drug was safe and effective, resulting in significant cost savings. This allows Generics to compete with Brand drugs with lower prices. In an effort to balance the incentives of Brand drugs to innovate with the benefits of Generic competition, the Bureau is committed to taking appropriate action to prevent practices by Brand drugs that aim to prevent Generics from competing in the market.

The Bureau re-emphasizes its serious concerns with this conduct and its commitment to addressing these concerns. This matter was ultimately resolved shortly after the Bureau became involved (but approximately one year after the Generic first requested samples). Following Otsuka's supply of Jinarc to the Generic subsequent to the Bureau's intervention and upon being satisfied that the supply had been delivered, the Bureau discontinued its inquiry. Despite this outcome, the Bureau remains very concerned with the course of conduct that is being repeated in the industry.

The Bureau will continue to monitor the pharmaceutical industry for any conduct that prevents or delays the supply of samples of branded drugs to Generics. As this is now the second time the Bureau has provided guidance to the industry on this issue, branded drug manufacturers should be aware that in future even if samples are eventually supplied, the Bureau will take the necessary steps to address past conduct, including seeking administrative monetary penalties, where the evidence establishes the Act is engaged. Given this guidance from the Bureau and the guidance discussed below from Health Canada, branded drug manufacturers should anticipate that the Bureau will treat any explanation for a failure to supply Generics in a timely manner with an extremely high degree of skepticism.

Should Generics face similar issues in the future, the Bureau encourages them to bring any concerns to the Bureau's attention at an early stage.

1. The Inquiry

a. Jinarc and its Risk Management Plan

Jinarc is the only pharmacological therapy approved in Canada for the treatment of autosomal dominant polycystic kidney disease ("**ADPKD**"), a genetic disease in which numerous cysts develop in both kidneys, enlarging them and impairing their function. Jinarc is indicated as a treatment to slow the progression of kidney enlargement and kidney function decline in patients with ADPKD.

Due to the risk of liver injury as a side effect of the drug's use, Jinarc is subject to a Risk Management Plan ("**RMP**"). Jinarc's RMP includes a controlled distribution program, known as the hepatic safety monitoring and distribution programme, which was required by Health Canada prior to marketing the drug. As a result, Jinarc is only available in Canada from Otsuka or its authorized third-party distributor ("**Otsuka's Distributor**").

The Bureau's understanding is that, as of July 25, 2019, no patents or other intellectual property rights applied to Jinarc that would impede the granting of marketing approvals to a generic drug manufacturer.

b. Six-resident application [2]

In October 2019, the Bureau received a six-resident application alleging that Otsuka had restricted a Generic's access to samples of Jinarc necessary to secure regulatory approvals, thereby delaying the marketing of a generic equivalent of Jinarc. The Commissioner initiated an inquiry on October 11, 2019.

The Bureau's inquiry related to Otsuka's treatment of the requests for samples of Jinarc by the Generic. Specifically, the Bureau's inquiry focussed on Otsuka's delay and failure to supply the Generic in response to requests first made to Otsuka's distributor, and later to Otsuka itself, as described more fully below.

On December 12, 2019, the Bureau filed an Application under section 11 of the Act [3] to obtain further information from Otsuka. The Application was adjourned on December 19, 2019, upon condition that Otsuka supply Jinarc to the Generic by end of January 2020, or such later date as the Generic may request. On February 18, 2020, the section 11 application was withdrawn after the Generic confirmed that the supply of Jinarc it had received was sufficient for its purposes, and on March 6, 2020, the Bureau's inquiry was discontinued.

c. Timeline of the alleged conduct

The Bureau's investigation confirmed that, since February 2019, the Generic made numerous attempts to acquire samples of Jinarc from Otsuka's Distributor. The Bureau's understanding is that the Generic's requests were referred to Otsuka by Otsuka's Distributor within a few weeks. Despite these requests, the Generic did not receive the requested samples from Otsuka's Distributor.

The Generic then sought samples of Jinarc from Otsuka directly as of May 2019. Over the course of the summer of 2019, there were various communications between the Generic and Otsuka where Otsuka raised its concerns over supplying Jinarc to the Generic. Otsuka's concerns revolved around the risk minimization measures set out in Jinarc's RMP and whether the supply of samples of Jinarc to the Generic would be in breach of the RMP. Otsuka also indicated that it needed clarification from Health Canada to ensure that the supply of Jinarc complied with Health Canada's guidelines and notice issued on July 4, 2019 (the "**July 2019 Notice**") [4], as detailed below.

During the course of events and prior to the Bureau's involvement in this matter, Health Canada issued the July 2019 Notice to drug manufacturers and sponsors concerning RMPs. The July 2019 Notice clarified that "[e]lements of an RMP, such as controlled distribution programs, cannot restrict access to CRPs for generic drug manufacturers that are conducting comparative testing". Even after the July 2019 Notice was issued, Otsuka maintained that it was unsure whether supply of Jinarc samples to a Generic would be in breach of its obligations under the RMP since Jinarc was subject to what Otsuka viewed as a very stringent RMP.

Despite Otsuka's stated ongoing concerns with supplying Jinarc to the Generic, it is the Bureau's understanding that Otsuka did not take any meaningful steps to seek further clarification from Health Canada until November 2019, months after the Generic initially sought supply of Jinarc samples and only after the Bureau's involvement in this matter. Following Otsuka's discussions and correspondence with Health Canada, Health Canada confirmed to Otsuka in December 2019, that it would not consider it a violation of the RMP for the branded drug manufacturer to provide a Generic with samples of the drug product to perform the necessary comparative testing. Otsuka subsequently committed to providing Jinarc samples to the Generic before the end of January 2020, or such later date as the Generic may request.

2. Analysis

Consistent with the 2018 Position Statement, the Bureau considered these allegations under the abuse of dominance provisions of the Act. Abuse of dominance occurs when a dominant firm or group of firms in a market engages in a practice of anti-competitive acts, with the result that competition has been or is likely to be prevented or lessened substantially. [5]

As the matter was resolved at an early stage of the investigation, it was not necessary for the Bureau to take further action. However, the facts as understood by the Bureau raised serious concerns under the abuse of dominance provision of the Act.

a. Dominance

The Bureau's preliminary view was that the relevant geographic market is national, and the relevant product market is confined to drugs containing tolvaptan for the treatment of ADPKD (i.e., Jinarc and any generic equivalents), consistent with the approach articulated in the Bureau's 2018 Position Statement. In this case, the fact that Jinarc is the only drug approved for the treatment of ADPKD reinforced this product market definition, as there is no pharmaceutical substitute marketed in Canada.

Otsuka is the only drug manufacturer marketing tolvaptan in Canada, and as a result, currently holds a monopoly position in the relevant market. Accordingly, the Bureau's preliminary view is that Otsuka possesses a substantial degree of market power in the relevant market.

b. A practice of anti-competitive acts

The Bureau's preliminary view is that Otsuka appears to have engaged in a practice of anti-competitive acts, in particular given Otsuka's failure to address its stated concerns surrounding supply of Jinarc to a Generic in a timely manner, especially following the issuance of Health Canada's July 2019 Notice.

The Bureau's preliminary view is that it was reasonably foreseeable that Otsuka's delay and failure to supply the Generic would have a negative, exclusionary impact on a competitor. The Bureau considers this indicative of anti-competitive intent, especially as these events occurred after the Bureau made clear that this type of conduct raises concerns under the Act, as detailed in the 2018 Position Statement. Given this evidence of anti-competitive intent, the Bureau considered potential justifications for Otsuka's conduct, taking into account both Otsuka's stated reasons for delay and its failure to supply samples of Jinarc to the Generic, as well as the timeliness of Otsuka's actions to address its concerns relating to supply.

As stated above, one of Otsuka's stated reasons for not supplying the Generic related to Jinarc's RMP. The Bureau does not find this justification persuasive in light of the issuance and clarity of Health Canada's July 2019 Notice. In any event, even if Otsuka required additional clarity beyond what was contained in the Notice, the information gathered suggests that Otsuka waited months before seeking guidance from Health Canada despite the Generic's repeated requests for samples. In the Bureau's view, this further undermines the stated justification for the refusal to supply.

Because the matter was resolved at an early stage of the investigation, the Bureau did not fully consider additional justifications offered by Otsuka in respect of the delay and failure to supply the Generic with Jinarc, including liability concerns. The Bureau will assess the objective basis for liability and reputational risk concerns in light of the fact that bioequivalence testing protocols are typically reviewed and approved in advance by regulatory authorities to ensure proper safety standards are in place.

c. Substantial lessening or prevention of competition

As a general matter, generic drugs are priced substantially lower than branded drugs and take a significant volume of sales away from the branded drug when they are introduced. Typically, the first generic drug introduced to the market is priced at 85% (or less) of the cost of the branded pharmaceutical. The Bureau has no information to suggest that the first generic tolvaptan product on the market would not also have a similar price reduction from the cost of Jinarc.

There is reason to believe that generic entry was delayed by approximately 11 months compared to if the Generic had received samples upon the first request to Otsuka's Distributor, and would have been delayed longer had adequate supply not been provided soon after the Bureau became aware of the conduct and commenced its inquiry. The Bureau has not fully substantiated the likely price effect or magnitude of delay, but if true, these facts would appear to be consistent with a substantial prevention of competition.

3. Conclusion

The Commissioner has decided to discontinue his inquiry following supply of Jinarc to the Generic by Otsuka. The Bureau notes that the specificity and credible information set out in the six-resident application allowed it to take swift action in this matter, as evidenced by the timely filing of an Application under section 11 to gather further information from Otsuka.

Should another situation arise that suggests evidence of competitive harm resulting from a drug manufacturer's failure to provide access to samples of its branded products to Generics, or any other conduct that excludes competitors, the Bureau will not hesitate to take appropriate action.

Footnotes

1 See Competition Bureau Statement Regarding Its Investigation into Alleged Practices of Celgene, Pfizer, Sanofi dated December 20, 2018.

2 Under section 9 of the Act, any six persons who are residents of Canada and are over the age of 18 may apply to the Commissioner for an inquiry into a matter, often called a six resident application.

3 The Commissioner may apply under section 11 of the Act for an order to obtain information that is relevant to his inquiry.

4 See Health Canada's Notice of clarification to drug manufacturers and sponsors - Risk Management Plans dated July 4, 2019.

5 For more information on the abuse of dominance provisions, see the Bureau's Abuse of Dominance Enforcement Guidelines.

Date modified:
2022-01-20

ontact the Competition Bureau

10

Competition Tribunal Tribunal de la Concurrence

CT - 1994 / 003 – Doc # 204a

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

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Tele-Direct (Publications) Inc.
Tele-Direct (Services) Inc.

Respondents

- and -

Anglo-Canadian Telephone Company
NDAP-TMP Worldwide Ltd. and
Directory Advertising Consultants Limited
Thunder Bay Telephone

Intervenors

REASONS AND ORDER

Dates of Hearing:

September 5-8, 11-14, 27-29; October 2-3, 5-6, 10-13, 16-20, 23-27; 30;
November 2-3, 6-10, 14-17, 20-22, 24, 27-30; December 1, 4, 6-8, 1995;
January 22-26; February 12-16, 23, 26-29; March 1, 1996

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Frank Roseman
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GUIDE TO ACRONYMS

ASR	authorized selling representative
CANYPS	Canadian Yellow Pages Service
CCS	cost of customer service
CMR	Certified Marketing Representative
CPI	consumer price index
CPM	cost per thousand
CRTC	Canadian Radio-television and Telecommunications Commission
DAC	Directory Advertising Consultants Limited
DSP	Dial Source Plus, Inc.
GSF	general sales force
NAM	national account manager
NAR	national account representative
NDAP	NDAP-TMP Worldwide Ltd.
NYPSA	National Yellow Pages Service Association
RRC	raising rivals' costs
telco	telephone company
TPA	Total Performance Assessment
TYP	Talking Yellow Pages
VAN	Value-Added Network

VIA	Very Important Advertiser
YPPA	Yellow Pages Publishers Association

COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

Tele-Direct (Publications) Inc. et al.

I. INTRODUCTION

This application is concerned, broadly speaking, with two aspects of telephone directory or, as it is commonly referred to "Yellow Pages", advertising. The first aspect is the provision of advertising space in a published directory or the publishing business. This aspect of the business encompasses activities such as the compilation, printing and distribution of the directory. The second aspect is the provision of the advertising services required to create a finished advertisement for publication in a directory. The services aspect of the business includes such elements as locating customers, selling advertising space, and providing advice and information to customers on the design, content, creation and placement of directory advertising.

The applicant in this case is the Director of Investigation and Research ("Director"), the public official charged with enforcement of the *Competition Act* ("Act").[1] The Director brings an application against the respondents, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., under sections 77 and 79 of the Act, the provisions dealing with, as they are commonly known, tied selling and abuse of dominant position:

> 77. (1) For the purposes of this 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 or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.
>
> (2) Where, on application by the Director, the Tribunal finds that . . . 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 . . . tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.
>
> 79. (1) Where, on application by the 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.

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

In relation to section 77, the Director alleges that the respondents have engaged in a practice whereby, as a condition of supplying advertising space in telephone directories, they have required or induced customers seeking advertising space in telephone directories to acquire another product from them, namely telephone directory advertising services. As the respondents are allegedly major suppliers of advertising space, this practice of tied selling has allegedly impeded entry into or expansion of firms in the market because advertising agencies or others would provide the services or would expand to provide increased services, were space and services not tied together by the respondents. The result, it is alleged, is that competition has been, is, or is likely to be lessened substantially.

With respect to the alleged abuse of dominant position, the Director alleges that the respondents substantially or completely control the classes or species of business they engage in, namely the provision of advertising space and the provision of advertising services. The respondents, it is alleged, have engaged in or are engaging in a practice of anti-competitive acts in each of the markets for space and for services. In the advertising space market, the alleged practice focuses on the actions taken by the respondents upon entry by competing publishers of telephone directories into some of their markets. In the services market, the alleged practice includes acts directed by the respondents against alternative or independent suppliers of services. The acts alleged to be anti-competitive in the services market cover a wide gambit, including, among others, refusal to deal directly with certain service suppliers as agents for advertisers, providing space to independent service suppliers on less favourable terms than to the respondents' internal sales staff, "squeezing" the return available to independent service providers by restricting the availability of commission over time, and refusing to license its Yellow Pages trade-marks to competing service suppliers. These practices allegedly have had, are having, or are likely to have the effect of preventing or lessening competition substantially in the markets for the provision of advertising space in telephone directories and advertising services, respectively.

The respondent Tele-Direct (Publications) Inc. is owned by Bell Canada and BCE Inc. It is comprised of two parts: a "directory" division and an "other business" division. The directory division embraces the directory publishing operations for Bell Canada in its territory, which covers most of Quebec and Ontario. The other business division is made up of various companies partly or wholly owned by BCE Inc., one of which is Tele-Direct (Services) Inc.[2] Tele-Direct (Services) Inc. publishes telephone directories under contract for non-Bell Canada telephone companies ("telcos") with discrete territories within Ontario,[3] for Télébec (owned by BCE Inc.) in parts of Quebec, and for other telcos outside of Ontario and Quebec. Tele-Direct (Services) Inc. also has international operations and includes Tele-Direct (Media) Inc., an accredited advertising agency specializing in Yellow Pages created by Tele-Direct in 1994. There is overlap between Tele-Direct (Services) Inc. and Tele-Direct (Publications) Inc. at the officer level but Tele-Direct (Services) Inc. has its own employees who run its business. In these

[2] Others include the remaining portion of Bell Canada, Télébec, Maritime Tel & Tel, etc.

[3] E.g., the Corporation of the City of Thunder Bay, Amtelecom Inc. (Aylmer, Straffordville and Port Burwell), the Corporation of the Town of Kenora.

reasons, except where the context requires separate identification, the two respondents will be referred to together as "Tele-Direct" or the respondents.

The respondents deny each of the allegations in the Director's application. In particular, regarding the tied selling allegation, the respondents' primary position is that advertising services and advertising space form an inseparable package for reasons of efficiency and revenue growth. In response to the abuse of dominance allegations, the respondents maintain that they do not substantially or completely control, or have market power in, the alleged market as there are many adequate substitutes for telephone directory advertising, namely other local advertising media. With respect to the specific alleged anti-competitive acts, the respondents take the position that the allegations relate to acts directed at three specific groups operating in separate markets: other directory publishers, Tele-Direct's accredited agents and non-accredited service providers. Save for publishers, they assert that they are not in competition with the groups against whom their acts are said to be directed.

Five requests for leave to intervene were received and granted in this proceeding although two of those were later discontinued.

NDAP-TMP Worldwide Ltd. ("NDAP") and Directory Advertising Consultants Limited ("DAC") are accredited Yellow Pages advertising agencies which provide services to clients who wish to advertise in telephone directories, particularly those published by or for the various telcos across Canada. They arrange for the preparation and placement of the advertisements in these directories on behalf of their clients. They presented final argument on the issues relevant to the role of agencies in the market.

The Anglo-Canadian Telephone Company ("Anglo-Canadian"), through one of its divisions, publishes Yellow Pages directories in British Columbia for BC Tel and in parts of Quebec for Quebec Tel. Anglo-Canadian licenses the Yellow Pages trade-marks from the respondents. Anglo-Canadian presented final argument only on the issues related to the possible compulsory licensing of the Yellow Pages trade-marks requested by the Director as part of the abuse of dominance case.

InfoText Limited ("InfoText"), a subsidiary of Newfoundland Tel, and Thunder Bay Telephone supply subscriber listing information to Tele-Direct for directory publication for subscribers in Newfoundland and Labrador and in the city of Thunder Bay, respectively. InfoText subsequently discontinued its intervention. Both InfoText and Thunder Bay Telephone requested intervenor status only to place their requests for leave to intervene on the record, which the Tribunal allowed.

White Directory of Canada, Inc. ("White") is a non-telco publisher of telephone directories in St. Catharines, Niagara Falls and Fort Erie. White discontinued its intervention prior to the commencement of the hearing.

Preliminary Comments of the Presiding Judicial Member

The notice of application in this matter was filed on December 22, 1994. The hearing commenced in September 1995 and ended at the beginning of March 1996. This decision has taken over 11 months to issue. In view of the Tribunal's usual practice of dealing with matters before it more expeditiously, some explanation is warranted.

There is no doubt that this has been the most complex case presented to the Tribunal since its inception. In addition to a strongly contested question of market definition, the case, in reality, consists of five cases, each requiring the Tribunal to address substantial competition issues (tied selling, abuse of dominance in respect of agents, consultants and publishers and trade-marks). Each of the five cases involves a multitude of sub-issues. Many of the Director's numerous specific allegations were multifaceted. To each allegation, the respondents raised a host of defences.

The record in this case provides a telling indication of its complexity. It consists of almost 15,000 pages of transcript taken over 70 days and involving 58 witnesses, including five expert witnesses. There were 36 volumes of documents produced in the joint book of documents alone. A further 156 exhibits not included in the joint book were entered in evidence by the parties. The parties submitted over 600 pages of written argument and oral argument took 11 days.

In many respects, the approach of the Director and respondents to this case does not result in a joining of issues. Counsel for the Director referred to their respective positions as "ships passing in the night". The result is that the Tribunal has often been left to identify and define, as well as resolve, the issues.

Indeed, the appropriate conceptual frameworks for the various issues have been very difficult to determine. The application included novel allegations of anti-competitive acts (for example, "targeting" in respect of publisher entrants) and inter-relationships between issues, such as the alleged anti-competitive acts against agents in the abuse of dominance case and tying, which required considerable deliberation.

Finally, there was the troubling issue of tying. This is the first case in which tying has been raised as a "principal" or substantial allegation.[4] This is a particularly difficult issue when related to services. There has been considerable debate among competition lawyers, economists and jurists about the difficulty of addressing alleged anti-competitive activity without adversely affecting efficiency in the context of tying, and the Tribunal was squarely faced with these issues in this case.

[4] Tying was a minor portion of the case in *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 C.P.R. (3d) 1, [1990] C.C.T.D. No. 17 (QL).

Summary of Conclusions

1. Telephone directory advertising is a distinct advertising medium without close substitutes and is therefore the relevant product market. Geographic markets are local, corresponding roughly to the scope of each of Tele-Direct's directories. Tele-Direct has an overwhelming share of the product market in all relevant local markets.

2. Tele-Direct has control or market power since the condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied. Direct indicators of market power, such as the level of profits and methods of pricing, reinforce this conclusion.

3. With respect to the allegation of tied selling, telephone directory space and telephone directory advertising services constitute two products solely for national and regional advertisers and Tele-Direct has tied the supply of advertising space to the acquisition of advertising services for these customers. We have prohibited the practice of tied selling.

4. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts against entrants into telephone directory publishing, particularly in the Sault Ste. Marie and Niagara regions, is rejected.

5. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts directed against agents and resulting in substantial lessening of competition is rejected.

6. The allegation that Tele-Direct has engaged in a practice of discriminatory anti-competitive acts against consultants which have or are likely to result in a substantial lessening of competition is accepted. Tele-Direct is ordered to cease the practice. Other allegations respecting consultants are rejected.

7. The allegation that Tele-Direct's refusal to license its trade-marks to certain competitors is a practice of anti-competitive acts is rejected because the refusal is protected from being an anti-competitive act by subsection 79(5) of the *Competition Act* as a legitimate exercise of its rights under the *Trade-marks Act*.

II. BACKGROUND FACTS

A. TELEPHONE DIRECTORY ADVERTISING

A white pages telephone directory is a comprehensive list of all telephone subscribers in a specified area. A listing includes a name, address and telephone number. A classified telephone directory, historically printed on yellow paper (hence "Yellow Pages"),[5] includes all business telephone subscriber listings plus advertising arranged by heading or descriptive category. There are often multiple headings under which a directory user might search in order to find a certain type of business.

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[5] The words "Yellow Pages" and "Pages jaunes" are registered trade-marks of the respondents in Canada although they are considered generic or descriptive in the United States. Tele-Direct licenses its trade-marks to other telco directory publishers in Canada but not to non-telco directory publishers.

Tele-Direct's Yellow Pages directories generally cover the same geographic area as the corresponding white pages. Some white pages directories, however, cover a much broader area than the Yellow Pages; in those cases, there would be several different Yellow Pages directories for a single white pages. Tele-Direct also publishes even more narrowly-scoped Yellow Pages directories for individual "neighbourhoods" in Montreal and Toronto.

Telcos are required by the Canadian Radio-television and Telecommunications Commission ("CRTC") to distribute the appropriate up-to-date telephone directory for their district, both white and Yellow Pages, to telephone subscribers at no additional charge. Tele-Direct pays the various telcos for subscriber listing information and the right to publish and distribute the directories to subscribers. It makes its profits from the net advertising revenues. Tele-Direct publishes directories annually.

Every business telephone subscriber is entitled to receive in its Yellow Pages directory one light-type listing free of charge under the heading of its choice. Any features added to a listing, for example, bold type or extra lines, a second heading or another directory must be purchased. Actual advertisements in the Yellow Pages must, of course, also be purchased. For Tele-Direct's purposes, an "advertiser" is a subscriber who has a paid item in either the white pages (an enhanced listing) or Yellow Pages of a directory. Revenues from Yellow Pages advertising is far greater than any "advertising" expenditures in the white pages.[6]

[6] Approximately 10 percent of Tele-Direct (Publications) Inc. 1994 directory revenue came from expenditures in the white pages.

Approximately 50 percent of business subscribers are "advertisers". The remainder are called "non-advertisers" or "non-ads". The percentage of advertisers is smaller in the largest centres such as Montreal and Toronto and larger in smaller centres. Excluding neighbourhood directories and agency clients,[7] average advertising expenditures in 1994 in Tele-Direct (Publications) Inc. directories were approximately $1,700, with advertisers spending that amount or less constituting around 30 percent of revenues but over 80 percent of advertisers. At the other end of the spectrum, the top 30 percent of revenues comes from only about two percent of advertisers, those who spend more than approximately $10,000 annually. A few very large advertisers spending an average of $113,000 provide 6.5 percent of revenues but represent only 0.1 percent of advertisers by number.

A number of different types of advertising can be purchased in a Tele-Direct Yellow Pages directory. Apart from the basic upgrades to its initial free listing (e.g., second heading, bold type), a business may purchase "in-column" or "display" advertising. The pages in Tele-Direct's directories are generally divided into four columns; an "in-column" advertisement fits within the confines of one of the columns with the variation being in the height of the advertisement. In-column advertisements are arranged alphabetically, interspersed among the simple listings.

A variation on the in-column advertisement is the trade item advertisement, including the trade-name, trade-mark and custom trade-mark advertisements (usually referred to together as

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[7] The very small and the very large accounts.

"trade-marks" or "trade-mark advertisements"). In order to place this type of advertisement, the listed businesses must have authorization to use the trade-name or mark in their directory advertising. The trade-name or mark acts as the heading for the advertisement, followed by one or more listings of specific businesses.

Display advertisements range in size from a quarter column (1/16 of a page) to a full page. The placement of these advertisements is loosely alphabetical, as space on a page permits. Options like various types of borders, red, other colours, "white knockout" (white background instead of yellow) may be added to both in-column and display advertisements. They also feature a variety of design and layout techniques, print styles and sizes and graphics.

B. PUBLISHERS

Revenues from the telephone directory business in Canada amount to about $900 million to $1 billion annually. The vast majority of these are generated by the telco-affiliated directories. Apart from the Tele-Direct directories and other directories published by or on behalf of telcos, there are over 250 "independent" directories published in Tele-Direct's territory. These directories are independent in the sense that they have no connection to the provider of telephone service. They come in a wide variety of formats (size, subject, colour of paper) but can, generally, be characterized as two types: "niche" and "broadly-scoped" directories.

Niche directories operate in geographic areas which are substantially smaller than the areas covered by the corresponding telco directories. These directories have a generally smaller, more tightly-scoped distribution area than the telco directory, allowing a local retailer to advertise to a smaller geographic area at a lower cost. Niche directories are often directed at a particular religious, ethnic or demographic group.

Two independent publishers of broadly-scoped directories currently produce directories in parts of Tele-Direct's territory. White, which was for a brief time an intervenor in this proceeding, has published directories in the Niagara region since 1993. Dial Source Plus, Inc. ("DSP") publishes a directory in the Sault Ste. Marie area and has also done so since 1993.

C. SERVICE SUPPLIERS

Telephone directory advertising services, including the sale of space in Tele-Direct's directories, are provided by three groups: Tele-Direct's internal sales force, advertising agencies and consultants. More detail on each of these groups and their particular method of operation will be provided as appropriate throughout these reasons. For the moment, the following should suffice to introduce the various players.

The internal sales force of Tele-Direct consists largely of unionized sales representatives who are remunerated through a combination of salary, commission and other incentives. Services similar to those provided by Tele-Direct's internal sales force are also offered by outside advertising agencies. These include general advertising agencies which, if they deal with Yellow Pages at all, usually have a department devoted to that function, advertising agencies specializing in Yellow Pages only and in-house advertising agencies.

Agencies are not remunerated directly by the advertiser but, rather, through a commission paid by the publisher as a percentage of the value of the advertising purchased. While the agency receives commission, the agency's employees earn salary for providing services to the agency's clients. Agencies are restricted in the accounts that they can service as Tele-Direct only pays commission on accounts which meet certain criteria. Tele-Direct's commissionable account definition has undergone a number of changes over the years which will be discussed in further detail later. It is not controversial that fewer accounts meet the current criteria than met prior definitions. The current criteria were adopted in 1993 and are sometimes referred to as the "national" account definition.[8] In order to receive the 25 percent commission payable on these accounts, the agency placing the advertising must be accredited as a Certified Marketing Representative or "CMR" in accordance with the standards set by the Yellow Pages Publishers Association ("YPPA").

Services are also provided by Yellow Pages consultants. Consultants create advertisements for Yellow Pages advertisers and advise them on where and to what extent they should advertise in the Yellow Pages. Typically, consultants obtain cost savings on behalf of

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[8] Under this rule, in very general terms, to qualify for commission, an account must involve advertising in at least 20 Yellow Pages directories within Tele-Direct's territory and at least 20 percent of the total value of the advertising must be placed in directories of another publisher outside Tele-Direct's territory.

advertisers by advising the purchase of smaller or less colourful advertisements, more limited geographic placement of advertisements or by redesigning the advertising. They are not recognized by Tele-Direct, which refers to them by the less complimentary term of "cut agents". Consultants do not receive commission. In general, consultants are paid by the advertiser out of the savings in advertising expenditures resulting from the adoption of the consultant's advice.

III. TIME LIMITATIONS

The respondents argue that the Director is subject to three time constraints which limit the allegations of anti-competitive acts that can be advanced for the purposes of the Director's case under section 79. These arguments are that: the *Competition Act* is not retrospective; the Director's allegations are statute-barred by the *Crown Liability and Proceedings Act*;[9] and subsection 79(6) of the *Competition Act* further limits those allegations. Each argument will be dealt with in turn.

The particular allegations that are challenged relate to Tele-Direct's requirement of "issue billing" (payment from CMRs required at the time of issue of a directory as opposed to monthly payments when advertisers deal with Tele-Direct's general sales force) and its restricting of the commissionability criteria applicable to CMRs. The actual words at paragraph 65 of the application are:

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[9] R.S.C. 1985, c. C-50.

> . . . the Applicant says that the Respondents have engaged in the following anti-competitive acts:
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> . . .
>
> (c) providing advertising space to independent advertising agencies on less favourable terms and conditions than to its own sales staff, including: . . .
>
> (ii) requiring that such independent agencies pay the total amount outstanding for a year's insertion of advertising in a given directory, while customers placing orders through internal sales staff may pay such amount monthly over the course of the year without interest charges; . . .
> (d) squeezing the return available to independent advertising agencies by acts which include:
>
> . . .
>
> (iv) further restricting the availability of commission to such agencies over time.

A. RETROSPECTIVITY

There is no apparent difference between the parties with respect to the broad legal principles regarding retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the particular statute.[10] Côté, one of the authorities cited by the respondents, states that a retrospective effect occurs when a new statute is applied "in such a way as to prescribe the legal regime of facts entirely accomplished prior to its commencement." He further states that it is *not* retrospective operation when a statute is applied to ongoing facts which began prior to the statute's commencement.[11] The Driedger text, also referred to by the respondents, describes ongoing facts or "continuing facts" as

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[10] *Gustavson Drilling (1964) Limited v. M.N.R.* (1975), [1977] 1 S.C.R. 271 at 279.

[11] P. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Quebec: Yvon Blais, 1991) at 118, 123.

> . . . one or more facts that endure over a period of time, such as ownership or imprisonment or residency. A continuing fact can be any state of affairs or status or relationship that is capable of persisting over time. . . .[12]

The dispute between the parties is whether the allegations advanced by the Director regarding issue billing and commissionability criteria imply retrospective application of the *Competition Act*.

The respondents submit that since no concept of an "anti-competitive act" existed before 1986, when the *Competition Act* came into force, no act which occurred prior to 1986 can now be characterized as anti-competitive for purposes of section 79. They also argue that section 79 on its terms can *only* be applied to discrete acts or events, of which there must be multiple instances to constitute a "practice".

With respect to commissionability, the respondents argue that the Director is alleging that they "narrowed" the definition by discrete acts which occurred in 1975 and again in 1993. The 1975 "narrowing" cannot be anti-competitive and the 1993 "narrowing" alone is only one act and cannot amount to a "practice". Likewise, they say that the Director has alleged that Tele-Direct's "decision" to require issue billing, another discrete act which took place long before 1986, cannot be an anti-competitive act. The fact that these decisions resulted in allegedly restrictive policies that have been applied continuously ever since, they submit, is irrelevant because there is no "new act" of "requiring issue billing" or of "narrowing" besides 1993.

[12] *Driedger on the Construction of Statutes*, 3d ed. by R. Sullivan (Toronto: Butterworths, 1994) at 514-15.

The Director argues that the respondents have mischaracterized the pleadings. The Director submits that the current situation, the day-to-day restricted state of the commissionable market and the ongoing requirement of issue billing, are the focus of the allegations of anti-competitive acts, rather than the original decisions to implement these policies. The pre-1986 events, the Director submits, shed light on history, intent and progress. Thus, the Director says there is no question of retrospectivity.

We are of the view that section 79 is not restricted in its application to discrete acts or events as opposed to an ongoing course of conduct or state of affairs. The meaning of "practice" in subsection 79(1) was considered by the Tribunal in the *NutraSweet* case.[13] There, the Tribunal found that a practice may exist where there is more than an "isolated act or acts". It also observed that the examples of anti-competitive acts listed in section 78 could entail both a course of conduct over time as well as discrete acts:

> . . . The anti-competitive acts covered in s. 78 run a wide gamut. Some almost certainly entail a course of conduct over a period of time, such as freight equalization in para. 78(*c*), whereas others consist of discrete acts, such as the setting of product specifications in para. 78(*g*). The interpretation of "practice" must be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the tribunal is of the view that a practice may exist where there is more than an "isolated act or acts". For the same reasons, the tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice.[14]

[13] *Supra* note 4.

[14] *Ibid*. at 35.

We are satisfied that the practice contemplated by subsection 79(1) must be more than an isolated act or acts but can include a number of individual anti-competitive acts taken together or a course of anti-competitive conduct over time.

Clearly, the Director's pleadings contemplate the violation of subsection 79(1) of the *Competition Act* by a current practice of anti-competitive acts by the respondents. The fact that the act or acts giving rise to the current practice took place prior to 1986 does not make application of the subsection retrospective. In this case, the Director is not challenging the initial decisions by Tele-Direct to commence issue billing and to restrict commission in 1975 as discrete anti-competitive acts in and of themselves. Requiring payment from CMRs at time of issue of a directory may have been instituted in 1959 but it continued after 1986 and existed when the Director's application was filed. Similarly, the "narrow" commissionability market which commenced with a change in the commissionability rules in 1975 continued after 1986. While it may have been narrowed further in 1993, it is not the discrete act of narrowing that is in issue in this case. Rather, it is the ongoing narrow commissionability rules that existed when the Director's application was filed and that were, in the view of the Director, exacerbated in 1993 with further narrowing, that are the focus of the allegations of anti-competitive conduct. As such, there is no retrospective application of the *Competition Act* in this case.

Nor is it inappropriate in these circumstances to have regard to events occurring prior to 1986 to consider fully the allegations made under section 79. We take guidance from the approach adopted by the Supreme Court in *Gamble v. R.* Wilson J., speaking for the majority, states:

> . . . Frequently an alleged current violation [of the *Charter*] will have to be placed in the context of its pre-*Charter* history in order to be fully appreciated. . . . Charter standards cannot be applied to events occurring before its proclamation but it would be folly, in my view, to exclude from the Court's consideration crucial pre-*Charter* history.[15]

It is clear from the words of the application, and from the way the case developed before the Tribunal, that the current state of affairs is the focus of the Director's allegations of anti-competitive conduct. The respondents have not argued that the Director's pleadings misled them regarding the case they had to meet and that therefore they have suffered prejudice in preparing or presenting their case. Indeed, such an argument could not be advanced given the detailed and inclusive record regarding not only the current situation in the market but also the historical context.

B. *CROWN LIABILITY AND PROCEEDINGS ACT*

The respondents' second limitation argument is based on section 32 of the *Crown Liability and Proceedings Act* which reads:

[15] [1988] 2 S.C.R. 595 at 625-26.

> Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of a cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

The respondents argue that the *Crown Liability and Proceedings Act* statutorily bars the Crown (here, the Director) from acting on a cause of action which arose more than six years before the issuing of the application, that is, prior to December 22, 1988. Thus, they argue, all references to changes made in commissionability criteria or any other alleged anti-competitive act after 1986, when sections 78 and 79 were enacted, but prior to December 22, 1988 (six years before the application was filed), are statute-barred.

The respondents did not press this point and it will be dealt with summarily. First, as argued by the Director, the respondents cannot rely on the *Crown Liability and Proceedings Act* as they did not plead it in their response. The law is clear that a limitation period does not terminate a cause of action but provides a defendant with a procedural means of defence which must be pleaded in the defence.[16]

Second, section 32 of the *Crown Liability and Proceedings Act* is simply not applicable to this case. The opening words of section 32 indicate that if there is a specific limitation period in the statute governing the cause of action involved, here the *Competition Act*, that limitation period applies.[17] It is only in the absence of a specific provision that either a provincial limitation

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[16] *Kibale v. Canada* (1990), 123 N.R. 153 (F.C.A.). See also rule 409 of the Federal Court Rules.

[17] *Canada v. Maritime Group (Canada) Inc.*, [1993] 1 F.C. 131 (T.D.)

period or the six-year limitation period in section 32 is considered. Subsection 79(6) of the *Competition Act*, to which the respondents have also made reference, provides a limitation period for proceedings brought under that section.

C. SUBSECTION 79(6)

Subsection 79(6) of the *Competition Act* states:

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

Again, the respondents did not plead this limitation period. Further, while they refer to subsection 79(6), the respondents made no effort to argue how it applies in this case. No more need be said.

IV. IMPACT OF THE CONSENT ORDER

The respondents argue that the Director is estopped from bringing this application before the Tribunal to the extent that it deals with issues adjudicated by the Tribunal in a previous proceeding. On November 18, 1994, the Tribunal issued an order, the terms of which were agreed to by the parties, as a result of an application brought by the Director against the Yellow Pages publishers in Canada.[18] We will refer to that order as the Consent Order. The respondents in the present proceedings were among the respondents named in that order.

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[18] *Director of Investigation and Research v. AGT Directory Limited et al.*, CT-94/2.

In the application which resulted in the Consent Order, the Director alleged that the respondents in those proceedings had jointly engaged in a practice of anti-competitive acts within the meaning of sections 78 and 79 of the Act. The specific allegations levied against those respondents and found at paragraph 74 of the application were as follows:

> . . . it is the Director's submission that the Respondents engaged in the following anti-competitive acts to impede or prevent a competitor's entry into or eliminating a competitor from a market. The anti-competitive acts of the Respondents constituted a practice of anti-competitive acts by the Respondents which had the effect of substantially preventing or lessening competition in the relevant product market of the Selling of National Advertising into Telephone Directories in Canada. The Respondents:
>
> (i) agreed that only Publishers could Sell National Advertising directly into Telephone Directories;
>
> (ii) appointed each other as their exclusive Selling Companies for the Selling of National Advertising in Telephone Directories in each of their respective territories and therefore did not compete with such exclusive Selling Companies in those territories;
>
> (iii) agreed to a Head Office Rule, thus precluding the National Advertiser from either placing the advertisement directly with all the Respondents which actually published the advertisements or using an entity unrelated to any of the Respondents to place the advertising directly in each Respondent's Telephone Directories.

The Consent Order contains prohibitions designed to prevent the respondents who agreed to it from engaging in certain acts in the selling of national advertising in Yellow Pages telephone directories, including:

> With regard to the sale of national advertising in Yellow Pages telephone directories, each respondent shall be prohibited from:
>
> . . .
>
> (f) agreeing with any other respondent on the criteria for determining which national advertising accounts are commissionable;
>
> (g) agreeing with any other respondent on the rate of commission

> payable, except during a transition period ending June 30, 1995 during which a minimum commission of 25% will be available to selling companies for national advertising which meets the commissionability criteria established by each respondent. . . .[19]

The parties appear to be in agreement with respect to the law of issue estoppel. The doctrine of issue estoppel precludes an action being brought against a party with respect to an issue which was already decided in an earlier proceeding. There are three requirements to be met before issue estoppel applies so as to bar a new proceeding. First, there must have been an earlier proceeding in which there was a determination of the same issue. Second, the determination of the issue in the earlier proceeding must have been a final decision. Finally, the parties to each of the two proceedings must be the same.[20] The doctrine of issue estoppel applies equally to issues decided in consent orders and in contested orders.[21]

The Supreme Court of Canada has held that the decision upon which a party relies for issue estoppel must have dealt directly and necessarily with the issue which is being raised for a second time:

> . . . It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. . . . The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings.[22] (references omitted)

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[19] *Director of Investigation and Research v. AGT Directory Limited* (18 November 1994), CT-94/2, Consent Order at para. 3, [1994] C.C.T.D. No. 24 (QL).

[20] *Angle v. M.N.R.* (1974), [1975] 2 S.C.R. 248.

[21] G. Spencer Bower & A.K. Turner, *The Doctrine of Res Judicata*, 2d ed. (London: Butterworths, 1969) at 37.

[22] *Supra* note 20 at 255.

Tele-Direct argues that the issues relating to its commissionability criteria alleged by the Director in this case, namely, that its policy of offering commission only on accounts which meet its "national" definition is an anti-competitive act and constitutes tied selling, were dealt with by the Tribunal in the Consent Order. Tele-Direct's position is that the Director is estopped from re-litigating these issues in the present proceeding. According to Tele-Direct, the Director, and the Tribunal by virtue of its issuance of the Consent Order, were satisfied that any substantial lessening of competition in the sales of national advertising would be alleviated by the terms of the order. If the Director seeks to vary the Consent Order, the Director can only do so by following the procedure for rescission and variation of consent orders which is governed by section 106 of the Act; this course was not pursued by the Director.

The respondents further argue that, by implication, the Consent Order authorizes them to set their own commissionability criteria without interference as long as they do not agree on the rate with any other publisher. Accordingly, they say that it is inconsistent for the Director to bring this proceeding, which could result in the Tribunal interfering with Tele-Direct's decisions relating to its commissionability criteria for national advertising.

The Director's position is that the issues raised in the two proceedings are not the same and that, therefore, the doctrine of issue estoppel does not apply. According to the Director, the anti-competitive acts which were the subject of the Consent Order were certain *joint* practices of the Canadian Yellow Pages Service ("CANYPS") members (the telco publishers) regarding the manner in which national advertising could be placed in their directories. It was the agreements between the respondents to the Consent Order which constituted the anti-competitive acts and resulted in a substantial lessening of competition which were remedied by the order. In the present proceeding, however, it is alleged anti-competitive acts of Tele-Direct itself which are the subject of review. There was no decision in the earlier proceedings regarding how Tele-Direct sets its own commissionability criteria or how it otherwise deals with independent agencies located in its territory.

The requirements for issue estoppel are not met in this case. While the Consent Order was a final decision of the Tribunal, the terms of which are binding on Tele-Direct, the issues which were dealt with in that proceeding are not the same as those in the present case. This is clear from the application and supporting documentation and the Consent Order. It was the substantial lessening of competition resulting from the respondents' joint practice of anti-competitive acts or joint abuse of dominance that the Director sought to remedy by the Consent Order. The instant case deals with entirely separate allegations of anti-competitive acts of Tele-Direct acting alone. The Consent Order prohibits the respondents named in it from agreeing amongst themselves on the rate of commission payable. That order does not address the commissionability criteria which an individual publisher may set. Nothing in the Consent Order limits the jurisdiction of the Tribunal to review the commissionability criteria set by Tele-Direct.

V. TRADE-MARKS

The Director alleges that the respondents, by "refusing to licence [their] trade-marks, such as the words `Yellow Pages' and `Pages Jaunes' and the walking fingers logo, to competing suppliers of advertising services", have engaged in a practice of anti-competitive acts contrary to section 79 of the Act. In particular, the Director seeks to prohibit the respondents' alleged practice of "selective licensing" whereby certain competitors are refused licences, allegedly arbitrarily or pursuant to an anti-competitive intent, and others are not. As a remedy, the Director seeks an order "that the respondents licence, at the request of independent advertising agencies, including consultants, and on commercially reasonable terms and conditions, the trade-marks registered for the respondents' own use in relation to telephone directories."

The Director's submissions raise two issues. First, the Tribunal must determine whether the refusal to license a trade-mark to certain persons or groups of persons is an anti-competitive act. Second, if it is an anti-competitive act, the Tribunal must determine whether it has jurisdiction to order the respondents to license their trade-marks. Having carefully considered the evidence and the submissions of counsel, the Tribunal is of the view that the selective refusal to license a trade-mark is not an anti-competitive act. Accordingly, the second question need not be answered.

The facts concerning the respondents' refusal to license their trade-marks are not disputed. The respondents license the use of their trade-marks to CMRs and other telco-affiliated directory publishers; they do not license other advertising agencies or consultants. The respondents aggressively defend their trade-marks against what they perceive to be infringement but they do not pursue every perceived infringement with equal zeal. The evidence is that Tele-

Direct overlooks certain uses of its trade-marks but threatens to, or institutes, legal action against the use of its trade-marks by, for instance, consultants.

Both the *Trade-marks Act*[23] and the *Competition Act* are relevant. The purpose of a trade-mark is to distinguish the wares or services of the owner from those of others.[24] The *Trade-marks Act* provides that the owner of a trade-mark has the exclusive right to its use.[25] Further, the owner of a trade-mark may license another to use that trade-mark, and that use is deemed to have the same effect as use by the owner.[26] Subsection 79(5) of the *Competition Act* provides:

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

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[23] *Trade-marks Act*, R.S.C. 1985, c. T-13.

[24] A "trade-mark" is defined in s. 2 of the *Trade-marks Act* as "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others. . . ."

[25] *Trade-marks Act*, s. 19.

[26] S. 50(1) of the *Trade-marks Act*, as am. S.C. 1993, c. 15, s. 69, provides:

For the purposes of this Act, if an entity is licensed by or with the authority of the owner of the trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade-name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner.

The Director submits that subsection 79(5) does not preclude a finding that "abuses" of intellectual property rights are anti-competitive acts. It is the Director's position that Tele-Direct's practice of selective licensing is an abuse of Tele-Direct's trade-mark rights. The Director asserts that an owner's "exclusive right to use" its trade-mark is not unlimited. The Director relies upon case law which has defined "use" not to include activities which are for purposes other than distinguishing wares or services of the owner from the wares or services of others.[27] Accordingly, the Director submits that the respondents' position that "any written use of the words `Yellow Pages' would be dealt with" and the fact that the respondents have used their "superior resources" to assert this claim successfully is evidence of the respondents' exclusionary intent in respect of their trade-marks.

Tele-Direct argues that, as owner of the trade-marks, it has the statutory right to decide to whom it will or will not license those trade-marks, including the right to refuse to licence where it is not in its best interest to do so. It argues that there is no evidence that it has adopted a policy of refusing to license trade-marks to competitors for the purposes of restraining competition; rather, it does not make sense for Tele-Direct to license its trade-marks to consultants whose businesses are based on the premise that Tele-Direct "rips-off" its customers.

In support of his position, the Director relies on the decision of the United States District Court in *Car-Freshener Corp. v. Auto-Aid Manufacturing Corp.*, where the Court stated that

[27] E.g., comparative advertising or use of trade-mark in a merely descriptive sense, for example, does not constitute infringement: see *Clairol International Corp. v. Thomas Supply & Equipment Co.*, [1968] 2 Ex. C.R. 552 at 556; *Syntex Inc. v. Apotex Inc.* (1984), 1 C.P.R. (3d) 145 (F.C.A.).

there was "no doubt that a trade-mark may be utilized in such a manner as to constitute a violation of antitrust laws"[28] and offered several examples: the use of a strong trade-mark to unlawfully tie a weaker product, unlawful price discrimination exercised with respect to a trade-mark, or other illegal anti-competitive practices. The Tribunal is in agreement with the Director that there may be instances where a trade-mark may be misused. However, in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trade-mark. Subsection 79(5) explicitly recognizes this.

The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

The owner's exclusive jurisdiction over licensing accords with the scheme of the *Trade-marks Act*. There is no statutory means by which a person can petition the Registrar of Trade-

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[28] 483 F.Supp. 82 at 86-87 (1977).

marks for a licence to use a trade-mark, implying that the decision to license rests with the owner of the mark. Furthermore, the licensing provisions of the *Trade-marks Act* provide that, in order to constitute a valid licence, the trade-mark owner should have "direct or indirect control of the character or quality of the wares or services" to which the licensee was attaching the mark. Indeed, in *Unitel Communications Inc. v. Bell Canada*,[29] the Court expunged trade-marks owned by Bell Canada, in part because Bell Canada had failed to exercise control over the use of its trade-marks by an independent telco. In the case at bar, the lack of control over the quality of the goods or services is particularly relevant since the Director is suggesting that the respondents' trade-marks should be licensed to consultants with whom the respondents do not share identity of interest.

While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the *Trade-marks Act* allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the *Trade-marks Act* does not prescribe any limit to the exercise of that right.

The respondents' legitimate desire to protect the value of the goodwill vested in their trade-marks by refusing to license them does not amount to an anti-competitive act. In view of the strength of their trade-marks, the respondents can be expected to be, and are entitled to be, protective of their rights. Indeed, if the respondents did not protect their marks, they would risk

[29] (1995), 61 C.P.R. (3d) 12 (F.C.T.D.).

having them lose their distinctiveness, as in *Unitel*. This is a real concern, given that the Yellow Pages trade-marks are no longer registered in the United States.

While independent advertising agencies and consultants may wish to use the respondents' trade-marks, there is simply no basis for granting an order requiring the respondents to license their trade-marks.[30] Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the *Trade-marks Act*, accorded the right to refuse to license their trade- marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the Act.

VI. MARKET DEFINITION

A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Director of Investigation and Research v. D & B Companies of Canada*[31] that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof", refers to

[30] In fact, neither the Director nor the respondents directed the Tribunal to any cases where a party was ordered to license a trade-mark.

[31] (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.).

the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power.

A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market . . . is likely to" have a number of detrimental effects. If Tele-Direct is found to have market power, it would qualify as a "major supplier".

A. PRODUCT MARKET

The argument and the evidence presented to us regarding the relevant product market focus on whether there are close substitutes for telephone directory advertising. The Director includes in his relevant market advertising in Tele-Direct's Yellow Pages directories and in telephone directories produced by independent (non-telco affiliated) publishers.

The respondents concede that advertising in independent directories is in the same relevant market as advertising in Yellow Pages directories. Their position is that both independent and Yellow Pages directories form part of a broader product market comprised of all local advertising media. The respondents define "local advertising" in this context as advertising designed to promote business at a particular location. They would include, for example, direct mail, outdoor signage, community newspapers, daily newspapers, catalogues, trade magazines, flyers, radio, television -- in fact advertising in any medium as long as the advertising is designed to promote a particular location.

It is important to keep in mind that our goal in defining the relevant market in this case is to determine whether other local advertising media provide competitive discipline for Tele-Direct in respect of its Yellow Pages pricing[32] and output decisions. The Director argues that they do not. The respondents argue that they do.

(1) Substitutability -- The Basic Test

The parties agree that the fundamental test or "touchstone" for determining the boundaries of the relevant product market is substitutability, as the Tribunal has consistently held in previous decisions, including three abuse of dominant position cases.[33] Products must be close substitutes in order to be placed in the same product market. The parties also agree that the appropriate approach to or framework for market definition is set out in the Federal Court of Appeal decision in *Director of Investigation and Research v. Southam Inc*.[34] Both parties quote the same passage from that decision:

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[32] Or surrogates such as service, quality, etc.

[33] *NutraSweet, supra* note 4; *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (QL); *D & B, supra* note .

[34] [1995] 3 F.C. 557 (C.A). An important issue in *Southam* was whether the two Pacific Press dailies and various community newspapers, all owned by Southam, were in the same product market. The Tribunal found that they were not; the Court of Appeal reversed on this point. An appeal to the Supreme Court is pending.

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical *indicia*, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.[35] (reference omitted)

It is also common ground between the parties that this approach does not represent a radical departure from the approach used by the Tribunal in previous decisions.

(2) The *Southam* Decision

The *Southam* decision is the first Court of Appeal decision to deal in any depth with market definition under the Act.[36] That the parties differ considerably on how the general approach stated by the Court of Appeal in *Southam* is to be applied to the facts of the case before us is evident from the broad product market proposed by the respondents and the narrow product market proposed by the Director.

(a) Direct Evidence of Substitutability

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[35] *Ibid*. at 632-33.

[36] *Southam* was followed in *R. v. Clarke Transport Canada Inc.* (1995), 130 D.L.R. (4th) 500 (Ont. Ct. (Gen. Div.)), (1995) 64 C.P.R. (3d) 289. While the Director referred to that decision, it was not argued in any detail nor, apparently, relied on by either side.

There is no dispute that, first, we must consider any direct evidence of substitutability. In *Southam* the Court of Appeal states:

> To the extent that it is possible to adduce statistical evidence of high demand elasticity, such evidence is virtually conclusive that two products are in the same product market. Evidence of price sensitivity can also come in anecdotal form which is a less conclusive, although still a persuasive factor tending to show that products are close substitutes.[37]

The Director did not adduce any statistical evidence. The respondents mention the two "Elliott" reports, studies conducted for Tele-Direct in early 1993 for purposes other than this proceeding, as "statistical data" on advertisers' reaction to relative price increases.[38] The Elliott reports were general surveys of "customer satisfaction" which did not deal with price sensitivity of advertisers between different media.[39] Even if they had dealt with relative prices of various different media, in our view the Elliott reports would not qualify as the type of direct statistical evidence of demand cross-elasticity that was intended by the Court of Appeal. Such a study would have to be undertaken for the purpose of determining cross-elasticity between the products alleged to be in the market, be conducted in an appropriately rigorous fashion and meet tests of statistical significance. While the Elliott reports do not qualify as statistical evidence of demand cross-elasticity, they will be considered as part of the indirect evidence of substitutability.

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[37] *Supra* note 34 at 633.

[38] Confidential exhibit CJ-14 (blue vol. 5), tab 173; confidential exhibit CJ-19 (blue vol. 10), tab 285 (Newfoundland).

[39] The participants were asked if they would shift their advertising from Tele-Direct to an independent *directory* in response to a 15 percent increase in Tele-Direct's prices.

Although the Director called a number of buyers or advertisers as witnesses in this case, he does not rely on their evidence as "anecdotal evidence" of price sensitivity, from his point of view, low price sensitivity. He refers to their evidence as indirect evidence under various rubrics. The respondents likewise treat the testimony of the advertisers as indirect evidence. We will therefore not address the question of whether that testimony provides any direct evidence of price sensitivity or a lack thereof.

In the absence of direct evidence regarding buyer price sensitivity, we must therefore proceed to examine the available indirect evidence or "practical indicia" to draw inferences about price sensitivity.

(b) Indirect Evidence of Substitutability

The Director has organized the evidence of product market definition using headings similar to those set out in the *Merger Enforcement Guidelines*:[40] end use, physical and technical characteristics, views, strategies, behaviour and identity of buyers, trade views, strategies and behaviour ("inter-industry competition"), price relationships and relative price levels and switching costs. The respondents have also used the same headings to organize their evidence, although in a slightly different order. The *Merger Enforcement Guidelines* are not sacrosanct.

[40] Consumer and Corporate Affairs Canada, Director of Investigation and Research, *Merger Enforcement Guidelines*, Information Bulletin No. 5 (Supply and Services Canada, March 1991).

But, as the parties are agreed that the evidence may be organized according to those guidelines, we accept that this is a practical and useful way in which to proceed.

The parties may use the same organizational structure but they do not agree on the respective roles to be accorded to the various practical indicia. In particular, they take different positions on the way in which the indicia of "functional interchangeability" and "inter-industry competition" should be employed in defining a product market based on the Court of Appeal decision in *Southam*. They also differ, of course, on the nature of the evidence and the conclusions to be drawn therefrom that should be considered under each heading. A detailed review of the evidence and the arguments under each heading will follow. We must first address, however, the arguments regarding the general approach to the practical indicia or indirect evidence of substitutability.

The Director submits that the Court of Appeal in *Southam* found that functional interchangeability is a "vital feature" and a "central part of the framework" of market definition, although it is not a sufficient condition for two products to be in the same market. The Director argues that the Court of Appeal did not state that functional interchangeability and inter-industry competition were the "sole" or "driving" factors in market definition but only found that *ignoring* those factors was an error of law.

The respondents in their written argument agree that the Tribunal must consider the evidence with respect to functional interchangeability and that it is central but alone does not conclusively demonstrate that two products belong in the same relevant market -- other factors must be considered. They point out that the additional factor that was "very important" to the Court of Appeal in *Southam* was inter-industry competition. During oral argument, counsel took the stricter position that the Court of Appeal held that if functional interchangeability and "broad" inter-industry competition are found, then it is an error not to place the products under consideration in the same market. If the two indicia mentioned are present, the Tribunal *must* infer price sensitivity and therefore a single product market.

The Tribunal must determine whether the Court of Appeal prescribed, as a matter of law, the role and importance of the factors or indicia of "functional interchangeability" and "inter-industry competition". With respect to functional interchangeability as one of the indirect indicia, the Court of Appeal stated that it was "not simply one of many criteria to be considered but a critical part of the framework." It also confirmed that functional interchangeability will generally be regarded as a "necessary but not sufficient condition to be met before products will be placed in the same market." With respect to inter-industry competition, the Court of Appeal found that evidence of "broad" competition, namely that the two types of newspapers were striving to reach many of the same advertisers with significant success by the community newspapers which, in turn, preoccupied Southam and generated responses by it, was sufficient to show competition "in fact".[41]

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[41] *Supra* note 34 at 635, 637-38.

A finding that the products alleged to be in the same market serve the same relevant purpose is a necessary first step in the analysis. A finding of functional interchangeability, however, is not alone sufficient to place the products in the same market. As the Court stated:

> . . . There are other factors which may tend to reinforce, or undermine, a finding that two products are functionally interchangeable.[42]

With respect to evidence of "broad" inter-industry competition, we do not understand the Court to be saying that the presence of such evidence, along with evidence of functional interchangeability, will, in every case, dictate that the products in question should be placed in the same product market. If the Court intended to confine the analysis to these two practical indicia and effectively negate consideration of other factors, like, for example, the views, strategies and behaviour of buyers, the Court would have done so explicitly. It did not do so. In *Southam*, the Court confined its conclusions to the matter before it:

> While evidence of substitutability through functional interchangeability and inter-industry competition was adduced, the Tribunal ultimately ignored such evidence. In doing so, the Tribunal adopted an overly narrow approach to substitutability as it dismissed "broad" conceptions of interchangeability and inter-industry competition. In doing so, the Tribunal erred in focusing predominantly on price sensitivity. *In this case, the similarity of use between Pacific Dailies and community newspapers, and the competitiveness which existed between them, is sufficient to place both in the same product market.*[43] (emphasis added)

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[42] *Ibid*. at 637.

[43] *Ibid*. at 640.

We conclude that consideration of functional interchangeability is essential in assessing indirect evidence of whether two or more products are in the same market. But this does not exclude other relevant evidence which may reinforce or undermine what functional interchangeability implies.

In considering the whole of the evidence, the Tribunal will bear in mind the ultimate reason why the market is being defined. In this case, the goal is to determine if the respondents have market power (or are "major suppliers"), that is, if the alleged close substitutes, other local advertising media, provide competitive discipline for Tele-Direct in making price (or quality) and output decisions.

(3) Functional Interchangeability

The Director submits that two headings from the *Merger Enforcement Guidelines*, "end use" and "physical and technical characteristics", are both related to the question of functional interchangeability. Certain characteristics of directories are, he argues, key factors which dictate the end use of a directory as a directional reference tool and which thus limit the "functional interchangeability" of directory advertising with directional advertising in other media.

The respondents argue that all local advertising has the same end use: to increase business at a particular location. They submit that the characteristics of the various media should not be considered as part of the determination of functional interchangeability.

Regarding functional interchangeability, the Court of Appeal in *Southam* says:

> . . . But the fact that community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter *subjective* factor should not be mingled with the purely *objective* factor of functional interchangeability which focusses on use or purpose.[44] (emphasis added)

The Court imposes the constraint that the views of buyers should not enter when functional interchangeability is being decided because they are "subjective". Only "objective" factors should enter at this point.

Under the criterion "end use", the *Merger Enforcement Guidelines* refer to the extent to which two products are "functionally interchangeable in end use". That is the way in which the term will be used in this decision. Physical and technical characteristics, along with other indicia, serve to determine whether the products found to be functionally interchangeable in end use are close substitutes. Rather than considering physical and technical characteristics as part of the determination of functional interchangeability, as the Director proposes, the Tribunal will treat them separately from functional interchangeability.

The Director and one of his economics expert witnesses, Richard Schwindt,[45] have defined the relevant end use of telephone directory advertising to be use as a "directional" medium. ("Directional" and "directive" were used interchangeably in the material before us.)

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[44] *Ibid*. at 636-37.

[45] Associate Professor of Economics and Business Administration at Simon Fraser University.

Two elements are said to characterize a directional advertising medium: (a) consumers consult the medium when they are at a point in the buying cycle when they are ready to buy, and (b) the medium is used as a reference tool. Directional advertising is distinguished from creative advertising, which is widely acknowledged to be used for creating or stimulating demand. The Director admits that other advertising media besides Yellow Pages might be considered directional but names catalogues, direct mail and classified newspaper advertising as the only candidates.

The respondents and their economics expert witness, Robert Willig,[46] take the view that all "local" advertising[47] has the same end use, to attract customers to a particular establishment. Thus, they argue, advertising in the Yellow Pages and advertising in other local media are functionally interchangeable. In response to the Director's argument, they argue that directionality is not generally regarded as encompassing the element of use as a reference tool. They further argue that the directional/creative dichotomy is not valid. They take the position that there is no such sharp distinction in the advertising done by local advertisers. In their submission, directional means only that the advertising directs consumers to a particular establishment -- which can be done in any medium. Given the respondents' definition of "local" advertising, all advertising by a local advertiser necessarily has a directional component. Similarly, since they are of the view that all local advertising, including advertising in telephone

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46 Professor of Economics and Public Affairs at Princeton University.

47 As opposed to "national" or "brand awareness" advertising which promotes a product wholly apart from *any* location.

directories, has as its goal the stimulation of demand at a location, all local advertising necessarily has a creative component.

Since the respondents have defined "local" advertising as advertising designed to promote business at a particular location, it follows that the purpose of all local advertising is to attract customers to a business. Such a definition is at a high level of generality. While we recognize that the "end use" indicia acts as a "filter" or a "first stage" in the analysis only, it should still cast some light on the ultimate question to be determined, i.e., whether all "local" media are *close* substitutes providing sufficient competitive discipline among themselves that they should be considered to be part of the same product market in this case. We find the words of Gibson J. in *R. v. J.W. Mills & Sons Ltd.*, which the Court of Appeal in *Southam* found "worthy of replication", to be instructive on this point:

> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.
>
> At one extremity, an ill-defined description of competition is that every service, article, or commodity, which competes for the consumer's dollar is in competition with every other service, article or commodity.
>
> At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service.
>
> In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.[48]

[48] [1968] 2 Ex. C.R. 275 at 305-306.

The criterion of functional interchangeability in end use should not be treated at such a high level of generality that it precludes objective yet contextual analysis. To say that, for example, automobiles and bicycles are in the same product market because they both provide a means of transportation would make the level of generality so high that no meaningful analysis could be performed as a result of it. Some consideration must be given to context.

To put functional interchangeability in end use in context in this case, it is important to look at the buying cycle and which types of media are generally regarded as directional and thus particularly effective in reaching consumers who are at the end of the buying cycle. These consumers are "ready to buy" but must decide which commercial establishment to patronize. The question is which types of media effectively bring the particular establishment to the consumer's attention in those circumstances.

The respondents referred us to a number of American cases which, they argue, support their broad conception of end use. We do not find these authorities particularly helpful. First, and most importantly, the product market that is arrived at in a particular case is very much dependent on the facts of that case and the context in which the case is brought, that is, the alleged anti-competitive wrong that the plaintiff is seeking to cure. As Gibson J. stated in the passage quoted above, "two products may be in the same market in one case and not in another." Therefore, the mere fact that another court did or did not find that directory advertising was in the same market as other local media is not in itself compelling. Some of the cases cited by the respondents were not antitrust cases.[49] Others did not deal with directory advertising.[50] In addition, counsel for the Director was able to bring to our attention a number of other American cases in which the courts, either explicitly or implicitly, used Yellow Pages advertising as a relevant market.[51] Further, while the reasoning with respect to market definition in another case might provide us with some insight, one would have to be reasonably certain that the court in question was applying the same conceptual framework or "test" as we have adopted. These considerations all highlight the futility of looking for a simple, neat answer to market definition in the case law.

Based on the evidence, particularly materials created by the respondents themselves outside of the context of this proceeding, which we will review in more detail below, we accept the Director's position that the distinction between creative and directional media is a valid one for determining the end use of Yellow Pages and other local advertising. A fair consideration of the evidence, which will shortly be addressed, supports the position that creative advertising creates awareness of and demand for goods and services at the beginning of the buying cycle and that directional advertising refers to advertising to consumers who are at the end of the buying cycle which "directs" them where to buy a product or service. This effectively limits the number of media that can be considered to be directional.

[49] Respondents' Book of Authorities, vol. 6, tabs A,B.

[50] Respondents' Book of Authorities, vol. 6, tabs C, D; vol. 3, tab 41.

[51] Respondents' Book of Authorities, vol. 3, tabs 38, 47; Director's Book of Authorities in Reply, tabs 6, 7, 9.

Although the respondents argued that directional advertising simply means advertising (in any media including those traditionally considered creative) that contains a name, address or phone number to "direct" a consumer to particular establishment,[52] this was not Tele-Direct's view outside of this case. In the Multimedia Training Course created by Tele-Direct for its sales representatives, directional advertising is defined as:

> Media used by the advertiser to direct the buyer where to buy or use a product or service. Examples: Yellow Pages, catalogues, direct mail. Directive media complements and supports creative media.[53]

The three examples used suggest that directional media, in fact, have very specific characteristics beyond simply including a name, address or phone number. All are print media and in each case there is no editorial or entertainment content. The consumer has no reason to consult these media other than a reason related to making a purchase, i.e., at the end of the buying cycle.

The course material also discusses and sets out in chart form the role of the various media at the various stages of the buying cycle: awareness, interest, comprehension, trial, purchase and repurchase. The text explains:

> . . . [S]uch traditional advertising media as TV, Radio and Magazines are by their nature designed to generate awareness for products and services. The impact or intrusion qualities of this advertising creates an interest for the products and services and has the ability to demonstrate the benefits to the consumer and is ultimately designed to create a need or desire in the mind of the consumer.

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52 This is, of course, co-extensive with their definition of local advertising.

53 Confidential exhibit CJ-16 (blue vol. 7), tab 215 at 118727.

. . .
Although creative advertising is crucial at the awareness, interest and comprehension stage of the buying cycle, it loses impact at the actual purchase stage because of the time or distance between the initial awareness and the purchase.[54]

At the purchase stage, newspaper, direct mail, outdoor, radio and Yellow Pages are all considered to have some strengths. Television and magazines are not. Of those with strength at the purchase stage, only newspapers and direct mail (and Yellow Pages), however, are described as "directive". The strength of outdoor advertising at the purchase stage is as a "reminder message". The strength of radio at that stage is to offer price points and convey a "sense of urgency". Again, this course material supports the view that directionality imports something more than the ability to provide a consumer with a name and address. All of television, newspapers, direct mail, outdoor, radio and Yellow Pages are capable of including this information in advertising, yet Tele-Direct did not consider them all to be directional.

This interpretation is further supported by the letter sent to the Director by Tele-Direct during the course of the Director's investigation into the industry (referred to as the "Bourke letter"). The letter was intended to provide industry background.[55] It states that:

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[54] *Ibid*. at 118801.

[55] At the hearing, counsel for the respondents attempted to convince the Tribunal to attribute less weight to the letter than we otherwise might on the grounds that it was not prepared with the assistance of an economist and that it was produced in a compressed period of time. The letter was written by Tele-Direct's Vice-president of Marketing with the assistance of a number of lawyers from counsel's office. We have no information as to the extent of the economic background of any of those lawyers. It is signed by the President of Tele-Direct. During the discovery process the respondents resisted production of the letter on the grounds that it was protected by settlement negotiation privilege. The Tribunal ruled that the letter did not fall within that privilege and ordered it produced. We have no hesitation, for the purposes for which we refer to the letter, of attributing significant weight to it.

> The Yellow Pages traditionally is viewed as a "directional" or "considered purchase" advertising medium, which provides consumers with information on where they can purchase the goods and services they want. . . . Directional advertising is most attractive to local advertisers, particularly local retailers, who seek to motivate customers to visit their stores or to use their services. *Other directional media include direct marketing, catalogues, trade magazines, and specialty supplements to newspapers or magazines*.[56] (emphasis added)

There is no mention made of outdoor or television and radio as directional media. When Thomas Bourke, Tele-Direct's President, testified at the hearing he confirmed that the basic strength of Yellow Pages was to provide information on where to buy, as stated in the letter. In the list of directional media, he would, however, now include the classified sections of daily and community newspapers and specialty and other classified directories.

The letter continues:

> By contrast, the other major advertising media - outdoor, newspapers, radio, television and magazines - are classified as "creative" advertising media, which create awareness of and demand for products and services. Creative advertising assists advertisers who are either trying to sell a product or service, or promote their name. This service is attractive to major manufacturers or suppliers, who usually do not have a preference as to where the consumer buys its product or services.[57]

Since names, addresses and phone numbers could just as easily be included in advertising in the regular part of a newspaper and a magazine as in a special supplement or classified section, something more is involved in the way that the participants in the industry view directionality. As in the training material, all the examples of directional media are characterized by the absence of general editorial content. The characteristic that specialty supplements and classified sections in newspapers or magazines, other directories, catalogues and direct mail

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[56] Exhibit J-5 (green vol. 3), tab 239 at 86008.

[57] *Ibid*.

share with Yellow Pages is that the advertising in those media will be totally ineffective unless it is consulted by people who are "in the market" -- who are looking to make a purchase. As Mr. Bourke put it when describing how Yellow Pages complete the buying cycle, they must be in a "buying frame of mind". Consumers will not be involuntarily exposed to the advertising by virtue of going to the medium for entertainment or other reasons; they must voluntarily decide to consult the Yellow Pages or a catalogue, read the direct mail or an advertising supplement or classified section. These media are not picked up and browsed through idly in a spare moment.

The respondents argue that all directional advertising, even Yellow Pages advertising, has a "creative" component. Otherwise, they submit, no one would pay for a display advertisement in the Yellow Pages. The free business listing could provide a name, address and phone number. Clearly, there is "creativity" involved in designing an eye-catching Yellow Pages advertisement. This is not the same as creative ("creates" *demand*) as opposed to directional ("directs" consumers who are ready to buy) advertising as those terms are used in the industry, according to the evidence.

Mr. Bourke, echoing Raymond Greimel, Executive Director of YPPA, testified that the new attitude in the industry is that Yellow Pages are *both* directional and creative. He was unable, however, to explain how Yellow Pages advertising "creates awareness of and demand for products and services" in the words of the Bourke letter, as he recognized that people do not consult the Yellow Pages unless they already have a need for some product or service. He could only say that Yellow Pages advertising "reinforced" or "supported" the advertising in the creative media.

We are not satisfied from the paucity of evidence on the point that directional advertising means that the medium containing the advertising is a "reference tool", as the Director further submits. If this element were proven, virtually all media except directories would be excluded from potentially being part of the relevant product market at this point. We do not consider that the evidence supports narrowing the definition of "directional" in this respect.

Functional interchangeability is simply a preliminary filter to exclude those products which evidently do not have the same end use as Yellow Pages advertising. Nevertheless, certain conclusions can be stated. First, the respondents' position that local advertising in *all* media qualifies as directional is not tenable. In particular, television, radio and outdoor media are clearly not treated as directional in Tele-Direct's own materials. Television is seen as having little relevance to the latter stages in the buying cycle; it is strong in creating awareness and interest at the beginning of the cycle only. While radio and outdoor have a role at the later stages, that role was not to present a directive message but rather to create "urgency" or serve as a "reminder" of other advertising.

This is not to say that these media *cannot* be used for directional advertising in any circumstances. It is a possibility, but in deciding whether various media serve the same end use, one must look to usual uses and not mere possibilities unsupported by the evidence. We are of the view that both the electronic and outdoor media can be excluded at this point as they are not directional media and thus do not have the same end use as Yellow Pages advertising. Since the electronic and outdoor media have not met this "necessary" condition for inclusion in the relevant product market, we will not deal with them further.

Second, there is some doubt as to whether "regular" advertising (as opposed to special supplements or classifieds) in newspapers and magazines is properly included as directional advertising. Based on the list in the Bourke letter, which was updated by Mr. Bourke in his testimony and is therefore, presumably, as comprehensive as Tele-Direct considers it should be, we could exclude "regular" newspaper and magazine advertising at this point. The Multimedia Training Course, however, does refer to "newspaper" advertising, without further details, as directive. Given the preliminary nature of the criteria of functional interchangeability and in light of the overall model used by the respondents to argue their case, we will not exclude newspapers from further consideration. Magazines will not be dealt with further, as they were largely ignored in the remainder of the evidence and argument of both parties.

(4) Other Relevant Indicia

Having determined that some, though not all, local advertising media pass the threshold test of functional interchangeability, we will now consider the evidence and argument on the remaining practical indicia to decide if those media are close substitutes and belong to the same product market as telephone directory advertising.

(a) Physical and Technical Characteristics

Telephone directories are issued annually, are comprehensive both with respect to including all suppliers and being delivered to all telephone subscribers, and they are governed by their own rules with respect to the content of advertising. The Director is of the view that these characteristics set Yellow Pages apart from other media.

The respondents argue that each advertising medium has different "strengths and weaknesses" and can claim to be unique. They submit that a "catalogue" of differences is not alone enough to place two products in separate markets. They state that the relevant question is whether the product is unique in some respect that significantly limits the extent to which *buyers* (here, advertisers) are willing to substitute other products for the product at issue. We agree that to deal with physical and technical characteristics separately from the views and behaviour of buyers is somewhat artificial. It is, however, the way in which the parties have chosen to organize their arguments and the evidence in this case. Therefore, in this portion of the judgment, we will restrict ourselves to the points raised by the parties in their respective arguments under that heading. We recognize that this factor is mainly important in the analysis as providing background for the next section on buyer views and behaviour.

(i) Time Insensitivity/Permanence

Advertisements in the Yellow Pages are finalized several months prior to publication and have to stand for the entire year between directories. This means that Yellow Pages advertising cannot be used to convey time-sensitive information. As noted by Professor Schwindt, for the Director, this sets Yellow Pages apart from other directional media, such as direct mail or supplements to magazines or newspapers, in which time-sensitive information such as prices tends to be featured. In fact, until recently Tele-Direct regulations prohibited the inclusion of prices in Yellow Page advertisements to avoid potential false advertising claims. This ban has now been lifted. It is doubtful whether, in a fast-changing world, price advertising can ever be an important part of telephone directory advertising while directories are a print medium that changes only every year.[58] The evidence of the advertiser witnesses amply supported the conclusion that Yellow Pages are *not* used for time-sensitive advertising.[59]

The fact that Yellow Pages cannot be used to convey time-sensitive information is characterized by the respondents as a "weakness", the "flip side" of which is "permanence", a "strength". Based on a statement by Professor Willig in his rebuttal affidavit,[60] they conclude that a weakness in Yellow Pages does not suggest that advertisers *would not* substitute other media for Yellow Pages; a weakness probably suggests that they *would* substitute other media.

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[58] Apparently there is some experimentation in some American centres with allowing restaurants to run advertisements that include menus. In a relatively stable economic environment firms in such an industry might be willing to risk committing themselves to prices for as long as a year.

[59] See, e.g., the testimony of Jack Forrester of HOJ Car and Truck Rentals, that he does not use Yellow Pages for specials or promotions: transcript at 5:778 (11 September 1995); the testimony of Jean-Yves Laberge of the Turpin Group of automobile sales and leasing businesses, that he puts prices and specials in his newspaper advertisement but not in the Yellow Pages: transcript at 13:2406-407 (3 October 1995); and the testimony of Steve Kantor of Tiremag Corp., who sells wheels and tires, that he cannot use Yellow Pages to advertise seasonal product offerings or prices: transcript at 17:3288-89 (11 October 1995).

[60] Paragraph 24 of Professor Willig's rebuttal affidavit (exhibit R-181) reads:

> . . . As a matter of economics, it is difficult to see how negative characteristics can contribute to a showing of dominance in a narrow relevant market. Instead, negative characteristics contribute to the willingness of buyers to substitute out of the product at issue, and so their recognition should, if anything, argue for a wider market to be relevant, not a narrower one.

Thus, any identified weaknesses are seen as evidence of Yellow Pages vulnerability and not as evidence that the products against which Yellow Pages is being compared may not be close substitutes.

We do not accept that a "weakness" alone provides evidence of or even suggests substitutability. Substitution is not a one-way process. The conclusion on whether there are close substitutes for the firm's products is not based on asymmetrical substitution. We must certainly consider whether there is ready substitution *from* Yellow Pages *to* other media but we must also be satisfied of the reverse, ready substitution *to* Yellow Pages *from* other media.

For the very reason that telephone directories are not suited to time-sensitive information, they are the one source of directional advertising that advertisers can be virtually certain will be retained for a long period by consumers. Apart from catalogues, which often are valid for periods of up to six months, the information in other vehicles is quickly dated and will be discarded. Catalogues, however, generally provide information on a single seller and do not cover the wide range of goods and services found in the Yellow Pages. The relative permanence of directories supports the Director's position that Yellow Pages are unique among directional media in serving as a continuing reference of all available suppliers.

(ii) Comprehensiveness

It is conceded by the respondents that telephone directories are unique with respect to their comprehensive list of suppliers. They argue, however, that comprehensiveness comes from the free listings and that the directory would still be comprehensive even if it contained no display advertisements. That is true. The respondents go on to state that an advertiser values comprehensiveness *only* if the advertiser is targeting customers who contact *all* listed suppliers before making a purchase, in which case the advertiser would not need a display advertisement. The latter statement simply does not follow. The advertiser witnesses who appeared before us made it clear that they value the comprehensiveness of the Yellow Pages because that is a feature that leads consumers in general to use the Yellow Pages. (Since we are talking about a directional medium, we are speaking of consumers who are ready to purchase some good or service and are looking for a supplier.) Once a consumer decides to consult the Yellow Pages because of its comprehensiveness, an advertiser finds it profitable to advertise in the Yellow Pages to cause that consumer to choose its establishment as opposed to that of another supplier.

On the distribution side, the respondents do not dispute that there is no other medium that is so comprehensively distributed. All telephone subscribers, the vast majority of the population, receive a telephone directory. The respondents attempt to counter this fact by pointing out that persons who receive the Yellow Pages, and thus are the potential customers of businesses listed or advertising in the Yellow Pages, are also exposed to other media which do not depend on their active involvement, that is, on their deciding to consult the Yellow Pages. This argument, in effect, simply reiterates the respondents' position that all media have the same end use, since it ignores the fact that the voluntary nature of Yellow Pages (consumers must decide to consult the Yellow Pages to be exposed to the advertising) means that it is *not* used for the same purpose as are the creative media (consumers are involuntarily exposed to the advertising by virtue of using the medium for the entertainment or information value). We have found that Yellow Pages are a directional medium. Exposure to creative media is not relevant as they serve a different purpose.

The respondents also point out that the scope of a particular directory may be too broad for a particular advertiser. That advertiser may wish to reach only a limited geographic area and could do so more cost-effectively with flyers. This will be addressed in the next section when we consider buyer views on whether the unique characteristics of Yellow Pages are significant to them and thus limit their choices among media.

(iii) Other Restrictions

In addition to the restriction on price advertising there are Yellow Pages rules regulating comparative advertising, the use of coupons and the use of superlatives. There is no evidence on the effect of these restrictions. However, their existence does indicate that the publishers of telephone directories were and are willing to create an advertising environment that sets their vehicle apart from others. Clearly Tele-Direct is not concerned that these restrictions make Yellow Pages less attractive such that advertisers would substitute other media.

In summary, all media have strength and weaknesses. Contrary to the respondents' arguments, however, we are of the view that "weaknesses" of the Yellow Pages as a medium do not imply that advertisers will readily switch from it to other media. If pricing information is important to advertisers and they *cannot* use Yellow Pages to convey prices because of restrictive rules or time-insensitivity, then their choice to use newspaper advertising instead cannot be seen as a *substitution of newspapers for Yellow Pages*. Likewise, if advertisers *cannot* achieve their goal of being in a "reference" medium by advertising in newspapers, then their decision to advertise in the Yellow Pages cannot be seen as a *substitution of Yellow Pages for newspapers*. In other words, strengths and weaknesses in areas important to advertisers are really characteristics that tend *against* substitutability. The existence of significant (to advertisers) differences between Yellow Pages and other media would lead to the inference that other media are not close substitutes to the Yellow Pages.

(b) Views, Strategies, Behaviour and Identity of Buyers

Both sides recognize the importance of the identity, views and behaviour of buyers, in this case, Yellow Pages advertisers. Before turning to the more detailed evidence, we first set out the position of each of the Director and the respondents on the question of substitutability from the perspective of the advertisers.

The Director submits that advertisers do not consider that there are any close substitutes for Yellow Pages advertising. He bases this on the testimony of the advertiser and agency witnesses, who although not a representative sample, gave cogent reasons for their views on substitution despite the diverse businesses involved. He argues that the advertisers cannot easily move their advertising spending from Yellow Pages to other media because of the value that they place on certain unique characteristics of Yellow Pages as a medium. In support of this position, he also points to evidence that Yellow Pages spending is not even part of the "advertising" budget at large for many Yellow Pages advertisers.

The respondents conceive of all advertisers, including Yellow Pages advertisers, as operating on a fixed advertising budget which is allocated among various media (the "media mix") based on the highest returns that can be obtained from the advertising expenditures. Decisions about media mix are driven by perceptions of relative cost-effectiveness. Therefore, Yellow Pages spending is vulnerable to reduction (by means of smaller size, less colour) or cancellation in favour of expanded spending on other local media which are perceived as more cost-effective. The respondents' position emphasizes the possibility of significant substitution between media "at the margin".

The respondents argue that the evidence supports the following propositions (although they state them in a somewhat different order):

(1) the businesses that advertise in Tele-Direct's directories ("current Tele-Direct customers") also advertise in a variety of other media;

(2) current Tele-Direct customers perceive that other media provide as good or better value than Yellow Pages advertising and may be assigned as high or a higher priority in the advertiser's media mix;

(3) current Tele-Direct customers in the same line of business may each choose a different media mix, including a different emphasis on advertising in the Yellow Pages (bigger or smaller, black and white or colour Yellow Pages advertisement);

(4) many of the businesses that do not advertise in Yellow Pages ("Tele-Direct non-advertisers") advertise elsewhere;

(5) Yellow Pages advertisers who have cancelled their advertising in Yellow Pages ("former Tele-Direct customers") continue to advertise in other media; and

(6) former Tele-Direct customers are unenthusiastic about the value provided by Tele-Direct in relation to other suppliers.

They submit that these propositions support their theory that advertisers readily shift their spending between media and thus Yellow Pages advertising and advertising in all other local media are in the same product market. The respondents also point to some evidence which they say reflects *actual* switching behaviour by Yellow Pages advertisers to other media.

Two preliminary comments are in order. The first relates to the use of a term such as "at the margin" which, in effect, invites the Tribunal to ignore the cellophane fallacy because of its emphasis on current price levels rather than the competitive price.[61] Any firm or group of firms

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[61] It is commonplace economics that a firm with market power will set prices where the demand for its product is elastic; that is, at the point where a further increase in price would cause a reduction in revenue. Some of the reduction in revenue may result from consumers switching to other products which are the closest substitutes *at that price*, but which would not be considered by

that have fully exploited their market power might see some substitution if the relative price of their product goes up further. Their inability to raise their prices without buyer switching "at the margin" is, in these circumstances, because they have already exercised their market power *not* because they have *no* market power because of the presence of close substitutes.

Secondly, with regard to the proposition that advertising budgets are fixed, there is some support in the evidence that this is true for large companies. The situation is not so clear for small companies. We recognize, however, that some percentage of Tele-Direct's revenue is likely derived from advertisers who have advertising budgets that include Yellow Pages. Therefore, we will proceed to address the critical question of whether these advertisers and others treat Yellow Pages and other media as close substitutes. It will be convenient, in this instance, to organize our review of the evidence put forward by the parties by focusing in turn on each of the customer groups mentioned in the respondents' propositions. We will look first at the evidence regarding former Tele-Direct customers, then turn to non-advertisers and finally, current Tele-Direct customers.

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these consumers as substitutes if the firm with market power were pricing its product *at a competitive level*. This so-called "cellophane fallacy" (originating from criticism of the decision of the Supreme Court of the United States in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956)) can result in the mistaken conclusion that a firm does not have market power because of the presence of substitutes when in fact the reverse is true -- the substitution is occurring *because of* the exercise of market power. In principle markets should be defined at competitive prices.

(i) Former Tele-Direct Customers

This group comprises Tele-Direct customers who have *completely* cancelled their Yellow Pages advertising. One would expect, therefore, that these advertisers would provide the most compelling affirmation of the respondents' theory of ready shifts in spending between media.

At the outset, we note, however, that whatever is learned about former Tele-Direct customers cannot be generalized to the population of Yellow Pages advertisers as a whole. From Tele-Direct's 1994 Corporate Post Canvass Analysis Report we know that former Tele-Direct customers are relatively unimportant in terms of total Tele-Direct revenue, and individually they were spending far less than average annual amounts in the Yellow Pages. The 1993 revenue from advertisers who cancelled their Yellow Pages advertising completely in 1994 represented only 1.3 percent of total 1993 revenue for Tele-Direct (Publications) Inc. The average annual expenditure in the Yellow Pages for these advertisers was about $700.[62]

The respondents rely on the information about former customers provided by the January 1993 Elliott report on customer satisfaction.[63] The report indicates that former customers view Tele-Direct's products and services as "poor value" and generally of fair to poor quality, both absolutely and relative to other suppliers.

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[62] Confidential exhibit CJ-28 (black vol. 7), tab 42 at 129284. Customers who disconnected their business telephone service are not included. There was no general price change between 1993 and 1994, although there were a number of incentive plans.

[63] Confidential exhibit CJ-14 (blue vol. 5), tab 173.

Because the former Tele-Direct customers could answer questions about other media suppliers, the results do indicate that *some* Tele-Direct former customers use other media. The study does not reveal what percentage of former customers are, in fact, using other advertising vehicles or which ones they are using. We know from the 1994 Corporate Post Canvass Analysis Report that former advertisers were spending relatively small amounts in the Yellow Pages. This would tend to indicate their options for buying other media on an annual basis with the dollars thus freed up are limited, given the cost of some of the media (particularly newspapers, radio and television) alleged to be close substitutes. The survey also found, not surprisingly, a low level of satisfaction with Tele-Direct among former customers. The study does not provide convincing evidence that a significant portion of former customers transferred advertising spending *from* the Yellow Pages *to* other media or that Yellow Pages is vulnerable to competition from other media as opposed to losing advertisers by virtue of its own failings.

With respect to former Tele-Direct customers the Director refers to two Tele-Direct reports which set out the reasons which customers gave to Tele-Direct sales representatives for cancelling their advertising: the "P.A.R. (Potential Advertiser Retrieval) Summary" report and the "Wipe Out Sampling Summary".[64] One can assume from the fact that the representatives were able to contact the customers that they remained in business and maintained a business listing.

[64] Confidential exhibit CJ-87 (black vol. 14), tab 111 at 134805; confidential exhibit CJ-33 (black vol. 12), tab 85 at 132815.

Tele-Direct uses the P.A.R. form completed by cancelled customers to attempt to understand why advertising was cancelled. One of the choices on the form for reason for cancellation is "trying other media". Professor Willig found it "notable" that Tele-Direct listed "trying other media" as a choice on the P.A.R. form., i.e., that Tele-Direct was alive to the possibility of its advertisers switching to other media. However, the P.A.R. Summary report printed in September 1995 shows that only four out of 203 former customers (two percent) surveyed stated that they cancelled because they were "trying other media". Professor Willig conceded that this low number would have some significance and would suggest a low level of movement between media if the study were meant to be comprehensive.

To counter the low percentage, the respondents argue that the relevant denominator is actually smaller than 203. To the extent that 56 customers were probably going to go out of business, they should be excluded. If we remove these customers, only three percent of the former customers surveyed gave "trying other media" as their reason for cancelling their Yellow Pages advertising.

The respondents would also exclude a further 84 customers who gave a variety of reasons other than "trying other media" for their cancellation (e.g., "financial reasons", "restructuring", "wouldn't discuss", "clients are mostly from referrals") to bring the sample size to 63. They would also include in the numerator, with those advertisers who answered "trying other media", another 47 advertisers who gave various other responses[65] on the argument that these advertisers

[65] "Non-believers", "inadequate response from advertising" and "don't need large recognition".

were probably already using other media and, therefore, would not say they were "trying" other media when they moved their dollars to what they considered a more effective medium. Thus restructured, they argue that the report yields an 81 percent response rate in favour of substitutability between all media.

There is nothing in the report which supports the changes advocated by the respondents. The inclusions and exclusions are based on speculation, at best. Beyond removing the customers who have gone out of business, the report must be taken as it stands. If it is significant, as Professor Willig maintained, that Tele-Direct wanted to know if former customers were "trying other media", and included it as a possible response for former customers to choose, then it is significant whether they did choose that response or not. Any of the customers who answered could have selected "trying other media" if that were indeed their primary motivation for leaving the Yellow Pages.

On the whole the P.A.R. Summary report demonstrates that only a handful of customers may have discontinued Yellow Page advertising in favour of other advertising vehicles. Even for these customers little can be concluded about substitutability. They said they were "trying other media". Without some follow-up as to whether they found other advertising vehicles more effective in boosting their sales, it is not possible to tell if the other media were close substitutes for them. Indeed, some of these customers may have returned to Yellow Pages because they did *not* find the other media adequate for their purposes.

Similarly, the "Wipe Out Sampling Summary" by Tele-Direct shows only two of 87 (about two percent) former customers "trying other methods of advertising". The respondents attempt to re-interpret these results in the same manner as with the P.A.R. Summary report, i.e., by reducing the denominator. Again, there is no support in the document itself for such re-interpretation. This report tends to support the conclusion from the P.A.R. Summary report that very few customers discontinued Yellow Pages advertising in favour of other advertising vehicles.

(ii) Tele-Direct Non-advertisers

Tele-Direct's overall penetration rate is about 50 percent. This means, as the respondents state, that some businesses do not buy any Yellow Pages advertising. It is probably also true that most businesses advertise in some way. What does the evidence reveal, if anything, about this class of Tele-Direct non-advertisers? Is their advertising spending likely to be easily switched from whatever vehicles they are currently using into Yellow Pages (and vice versa)?

Tele-Direct divides non-advertisers into two groups: poor prospects for Yellow Pages advertising (Market 6)[66] and current non-advertisers with some potential (Market 7). Market 6 accounts are not contacted during a sales canvass; about 85 percent of Market 7 accounts are contacted. Both Valerie McIlroy, Tele-Direct's Vice-president of Marketing until July 1994, and David Giddings, a Vice-president of Sales, described the manner in which Tele-Direct contacts these non-advertisers as a "blitz". During a canvass, one or two days at various times are

[66] For example, individuals in professions prohibited from advertising, variety stores, construction sites.

designated as "non-ad blitz days" and the telephone sales representatives focus on calling as many non-advertisers as they can each day, up to 20 to 30 calls. Tele-Direct's success in converting these non-advertisers is at most five percent.

If all media are close substitutes and advertising dollars are as fluid as the respondents argue, then Tele-Direct would seem to have a reasonable prospect of luring customers away from those other media and into the Yellow Pages. Yet, Tele-Direct's success rate with non-advertisers is very low. In addition, the approach taken to non-advertisers, namely telephone sales "blitz" days, provides little indication that Tele-Direct considers these non-advertisers "good" prospects which merit spending a lot of time and money to convert. Former Yellow Pages advertisers who have cancelled would presumably be especially good candidates but Tele-Direct does not appear to direct any special effort even to this group.

One of the studies referred to by the respondents that does include some specific information on non-advertisers is the 1990 study by Impact Research.[67] The study consisted of interviews with 36 business people in Montreal and Toronto, half of whom were Yellow Pages "non-advertisers".[68] There is some indication that the non-advertisers were probably using some other media but there is no data on how many advertisers or which media.

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[67] Confidential exhibit CJ-18 (blue vol. 9), tab 249.

[68] Contrary to Tele-Direct's habitual use of the term, the "non-advertisers" studied may have had a bold listing.

The results of the study do not, in any event, support the respondents' contention about the potential to shift advertising dollars between all local media in search of the most "cost-effective" alternative. Seventeen of the 18 non-advertisers did not advertise in the Yellow Pages "mainly because of the *perceived non-use of the Yellow Pages by their potential customers*." Sixteen of the non-advertisers were not going to advertise in the next Yellow Pages edition because they were convinced it was an "*inappropriate medium* for their advertising needs".[69] Two were undecided.

The views of non-advertisers do not support the contention that there is ready substitution between Yellow Pages and all other local media. If anything, the evidence that is available tends in the opposite direction.

(iii) Current Tele-Direct Customers

The respondents place considerable emphasis on the fact that existing Yellow Pages advertisers use a variety of media and that many believe that other media are as good or a better value than Yellow Pages. Because many firms advertise in a number of different advertising vehicles, the respondents argue, they are thus able to shift advertising dollars among them as the returns on them vary.

[69] *Supra* note at 107661, 107681 (emphasis added). One non-advertiser was just starting up his business and could not make the current edition deadline.

The evidence from the Director's advertiser witnesses, as well as from the Tele-Direct surveys,[70] confirms that Yellow Page advertisers tend not to be solely reliant on this one vehicle. Many advertisers use a variety of media. Even within a heading, some Yellow Pages advertisers have smaller advertisements, advertisements without colour or simply a free listing, thus potentially freeing advertising dollars to spend in other media. However, there is little that we can conclude from this fact alone. As acknowledged by Professor Willig, the use of more than one advertising vehicle tells us nothing about whether the vehicles in question are substitutes, complements,[71] or have no relationship whatsoever. To draw conclusions about substitutability there must be evidence that advertisers do *in fact* shift between the various media in response to competitive moves by those media.

The principal evidentiary source referred to by the respondents respecting current customers is the January 1993 Elliott report. As with cancelled customers, current customers were asked to rate Tele-Direct in terms of, among other items, value for money and overall quality. Many existing customers believe that other media provide as good value or better value and quality than Yellow Pages advertising. Thirty-five percent say that the relative value for the money of Yellow Pages is much or somewhat worse than other suppliers while the relative quality is about the same as other suppliers. Likewise, 38 percent of all customers believe that

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[70] E.g., Elliott reports: confidential exhibit CJ-14 (blue vol. 5), tab 173 (January 1993) and confidential exhibit CJ-19 (blue vol. 10), tab 285 (February 1993 - Newfoundland); V.I.A. survey: confidential exhibit CJ-11 (blue vol. 2), tab 89; Yellow Pages Satisfaction Study (Omnifacts Research): confidential exhibit CJ-15 (blue vol. 6), tab 199.

[71] The term "complement" has been used in this context primarily in its ordinary sense and not in its strict economic sense. No one has asserted that the different advertising vehicles are complements in the sense that a reduction in the price of one vehicle would lead to an increase in the price of the other. Rather the term has been used to indicate that Yellow Pages perform a different function than other vehicles and are thus needed to complete an advertising programme.

Yellow Pages are high or very high priced in relation to other suppliers. In the western region (Ontario), 56 percent of large customers believe that Yellow Pages are high or very high priced while only five percent say that Yellow Pages are very low or low priced. The respondents say this evidence shows that Yellow Pages are vulnerable to advertisers switching to other media.

We are of the view that these results tend to contradict rather than support the respondents' premise that all media are close substitutes. It is difficult to conclude that customers who had good substitutes would choose to continue to purchase a product that they believed was too high priced and of poor value. One would expect that, if all media were close substitutes, the medium perceived as providing better value and price would be purchased in preference to the others. Yet, dissatisfied Tele-Direct customers apparently continue to advertise in the Yellow Pages despite their opinion that other media are as good or better value and lower priced. The Elliott report provides more support for the proposition that Tele-Direct has a comfortable cushion of market power that permits it to keep its customers in spite of the fact that significant numbers of them were not complimentary about its service and pricing than it does for the proposition that Tele-Direct competes with other suppliers providing easily substitutable products.

The respondents also refer to a 1994 study by Omnifacts Research in Newfoundland.[72] Four focus group sessions were conducted with a total of 31 Yellow Pages advertisers, two sessions with new advertisers and two sessions with established customers.[73] In-depth interviews

[72] *Supra* note 70.

[73] *Ibid.* New advertisers were generally very small companies; established customers were larger.

were conducted with 16 customers, 10 of whom had reduced their Yellow Pages spending. Many of the customers also used other media, primarily print, in the form of local trade magazines, flyers and direct mail for new customers and flyers and direct mail for established customers.

There was a general view among the participants that they *had* to advertise in the Yellow Pages. They generally found it difficult to judge the effectiveness of the advertising they did, including Yellow Pages. In particular, they expressed considerable uncertainty about the value of larger size and coloured advertisements in Yellow Pages. Established customers ". . . tend to follow the competition when deciding on placement and size of Yellow Pages advertising. Most are clearly not sure whether the advertising in the Yellow Pages actually works, but the consensus is that they have to be there."[74] Some expressed displeasure at the number of headings since they felt compelled to advertise in several headings if their competitors did.

Particularly significant are the results of the interviews with customers who had reduced their Yellow Pages expenditures. The report states:

> Those companies who reported that their expenditures decreased fall into two main groupings: those who decreased as a cost cutting measure and those who decreased primarily because they do not perceive the Yellow Pages to be effective for reaching their target markets.
>
> Those that decreased their expenditures as a cost cutting measure essentially felt that the current economic conditions were affecting their business revenues. . . .

[74] *Ibid.* at 116796.

> Clients who have decreased their Yellow Pages expenditures because they did not consider the Yellow Pages to be effective, reported that their markets are primarily industrial or business-to-business and given the nature of the products and services that they offer, the Yellow Pages are not therefore consistent with their target markets.[75]

There is no indication in either case that customers reduced their Yellow Pages advertising in order to shift dollars into other media.[76]

Turning to the Director's evidence, the viva voce evidence of advertisers and other market participants who represent advertisers strongly supports the position of the Director that advertisers do not regard Yellow Pages and other media as close substitutes. Although several advertisers were approximately average size in terms of spending on Yellow Pages, most were in the top two or three percent of Tele-Direct customers. That is, average expenditures ranged from about $2,000 annually to well in excess of $100,000. For the most part a large percentage of advertising dollars were spent by these advertisers on other advertising vehicles, although a small number of the advertiser witnesses devoted almost all their advertising to Yellow Pages. Advertisers spending relatively large amounts in the Yellow Pages are, nevertheless, well placed to provide evidence on the opportunities for substituting between Yellow Pages and other advertising vehicles.

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[75] *Ibid.* at 116811-12.

[76] In terms of actual switching behaviour, the respondents referred to evidence of a locksmith who cut his Yellow Pages spending and bought brochures, on the advice of a Yellow Pages consultant, and of a photographer who was visited by a newspaper consultant who designed a smaller Yellow Pages advertisement for him. The implications of the existence and practices of the consultants for substitutability will be dealt with in the next section. Both newspaper and Yellow Pages consultants use a similar methodology, in that they attempt to convince an advertiser that a smaller, less expensive Yellow Pages advertisement will be equally effective *in the Yellow Pages*. The Director also provided numerous examples of "non-switching" where increases or decreases in spending on other media were unrelated to spending on Yellow Pages.

Although the circumstances of advertisers and the language used to describe their advertising strategies varied, none of the advertisers indicated that other media could be substituted for Yellow Pages. What they did say was that they use different media for different purposes. They use Yellow Pages advertising for purposes which take advantage of its unique characteristics. They advertise in the Yellow Pages because it is a reference of all available suppliers which is received and retained by most consumers and is consulted by them. They consider that Yellow Pages is cost-effective in this regard and generates a superior level of customer response.

Some, particularly large-budget, advertisers use other media to "create awareness". The witnesses use media other than Yellow Pages to advertise specials, include prices or to target a specific group or occasion. Steve Kantor of Tiremag Corp., who sells aluminum wheels and tires, uses other vehicles to convey a seasonal message, selling the "sporty" look in spring and "safety" in fall. Likewise, Kenneth Flinn, who operates a taxi and courier business (Lockerby Taxi Inc.) and relies almost exclusively on Yellow Pages, uses radio during the holiday season to convey the message "don't drink and drive". Yellow Pages cannot accommodate this time-sensitive advertising.

On this point, the respondents attempted to demonstrate the vulnerability of Yellow Pages to substitution by a review of advertisements in a number of newspapers from Toronto, Thornhill, London, Ottawa, Niagara, Sault Ste. Marie, St. Catharines and Montreal over a three-week period. The purpose was to show that some advertisers were using both Yellow

Pages and newspapers and that they could substitute one for the other.[77] Professor Willig observes that a "limited number" of advertisers employed "much the same" advertisements in both the newspaper and the Yellow Pages. He puts forward only four examples, of which only two are identical. For the other two, "the newspaper ad includes some of the same information presented in the directory display ad, but . . . the newspaper ad also includes some timely information of the kind that a directory ad could not contain, due to its permanence."[78]

The respondents provided three further examples of advertisements that were similar in both the Yellow Pages and a newspaper.[79] These types of advertisements evidently represent a very small percentage of Yellow Pages advertisements. Equally important is the conclusion that the respondents draw from Professor Willig's survey and the other examples, that the advertisements are only "essentially" the same and that where differences arise, they often stem from the *greater timeliness* of the newspaper. For example, the newspaper advertisement contains a price. They did not, however, provide us with any basis for concluding that prices and other time-sensitive information are trivial or unimportant to advertisers.

[77] Newspaper advertisements were identified for establishments in the businesses represented by the top five Yellow Pages headings in the region's Tele-Direct directories. Then, those establishments with newspaper advertisements were sought in their local Tele-Direct Yellow Pages directories. Overall, the search found 542 newspaper advertisers in these categories. Of this group, 39% had display advertisements in both the searched newspaper and in the local Tele-Direct Yellow Pages directory, while 61% of the newspaper advertisers had no display advertisement in their local Tele-Direct Yellow Pages directory. (The 61% is comprised of 42% who had no Yellow Pages business phone number, and hence no listing in the Tele-Direct Yellow Pages of any kind. Another 12% did have lightface classified listings in the local Tele-Direct Yellow Pages directory, but no advertisement in that directory of any kind. Yet another 6% had a boldface listing in their local Tele-Direct Yellow Pages directory, but no display advertisement in that directory.)

[78] Expert affidavit of R. Willig (17 August 1995): exhibit R-180 at paras. 20-22, appendix 2B.

[79] Exhibit R-116. One of the three contained pricing information in the newspaper and not in the directory.

Time sensitivity for some advertisers cannot mean that those advertisers are likely to *switch from* Yellow Pages *to* newspapers and vice versa. Instead, they will use newspapers to convey time-sensitive information because that is what newspapers are good at doing. Likewise, they will use Yellow Pages to convey a message that is *not* time-sensitive but that takes advantage of other characteristics of Yellow Pages as a medium.

Agents specialized in selling Yellow Pages, general advertising agents, a witness with a large media buying agency and the former Vice-president of Marketing with Tele-Direct also testified that they did not consider other advertising vehicles a substitute for Yellow Pages and had not observed their customers to have ever done so.

Professor Schwindt's evidence supports the Director's argument that certain types of businesses use or do not use the Yellow Pages because Yellow Pages have particular characteristics that set them apart from other advertising vehicles. His evidence showed that businesses providing emergency services (glass repair, contractors, plumbers), infrequently consumed products (lawyers, moving and storage, exterminators), services used by travellers (automobile rental), products for which the use of the telephone is important (pizza), or any combination of these, tend to rely heavily on the Yellow Pages. Professor Schwindt also points out that there are types of businesses (grocers, department stores and theatres) that are known to advertise very heavily in other vehicles such as newspapers and flyers and spend virtually nothing on Yellow Pages.

On the other hand, Professor Willig, for the respondents, pointed out that whether Tele-Direct has market power, i.e., is vulnerable to ready substitution by advertisers to other media, depends on the combined demand of all advertisers, including those who are not necessarily very reliant on Yellow Pages. While he concedes some advertisers are more reliant than others on Yellow Pages advertising and that this affects the *average* elasticity of demand and the ability of Tele-Direct to exercise market power, he is of the view that the presence of advertisers who are willing to switch serves to discipline Tele-Direct's pricing. He acknowledges, however, that his position is subject to exception if Yellow Pages publishers could be shown to have the ability to price discriminate.

Price discrimination allows a firm with market power to secure higher profits (strictly, price less marginal cost) on sales to some customers than on sales to others. A firm without the ability to price discriminate may be disciplined by the ready ability of at least some of its customers to switch if prices are increased and, when considering a price increase, must weigh what it will lose against what it will gain from that action.

However, where a firm has found a way to price discriminate, no weighing need be considered. The prices for customers who might switch will be left at a level where they will continue to purchase. However, for those customers who are so reliant on the firm that they cannot switch, the firm may extract higher prices and therefore higher profits on sales to them. The ability to price discriminate therefore tends to demonstrate that a firm is not, at least in respect to the customers who are subject to the discrimination, vulnerable to those customers substituting other products for that of the firm.

On our assessment of the evidence, Tele-Direct does engage in price discrimination but not as between headings, i.e., it does not charge plumbers (a business likely to be heavily reliant on Yellow Pages) more for the same advertisement than it does grocery stores (likely to be less reliant). Rather, Tele-Direct price discriminates against those who tend to spend more in Yellow Pages by buying larger advertisements[80] or colour. Those customers are charged much more than can be explained by the additional costs associated with producing and servicing the enhanced advertisement. Thus, larger advertisers (by expenditure) under all headings contribute more to Tele-Direct's profits than smaller advertisers. Professor Willig agreed that if customers who use colour value Yellow Pages more than customers who do not, the pricing of colour is a way to price discriminate between customers who value Yellow Pages more and customers who value it less.

Tele-Direct does not have to target these firms; they in effect identify themselves. Firms that are heavily reliant on Yellow Pages are the ones that will buy a larger and more colourful advertisement in order to attract customers away from their competitors in the same Yellow Pages heading. This is indicated by the large average expenditures per subscriber and per advertiser under headings such as "moving and storage" and five other headings that stand out in the top 25 listed by Professor Schwindt in his report. The fact that there are advertisers under

[80] There is an important difference between Yellow Pages and non-classified advertising in other print media (or electronic media, for that matter) that results from the fact that media with editorial or entertainment content usually prefer to have minimum percentage of such content. The effect is to create an opportunity cost to having larger advertisements, because they absorb some of the available space for other content. This consideration is not present in the case of Yellow Pages and should not affect the pricing of larger advertisements.

other headings who are less reliant on Yellow Pages can have no influence on the ability of Tele-Direct to extract higher returns from advertisers who compete heavily within headings.

Moreover, while headings provide an important first indicator of whether a business is likely to be a heavy advertiser, there may be important differences among advertisers within a heading. One advertiser in a heading may have a larger or more colourful advertisement than the advertising by its competition within that heading. This is illustrated by the evidence of Howard Kitchen of Lansing Buildall, whose firm of lumber supply outlets is a relatively large Yellow Pages advertiser in the Toronto area. When asked about the fact that a large new entrant in lumber supply was not advertising in the Yellow Pages, he pointed out that his firm encouraged telephone inquiries while his competitor did not. The pricing of Yellow Pages, therefore, is able to capture the greater need of particular customers within headings as well as between headings. Thus, Tele-Direct's ability to price discriminate causes us to conclude, at least in respect of those larger advertisers who are most reliant on Yellow Pages advertising and therefore purchase large size advertisements or colour, that there is no ready substitutability between Yellow Pages and other media.

(iv) Conclusion

There is little evidence supporting the respondents' position that all media are substitutes for local advertisers. Specifically, the evidence of switching behaviour between Yellow Pages and other media is extremely weak. There is almost no evidence that advertisers regard Yellow Pages as serving the same purpose as other media nor that they regard its purpose in the broad manner put forward by the respondents. While there is evidence of changes in advertising expenditures, they are associated with changes in economic conditions or advertising strategy rather than switching between media in response to competitive moves by those media.

While it is true as a matter of arithmetic that when expenditures are shifted within a fixed budget there will be winners and losers among the media, this fact tells us nothing about the willingness of firms to reallocate expenditures within the budget *as a result of competitive moves by advertising vehicles*. Advertisers' goals, situations and advertising needs are subject to change. Specific physical and technical differences among media limit the way that they can be used to accomplish a specific objective, such as the announcement of a sale, the listing of prices or a promotion related to a change in season and raise doubt about the willingness of advertisers to treat advertising dollars as fluid or as easily substitutable between Yellow Pages and other media. The respondents' proposition that both former and current Yellow Pages advertisers use a variety of advertising vehicles is likely correct. It was also proven that relatively large percentages of former and current advertisers do not think very highly of Yellow Pages. This tells us nothing about whether there is a sufficiently large body of Yellow Pages advertisers who are willing to switch their advertising dollars in the event that Yellow Pages were priced above the competitive level. There must be evidence that advertisers reallocate dollars in reaction to competitive moves by different media. It is insufficient just to demonstrate a fixed budget and changes in allocation by advertisers between media. In other words, there must be evidence in one form or another that advertisers regard other advertising vehicles as close substitutes for Yellow Pages.

The testimony of the advertiser witnesses about why they use Yellow Pages and the importance of Yellow Pages advertising to them is supported by Tele-Direct's own studies of advertisers. Many advertisers believe they *have* to be in Yellow Pages to be in a comprehensive reference tool, particularly if their competition is there. They feel they have no choice. As stated in the Omnifacts study:

> . . . There were numerous comments concerning the fact that the Yellow Pages, like the telco, operates in a monopoly situation where their customers are to some extent captive advertisers, who have really no choice but to place their advertising with Tele-Direct.[81]

If they do not use Yellow Pages it is because it does not suit their purpose, not because they can readily move dollars between Yellow Pages and other media. The views of buyers, therefore, strongly tend to support the view that Yellow Pages and other local media are not close substitutes.

(c) Trade Views, Strategies and Behaviour (Inter-industry Competition)

The Director argues that there is little evidence that Tele-Direct or other market participants consider Yellow Pages to be in competition with other media. Whatever steps Tele-Direct took in relation to other media, he submits, are to be contrasted with its reaction to other

[81] Confidential exhibit CJ-15 (blue vol. 6), tab 199 at 116802.

market participants that it clearly regarded as competition. The other competitors referred to by the Director are consultants, agencies which sell Yellow Pages advertising, and independent publishers of telephone directories.

The respondents argue that Tele-Direct does not compete, for various reasons, with either consultants or agencies in providing *services* to advertisers. They do, however, admit that independent publishers are in the relevant market with Tele-Direct, whether that market includes only directories or all local media. We will, therefore, compare Tele-Direct's reactions to other media to its reactions to independent directory publishers, about which there is no dispute between the parties.

The respondents argue that the evidence reveals "broad competition" or "competition in fact", as referred to by the Court of Appeal in *Southam,* between Tele-Direct and all other local media. They submit that Tele-Direct views other media as competitors and has taken various initiatives to compete with other media. They argue that other media, in turn, view Tele-Direct as a competitor.

The respondents submit that evidence of "broad competition" places all local media in the same product market. The respondents say that differences in the type or intensity of response to different "competitors" should not eliminate some "competitors" from the relevant market. We cannot agree. The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close substitutes. Substitutability, as pointed out in the *J.W. Mills* case quoted above, is always a question of degree. Differences in the intensity of the reaction to players admitted to be competitors by Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case.

(i) Tele-Direct's Views and Behaviour

General

The evidence is unequivocal that other directory publishers have been referred to as competitors by Tele-Direct and the respondents concede that they are. A number of independent publishers not affiliated with a telco produce directories in Tele-Direct's territory. Over the years, Tele-Direct has collected information on and copies of directories of independent publishers. As of 1994, the information was organized into a "competitive database" as part of the creation of a "Sensitive Market Intelligence System". The sales representatives gather information and the marketing department analyzes information on independent publishers as part of this system. Tele-Direct goes to considerable lengths to track and compile data on the revenues, prices, scoping, circulation and other features of independent directories.[82]

[82] See Competition Database Binder (1994): confidential exhibit CJ-15 (blue vol. 6), tab 205; 1994 Sensitive Market Report: confidential exhibit CJ-29 (black vol. 8), tab 51; Directory Publishers in Tele-Direct Operating Area: confidential exhibit CJ-32 (black vol. 11), tab 77 at 132125-45.

Further, it is not in dispute between the parties that when a broadly-scoped independent directory entered into Tele-Direct's territory in each of the Niagara region and in Sault Ste. Marie, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns, and improvements to its own directories.[83]

While there are references within Tele-Direct documents to other media as "competitors" and to "competing for the advertising dollar", there was no effort on Tele-Direct's part to track revenues, prices, features or circulation in a comprehensive and detailed a fashion as there was with other directory publishers. When one compares the competition data base and sensitive markets material cited above to the documents put forward by the respondents as showing competition with other media, the difference in intensity is immediately apparent. They refer in their written argument, for example, to two speeches from 1984 and 1985 which refer to "competing with all other types of advertising media" and being in a "constant struggle for the customer's advertising dollar." Considerable emphasis is also placed on a 1993 document entitled "East Office Competition Analysis". The "east office" deals with only a portion of Tele-Direct's territory, namely the Peterborough, Orillia and Barrie areas. The document is a summary of a meeting regarding competition. It lists newspapers, flyers, consultants and television as competitors and canvasses various points of discussion. It does not identify particular competitors, give any detail on revenues likely lost, comparative pricing or features like circulation.

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[83] For further details, see the facts set out in the section entitled "C. Market for Advertising Space - Publishing" in chapter "IX. Abuse of Dominant Position", *infra*.

There was likewise no evidence of a Tele-Direct response to other media competition that bears any resemblance to the focused and intense response to the competing directory publishers. The respondents referred us to other initiatives by Tele-Direct that they submit are of particular significance and we will deal with them in further detail below.

Educational Efforts

Educating employees to deal with the existence of competitors might be some evidence of concern by Tele-Direct about the potential for its advertisers to switch to other media. The evidence regarding Tele-Direct's educational efforts indicates, at best, a weak concern about the necessity to compete with other media. The respondents rely on the Multimedia Training Course as the principal Tele-Direct initiative to compete with other media. The only clear evidence we have, which comes from a written answer by the respondents to a question on discovery, is that the course was given once in 1992 for four days to all sales "employees". The oral evidence on the issue was vague, suggesting that the course was not an initiative that was considered significant by Tele-Direct.[84]

Based on the course having been given once in 1992 to all sales representatives, the investment by Tele-Direct was 1880 (470 x 4) person-days. Based on the average remuneration

[84] Mr. Giddings' testimony on this topic was confusing. He testified at various times that the course, or perhaps one module of it (which a discovery answer indicated had never been used for training purposes), was given to new representatives in about 1990 and that it, or some part of it, had been repeated for unknown numbers in 1993 and 1994. However, he also testified that no new premise sales representatives had been hired since 1992 casting doubt as to how many times and to how many persons the course was given.

of a premise sales representative, the cost to Tele-Direct was *at most* $500,000.[85] This was a one-time cost relating to *all* of Tele-Direct's territory with benefits spread over a number of years. By contrast, in reaction to the entry of DSP in Sault Ste. Marie, in one year (1993) in one relatively small market Tele-Direct spent over $215,000. Evidence of educational efforts does not suggest a great concern on Tele-Direct's part about other media competition.

Sales Aids

The respondents point to a variety of "sales aids" produced by Tele-Direct which contain references to other media. They submit that the specific claims made in the documents with respect to other media in relation to Yellow Pages are unimportant. Rather, they say significance lies in the simple fact that Tele-Direct created material which refers to other media to provide to its sales force. They claim that if Yellow Pages were "unique", there would be no need for this type of promotional material.

We are of the view that in examining the documents prepared for use by Yellow Pages representatives, we should consider whether the content of those documents points to the treatment by Tele-Direct of Yellow Pages as a separate advertising medium (the Director's position) versus whether the content indicates signs of competitive activity with other media (the

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[85] The use of the average premise remuneration errs on the side of being too high. The other type of sales representative, a telephone sales representative, earns, on average, only about 60 percent of what a premise representative earns. Also, Mr. Giddings did say at one point that this course was given to *new* representatives, who would likely earn less than average in any case.

respondents' position). The mere existence of sales aids which mention other media in some context cannot be solely determinative of the issue.

Two memoranda dated 1983 and 1985, respectively, deal with direct mail (flyers) as an alternative to Yellow Pages and provide visual aids to salespeople. The first concludes:

> We all know that any form of advertising is beneficial in one way or another but direct mail should never be an alternative to Yellow Pages when considering the circulation, permanence, or economy of the two mediums, and these visuals prove that.[86]

The second states:

> Unbelievable.
>
> When comparing the economy of Yellow Pages with the cost of Direct Mail it is hard to imagine why someone would consider Direct Mail an alternative to Yellow Pages advertising.[87]

Despite the fact that Tele-Direct sales representatives may have had, to some extent, to provide arguments on the superiority of Yellow Pages in relation to flyers and, indeed, any other media, the words used suggest non-, or at least low, substitutability between Yellow Pages and the alternative media. The authors of the memoranda appear to express disbelief and incredulity that anyone would ever consider direct mail as an economical alternative to Yellow Pages advertising.

Tele-Direct's Strategic Business Plan for the time period 1983-88 states:

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[86] Exhibit J-2 (red vol. 2), tab 82 at 8833.

[87] *Ibid*., tab 81 at 8827.

> Part of a large, profitable but slow growth industry, the directory advertising business operates from a privileged position in a captive market.[88]

Tele-Direct has characterized its own market as "captive" in this business plan. We infer that this high level document reflects the perception of Tele-Direct management as to competition from other media. It places in context the aforementioned memoranda.

The respondents also refer to a set of documents that was prepared for the 1992 sales canvass which includes comparisons between the cost of advertising in Yellow Pages and two dailies and three community newspapers in the Toronto area. Other documents give the same type of information for other cities and towns. Another similar package compares the cost of Yellow Pages to two Toronto dailies, and shows what could be purchased with the Yellow Pages dollars in television, radio, flyers, calendars, key chains and ball point pens.

When we examine the content of these documents, we find that, as with the direct mail examples, what is being emphasized is the *lack* of comparability between the cost of Yellow Pages and the other media. With respect to the comparisons with newspaper advertising, one document (from 1992), for example, compares a 1/4 page advertisement for 30 days in the Toronto Yellow Pages (circulation over 1.3 million) at $677 with a 1/4 page single insertion in *The Globe and Mail* (circulation about 325,000) at over $7,000. Mr. Giddings described this type of sales pitch as making a comparison to point out that there is *no* comparison between Yellow Pages and newspapers. Newspapers are simply so much more expensive that there is no

[88] Exhibit J-2 (red vol. 2), tab 116 at 13525.

comparability. Another document has a similar tone; it focuses mainly on newspapers for comparisons but also highlights how *little* can be purchased with the Yellow Pages dollars if transferred to television ("2-60 second spots, non-prime time"), radio ("2-1 minute spots") and flyers, calendars, key chains and ball point pens (15,600 flyers, 709 calendars, 1,213 key chains and 1,365 pens while Yellow Pages circulation is over 900,000).

Tele-Direct, unlike other print media, does not use a "CPM" or cost per thousand measure in promoting its product to advertisers. A CPM is a calculation of the cost of the medium per thousand persons reached, which can be applied to the number of copies sold (assuming one reader per copy sold) or read (if that number is known) of, for example, a magazine or newspaper. The CPM allows comparisons between print media. Tele-Direct researched the possibility of developing a CPM for its directories in the late 1980s. Its survey of general and specialized advertising agencies revealed that the agencies thought such a measure

> . . . entirely unnecessary since we [Tele-Direct] are the only ones in this field and there can be no similar comparison (they absolutely cannot imagine comparing us to the other "media").
>
> . . .
>
> In the event of serious competition, all agree that such a tool would be useful.
>
> However, two of the largest agencies already understand the usefulness and even suggest the development of this type of measure to better acquaint people with the Yellow Pages on a "national" level, and to establish ourselves as the unbeatable leader in the industry.[89]

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[89] Confidential exhibit CJ-10 (blue vol. 1), tab 17 at 106527-28.

Although a later study concluded that a CPM measure should be developed for Yellow Pages that would be, to some extent, comparable to other media in order to "contribute to developing a media image for Y.P. directories, and would create a barrier for potential competition", none was developed. Tele-Direct does use a CPM-type formula internally in its pricing to ensure that its directories of similar circulation are priced similarly but CPM is not used as a marketing tool.

Equally relevant to the question of how Tele-Direct views its product in relation to other media is the large volume of Tele-Direct promotional material selling advertisers on the advantages of being dominant *in* a Yellow Pages heading. The virtues of size and colour are extolled in testimonial letters and other promotional material. The "YPROI study", which the respondents argue is a primary tool of their sales force in selling the "value of the medium", starts with a comparison of which media influenced persons who had made a recent purchase,[90] but also includes a page trumpeting the importance of size, colour and "impact" within the Yellow Pages so as to influence the buyer's selection of a firm once he or she consults the Yellow Pages.

The advantage of "standing out" that is being sold to customers is with respect to competitors advertising *in the Yellow Pages*, and not with reference to advertisements in some other medium. As pointed out by one of the Director's economics expert witnesses, Margaret Slade,[91] the amount of advertising a firm does in the Yellow Pages is dependent on how much its

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[90] Radio - 4%, television - 6%, other - 11%, newspapers - 19% and Yellow Pages - 60%: confidential exhibit CJ-18 (blue vol. 9), tab 243 at 107177ff.

[91] Professor of Economics at the University of British Columbia.

competitors do. When a Yellow Pages sales representative convinces a customer to increase its expenditures on Yellow Pages advertising, this creates pressure on its competitors to do likewise (referred to as the "prisoner's dilemma"). This phenomenon came through in the comments received from the established customers participating in the Omnifacts study in Newfoundland, that they tend to follow the competition when deciding on placement and size of their Yellow Pages advertising. The pressure on advertisers to observe and to some extent follow what their competitors are doing in the Yellow Pages indicates that Yellow Pages are a distinct medium, a separate arena within which firms seek to stand out.

The respondents stress that competition for the advertising dollar is not so much a matter of whether firms advertise in the Yellow Pages but of how *much* they advertise, primarily whether they buy coloured advertisements and larger advertisements. The number of headings would be an additional factor determining the expenditures of customers. It is noteworthy that the attempts by Tele-Direct to sell colour and size to its advertisers are based on comparisons with black and white advertisements or smaller advertisements *within* Yellow Pages.[92] Thus, the success or failure of Tele-Direct representatives in capturing more of the advertising dollar depends on the extent to which they can convince customers that they need to upgrade their advertisements *to be more effective vis-à-vis the customers' competitors* in the Yellow Pages. It is difficult to perceive of this as "inter-media" competition.

[92] While it is true that price comparisons with the newspapers are used, including different sizes of newspaper advertisements and advertisements with red, the message is that it is cheaper to use the Yellow Pages regardless of the size or colour of the advertisement.

Pricing -- General Policy

Another relevant area in inter-media views and conduct concerns how, if at all, the prices of other media influence Tele-Direct's pricing. Tele-Direct generally establishes its prices about a year and a half to two years in advance, with prices, for example, for the 1995 directories set in late 1993.

The Pricing Policy documents placed on the record reveal that Tele-Direct considers various inputs in setting prices. For example, in the 1993 Pricing Policy produced in October 1991,[93] these included rate/circulation alignment policy,[94] recent Tele-Direct price-ups (1988-92), the consumer price index ("CPI") (1991-93), the paper and allied industry price index (1990-92), the percentage change year-to-year in the number of directory copies printed by Tele-Direct (1991-93), estimated price-ups in other media for 1992 and Tele-Direct's internal rate of inflation (1991-93). Given the timing, much of the information is estimated. The 1994 Pricing Policy is a two-page document only as all 1994 issues had a zero percent price-up. In the brief text, the following are mentioned: relationship with customers, impact on profitability, prevailing economic factors, cost containment including a recent, more favourable printing contract and the rate of inflation or CPI. In the 1995 Pricing Policy, the only change from the 1993 Pricing Policy is to replace the "paper and allied industry price index" heading

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[93] The 1993 prices were revised in February 1992. The respondents rely heavily on this particular exercise; it is reviewed in detail below.

[94] Consistency in cost per thousand of circulation across directories.

with "junked directories".[95] The 1996 Pricing Policy adds two additional items, gross domestic product and personal disposable income and reverts to using an indicator of paper cost increase, as for 1993.

In all cases, the information regarding the forecasted price-ups of other media that is contained in the policies was obtained from general advertising agencies, usually two or three different ones, and is stated as a range. The media included are television, dailies, magazines, outdoor and radio. "Business papers" also appeared in one year and "transit" in one other year.

To obtain insight on how the information with respect to other media entered into pricing decisions, we look to the testimony of Ms. McIlroy, who was intimately involved in the pricing decisions. According to her, the "key drivers" of pricing were, in order of importance: relationship to cost, rate/circulation re-alignment, revenue stream for the sales force and local considerations, both economic and the presence or feared entry of a competitive directory. She stated that there was no direct relationship between the prices of other media and Tele-Direct's pricing. Her view was based on her own experience and a review of all relevant pricing documents on the record, dating from the early 1980s to the 1995 Pricing Policy. Ms. McIlroy did not alter her position regarding the relative unimportance of other media in setting Yellow Pages prices when responding to questions on cross-examination.

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[95] Ms. McIlroy explained that the "junked directories" are those that never enter into circulation. Tele-Direct used the volume of junked directories to forecast how many copies should be printed and to ensure that estimate was realistic. If many of the copies printed end up as junked directories, this over-inflates Tele-Direct's circulation figures.

Douglas Renwicke was the Senior Vice-president to whom Ms. McIlroy reported from 1991-94 and was involved in sales or marketing from 1988. He expressed general agreement with Ms. McIlroy's description of the price setting process. He disagreed over certain details that are not germane to the present discussion. However, more importantly, he also disagreed with Ms. McIlroy concerning the relevancy of other media prices in Tele-Direct price setting.

Mr. Renwicke stated that the three "primary" key drivers for pricing in the 1990s are CPI, other media price-ups and local market knowledge. A group of "secondary" key drivers include growth and circulation, gross domestic product and Tele-Direct's internal rate of inflation (costs). He distinguished price setting in the 1980s when the key drivers were circulation, internal costs and, from 1987 to 1990, circulation alignment.

At least for the 1980s, during which Tele-Direct enjoyed exceptional growth, Mr. Renwicke agrees with Ms. McIlroy that factors such as the internal rate of inflation at Tele-Direct and circulation growth were primary determinants of Tele-Direct's prices. He also recognizes that towards the end of the 1980s discrepancies in rates per thousand in different directories became another important concern that entered at the local market level. The attempt to get prices in line across markets was abandoned for a couple of years following the recession but appears to be re-emerging as an ongoing factor. Considering Ms. McIlroy's and Mr. Renwicke's evidence together, we conclude that other media prices were not a "key driver" during the 1980s.

Mr. Renwicke explicitly distinguishes the 1990s and it is here that he appears to take issue with Ms. McIlroy. We will, therefore, look in more detail at the information available to the officers engaged in price setting in 1991, 1993 and 1994 (for 1993, 1995 and 1996).[96]

The 1993 Pricing Policy document sets out the following predicted increases in various items for 1993:

> Increase in CPI for Ontario: 3.6%
> Increase in CPI for Quebec: 3.7%
>
> Tele-Direct internal rate of inflation: 5%
>
> Increase in cost of printing: 4.7%
>
> Increase in copies to be printed: 2.9%
> (proxy for circulation increase)

The ranges of predicted percentage price-ups for other media set out in the document were obtained by Claude Phaneuf, Manager of Marketing Research, from two general advertising agencies and a media buying firm.[97] Notably, these predicted increases are for *1992 only*:

> Television: 0% - 10%
> Dailies: 3% - 7%
> Business Papers: 5% - 8%
> Magazines: 3% - 7%
> Outdoor: 3% - 5%
> Radio: 4% - 7%

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[96] The 1992 exercise (for 1994) is not included as prices were not increased.

[97] Information on business papers and outdoor came from only one source.

According to Messrs. Phaneuf and Renwicke the predicted price changes for 1992 were considered relevant even though Tele-Direct was considering price changes for 1993 because the canvass of customers for the 1993 directories was done during 1992. However, Mr. Phaneuf could not explain why predicted changes for other factors such as the CPI were obtained for 1993.

Two notes accompany the information on other media price increases. They state: "Demand Driven Market" and "Anybody's Crystal Ball". According to Mr. Phaneuf, the second note is a warning about the discrepancy in the information received from different sources (as indicated by the wide range of predicted price changes, such as for television). Taking the first note at its face value, it means that the prices that would actually prevail in 1992 would depend on the state of demand at that time.

The average Tele-Direct price increase established in October 1991 for 1993 was five percent, with a minimum of 3.5 percent and a maximum of 5.9 percent for specific directories. The average price increase of five percent for 1993 falls within the range of other media price-ups (not difficult since the range is so large) but the same average increase could just as easily have been arrived at without any reference to other media prices. This observation also applies to the pricing documents for 1995 and 1996 that were used in setting prices in 1993 and 1994.

Several other points emerge from a review of the information available to Mr. Renwicke and other officers. Although Mr. Renwicke stated that he would be concerned about the prices of community and daily newspapers, only the price-up of dailies was collected. While the general agencies that provided the information to Mr. Phaneuf were much more likely to be familiar with dailies than with community newspapers, it is instructive that there is no evidence of any effort by Tele-Direct to obtain pricing information about its other alleged competitors, community newspapers.

Further, no information on flyers or direct mail is included. Other Tele-Direct documents group flyers with Yellow Pages as directional media, indicating that prices for flyers would clearly be relevant, and perhaps more relevant than predicted prices for the electronic media, business papers and magazines. We also note that the information provided by Mr. Phaneuf for television does not reveal whether the prices in question relate to local television, network television or both. When questioned about this Mr. Renwicke was not sure but thought that the predicted price changes related to local television.

We conclude that Ms. McIlroy's view that the prices of other media had little or no influence on Tele-Direct's pricing policy in the 1990s is borne out. Mr. Renwicke's use of the term "key driver" when referring to the prices of other media is disingenuous. The documentary evidence does not support this characterization. Nor, in fact, does the remainder of Mr. Renwicke's own testimony. By a "key driver", he apparently meant a very tenuous relationship between Tele-Direct's price increases and the price increases of other media. He testified that other media prices enter into Tele-Direct's price setting as follows:

> . . . [W]e wouldn't focus this closely on network TV as we would on community or daily newspapers, but we focus on that because we don't want to be way out of line with what newspapers are pricing up at or other comparable media that we feel our advertisers use amongst their choices of how to promote their business.
>
> . . . We feel if the gap was too large and we didn't pay attention to that over time, there could be at least substitution on the margin that could take place.
>
> I think that's a real concern throughout the recession.
>
> . . .
>
> Q. You said you would be concerned if the prices were way out of line. What do you mean by "way out of line"?
>
> A. Frankly, particularly with newspapers, I would consider anything, five percent or greater, to be too much out of line.[98]

A fear of losing *some* advertising dollars to other media if a *relatively large* difference in price *increases* persists over time (and during a recession) confirms only that newspaper or other media pricing provides little or no competitive discipline for Tele-Direct's pricing. Tele-Direct did not ignore the prices of other media; they were a part of the general economic environment. But given the types of media covered and the tentative conclusions that it could derive from the information we cannot conclude that it had the concern of a firm worried about close substitutes.

Pricing -- Revision of 1993 Prices in 1992

The respondents place considerable emphasis on the fact that in February 1992 Tele-Direct, for the first time ever, revised its 1993 prices during the canvass for the 1993 directories

[98] Transcript at 44:9285-86, 9290 (22 November 1995).

as it ran into advertiser resistance due to the difficult economic times. For the remaining directories not yet canvassed the average price increase was reduced from five percent to 3.2 percent.

The respondents point to a brief statement in the minutes of a sales and marketing executive meeting held in February 1992 which they say reflects the reasons why prices were revised:

> The rates that were implemented for 1993 have been revised to lower levels given the reaction of our customers to our 1992 prices, *the pricing of other media* and the expected rate of inflation in Ontario and Quebec.[99] (emphasis added)

They also rely on the revised Standby Statement for 1993 Pricing which was presented at the meeting and apparently accepted by all concerned. The Statement reads:

> Our pricing policy for 1993 issues of Yellow Pages and White Pages directories has been revised downward to take into consideration the economic conditions prevailing in 1992.
>
> This policy reflects the fact that most prices are on a downward trend for 1992. It is also in step with the advertising industry where media rates for 1992 are expected to be in the 3% to 5% range for daily newspapers, magazines and out-of-home (billboards, etc.). Radio and T.V. are expected to be in the 0% to 5% range with peaks of 10% for T.V. due to high demand for last-minute buying.
>
> All media are expected to increase their rates towards the end of 1992 as the economy picks up. Forecasts for 1993 and 1994 are for prices increases of 10% or more. Based on these forecasts, it is evident that Yellow Pages directory advertising will be one of the media with the lowest price-ups during that period.

[99] Confidential exhibit CJ-12 (blue vol. 3), tab 115 at 109881.

> Finally, our pricing structure must also reflect our own internal cost increases which have been kept to a minimum for 1992 thus allowing us to keep price-ups at their very low levels.[100]

Both Mr. Renwicke and Ms. McIlroy attended the meeting at which the prices were revised. Ms. McIlroy attributed no importance to the Standby Statement as a price setting document, regarding it purely as a document prepared for public relations purposes. Nor did Mr. Renwicke mention other media prices when describing the motivation for the revision in 1993 prices. He emphasized general economic conditions:

> In 1991 we clearly did not project the decrease that would take place in CPI or the recession . . . [I]n February '92, we actually re-did prices for '93 for the books we could still catch and I am thinking of the border markets in particular that were being decimated with cross-border shopping, Niagara Falls, Sarnia, Windsor.
>
> We reduced those all by a percentage point. So, we did our best to try and get back down to a point where we were near CPI because our customers were reading in the paper every day that inflation in Toronto was approaching zero and why were our rates up at four per cent, five per cent, six per cent. Partly it was a function of the lag we had in setting those prices initially and not foreseeing the downturn that did take place in the economy.[101]

Taking into account both the documents and the views of two of the officers involved in the exercise, the 1993 price revision does not change our view that other media prices are not "key drivers" in Tele-Direct's pricing.

New Products

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[100] Confidential exhibit CJ-32 (black vol. 11), tab 76 at 132008-9 (public) (with covering memorandum).

[101] Transcript at 44:9283-84 (22 November 1995).

The respondents list four new product initiatives which they say show competition between Tele-Direct and the other media by the fact of their having been tried. These four products were coupons in directories, AdSpot and BrandSell (creative-type directory advertisements), colour and participation in the "Marketing the Medium" program which is designed to prove the value of Yellow Pages.

There was little evidence about the nature and cost of these programs and why they were launched, which media were considered important competitors in triggering them, what success they achieved in terms of revenue gain or loss for Tele-Direct and if they were discontinued and why. Contrary to the respondents' submissions, we cannot accept that the mere existence of these alleged new products is instructive. Their mere existence is not indicative of substitutability between Yellow Pages and any other advertising medium.

(ii) Newspapers

Newspaper Consultants

The respondents rely on the evidence of the activities of newspaper consultants as proof both of Tele-Direct's response to a "competitor" (daily newspapers) and of an initiative by another medium to compete against Yellow Pages. Newspaper consultants attempt to convince Yellow Pages advertisers that they are spending too much on their Yellow Pages advertising. Once the newspaper consultants have succeeded in persuading the advertiser to cut back on

Yellow Pages spending, they then try to convince the advertiser to place some of the dollars "saved" in newspaper advertising.

Newspaper consultants first became active in Canada in 1987, having previously operated in the United States. One method used by the consultants was to hold seminars, sponsored by the newspaper that hired the consultants, to which Yellow Page advertisers were invited. A second method, apparently employed to a greater extent in recent years, is to locate good "prospects" among Yellow Pages advertisers (those with large or coloured Yellow Pages advertisements) and then visit them.

Newspaper consultant activity is not convincing evidence that newspapers and Yellow Pages are close substitutes. If Yellow Pages and newspapers were close substitutes, the newspaper's sales representatives would be fully familiar with Yellow Pages as part of the competitive environment. If the two media were close substitutes it would not be necessary for newspapers to hire outside "consultants" on a one-shot or periodic basis. Further, it would be expected that price discounting by the newspapers would be a more potent weapon than the rather circuitous approach of the use of consultants in regaining or capturing revenue from the Yellow Pages. The success of newspaper consultants depends on finding customers who are unhappy with Tele-Direct. An unmistakable implication is that such customers do not perceive other media as close substitutes for Yellow Pages, otherwise they would already have stopped or reduced their use of Yellow Pages.

Further, a successful newspaper consultant must convince the advertiser that a different, less costly Yellow Pages advertisement or set of advertisements will work *as well* as the existing Yellow Pages advertising. In other words, the question is how much does that advertiser really need to spend to have an effective advertisement *in the Yellow Pages*? This is borne out by the fact that a consultant's methodology involves two distinct steps. First, the Yellow Pages advertiser must be convinced that he or she can reduce Yellow Pages expenditures without prejudicing the results from the Yellow Pages advertising. Then, the newspaper consultant must try and sell the advertiser on spending the dollars saved elsewhere. But, this is clearly a second step. This is recognized even by Tele-Direct in a document referring to newspaper consultants:

> newspaper reps are recommending down-size YP and don't talk about newspapers (probably will go in later to make pitch).[102]

The advertiser, of course, may simply decide to pocket the savings. This process is not indicative of shifting of spending from one competing media to another. The restriction of the context to the Yellow Pages as the first step taken by newspaper consultants is a critical point in defining the relevant market. It indicates that what is occurring is not the allocation of the advertisers' overall advertising budget between newspapers and Yellow Pages but rather focusing on whether money can be saved in Yellow Pages advertising without regard to other media.

On the whole, the presence of newspaper consultants has been sporadic, sometimes in one local market and sometimes in another. In no case have they been continuously active in any

[102] East Office Competition Analysis: confidential exhibit CJ-13 (blue vol. 4), tab 158 at 115094.

local market. With respect to the actual success of the newspaper consultants, Ms. McIlroy testified that "they were never successful in doing any damage really of any kind, at least that we monitored. I never noticed any significant damage."[103] Mr. Giddings also testified that he could not quantify their impact.[104] This is telling evidence regarding Tele-Direct's response to the alleged "competition". The success of newspaper consultants could be easily tracked. They visit advertisers individually and try to convince them to adopt a specific advertising plan. In these cases it is perfectly clear to the Tele-Direct sales representatives why the customer is making changes in his or her program. No data was gathered by Tele-Direct on the impact of newspaper consultants, which would have been expected had Tele-Direct considered the effort worthwhile. It apparently did not.

Community Newspapers

The respondents called one witness who represented community newspapers. Ginette Allard-Villeneuve of Quebecor testified that, in her opinion, community newspapers and Yellow Pages compete for the advertising budget and that the advertisements placed in each are "somewhat interchangeable". Since Ms. Allard-Villeneuve appeared to have very little familiarity with or knowledge about the Yellow Pages, it is evident that she is referring to a very attenuated form of "competition" between the two. The respondents do not, in fact, seem to be claiming anything more than that.

[103] Transcript at 20:3827 (16 October 1995).

[104] Transcript at 39:8077-78 (15 November 1995).

(iii) Conclusion

The evidence on inter-industry views and conduct indicates that there was some limited competition between Yellow Pages and other media, principally newspapers. When the form of this competition and Tele-Direct's response to it are contrasted with the kind of head-to-head competition that occurred in Sault Ste. Marie and Niagara Falls, where there was entry of competing broadly-scoped telephone directories, there are pronounced differences in the intensity of Tele-Direct response.[105] The same difference in intensity is found in Tele-Direct's failure to track its successes and failures relative to other media and its assiduous efforts to track the sales volumes of independent publishers that it had identified as competitors. Tele-Direct did collect anticipated prices of other media in setting its prices. However, these were broad estimates and the prices for electronic media, for which there is virtually no evidence of direct competition with Yellow Pages, are included. On the other hand, media which are closer (as opposed to "close") substitutes such as community newspapers and flyers are excluded. It is difficult to see the predicted price changes of other media as an important ingredient in Tele-Direct's pricing. In short, the evidence of inter-media competition supports the Director's position that Yellow Pages and other media are not close substitutes.

[105] As already indicated, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns and improvements to its own directories.

(d) Price Relationships and Relative Price Levels

There is little evidence that can properly be considered under this heading. Telephone directories and other media do not have a common standard of measurement that would allow valid price comparisons. While price comparisons were prepared for the use of Tele-Direct sales representatives, they were designed to show that Yellow Pages advertising was virtually non-comparable to other media (primarily newspapers). In any event, no common standard of measurement was used.

The respondents refer to two documents which purport to track a weighted average of annual price increases of other media and those of Tele-Direct over approximately a decade, along with the overall rate of inflation.[106] There is no rigorous analysis either in the internal documents of Tele-Direct or by the experts that would allow any conclusion to be drawn from these documents alone. Given that there are common economic forces driving prices even in very disparate industries, one would expect to see some correlation in overall price movement. An attenuated correlation in price movement does not indicate close substitutes. Even a high correlation between two sets of prices is only a *necessary* condition for the two products to be considered to be in the same market. But, it is not a *sufficient* condition to prove they are in the same market because other factors than substitutability may be responsible for the correlation.

[106] Pricing Policy - CPI & Media Price Evolution (1984-1994): confidential exhibit CR-158 at 111314; Tele-Direct Price Up vs. Canada Inflation Rate and Other Media: confidential exhibit CJ-29 (black vol. 8), tab 48 at 129708.

(e) Switching Costs

There is no dispute that the costs of switching from one medium to another are relatively low.

(5) Conclusions Regarding Substitutability

Each of the indicia points in the same direction. We have little difficulty in concluding that telephone directory advertising is a distinct advertising medium without close substitutes. Directory advertising is a directional medium with a function distinct from that of creative media. Within the group of media considered to be directional, a review of the evidence regarding physical and technical characteristics, advertiser perceptions and behaviour, inter-industry competition and price relationships leads us to conclude that telephone directory advertising is a relevant product market.

B. GEOGRAPHIC MARKET

There is no dispute between the parties that the geographic market is local in nature, corresponding roughly to the scope of each of Tele-Direct's directories.

VII. CONTROL: MARKET POWER

The exercise of defining a relevant market is only a step towards answering the critical question of whether Tele-Direct has "control" or market power in that market. As the Tribunal has said on previous occasions, market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms. In those cases, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry.[107]

The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded. In this case, the parties addressed both the indirect or structural approach to market power (market share and barriers to entry) and "other evidence" of market power of a more direct nature. The Tribunal will likewise address both avenues in that order.

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[107] *NutraSweet, supra* note 4; *Laidlaw, supra* note 33; *D & B, supra* note 31.

A. INDIRECT APPROACH: MARKET STRUCTURE

Having determined that telephone directory advertising in local areas constitute relevant markets, it remains to determine Tele-Direct's market share and the conditions of entry into those markets. A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry.[108]

We will deal with the question of market power in the supply of telephone directory advertising, which includes both publishing and advertising services. The issues relating to the possible "subdivision" of the market into two (or perhaps more) component parts will be canvassed later in these reasons.

(1) Market Share

Based on Tele-Direct's November 1995 revenue estimates for independent publishers operating in its markets and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, Tele-Direct (Publications) Inc. has approximately 96 percent share of telephone directory revenues in Ontario and Quebec.[109] It is instructive to note that, in 1992, a

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[108] *Laidlaw, ibid.* at 325; *D & B, ibid.* at 254-55.

[109] Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170; Tele-Direct (Publications) Inc. - Profitability Study for 1994: confidential exhibit CR-185. Tele-Direct's 1994 published revenues were the most recent available at the time of the hearing. Exhibit CR-170 was put forward by the respondents as their most up-to-date information on independents' revenues and so we will refer to it to the exclusion of the various other numbers and documents brought up during Mr. Renwicke's testimony. Exhibit CR-170 provides two different bottom line totals for number of independent directories and revenue. The difference is accounted for by cessation of publication by one publisher with ten directories and revenues of $1.5 million. The totals that have been used are those that include that publisher and its revenues.

Tele-Direct document estimated the total *potential* sales of independent directories in Ontario and Quebec at $32 million.[110] That would indicate an upper limit on the potential growth of the independents of well under 10 percent of Tele-Direct revenues. The same year, Tele-Direct estimated the *actual* sales of independents at less than one-third of the "potential" amount set out. The November 1995 estimates place the total revenues of the independents at slightly over one-half of what was described as their potential business in 1992. Even in Tele-Direct's worst case scenario regarding growth of independents, it would still be left with a market share of 90 percent.

Although there was no significant disagreement between the parties that the geographic markets are local in nature, largely corresponding to the scope of the relevant Tele-Direct directory, Tele-Direct's information on other publishers was presented for sales throughout the territory of Tele-Direct (Publications) Inc., namely Ontario and Quebec. No local market information was placed on the record except for the revenues of White and DSP in the Niagara and Sault Ste. Marie areas. White publishes a directory in each of Niagara Falls, St. Catharines and Fort Erie, as does Tele-Direct. DSP publishes one directory covering the area bounded by Sault Ste. Marie, Elliot Lake and Wawa in Canada. Tele-Direct publishes three separate directories for that area. On the basis that in each of those two local markets the large independent and Tele-Direct are the only significant players, in the Niagara region based on

[110] Telephone Directory Competition in Ontario/Quebec: confidential exhibit CJ-13 (blue vol. 4), tab 164; testimony of D. Renwicke: transcript at 46:9679-80 (27 November 1995). This figure was calculated based on a research study conducted in the United States which determined that independents overall had 5.9 percent of telco directory revenues. The 1993 Simba/Communications Trends study places independents at under 7 percent of total national revenues: confidential exhibit CJ-14 (blue vol. 5), tab 174.

1994 revenues, Tele-Direct has a market share of about 85 percent, while in the Sault Ste. Marie region its market share is about 80 percent.[111]

Thus, even in the two markets in which Tele-Direct faces the most significant competition, its market share is still over 80 percent. In the absence of further detailed information on local market shares, which apparently even Tele-Direct does not compile, this fact, allied with Tele-Direct's overwhelming share of sales over its territory as a whole, leads us to conclude that Tele-Direct dominates telephone directory advertising in markets in Ontario and Quebec. *Prima facie*, we are of the view that Tele-Direct has market power based on its large share of the relevant market, absent compelling evidence of easy entry into the supply of telephone directory advertising.

(2) Barriers to Entry

In the absence of barriers to entry, even a single seller cannot exercise market power. Any attempt by the incumbent to price above the competitive level will attract immediate entry by competing sellers. We have concluded that Tele-Direct has a large share of the relevant

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[111] According to the respondents' map of other publishers (exhibit R-159), only DSP and Tele-Direct are in Sault Ste. Marie, Elliot Lake and Wawa; only White and Tele-Direct are in St. Catharines and Niagara Falls. There are the Locator and Easy to Read directories in Fort Erie but there is no local revenue information on the record. It cannot be very high based on averages taken from Overview of Other Publishers in Tele-Direct Markets (confidential exhibit CR-170). Niagara calculation: Tele-Direct 1994 published revenues for Niagara Falls, St. Catharines and Fort Erie taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128980); White's 1994 revenue was stated by Richard Lewis to be 17 percent of Tele-Direct's revenue (transcript at 22:4363-64 (18 October 1995)). Sault Ste. Marie calculation: Tele-Direct 1994 published revenues for the Sault Ste. Marie, Elliot Lake and Wawa taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128983); DSP 1994 (year 2) revenues taken from DSP - Sault Ste. Marie Directory - Gross Revenue from 1993 to 1995 (confidential exhibit CA-109).

market. Proof of easy entry would overcome the initial determination that Tele-Direct has market power in the supply of telephone directory advertising.

The parties have organized their arguments regarding barriers to entry under three headings, (a) observed entry and exit, (b) sunk costs and (c) incumbent advantages. We will use the same headings.

(a) Observed Entry and Exit

Observed entry into a market can provide some indication of the existence or non-existence and the nature of any barriers to entry. There is no dispute that entry into publishing a "niche" directory appears to be relatively easy. The Director has admitted as much, based on the large number of niche directories and the high level of observed entry and exit.

The Director argues that the smaller directories have captured only a "minuscule" portion of the market and that fact, combined with Tele-Direct's lack of competitive reaction to their presence, confirms that they are of little importance in constraining Tele-Direct's market power. Further, the experience of White and DSP confirms the existence of significant barriers to entry by a broadly-scoped directory.

The respondents submit that entry need not be on a large scale and that many independent publishers have entered on a small scale and then grown slowly, thus avoiding drawing a response from Tele-Direct. Although not directly stated, the implication is that the publishers that chose this strategy have become a competitive force in the market. They also point to White and DSP as proof that broadly-scoped directories have successfully entered, remain in the market and are even profitable.

(i) Niche/Smaller Directories

Relative ease of entry by niche directories is not particularly relevant to an assessment of Tele-Direct's market power as it is clear from the evidence that the presence of these directories has had and can have little competitive impact on Tele-Direct. There is no evidence of any response by Tele-Direct to the presence or entry of a niche directory. There is certainly no evidence that they currently limit Tele-Direct's pricing or encourage better service by their presence.

With the exception of directories published by White and DSP, virtually all of the independent directories cover smaller geographic areas than the directories produced by Tele-Direct. The Director is correct that these smaller directories account for only a small portion of the overall market (less than three percent by revenue). Further, level of activity of each of the smaller independent directories indicates why individually they are not a serious threat to Tele-Direct. If the directories of DSP and White are excluded, there are 279 other independent directories with estimated average annual sales of just over $51,000 each. Of these, the 30 Locator directories had by far the largest estimated average annual sales, of the order of

$200,000 per directory. Mr. Renwicke thought that the largest Locator directory "could" be close to $1 million in revenue, which would make the remaining directories even smaller on average. The remaining 249 directories had estimated average annual sales of approximately $33,000 each. In contrast, in 1995, the broadly-scoped DSP directory had estimated annual revenues of over $1 million while each of White's three broadly-scoped directories averaged over $500,000 in revenues.

The respondents spent some time with their witness, Mr. Renwicke, reviewing examples of directories of three independent publishers in support of their position that, instead of going "head-to-head" with Tele-Direct, an independent could enter small and gradually expand and still be a competitive force in local markets. The respondents referred specifically to the Easy to Read directory, the Locator directories and the Other Book. There are Easy to Read directories in about a dozen, mainly small, Ontario communities. Locator publishes some 30 directories in various small to medium-sized Ontario towns. The Other Book published ten directories, all in the Ottawa area, but is not published anymore.[112]

The argument focuses on the Easy to Read directory in Stratford, Ontario. It is described in the argument as an "impressive" directory. The fact remains, however, that it is of negligible size. The total revenues of all the Easy to Read directories are not even stated separately on the Overview of Other Publishers in Tele-Direct Markets. Presumably they are included in the group

[112] Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170.

of "Other Publishers in Ontario (geographic)" which have average total annual sales of only about $31,000. Tele-Direct's 1994 revenues in Stratford were over 40 times that amount.[113]

Mr. Renwicke pointed out and made favourable comments about the features of the Locator directory entered in evidence, which included postal codes, audiotext[114] and community pages. He also described the Other Book, which had postal codes, amortization tables and a babysitter's guide as some of its features, as a "good-looking book".

Yet, despite the apparent quality of these directories, some of which contain features not offered by Tele-Direct in its directories, the respondents did not refer us to any evidence of Tele-Direct reacting to their presence in a way that would indicate that they were actually a competitive concern, in the sense of providing some discipline on Tele-Direct's quality and pricing. It is indisputable that Tele-Direct is aware of the presence of these independents and to some extent monitors their progress. That is not, in our view, evidence that these directories are a competitive force in the market. There is no indication on the record before us of any positive reaction of the type that occurred when DSP and White entered. Other than the existence of the competitive database and Mr. Renwicke's opinions, the respondents referred only to a 1993 presentation by Mr. Renwicke to the Tele-Direct board which provided information on independents and named White, DSP and Locator.

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[113] Tele-Direct's 1994 Corporate Post Canvass Analysis Report: confidential exhibit CJ-28 (black vol. 7), tab 42 at 128982.

[114] Phone numbers that people could call to get anything from up-to-date news, weather and sports, to medical information and their daily horoscope.

Moreover, even if there was evidence of some competitive response by Tele-Direct to niche directories this by itself would hardly be sufficient to conclude that Tele-Direct did not have market power given its overwhelming market share. The smaller or niche directories are, by their very nature, limited in scope and influence. Thus, although entry on this scale is easy, up to a point (since each new entrant must find a new "niche" and there is a limited number), entry by smaller directories does not limit Tele-Direct's market power.

(ii) Broadly-Scoped Independent Directories

The conditions of entry by a broadly-scoped independent directory covering an area similar to the corresponding Tele-Direct directory, which will compete head-to-head with Tele-Direct, are highly relevant to the question of market power. Tele-Direct's responses to the entry of broadly-scoped directories in the Niagara and Sault Ste. Marie areas indicate that only such head-to-head competition has the potential to produce the benefits to consumers that one looks to competition for, namely lower prices and better products and services.

Can entry by publishers of broadly-scoped directories be considered sufficiently easy so that Tele-Direct is unable to take advantage of its large market share? Additionally, assuming that entry of a single competing publisher were to occur, would this assure that Tele-Direct would no longer have market power because of either the intensity of competition or easy entry conditions for additional publishers? The respondents urge us to conclude that because White and DSP managed to enter in particular markets and have remained in business, entry barriers are low enough that Tele-Direct has no market power. We decline to place so much emphasis on two isolated instances of entry in answering these questions. To answer both questions properly, we must review the arguments on entry conditions for broadly-scoped independent directories in some detail.

(b) Sunk Costs

The Director argues that sunk costs are a barrier to entry as they are perceived by potential entrants as unrecoverable if entry is unsuccessful. The respondents submit that, based on the Tribunal's decision in *Southam*, sunk costs alone are not enough. In *Southam*, the Tribunal held that neither sunk costs nor economies of scale were themselves sufficient to create an entry barrier but that together they were.[115] The respondents contend that the other source of a barrier to entry identified by the Director in this case, namely incumbent advantages, is not like economies of scale and does not operate with whatever sunk costs are present to create entry barriers in the sense required by *Southam*.

We agree that *Southam* held that sunk costs or economies of scale individually are not sufficient. That decision, however, should not be taken to mean that the combination of sunk costs and economies of scale is the only way in which sunk costs can form part of a barrier to entry. What is important is whether the market in question is one in which the potential entrant faces the risk that the post-entry conditions will be less favourable than pre-entry conditions

[115] *Director of Investigation and Research v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 at 281-82, [1992] C.C.T.D. No. 7 (QL).

because of the likely response of the incumbent. Thus, in *Southam*, the presence of sunk costs and economies of scale meant that there was a credible threat that the incumbent would maintain output in the face of new entry even if doing so drove prices down towards cost.[116] This acted as a deterrent to entry.

In this case, therefore, it will be necessary to ask, first, whether there are in fact significant sunk costs associated with directory publishing. Then, we must determine whether the nature of the market is such that prospective entrants face a credible threat that the incumbent will respond in a manner that will make entry unprofitable given the existence of the sunk costs.

Sunk costs are defined as the part of the investment required for entry that cannot be recovered in the event that the attempt fails. Assets that are of value only to a specific enterprise are sunk and those that are of value to other firms are not sunk, or only partially sunk. The Director submits that entry into the directory business requires substantial sunk costs: acquiring and compiling subscriber listing information, assembling advertising into the finished directory, canvassing clients to place advertising, publishing the directory (including the cost of enhancements), training the sales force and promoting the directory. The respondents admit that there is no doubt that there are "some" sunk costs associated with publishing a directory for the first time but submit that the Director has overstated the sunk costs. They say the sunk costs are not, in fact, significant. However, the evidence of the witnesses from White and DSP, which was

[116] The same point is made in P.S. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) at 435-37.

not contradicted, amply supports the premise that the activities listed must be carried out in order to produce a directory and that the costs incurred are substantial.

DSP and White both entered by publishing a "prototype" directory. With a prototype directory, the publisher offers advertising in the directory at no charge. The prototype is distributed to consumers and the publisher then has a history of usage to give it credibility in selling advertising in its next directory. The respondents argue that the sunk costs are substantially increased when an independent publisher chooses to enter by publishing a prototype because there are no advertising revenues to offset the costs. They say that the extent of the sunk costs is within the control of the entrant and a different entry strategy would generate lower sunk costs.

Establishing usage and selling advertising are inextricably linked for a directory publisher. As stated in the 1993 Simba/Communications Trends study, achieving credibility among local advertisers is one of the biggest hurdles that a publisher must overcome.[117] It was precisely in order to overcome the credibility concerns of advertisers that both DSP and White chose initially to publish a prototype directory. Entering with a paid directory does not eliminate the credibility problem and achieving credibility, by whatever means chosen, involves costs. We have no basis on which to conclude, as urged by the respondents, that it would have been less costly overall for White and DSP to enter first with a paid directory.

[117] "Lessons of Yellow Pages Competition": confidential exhibit CJ-14 (blue vol. 5), tab 174 at 115924.

The respondents also submit that if the entrant chose to enter with an initial paid directory, it could avoid the cost of publishing entirely if a sufficient volume of business was not confirmed during the canvass and it then abandoned its plans to enter. While we agree that the only way to avoid the costs of producing a directory is to abandon the project, we do not agree that this is a strategy that could be used with impunity by would-be entrants. The mere possibility that such a strategy could be employed exacerbates the credibility problems facing a would-be entrant, and in the event it were employed, would detrimentally affect any prospects for the same firm or other firms to attempt entry in another market.

Recognizing that there are sunk costs involved in entry into directory publishing, do those sunk costs amount to a significant barrier to entry? We are of the opinion that those sunk costs do create a barrier to entry when a broadly-scoped directory is introduced because the entrant publisher is going "head-to-head" with the telco's directory. In those circumstances, the incumbent will respond and post-entry conditions will be less favourable for a would-be entrant than pre-entry conditions. As the Simba/Communications Trends study noted, under the heading "Disadvantages of Large, Head-to-Head Directories", "[u]tilities are willing to `pull out the big guns' to protect large bread-and-butter markets."[118] It is not disputed that when White and DSP entered into Tele-Direct's markets with broadly-scoped directories, Tele-Direct responded with price freezes, incentive programs, enhancements and promotional campaigns. Thus, the combination of sunk costs and likely response by the incumbent create a significant entry barrier

[118] *Ibid*. at 115982.

and entry would not necessarily occur even though Tele-Direct was pricing above competitive levels.

(c) Incumbent Advantages

(i) Subscriber Listing Information

Would-be entrants into the directory business do not have access to subscriber listing information from the telcos on the same terms as Tele-Direct. Access to subscriber listing information by independent publishers has been the subject of some controversy and has been dealt with on several occasions by the CRTC. In 1992, the CRTC ordered greater access to the subscriber listing information in the hands of Bell Canada. Because of the price of the information, and other conditions imposed on its distribution, this decision did not result in commercially viable access to the information. Both White and DSP witnesses testified that they were forced to wait until the Tele-Direct directory was published and then re-key, verify and update the listings to use in their own directories, a costly and time-consuming process.

In March 1995, the CRTC revisited the matter at the request of White and liberalized the availability of listing information, including reducing the price that could be charged by Bell Canada. There was no indication from the White or DSP witnesses who appeared before us of any problem with the 1995 resolution by the CRTC of the price and availability issues. Richard

Lewis, the Executive Vice-president and Chief Executive Officer of White, stated, in fact, that White was very satisfied with that aspect of the decision.

The CRTC added an important proviso, however, when it ruled that consumers who wanted to opt out of having their listings sold to a "third party" could do so. From the point of view of the independent directory publishers, this caused a problem because the CRTC did not distinguish between types of "third parties". Thus, the independent publishers were grouped in with, for example, telemarketers, to whom many consumers would not want their information to be released. The 1995 decision was stayed pending an appeal to Cabinet which, in late June 1996, overturned that portion of the CRTC ruling.

In light of the Cabinet decision, which was rendered after the close of the hearing in this matter, the Tribunal invited further submissions from the parties regarding the impact of that decision on their respective positions. The respondents submit that the Cabinet decision has removed the only barrier to entry into publishing. The respondents point to Mr. Lewis's statement that after a favourable decision from Cabinet, White will proceed with additional directories in the Toronto/Niagara area. The Director agrees that the Cabinet decision will likely reduce *one of* the barriers to entry into directory publishing but maintains that there are still other, significant barriers into the market. The Director refers to the United States situation where, despite access to subscriber listing information for several years, independents have less than seven percent of total industry revenues.

The only evidence before us is that the issues of importance to the independents, availability, price and opting out, have been dealt with satisfactorily to them. We conclude that, at present, subscriber listing information cannot be considered to be a significant barrier to entry.

(ii) Reputation/Affiliation with Telco

An entrant into directory publishing has the related tasks of convincing users of the value of its directory and of convincing advertisers that it is a worthwhile vehicle in which to advertise. The directory will only be widely used if it has a critical mass of advertising in it. If the directory is not widely used, few businesses will advertise in it and, in the absence of advertising by its competitors in a new directory, there is no pressure on a potential customer to advertise itself in the new directory. This is not a problem that Tele-Direct ever had to face because of its (or Bell Canada's) longstanding presence in the market as the only available directory. In addition, Tele-Direct benefits from its affiliation with a large and established telco which lends a certain authenticity.

To overcome the preference of advertisers for the incumbent directory requires enhanced expenditures on advertising and promotion and lower prices by the entrant. There is numerical evidence on the disadvantage of entrants *vis-à-vis* the incumbent only with respect to lower prices. The Simba/Communications Trends study of the directory industry in the United States revealed that in the top 10 competitive markets, the average telco (utility) rate for a double-half column was 53 percent higher than for independent publishers competing head-to-head in those markets. The average cost of advertising, per thousand of circulation, for the utility directories was 46 percent higher than for the independents.[119]

Mr. Lewis of White stated that his company usually plans on pricing about 40 percent lower than the telco directory in a market they are considering entering. Gary Campbell, the General Manager of DSP, testified that on average their prices were 30 percent less than those of Tele-Direct. A comparison of published prices between Tele-Direct and the initial White and DSP directories confirms these general statements although price differences vary considerably between types of advertisements.[120]

In both markets, the entrants had invested in introducing new features (enhancements) into their directories that Tele-Direct had not hitherto introduced. For example, White's Niagara region directories included the following features not previously offered by Tele-Direct: free smaller size copy in addition to the regular size directory (a "mini"), audiotext, extensive community pages which provide information of regional or local interest,[121] larger size print, three column format instead of four, postal codes included in the white pages, additional colour

[119] *Ibid.* at 115984.

[120] White's prices in 1994 were generally about 25 percent less than Tele-Direct's for in-column, about 40 percent less for display and about 55 less for red display: exhibit A-103. White first published in Niagara in 1993 with a prototype directory in which advertisers could advertise free of charge. The 1994 prices are for its first "revenue" directory in which advertisers paid for their advertising. Likewise, in Sault Ste. Marie, the DSP rates reflected substantial discounts off Tele-Direct's, with greater discounts for display and coloured display than for other types of advertisements: YPPA Rates and Data Information for the period 1992-95: exhibit A-111.

[121] For example, area sports team schedules, seating diagrams for theatres and arenas, a listing of local golf courses, highway access information, historical sites, schedule of events, maps, senior citizens' services listings, human services' listings, "kid's pages", bus routes, customs and goods and services tax information.

in the advertisements. DSP also included many of the same enhancements in its directories plus other, unique, features.[122] Thus, any advantage enjoyed by Tele-Direct clearly stemmed from its incumbency and its affiliation with Bell Canada and not from the superiority of its product.

Based on White's experience in the United States, it appears that the rate differential between the independent and the telco does narrow over time but still remains significant. Mr. Lewis testified that in Buffalo, New York, where White has published for 27 years, its prices are still 25 to 33 percent less than those of the telco directory.

As part of the survey resulting in the January 1993 Elliott report, customers of Tele-Direct were asked if they would advertise in a competing directory if it offered 15 percent lower prices. Only 36 percent said that they would advertise in the new directory and a mere eight percent that they would discontinue advertising in Tele-Direct's directory.[123] As indicated by the United States data and the experience of White and DSP, to attract a significant number of advertisers the entrant would likely have to offer discounts closer to 50 percent than to 15 percent.

Based on both the particular experiences of White and DSP in entering Tele-Direct's markets and the more general evidence relating to the United States experience, it is our

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[122] For example, it is a "flip" directory with the Canadian cities on one side and the neighbouring American cities on the other. The book also includes a "reverse directory" -- listings by phone number first.

[123] Confidential exhibit CJ-14 (blue vol. 5), tab 73 at 115416-18.

conclusion that an incumbent directory publisher's "reputation" or affiliation with a telco constitutes a significant barrier to entry into publishing a competing broadly-scoped directory. An important part of this barrier is the advantage that the incumbent directory has because it already contains the advertisements of a business's competitors. A new entrant must overcome that fact in seeking to persuade the business to advertise in its new directory. New entrants must offer substantial price discounts, even when they are publishing a product with features not included in the incumbent's directory.

(iii) "Yellow Pages" Trade-mark

The words "Yellow Pages" and "Pages Jaunes" and the "walking fingers" logo are both registered trade-marks of Tele-Direct in Canada. Tele-Direct only licenses those marks to publishers which are affiliated with other telcos. The same words and the logo are in the public domain in the United States.

As attested to by Mr. Lewis, it probably would have been easier for White (and DSP or any other entrant) to explain the nature of the product it was seeking to introduce in the Canadian market if it had been permitted to use the marks, which have a high level of public recognition, as it can and does in the United States. In fact, Mr. Lewis would have paid a "substantial" fee to use the marks in Canada. The trade-mark situation appears to confer some marketing advantage on Tele-Direct and reinforces the other barriers already discussed.

(iv) Strategic Behaviour

Under this heading, the Director first refers to the anti-competitive acts being alleged in a later portion of the argument regarding other publishers. Paragraph 120 states that

> . . . It was Tele-Direct's objective to "make competition expensive" and "raising the bar" to entry and it succeeded.

The only way in which we could determine if the strategic behaviour referred to constitutes an entry barrier would be to assess the effects of that behaviour on the market. The Director did not deal with evidence of effects in relation to the issue of market power. The alleged anti-competitive acts regarding publishers will, of course, be dealt with in due course.

The Director also argues that the alleged anti-competitive acts in respect of services are relevant to entry conditions into publishing. It is submitted that one of Tele-Direct's objectives was to reduce the power of the specialized agencies in order to make it harder for new entrants into publishing to gain market share. If it had been proven that some Tele-Direct policy or initiative against agents did indeed have a deleterious effect on new publishing entrants, this would be relevant to our assessment of entry barriers. We are of the view, however, that the limited evidence provided on this point does not prove that there were such effects.

(3) Conclusion

We are of the view that even with subscriber listings available to independent publishers on reasonable terms, significant entry barriers in the form of the reputation effects and sunk costs reviewed above will remain. The condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied.

B. DIRECT APPROACH: OTHER EVIDENCE OF MARKET POWER

As other evidence of market power the Director relies on the high profits earned by Tele-Direct, its lack of responsiveness to customer needs, and an allegation that it has lagged behind other media in supporting agents, in promoting the product and in using technology to process advertisements received from agents. We are of the view that there is insufficient evidence on the record, and that the question was not explored in sufficient depth, for us to draw a conclusion one way or the other regarding the allegation of lagging behind other media. The evidence regarding profitability and customer dissatisfaction, however, is extensive.

(1) Profits

The respondents acknowledge at paragraph 41 of their response that Tele-Direct earns very large accounting profits. It is also undisputed that Tele-Direct pays 40 percent of its collected revenues directly to Bell Canada and a similar percentage to the other telcos with which it contracts to publish a directory. This payment is said to be in return for access to subscriber lists and for services. The evidence revealed that the only service provided by the telcos is billing.

Where the respondents and their expert, Professor Willig, differ from the Director is with respect to the significance of Tele-Direct's admitted profitability as an indicator of market power. The respondents' argument first points out the well-known concerns about trying to convert accounting to economic profit. While we recognize the validity of those concerns in general, we do not consider that they apply with much force to the most compelling evidence of profitability, the payment by Tele-Direct to Bell Canada. That payment is a set percentage of collected revenues. It is not an accounting "profit" figure or a "bottom line" amount produced by the application of accounting conventions. Therefore, we are of the view that an examination of the payment to Bell Canada and its possible implications for market power is not clouded by accounting conventions at the outset. The presence of such a payment indicates that Tele-Direct has revenues of at least 40 percent over its recorded costs.

Professor Willig took the position that the profits which allow Tele-Direct to make the payment to Bell Canada reflect a return on intangible capital which is a necessary investment in the creation of the profits. In his rebuttal affidavit he stated:

> 46. . . . It is well known that there are many reasons why accounting measures of profits can deviate both randomly and systematically from being an indicator of the theoretical notion of economic profits. One reason for systematic deviation is of general significance in businesses where intangible assets are important. Here, the value of the intangible assets does not appear on the accounting books. Then, when operating margins are expressed as a percent of

the book value of assets, the resulting percent is systematically too large, relative to economic meaning, simply because the book's list of assets misses the intangible ones. This effect is likely to be of specially great quantitative significance where trade-marks, brand-names, product or service reputation, proprietary technology, and organizational capital are important to the business.

47. Of course, service industries typically contain leading instances of businesses where intangible assets are important. For example, the business of any successful magazine is unlikely to rest on significant tangible assets, and instead to depend on intangible assets that include the name and design of the magazine, and perhaps the organizational capital embedded in the editorial and advertising sales teams. The rate of return on tangible assets earned by such a business will turn sensitively on whether the books include ownership of the business office and a fleet of trucks or autos, or whether the business leases such properties. In either event, the assets that really drive the success of the business will not be valued on the books, and so the rate of return on assets will indicate nothing about the economic profitability of the enterprise, and certainly nothing about market power.

48. It goes without saying that the directory publishing business is a prime example of the effects just discussed. For all the conventional reasons alluded to, the rate of return on assets, or other accounting measures of profits, are not reliable indicators of market power. . . .[124]

In other words, Tele-Direct is only earning the requisite return on its intangible assets to remain in business and not any kind of economic rents. Professor Willig returned in his oral testimony to the example of a magazine and its intangible assets which create a loyal readership. We have some difficulty seeing the same effect at work with a directory which has no editorial content, unlike a magazine. There may be creativity in the way the directory is assembled so it is of maximum utility to consumers but the evidence was that Tele-Direct lagged behind new entrants like White and DSP in this respect.

When asked specifically about the intangible assets or activities of Tele-Direct, Professor Willig responded:

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[124] Expert rebuttal affidavit of R. Willig (30 August 1995): exhibit R-181 at 13, paras. 46-48.

> Evidently . . . there is some value to having, and having had, the "utility" franchise in a given area. If one tries to translate that into what it means today or next year, the operative word really is "reputation", and the reputation is of significance both to advertisers and also to consumers who have to decide whether to pick the book up or not and, if so, which book to pick up. Somehow that reputation attaches to that book because of its heritage, its history, evidently, and also to its identification with the current telco.

. . .

I agree . . . that it is hard to reach out and grab that reputation. But if we think about the character of the directory business . . . the notion that, if you are an advertiser and you are being asked to pay for an ad in advance of the completion of the book and in advance of evidence about what consumers are going to do in terms of using it, then you have to reach, as an advertiser, an expectation, an anticipation of how good the book is going to be.

You have to form an image in your mind before you commit yourself to your advertising expenditure: Is everybody going to use this and will the other advertisers take ads in it? If they don't, then consumers won't use the book and, if consumers don't use the book, then my ad which I am being asked to pay for today won't have its exposure.

The key to the underlying value proposition of the advertiser is the anticipation that 18 months later or 12 months later the book is going to be out and it is going to be a really good book and people are really going to use it.

It is unusual that you can't really tell the value of what it is you are buying until it is done and many months have passed. . . .[125]

There are several difficulties with this hypothesis. First, on a factual level, there is evidence that Tele-Direct's advertisers (except the small group using agencies) do not pay for their advertising 12 to 18 months in advance. Monthly billing commences once the directory is published. Advertisers pay in instalments (interest free) after publication.

Second, Professor Willig emphasized that the key to the value of Tele-Direct's reputation asset was the anticipation that advertisers have that the directory is going to come out and will be a "good" directory that people are actually going to use. Surely all local media, which the respondents postulate are close substitutes for telephone directory advertising, face the same challenge in selling time or space to advertisers. Rather than paying Tele-Direct at a level that

[125] Transcript at 56:11663, 11667-68 (23 January 1996).

allows Tele-Direct to earn a 40 percent premium, would not advertisers simply switch to one of the other alleged close substitutes? Tele-Direct's premium would soon disappear in that scenario.

If, on the other hand, telephone directory advertising is somehow unique because of the close link between a critical mass of advertising in the directory and use of the directory by consumers, then this uniqueness argues against other media being close enough substitutes to provide competitive discipline. Tele-Direct's ability to exploit its association with the telco to earn returns well above its costs would then indicate market power in the market for telephone directory advertising. This latter scenario is more in accordance with the other evidence on the record which reveals that as between the telco directory and other *directory* publishers, the fact of association makes a significant difference. As was already discussed above, one cannot attribute the premium to Tele-Direct having a "superior product" to other telephone directory publishers in terms of the features of the directory. If it had a superior product, Tele-Direct would not concern itself with competing directories, which it does, and the only evidence before us was that the entrants like White and DSP were initially the superior product, until Tele-Direct responded to their enhancements.

Further, Professor Willig's theory of profits as a return on intangible assets cannot co-exist with the respondents' pleading that Tele-Direct's profits go to cross-subsidize Bell Canada's local telephone service as set out in their second amended response:

> 20. . . . What was initially conceived as an essential but costly feature of telephone service has become a lucrative revenue source for the telcos. . . .

21. In Ontario, for example, T-D Pubs pays each of the independent telcos with which it contracts 43% of the gross revenue collected from subscribers of the telco who advertise in the telephone directories. In the case of T-D Pubs, this revenue source, as well as the entire net income of T-D Pubs, are included by the CRTC in Bell Canada's revenues to reduce the cost of local service. Each residential telco subscriber in Ontario and Quebec receives a subsidy of over $2 per month as a result of the revenues captured through telephone directory advertising.

Bernard Courtois, Vice-president, Law and Regulatory Matters for Bell Canada, explained:

> . . . So, both the commission revenues from Tele-Direct [the 40 percent] and all the net income of Tele-Direct, that is equivalent to adding $284 million to the revenues of Bell Canada in 1994 for regulatory purposes. Divide that by the number of residential subscribers and it amounts to $3.38 per month on the average residence telephone bill.
>
> I should say that the average residence basic telephone bill in Bell Canada with Touchtone is about $12.75. So, if you didn't have the Tele-Direct activities going on, that bill would have to be more than $16.00. Of course, if Tele-Direct were a completely arm's length company, we would still get some of that commission revenue.
>
> . . .
>
> Q. I think you did point out that in any telco basically they always collect some of this profit through the 40 percent. I mean every telco seems to collect that so they all get subsidized in that way by publishers. Is that what you were saying?
>
> A. That's correct, and I should point out that it's a very large part. I guess the commission revenues might be two-thirds and the net income one-third of that subsidy. . . .[126]

George Anderson, who was previously with NYNEX, described a similar situation in the United States. He testified that the utility directory publisher has to "impute" a substantial portion of its income, over and above the cost for subscriber listing information which has been widely available for some time in that country, back to the telco to help defer the cost of telephone service. In his words:

[126] Transcript at 32:6559-61 (3 November 1995).

> The [AT & T] consent decrees . . . took an unregulated business, which was Yellow Pages, and at the ninety-ninth hour put it in with the regulated segment of the business to serve as a cash cow, not my words, to serve as a funding business that would help defray, defer, hold down the rate of return and hold down the cost of telephone service.[127]

James Logan, currently President of YPPA and formerly with US West, confirmed this view.

We observe that if all Tele-Direct and other telco directory publishers were earning was a competitive return on all assets, including intangibles, the telcos would not have "profits" available to use for a completely different purpose, namely cross-subsidization of local telephone service. Unless intangibles are to be treated as a *deus ex machina* to explain away high economic profits, they must be identifiable, as must be the activities resulting in their creation. Otherwise, simply asserting "intangibles" would always preclude high profits from demonstrating market power. We cannot accept an approach leading to such a conclusion. Intangibles that can account for *apparent* high economic profit are the result of activities that are extraordinarily successful, such as those creating new products or ways of doing things better than others. In contrast to the example of successful magazines cited by Professor Willig, there is no evidence of this in the case of Tele-Direct or the other Yellow Pages publishers. Moreover, the fact that there is such widespread subsidization of telephone services by Yellow Pages publishers associated with telcos strongly suggests that the source of the subsidies is not any outstanding effort on the part of individual publishers.

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[127] Transcript at 41:8556-57 (17 November 1995).

The Director also argues that the fact that new entrants view the market as potentially profitable, even given the large price discounts off Tele-Direct's prices that they must offer and the other expenses they must incur to establish their own credibility or reputation, is an objective measure of Tele-Direct's profitability. We agree that market participants are responding to economic profit rather than to accounting profit.

We conclude, therefore, that the payment to the telcos by Tele-Direct is a form of "economic rent" whose value depends on the surplus that can be earned from publishing a directory associated with a telco. The cost to the telcos of providing the subscriber listings and doing the billing is minimal. The listings are a by-product of supplying telephone service and the billing for advertising is incorporated into the subscriber's monthly telephone bill. While it is true that it would be more costly for Tele-Direct to do the billing itself, it is unlikely that it would cost, at most, more than a few percent of revenue.[128]

In the face of competition from other media the amount that Tele-Direct could afford to pay, and that the telcos could demand, would be considerably less. With sufficient competition the payments to the telcos would disappear entirely. Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada, place products in separate markets if their existence would not

[128] All the work relating to contract verification and dealing with complaints is already done by Tele-Direct. What is performed by Bell Canada are simply the mechanical steps of bill preparation and mailing.

prevent a hypothetical monopolist, post-merger, from increasing prices by five percent. Even allowing as much as two percent for mailing costs, one is left with a margin of 38 percent. We are of the view that the evidence of economic rents provides a direct indication of Tele-Direct's market power.

(2) Dissatisfied Customers

The Director submits that the respondents' actions towards the advertisers, their customers, display market power. Reference is made to Tele-Direct's requirement that advertisers give up copyright in their advertisement, its restrictions on group advertising and evidence of low customer satisfaction in general. There is evidence, in the form of studies like the Elliott reports and the presence of consultants, that a significant percentage of Tele-Direct customers are less than happy with the service provided by Tele-Direct. We reviewed the evidence to this effect in the section on Market Definition when dealing with the arguments of the respondents which emphasized the low degree of customer satisfaction. As a direct indicator of market power, however, we are reluctant to rely on customer dissatisfaction because of the practical difficulties in applying such a subjective test.

(3) Other: Pricing Policies

In addition to the evidence of profitability advanced by the Director, the Tribunal is of the view that Tele-Direct's approach to setting prices supports the conclusion that Tele-Direct is behaving more like a firm with a comfortable margin of market power than a firm facing close substitutes. We note Professor Willig's point that evidence of price discrimination, in isolation, would not reliably indicate market power. In combination with the other evidence it is, however, compelling. Two aspects of Tele-Direct's price-setting policy are important: the premiums charged for colour and larger size (price discrimination) and the effort to equalize price per thousand across geographic markets (circulation alignment).

(a) Price Discrimination

As we reviewed in the section on market definition, colour and increased size are more valuable to advertisers who rely more heavily on the Yellow Pages. In broad terms, these are advertisers whose business involves infrequently purchased or emergency services (e.g., plumber, exterminator, mover, auto repairs, lawyer), infrequently purchased, expensive durables where comparison shopping is likely (e.g., cars, major appliances), services used by travellers (e.g., car rental) or which encourage orders by telephone (e.g., pizza, lumber yard with telephone order business). They need to attract attention in the Yellow Pages so that a consumer is drawn to their Yellow Pages advertisement as opposed to the Yellow Pages advertisement of their competitor. In our view, Tele-Direct systematically price discriminates against advertisers who are heavily reliant on the Yellow Pages through its pricing of colour and size and its ability to do so is direct evidence of market power.

Tele-Direct charges a 50 percent premium to add red to an advertisement. This premium is unrelated to costs of production. The representative of one of the independent publishers testified that at a 50 percent premium, a publisher would be realizing a very high profit margin. In other words, the additional printing and production costs are well below the price charged.

Ms. McIlroy explained that the object of Tele-Direct's pricing of colour at a premium is to control its penetration to ensure that it will be sufficiently uncommon so that the coloured advertisements "stand out" on the page. The price is set high enough that everyone will not buy it. In the same vein, Tele-Direct introduced multi-colour in those markets where there was already a lot of red in the directories as an alternative way of allowing advertisers to "stand out". This is not the kind of pricing policy that can be pursued by a firm under competitive pressure because its competitors would simply charge a lower price to take advantage of the profit opportunity and compete away the premium.

Further, the premium for red is largely invariant across local markets. It is difficult to see how there could be such uniform pricing in the face of "competition" from other local media, which would vary from market to market. Tele-Direct's pricing of red can hardly be seen as a response to these prices but is much more consistent with a company concerned only about its own, unique environment.

Based on the evidence before us, there is similar uniformity and lack of relationship to cost in Tele-Direct's pricing of larger advertisements. A comprehensive Tele-Direct rate card was not placed in evidence. In the 33 local markets included on the excerpt from the YPPA rates that was tendered as an exhibit, the price increases by about 90 percent for each doubling of advertisement size from a quarter column (1/16 page) to a double quarter column (1/8 page) and from a double quarter column to a double half column (1/4 page).[129] As in the case of colour, the evidence revealed that the additional costs of producing larger advertisements do not appear to justify the increase in price. Based on cost, one would expect a discount greater than ten percent for an advertisement twice as large.

The respondents do not dispute that Tele-Direct's premiums for red and for size cannot be explained by additional costs. Counsel conceded in argument that those were the facts but argued that Tele-Direct was engaging in "value pricing". He hypothesized that an advertiser buying a larger advertisement might get ten times the results that would have been obtained with a smaller advertisement and, therefore, paying almost twice as much for the larger advertisement is actually a bargain. The larger advertiser, the argument goes, is getting more value out of the medium. Value pricing is not a phenomenon readily associated with a competitive market, the hallmark of which is pricing which is ultimately cost-driven.[130] Value pricing is more likely to be associated with a regulated monopolist and is more an indication of the presence of market power than of its absence.

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[129] YPPA Rates and Data Information for the period 1992-95: exhibit A-111 at 9.

[130] Leaving aside dynamic, innovation-driven industries, to which telephone directories do not belong.

The ability of Tele-Direct to discriminate against customers who spend *more* on advertising by way of larger or coloured advertisements is of particular importance in assessing whether Tele-Direct lacks market power *because* other local media provide close substitutes for Yellow Pages, as argued by the respondents. Larger Yellow Pages advertisers have greater choice among the allegedly competitive media since, by definition, they have more dollars in Yellow Pages that they can switch to any other media. Smaller advertisers are less likely to be able to afford the full range of other media. While it may be true, as Professor Willig pointed out, that certain vehicles, such as community newspapers or church calendars might be more acceptable to smaller advertisers, there is no denying that, from a budget point of view, larger advertisers have more options. Thus, larger Yellow Pages advertisers should have the more elastic demand if there are, as the respondents argue, close substitutes to Yellow Pages. The fact that Tele-Direct's margin over cost increases with enhanced expenditures on colour and size indicates the opposite. The anomaly of Tele-Direct being able to price discriminate against advertisers who at first blush have the greatest range of options underscores its market power.

The two broadly-scoped independent publishers, White and DSP, also charge some premiums for colour or size, although neither charges a premium as high or as consistent across the board as Tele-Direct's.[131] Certainly, no one has suggested that either White or DSP has market power. Yet, Mr. Campbell provided the same explanation of DSP's pricing of red, for

[131] In Sault Ste. Marie, DSP charges a premium for red ranging from 36 to 50 percent for full page, half page, double half column (1/4 page), double quarter column (1/8 page) and quarter column (1/16 page). For each doubling in size, however, DSP price increases are 56 percent to 76 percent, considerably lower than Tele-Direct's size premium. In Niagara Falls, White charges only between eight and nine percent premium for red, with one exception, a quarter column advertisement, which reflects a 28 percent increase. For each doubling in size, White charges from 74 to 91 percent more.

example, as Ms. McIlroy did -- that it is priced above incremental costs to ensure its scarcity. Does the independents' use of some premiums for colour or size imply that Tele-Direct has no market power? We think not. The presence of two publishers in Sault Ste. Marie and Niagara certainly does not indicate a "competitive" market.

The evidence regarding the independent publishers does not detract from our view that Tele-Direct's ability to price discriminate is evidence of market power. Although the independents can, to a much more limited extent, implement some of the same pricing policies, this is not surprising. Tele-Direct prices in each local market create an "umbrella" beneath which the new entrants can shelter which underlines that Tele-Direct has market power sufficient to create the umbrella.

(b) Circulation Alignment

Since 1987 (or for 1989 prices onwards), Tele-Direct has actively pursued a policy of "circulation alignment" in calculating its annual price increases. The only exception was in 1992 (for 1994 prices) when poor economic conditions resulted in a zero price increase across the board. The objective of this policy was to bring about consistency in cost per thousand or CPM between directories. Some directories had experienced rapid growth in circulation but since they were subject to the same general price increases as other directories which had not grown as much in circulation, their CPM or price relative to circulation was substantially lower. Ms. McIlroy referred to the Mississauga directory as one in which the rates were seen as too low given the circulation of the directory. A program was therefore instituted to bring the CPMs in all markets into line over a number of years by imposing additional price increases (but not price decreases) in particular local markets.

In applying the alignment policy absolutely no allowance was made, or is made, for differentials in the intensity of competition from other media in each local market. The entire process can be described as a very bureaucratic one and certainly not what one would expect if Tele-Direct was forced to respond to varying degrees of competitive pressure in the numerous (approximately 100) local markets where it operates.

Professor Willig conceded that this "bureaucratic" approach to pricing and apparent indifference to local market conditions was puzzling but theorized that it could result from Tele-Direct's connection to a utility company. Utilities come from a culture of regulation where pricing flexibility is frowned upon. Further, if individual sales people were given latitude to discount to individual customers, the result for a large organization like Tele-Direct would be chaos.

Pricing individually by customer goes well beyond responding to the supposedly competitive media in a local market and thus does not directly address the point. The regulatory "culture" of utilities, is, of course, undeniable. What is more pertinent is how Tele-Direct could maintain such a culture in the form of its approach to pricing in the presence of the alleged close substitutes. If its bureaucratic price-setting led Tele-Direct to set a price too high in a particular market, surely it would see a dramatic revenue loss to other media and would quickly change its approach. There is no evidence that this has happened.

(4) Conclusion

The other direct evidence of market power advanced by the Director along with Tele-Direct's pricing policies affirm our previous conclusion based on the indirect approach that Tele-Direct has market power in telephone directory advertising.

VIII. TIED SELLING

A. INTRODUCTION

Tying or "tied selling" is dealt with in section 77 of the *Competition Act*. The relevant parts of section 77 are:

> (1) . . . "tied selling" means
> (*a*) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to
> (i) acquire any other product from the supplier or the supplier's nominee, or
> (ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and
> (*b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

> (2) Where, on application by the Director, the Tribunal finds that . . . 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 . . . tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

A tie is the supply of one product *on the condition that* the buyer takes a second product as well *or* on terms that *induce* the buyer to take the second product as well. Such an arrangement may be prohibited by the Tribunal under section 77 if it meets all the other requirements of that section, namely that the tying is a practice engaged in by a major supplier and results in a substantial lessening of competition. The requirement that Tele-Direct must be a major supplier is satisfied by our earlier finding of market power in the telephone directory advertising market. The other requirements of the section are still to be resolved.

The Director alleges that the respondents have engaged in a practice of requiring or inducing customers for advertising space in telephone directories (the tying product) to acquire another product, telephone directory advertising services (the tied product), from the respondents. The Director further alleges that the practice of tied selling has impeded entry into or expansion of firms in the market resulting in a substantial lessening of competition.

The advertising space or publishing business is described at paragraph 9 of the application as including:

> . . . all matters relevant to the provision of advertising space in a directory, including access to a subscriber data base (including information relating to new subscribers) upon which the books are based, compilation, physical creation of hard copy, printing, promotion and distribution.

The advertising services business refers to:

> . . . the provision of services relating to the sale of advertising space in a telephone directory, including establishing new customers, calling on customers, and providing advice, information and other services relating to the design, cost, content, location, creation and placing of the advertisements.

The Director further states that the purchaser of an advertisement in a telephone directory obtains two products related to the two businesses: advertising space and advertising services.

B. FACTS

Before we proceed further, it is necessary to review some facts relevant to the supply of advertising services to Yellow Pages advertisers.

(1) Tele-Direct's Internal Sales Force

Tele-Direct sells telephone directory advertising through its internal sales force. This group is sub-divided into those representatives who deal with customers over the telephone ("tel-sell") and those who attend at the customers' places of business ("premise"), together called the general sales force or "GSF". The premise sales representatives travel from place to place during the year to canvass advertisers for a particular area or directory within a confined time frame. In

1994, premise sales accounted for about 60 percent of the revenues generated by Tele-Direct's internal sales force, while tel-sell generated less than 30 percent of revenues.

A further category of sales representatives, sometimes included as part of the GSF and sometimes considered apart from it by Tele-Direct, is that which services so-called "national accounts". These representatives are called national account managers ("NAMs") or national account representatives ("NARs"). This group accounts for the remaining approximately 10 percent of revenues.

There are no hard and fast rules governing which accounts are handled by the NAM/NAR group as opposed to the remainder of the GSF. Some large accounts are serviced by the GSF. The Tele-Direct witnesses indicated that, in general, accounts that require a great deal of servicing, for example, multiple visits over a year, are likely to be assigned to the NAM/NAR unit. Because of the canvass-based sales approach used by the GSF, often the GSF is involved in a canvass in another area and is unavailable to service a particular account repeatedly. The NAMs and NARs are located in certain centres all year long and can service these accounts more easily. A further factor is the account's complexity, including number of headings, the number of markets, and the amount of change required each year. If the account requires a lot of attention to ensure accuracy (for example, that no directories are missed) and perhaps clerical-type support, it will end up in the national group. There was also evidence that accounts which had little future growth potential or which had simply proven to be problem accounts in the past are handled by the NAM/NAR unit.

Tele-Direct (Publications) Inc. is divided into two geographic regions, eastern and western. The eastern region is comprised of the province of Quebec, with parts of Ontario such as Ottawa, Kingston, Sault Ste. Marie and Sudbury. The western region covers the remainder of Ontario. The structure and organization of the company in both regions is broadly similar, although the eastern region is smaller both in terms of revenue serviced and number of sales representatives.

The facts regarding (a) remuneration, (b) evaluation and (c) account assignment and continuity for Tele-Direct's internal sales force are relevant because one of the Director's arguments regarding Tele-Direct's motivation to engage in the alleged tied selling is that its internal sales force can be more effectively motivated to sell more Yellow Pages advertising than agents.

(a) Remuneration

The remuneration of the Tele-Direct representatives is highly dependent on the revenues generated by each individual as they are paid through a combination of salary and commission. Both the tel-sell and premise representatives earn a base salary (which is higher for premise) and in addition are eligible for a number of commissions and incentives.

The amount of commission paid to a sales representative is determined by the nature of the advertising which is sold. If the sales representative manages to generate new business (an increase over the previous year's advertising expenditure), an annual commission of 13 percent is paid on the total new business. If the advertiser is renewing the advertising which was purchased in the previous year, the sales representative is paid a 2.4 percent commission on the renewal amount. Renewal commission is paid on any portion of an account which is renewed, even if the total amount of advertising purchased is less than the previous year. The renewal commission was first introduced in the early 1980s, prior to which the representatives were paid only salary and new business commission. The final basis upon which a commission is paid to a sales representative reflects rate increases. This applies in a situation where an advertiser renews exactly the same advertising program as it had in the previous year but there has been a rate increase which is applicable to that advertising program. The sales representative receives renewal commission on the amount spent the previous year and rate increase commission on the difference between the two account totals because of the rate increase. The rate increase commission is six percent.

Since 1993, a premise representative also has the potential of earning a yearly bonus in the amount of $2,000. The bonus is based on factors such as the number of complaints made against the representative by advertisers, the representative's score in Tele-Direct's internal evaluation, the number of "lates" (advertising submitted after a directory closing date) and mistakes and the representative's overall work flow. Apart from the bonus, there are a number of other incentives offered to premise sales representatives, for example, awards and trips.

The NAM/NAR group also earn base salary plus commission but with a much larger proportion of their income accounted for by salary. Their new business commission is nine percent, with a renewal commission of 0.5 percent and a rate increase commission of 1.2 percent. They may qualify for a bonus equal to seven percent of their income for maximizing net sales or a bonus of three percent for maximizing retained revenue. An average NAM earns less than an average premise representative.

Sales representatives are supervised by salaried sales managers. Sales managers also qualify for various incentives and bonuses, which may vary in nature from year to year, based on the results of the sales representatives that they supervise.

(b) Evaluation

In the western region Tele-Direct has a formal assessment program for its sales representatives called Total Performance Assessment ("TPA"). Each representative is assessed using the TPA every six months.

The TPA is comprised of three categories: sales results (worth 60 percent), customer satisfaction (worth 20 percent) and job administration (worth 20 percent). The sales results score is largely based on the representative's incremental revenues in relation to other representatives (25 points of 60). Customer satisfaction is broken down into customer disputes and an overall customer survey. Customer disputes refer to the number of times customers of the representative have called in with a complaint or a concern. The customer survey component is a Gallup survey.[132] The final aspect is job administration which includes work flow (success in meeting benchmark requirements for servicing a certain percentage of revenue during a canvass by a certain date), number of internal queries and lates.

The TPA is not used in the eastern region which has not had a formal evaluation program since 1994 because of union disputes. Currently, sales representatives in the eastern region are evaluated by an internal management review in which their supervisors conduct follow-up interviews with clients. It is Tele-Direct's intention to replace this less formal evaluation process in the future.

(c) Account Assignment and Continuity

Tele-Direct uses a canvass approach to sell advertising. Each directory has a canvass period, the length of which depends on the size of the directory, during which the GSF focuses its attention on selling advertising for the next issue of that directory. The GSF is under time constraints to complete its sales and solicitations prior to the deadline, or the closing date, for the directory. Once one canvass is complete, the GSF moves on to the next one.

[132] Each year 25 customers of each sales representatives are asked questions relating to the quality of the service provided by the representative.

For each canvass, Tele-Direct canvass coordinators assign accounts to the sales representatives to ensure as much as possible that each salesperson ends up with a bundle of accounts which is balanced in revenue and in growth potential. Accounts are assigned based on a complex system of "markets" and "grades". For example, "Market 1" accounts are dealt with by premise representatives while "Market 2" accounts are dealt with by tel-sell. As well as being divided by market, accounts are also graded; the lower the grade assigned to an account the higher the potential that type of business will buy Yellow Pages. Grades are based on the type of business as represented by the heading under which it would appear in the directory.

For each canvass the grades and markets for the accounts are analyzed to determine whether, based on factors like time, the size of the cities or towns included and the number of sales representatives available, the premise representatives will cover all of the grades in Market 1, or whether, perhaps, some of the higher grades in that market should be assigned to tel-sell. For the same reasons, for a given canvass, not all accounts are assigned; those with lower potential or that are inactive may be dropped.

For both the premise and the tel-sell group, account assignment has traditionally been random. With a few minor exceptions, accounts were divided up at the beginning of each canvass with no intention of returning individual accounts to the same representative who serviced them in the previous year. In 1993, a test was conducted in a northern market whereby there was 100 percent continuity of tel-sell accounts. Ms. McIlroy's impression of the results was that they were positive in general; however, we have no information about whether tel-sell continuity has been adopted more generally. For premise sales, Tele-Direct adopted the Very Important Advertiser ("VIA") program in the late 1980s which provided a form of continuity: advertisers spending a certain amount per month were assigned the same representative every year. By 1992-93, there was a more general continuity policy in place whereby 30 percent of all premise accounts were assigned back to the sales representative for three years if $500 or more was being spent or a pricing incentive was involved. Currently, about 55 percent of the accounts of a typical premise representative (about 85 percent of revenue) are subject to continuity.

(2) Tele-Direct's Commissionability Rules

Prior to 1958, a 15 percent commission was available on "national" advertising. The definition of "national" was, however, unclear. In 1958, Bell Canada adopted a new policy, developed in consultation with and endorsed by the Canadian Association of Advertising Agencies. To be commissionable at 15 percent, the advertising had to appear in two or more directories serving two or more "calling areas" with no more than 80 percent of the total advertising in one directory. No particular association membership was required of the agency; if the agency's ability to pay was in doubt, its credit was investigated.

Tele-Direct's definition of a commissionable account underwent a further change effective January 1, 1976. The amended definition of commissionability became known as the "eight-market rule". To qualify as a commissionable account under this rule, the advertiser had to purchase advertising with a minimum value of a trade-mark in eight "markets", as defined by

Tele-Direct. Canada was divided into 19 markets, with six in Quebec and seven in Ontario. The entire United States constituted a single 20th market. If the account qualified and the agency provided completed artwork, Tele-Direct would pay a 15 percent commission on the account. Again, no particular membership in an industry association was required.

The commissionability rule was next changed effective July 1, 1993 to create the so-called "national definition" which is the current rule. Under this rule, to be commissionable an account must advertise, at a minimum, in directories in two provinces. Advertising must be placed in at least 20 directories and in each directory the value of the advertising must be a minimum of a trade-mark. Finally, 20 percent of the total value of the advertising must be placed in directories outside Tele-Direct's territory.

In order to receive 25 percent commission on "national accounts" the agency has to be a CMR and a member of YPPA. In addition, to be eligible for the 25 percent commission, the CMR must transmit its order to Tele-Direct via the Value-Added Network ("VAN") run by the YPPA. This facility provides for electronic transmission of account data and other information to a publisher. In order to access VAN, the CMR must be a member of the YPPA and must acquire the necessary computer hardware and software.

All accounts which met the eight-market rule as of July 1993 have been "grandfathered"; Tele-Direct still pays 15 percent commission on those accounts. Once an account ceases to qualify under the eight-market rule, it cannot be re-qualified. New accounts, those which reached eight-market status after July 1993, cannot be "grandfathered". Tele-Direct has made no commitment to how long the "grandfathering" of eight-market accounts will remain in place. It could be discontinued at any time.

C. ALTERNATE THEORIES OF THE CASE

As elaborated in the opening statement, the Director's theory of the case for tying is that the respondents, as a condition of supplying space, have required or induced customers to acquire the tied product, services, from them. We have already reviewed the structure of the market. The respondents offer a commission on accounts meeting their "national" definition and on grandfathered eight-market accounts. They service the remainder of the accounts themselves and do not offer a commission, or price space and services separately, for those "local" accounts, amounting to over 90 percent of Tele-Direct's revenue.

In accordance with his theory, the Director alleges that the respondents by refusing to sell either the space or the services in an unbundled fashion have violated section 77. Counsel for the Director described the Director's case in opening in alternative terms by referring to the respondents' refusal to pay commission except to the limited extent that they now do as a violation of section 77 because commission would be a means of recognizing or effecting an unbundling for the services that non-commissionable customers seek. The Director says that as matters now stand, non-commissionable customers have a choice of either obtaining services from respondents as part of the "package" price that they pay for their advertising or paying twice for the services -- once as part of the package price charged by the respondents and once directly to the service provider.

The respondents say that the Director's concept of tying is misconceived. They submit that there is no product known as "advertising services" separate from a product known as "advertising space". They focus on the *selling* portion of the services referred to by the Director and argue that the sales advice provided by Tele-Direct's internal sales force forms an inseparable package with the space which Tele-Direct supplies in its directories. Indeed, they emphasize, there is no advertising space without a sale. They argue that how advertisements in their directories are sold is a business decision to be made solely by Tele-Direct and is not justiciable. Tele-Direct determines when it is more appropriate to sell its product through its internal sales force and when it will "employ" and pay a commission to agents to sell its product.

In other words, the respondents argue that they have chosen a "hybrid" system. As their primary sales channel, they maintain an internal sales force. They have also chosen to employ agents to sell to a limited group of large advertisers who have distinct needs. Among the reasons given for primary use of the internal sales force were: efficiency, that the average cost of revenues serviced internally was lower than for revenues serviced by outside agents; revenue growth, that the internal sales force is more effective in growing revenue; and servicing, to ensure attention to small advertisers and non-advertisers that Tele-Direct considers important but external agents might not.

The respondents take the position that the Director's application regarding tied selling is an attack on vertical integration. They characterize Tele-Direct's decision regarding commissionability as a choice in some instances to buy services from agents and in others to make the services in-house. They refer to the words of Posner J. in *Jack Walters & Sons Corp. v. Morton Buildings, Inc.* for guidance:

> The end that Walters [a terminated dealer] alleges is that Morton [the manufacturer] wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face `make-or-buy' decisions -- that is, decisions whether to purchase a good or service in the market or to produce it internally -- and ordinarily the decision, whichever way it goes, raises no antitrust question." . . . Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.
>
> A common type of vertical integration is for a manufacturer to take over the distribution of his product. . . .
>
> We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor.[133] (references omitted)

The respondents urge us to take from the words of Posner J. that their narrowing of the commissionability criteria is simply taking over the distribution function internally and Tele-Direct's decision about how to run its business, which it does not have to "justify" to anyone.

The Director underlines that he is not opposed to vertical integration in principle. He cautions, however, that if the method chosen for the vertical integration violates a section of the

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[133] 1984-2 Trade Cas. (CCH) ¶ 66,080 at 66,024-25 (7th Cir. 1984).

Act, with particular reference to sections 75, 77 and 79, then it is subject to challenge and the respondents cannot achieve immunity by "waving the flag of vertical integration". We agree that simply affixing the label of "vertical integration" does not conclusively decide anything. It does not preclude the Director from attempting to convince the Tribunal that what is going on in the case before it meets the requirements of a section of the Act. This view is not inconsistent with the *dicta* of Posner J. in the *Jack Walters* case, who indicates that the presence of market power may cast vertical integration in a different light and points out that market power was not present on the facts before him:

> . . . some economists believe that monopolistic firms might integrate vertically in order to deny supplies or outlets to competitors, or to make it more costly for new firms to enter the market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for *its* competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. *Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly*.[134] (emphasis added; references omitted)

The recognition that vertical integration is generally pro-competitive on efficiency grounds raises another issue. The Director says there is no provision in section 77 for an efficiency "defence". We agree that there is no such explicit reference to an efficiency defence. However, many forced "package sales" are the product of efficiency and even a supplier with market power may sell items in combination for efficiency reasons.

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[134] *Ibid*. at 66,025.

A fundamental requirement of tying is the existence of two products, the tied product and the tying product. It is implicit in the determination of whether there are one or two products that efficiency considerations must be taken into account. We consider that demand for separate products and efficiency of bundling are the two "flip sides" of the question of separate products. Assuming demand for separate products, if efficiency is proven to be the reason for bundling, there is one product. If not, there are two products. As we will review below, this approach is consistent with the American jurisprudence regarding the test for separate products relied on by the Director.

The Director is of the view that, assuming that the necessary elements of the section have been met -- major supplier, two products, tying, and the exclusion of competitors resulting in a substantial lessening of competition -- it is not necessary for him to provide a plausible explanation of *why* or *how* the firm benefits from the tie. This is a valid position. The Tribunal would not impose such a requirement on the Director. It cannot be denied, however, that there is always more comfort in drawing conclusions the greater the depth of understanding.

In this case, the Director has in fact provided explanations as to why Tele-Direct might be engaged in tied selling. The Director submits that Tele-Direct is leveraging its market power in the sale of space into the market for advertising services through tying. One explanation of this is that Tele-Direct's policy of bundling advertising space and services allows Tele-Direct to exploit better an alleged information asymmetry it enjoys *vis-à-vis* its customers, the advertisers. As with any advertising medium, it is not possible to evaluate effectiveness of Yellow Pages advertising with any degree of precision. To the extent that data on effectiveness of the medium is available, it is in the control of Tele-Direct not the advertisers. In light of this, the Director argues that Tele-Direct prefers to keep advertising services in-house as much as possible because its representatives can be more effectively motivated to "oversell" than independent service providers. We will deal with this reasoning in due course.

The Director also says that the "usual" assumption of profit maximization used in determining whether a firm stands to gain from a tie does not apply in the instant case and the economic literature on the subject that relies on this assumption to analyze the possible effects of a tie is not a useful source. He says it is futile to seek a "rational" or "profit-maximizing" explanation for Tele-Direct's behaviour since Tele-Direct, because of its unique situation and relationship to Bell Canada, is not subject to the constraints of profit-maximization and its corollary, cost-minimization.

In support of the premise that Tele-Direct is not profit-maximizing, Thomas Wilson,[135] an economist expert witness for the Director, draws on the fact that the profits of Tele-Direct are included for regulatory purposes when decisions are made about Bell Canada's prices. He is of the view that the pressure to minimize costs is reduced and that there may also be systematic distortions such as the use of more capital than an unregulated firm would use in order to boost the capital base of the regulated firm (the "Averch-Johnson effect"). However, this particular

[135] Professor of Economics and Director of the Policy and Economic Analysis Program at the University of Toronto.

hypothesis is not supported by the evidence which, in fact, points in the other direction insofar as Tele-Direct has chosen to subcontract capital intensive operations such as printing.

Professors Wilson and Slade, for the Director, are also of the view that management's decisions with respect to the commissionability of various accounts are motivated by a concern to maximize *sales* rather than to minimize *costs*. Professor Wilson sees the reduced pressure on regulated firms to minimize costs as allowing Tele-Direct's management to pursue personal interests, such as operating a larger enterprise, thereby garnering personal satisfaction and monetary rewards. Professor Slade is of the view that the ownership structure of Tele-Direct, whereby there is no threat of a takeover, contributes to allow management to pursue its hypothesized desire for larger size.

Even though there are several occasions when we have difficulty understanding the decisions of Tele-Direct's management if they really are pursuing cost-minimization, we are far from convinced that Tele-Direct's management is not generally constrained to follow a profit-maximizing course. The fact that Tele-Direct is a wholly-owned subsidiary should be sufficient to ensure that there is adequate ownership control. It is obvious from the evidence of Mr. Courtois, the Bell Canada representative on Tele-Direct's Board of Directors, that Bell does not practice micro-management. The main instrument of control appears to be the requirement that Tele-Direct pay Bell the same percentage of revenues as Tele-Direct is required to pay other telcos when it contracts to perform their directory functions. This requirement was introduced precisely to impose market discipline on Tele-Direct. In addition to the forty percent of revenue that Tele-Direct remits to Bell, it also makes a substantial contribution to Bell's profits in the form of dividends. The evidence does not support the conclusion that Bell has been cavalier about allowing Tele-Direct's management to pursue other than profit-maximizing goals. Moreover, in recent years Bell's earnings have been well below its regulated allowed rate of return, a situation not conducive to permissiveness. Even when Bell earnings were not below the allowed rate of return, higher profits from Tele-Direct would still benefit Bell between applications for rate increases.

While we do not rule out that Tele-Direct's management may be under less than the usual amount of pressure to perform, we are reluctant to discard the usual working assumption of profit-maximization in the absence of some compelling evidence that is consistent with the assumption that Tele-Direct is pursuing other goals. The only specific evidence cited in support of the premise that Tele-Direct's management pushes revenue growth beyond the point of profit-maximization is the stress that they place on canvassing businesses that do not advertise in the Yellow Pages, the non-advertisers. The success rate from this effort is low and Professor Slade concludes that the fact that the effort is made can be explained by management's greater concern with growth of revenue than with profits. On the whole, however, the evidence on the canvass of non-advertisers is that moderate resources are devoted to this task. We are not convinced that the canvass of non-advertisers is not profit-maximizing.

We note here that there is another possible theory of the case. For reasons of clarity and coherence, however, it is more convenient to deal with it at a much later point in these reasons. We return to it below as an "Addendum" to our conclusion regarding the separate products issue.

We therefore do not accept that we should approach this case with a view to treating Tele-Direct as other than a profit-maximizing firm, albeit a firm with market power. Nor do we accept that efficiency considerations are not relevant to our section 77 analysis. Efficiency and demand, together, form the basis of the consideration of one or two products, to which we now proceed.

D. SEPARATE PRODUCTS

(1) Approach to Determining Separate Products or Single Product

The first element of section 77 to be considered is whether advertising space and advertising services are separate products. The Director takes the position that advertising services constitute a distinct product separate from advertising space. The respondents argue that advertising services are in fact an "input" into Yellow Pages advertising, not a separate product.

Merely labelling advertising services and advertising space as either two "products" or as "inputs" into a single product does not assist. As Areeda, Hovenkamp and Elhauge state:

> . . . just about any product could be described as a tie of its components. And just about any two products could be described as mere parts in a more encompassing single product. . . .[136]

There must be some rationale for distinguishing between situations where there are two products involved, and thus at least the possibility of an illegal tie that should be prohibited, and those where there is a single product and no question of tying.

The parties are in agreement that the Canadian jurisprudence does not provide much guidance on the test to be applied. Both parties referred to the 1984 decision of the Supreme Court of the United States in *Jefferson Parish Hospital District No. 2 v. Hyde*[137] for guidance, although they emphasize different portions of the decision.

In *Jefferson Parish* the Court provided its most extensive discussion of the "single product" test. At issue in the case was the validity of an exclusive contract between the hospital and a firm of anaesthesiologists. Any patient who chose to have an operation performed at that hospital was required to use an anaesthesiologist employed by the firm in question (Roux & Associates). The Court had to decide if this constituted an illegal tying arrangement. In making that inquiry, the Court considered two questions, whether the hospital was selling two separate products that might be tied together and, if so, whether the hospital used market power to force its patients to accept the tying arrangement. The majority answered the first question in the affirmative but the second question in the negative (the hospital was found not to have

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[136] P.E. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law*, vol. 10 (Boston: Little, Brown, 1996) at 175.

[137] 466 U.S. 2.

market power), so in the result it found no illegal tying arrangement. The minority found only one product and concluded for that reason that there was no illegal tying arrangement.[138]

In discussing the question of separate products, the majority noted that the answer to the question of one or two products turns not on the functional relationship between them but rather on the character of the demand for the two items. The majority then stated:

> . . . Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.[139] (reference omitted)

We adopt this statement of the majority as the applicable test for separate products. We believe that this test effectively captures both the demand and the efficiency elements necessary for us to distinguish between cases when a tie that is injurious to consumer welfare is possible and those in which the tie, although imposed by a major supplier, is efficient and should not be condemned. Demand is, of course, critical. If there is no demand, it would be pointless to require that the two products be offered separately. Efficiency is also critical as the existence of separate demand should not govern if providing the products separately would result in higher costs that would outweigh the benefits to those who want them separately.

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[138] The majority consisted of Stevens, Brennan, White, Marshall and Blackmun JJ. The minority included O'Connor, Powell, Rehnquist JJ. and Burger C.J.

[139] *Supra* note 137 at 21-22.

Our approach will be to examine first the evidence pertaining to the demand side of the equation, to determine whether the Director has proven buyer, in this case advertiser, interest in acquiring space and service separately. By this we mean an answer to the question: "Is there a significant set of advertisers who actually want the items separated?" If this question is answered in the affirmative, then we will turn to the evidence relating to whether it is efficient to separate the products.

The respondents rely on a portion of the minority judgment in *Jefferson Parish*. The minority wrote:

> . . . there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services, so the hospital can acquire no *additional* market power by selling the two services together. . . . In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.[140]

In conclusion, they reiterated:

> . . . Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. *The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of services.*[141] (emphasis added)

[140] *Ibid*. at 43.

[141] *Ibid*. at 46.

The respondents did not provide us with any reason to adopt the minority judgment over the majority. In fact, the majority opinion explicitly rejected tests based on functional relationships, including the "useless without" test. In a footnote the majority noted:

> The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices. . . .[142]

There are also sound economic reasons to reject such a test. As pointed out in the Areeda text, it may perversely save the most dangerous ties and call for review when there is little likelihood of adverse effects. The authors of that text use the example of a manufacturer with a monopoly over can-closing machinery who requires all purchasers of the machinery to buy cans from it to point out that:

> . . . [s]uch a tie would bring the [manufacturer] a complete monopoly over cans, for presumably no one would buy empty cans without the machinery to close them. Yet the useless-without test would immunize this tying arrangement. Moreover, while short-run profit maximization is *generally* not enhanced when the tied product has no other use, monopoly in the tied market can impair competition severely in the long-run. . . .[143]

(2) Other Case Law

The respondents have also advanced a plethora of other American cases with respect to the question of separate products. In general, the respondents rely on these cases to urge us to view the facts before us solely from the supplier's (Tele-Direct's) perspective and to ignore

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[142] *Ibid*. at 19 n. 30.

[143] *Supra* note 136 at 269.

demand considerations. Their fundamental premise appears to be that Tele-Direct's choice to "market" its product in a certain fashion is determinative and negates the possibility of any tying claim. We did not accept the Director's argument that considerations of demand govern; likewise we reject the respondents' argument that a supplier's choice is paramount. Both elements of demand and efficiency will be taken into account, as set out above. In any event, it is clear that the case before us is unique and does not "fit" exactly into any of the precedents cited to us. A more detailed treatment of the case law follows.

(a) Single Product

One tying case was referred to, *Souza v. Estate of Bishop*,[144] a case against a lessor of land in Hawaii based on the refusal of the lessor, like most other landowners in Hawaii, to sell the land. The tying product was argued to be the residences plaintiffs owned on the land while the tied product was the leasehold. The claim was dismissed on a motion for summary judgment, affirmed by the Court of Appeal.

From this decision, the respondents ask us to conclude that if a supplier presents two products as a package or, in other words, if they are being marketed together, that is the end of the matter and the Tribunal must conclude that there is a single product. The Court found that the plaintiffs' argument defied reason because the product being marketed was a house plus leased land and not a house purchasable separately from the land on which it stood. The Court also

[144] 1987-1 Trade Cas. (CCH) ¶ 67,628 (9th Cir. 1987).

found that the plaintiffs presented no evidence that the house and the leased land constituted separate products. We have already set out the test we intend to apply, which takes into account both demand and supply. We do not accept that simply because a producer or a supplier bundles products together that they are, *ipso facto*, one product.

Four cases are relied on by the respondents because they involve the Yellow Pages industry or an analogous industry. The respondents argue that these cases indicate that the United States courts have uniformly rejected any concept of an antitrust violation because of a publisher's refusal to pay commission or its decision to change the accounts on which it will pay commission. Thus, they conclude that the courts "in effect" have treated directory advertising as one product. They make this argument despite the fact that none of these cases was based on a claim of tied selling and therefore the issue of separate products in the sense with which we are dealing here was not before the court. The respondents claim, however, that these cases indicate that there is only one product *because* the tying argument was not raised in any of them.

We do not accept that the absence of a tying claim makes the cases dispositive of the issues before us in a tying case. In general, we do not see how the results in these cases can be directly transferred to the case before us. We will, however, review the decisions in order to see what, if any, assistance we can draw from the findings in resolving the issue of separate products on the facts before us.

In *Selten Agency, Inc. v. Pacific Telephone and Telegraph Co.*,[145] a specialized advertising agency brought an antitrust action involving numerous allegations against a number of telcos and telephone directory publishers that were members of the National Yellow Pages Service Association ("NYPSA") (the predecessor to YPPA). All of the allegations involved joint action by the NYPSA members. The only issue with any possible, although remote, relevance to this case was the claim by the agency that the NYPSA members *agreed* not to pay commissions on local advertising to agencies, constituting an illegal horizontal division of markets.

The Court concluded there was no evidence of an illegal agreement. The evidence was that the NYPSA agreement covered only national advertising; there was no prohibition on commissions for local advertising. Publishers were free to offer commission on local accounts and, the Court notes, some, in fact, did so. The Court also noted that those who did not offer commission on local accounts had their own sales force and therefore did not require the services of advertising agencies. The respondents rely heavily on the next sentence of the judgment, that "[i]t is not a violation of the antitrust laws for a publisher to refuse to buy a service that is not worth buying"[146] to argue that publishers do not have to buy services from agents or, in other words, provide a commission for any accounts they do not want to. As we have already stated, we do not accept that the supplier's choice is the sole governing factor in a tying case. Due consideration must be given to the supply side of the equation but we cannot ignore demand considerations.

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[145] No. CV 77-3450-FW (Dist. Ct. C.D. Cal. 8 June 1981).

[146] *Ibid*. at 17.

In *O'Connor Agency v. General Telephone Co.*,[147] an advertising agency alleged that a Yellow Pages publisher conspired with other publishers to change the definition of local or "B" accounts so that commission would no longer be paid on those accounts. The defendants brought a motion for summary judgment which was granted.

In granting the motion, the Court found an "agreement" to change the criteria based on adherence to the YPPA guidelines. Using a rule of reason approach, the Court then proceeded to consider and weigh both the anti- and pro-competitive effects of the change in the relevant market. The Court found that the plaintiff had provided no admissible evidence that the relevant product market was Yellow Pages and also provided insufficient admissible evidence of actual anti-competitive effect arising from the change. The Court also found that the publisher had a legitimate business reason for adhering to YPPA standards, namely the uncontroverted evidence that the defendant changed the commission criteria to increase its national Yellow Pages advertising which was not performing up to expectation.

The respondents rely on this case for the very broad proposition that "the U.S. jurisprudence directly involving Yellow Pages has rejected any concept of any antitrust violation because of the refusal of a publisher to pay commission to a CMR or as a result of the publisher changing the accounts on which it will pay a CMR" and that "[i]n effect the courts have said there is only one product that we're selling and we can sell it through whatever channel we

[147] No. CV-93-3650 LGB (U.S. Dist. Ct. C.D. Cal. 2 August 1994), appeal pending.

want".[148] The case certainly does not support those broad generalizations. It was a conspiracy case resolved on a motion for summary judgment because of failure to prove either a relevant market or actual anti-competitive effect.

The respondents submit that the case of *Thompson Everett, Inc. v. National Cable Advertising, L.P.*[149] is analogous to the case at bar. In that case an independent cable television advertiser representative brought action against exclusive contracts between the cable company and their spot advertising sales agents on the basis that the "traditional" cable representatives or sales agents were engaged in a concerted effort to exclude the independent from the business. The Court of Appeal affirmed the decision of the lower court to grant summary judgment.

The Court found that the exclusive contracts were not being enforced through an illegal conspiracy. It also found that the independent did not have access to the exclusive contracts because it was not willing to compete with the exclusive agents for them and was simply seeking to substitute its own method of serving the cable company for that selected by the cable company. The Court also found that there was no unlawful monopoly in the cable representative market because cable companies are part of a larger market.

Once again, the respondents rely on this case to argue that the Court endorsed the cable company's choice of using exclusive representatives simply because that was the way the cable

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[148] Transcript at 66:13762-63 (26 February 1996).

[149] 57 F.3d 1317 (4th Cir. 1995).

company chose to do it. We have already indicated that the supplier's choice will not be the only consideration in a tying case. Indeed, the case itself does not go that far.

The most interesting decision referred to by the respondents is *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*[150] The case involved a claim by an "authorized selling representative" ("ASR") for the placement of national advertising in telephone directories that the publisher had monopolized or attempted to monopolize the sale of Yellow Pages advertising. Because of problems in collecting payment for advertising placed by the ASR, the publisher started billing the advertisers directly. The ASR claimed that the publisher's direct contact with its customers resulted in a loss of accounts to it and its eventual failure.

The monopolization case failed because the ASR could not define any relevant market in which it and the publisher competed. The ASR had originally based its claim on the national advertising market where the publisher competed for the sale of national advertising as an ASR itself but could not show any market power on the part of the publisher in that market. The claim was then amended to allege that the relevant market was the sale of advertising space in a specific directory, shifting the focus to local advertising. Based on evidence that the ASR had received commission for the placement of advertisements for two local advertisers, apparently by accident, the ASR argued that it competed with the publisher's sales force for local advertising. The argument of the ASR was that the lawful power to publish the exclusive directory for a

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[150] 1987-2 Trade Cas. (CCH) ¶ 67,683 (11th Cir. 1987).

specific geographic area did not give the publisher the right to be the exclusive seller of advertising space within that directory as publication and sale were separate activities.

The Court commented that the ASR's market theory had a certain "superficial" appeal based on its similarity to a typical wholesale/retail monopolization case where a vertically integrated manufacturer uses its dominant position at one level of activity (manufacturing) to eliminate competition at another level (retailing). The Court noted that for the ASR's theory to work, the publisher must be viewed as a wholesaler or manufacturer of advertising space and the ASR as a retailer of this space. If not a retailer, the ASR could not be considered a competitor of the publisher at the retail level.

The Court concluded that, to the extent that the sale of Yellow Pages advertising is an activity separable from the publishing of the advertising, the sales made by independent ASRs were in the nature of an agency and not retail sales. Agents, the Court noted, do not compete with those whom they represent. The wholesale/retail analogy failed, in part, because there *could* be no "resale" of Yellow Pages:

> . . . Yellow pages is not a product that is produced and distributed. The blank yellow pages do not exist prior to the sale of an advertisement, somehow awaiting distribution on a resale market. Each advertisement, that is, the space of the ad, is "created" when the advertisement is sold to the advertiser. . . . ASRs do not maintain an inventory of ad space to be sold. An ASR cannot purchase a page in the yellow pages and then distribute it to advertisers as it sees fit.[151]

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[151] *Ibid*. at 58,482.

The agency characterization was preferred, in part, because the Court considered the relationship between the publisher and the ASR in the case before it to be analogous to the relationship between an airline and a travel agent:

> . . . The publisher lawfully establishes the price for its advertising and announces it to the public. It determines when it is going to publish directories, and has the ultimate say on how many advertisements it will accept. An advertiser may deal directly with the publisher, or may use an Authorized Sales Representative. However, should it use an ASR, the ASR must submit a request for advertising to the publisher, analogous to a reservation in the forthcoming publication. The ASR does not purchase an inventory of yellow pages space. The service which the advertiser has paid for is performed by the publisher, not the ASR. Further, should the advertisement fail to appear as requested in the appropriate directory, the publisher is under an obligation to refund the advertiser's money. Finally, should a publisher not receive enough advertisements to make a directory profitable, it must still publish the directory; the publisher retains the "risk" that not enough yellow pages advertisements will be "distributed" -- not the ASRs.[152]

The Court found ample evidence in the record that the ASR functioned as an agent, including the NYPSA guidelines which provided that ASRs represented the publisher "when selling National Yellow Pages advertising to national advertisers or their advertising agencies, or when negotiating disputes with such national advertisers or their advertising agencies".[153] The Court noted that there was also evidence that the ASR acted as an agent of the advertiser, including liability to the publisher for payment, but concluded that "[e]ither way, an ASR functions as an agent, not an `independent contractor,' and not, in any case, as a retailer of yellow pages advertising space."[154] Thus, the leveraging argument failed as there was no "second activity" to be monopolized by using the publisher's market power to publish directories as leverage.

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[152] *Ibid*. at 58,483.

[153] *Ibid*.

[154] *Ibid*. at 58,484.

One element of this decision is the Court's insistence that the ASRs had to be considered retailers in order to be in competition with the publisher. A finding that the ASRs were merely agents of the publishers or, perhaps, agents of the customers, in the sense of having no independent existence from either or both of those two entities seems to preclude competition between the ASRs and the publisher. We do not believe, however, that the inapplicability of a strict retail model is conclusive. The Court did mention in passing, for example, independent contractors. The fundamental question is whether the publisher is in competition with the ASR or other person alleged to be excluded by the activity in question, which we agree is a question that should also be addressed in the context of a tying claim.

A second important element of the Court's conclusion concerned the functions performed by ASRs, that were apparently viewed as simple "order takers" insofar as the commission from the publisher was concerned. The Court indicated its assumption that the ASR was paid separately by the advertiser for other services such as layout[155] when it distinguished the case before it from a successful monopolization claim by an advertising agency against a television station. The television station had expanded its in-house advertising agency services by starting to produce commercials (for a fee) as well as selling air time. In *Ad-Vantage*, the Court stated:

[155] Or these might have been provided by the advertiser's "advertising agency" and not the ASR.

> Thus, in *Six Twenty-Nine Productions*, a leveraging argument was possible. The production of [Yellow Pages] advertisements is a related activity separate from the sale of advertising space. Each is a separate source of revenue. In the context of this case, no evidence was presented indicating that ASRs receive no separate compensation from their clients when the ASRs engage in the production -- the lay out -- of the advertisements. In fact, testimony of a former NYPSA official indicated that *most* of the national yellow pages advertising is purchased through ASRs by advertising agencies on behalf of national advertisers, supporting the notion that ad agencies perform a separate function. Thus, the leveraging argument made in *Six Twenty-Nine Productions* is not available here.[156]

What we take from this case is that it is important to examine the actual services performed by the agents for advertisers and the relationship between Tele-Direct and the agents, with a view to determining if they do, in fact, "compete" with Tele-Direct in any relevant sense.

(b) Relationship between Agents, Advertisers and Tele-Direct

The respondents say that, as in the *Ad-Vantage* case, agents in the case before us function as either representatives of Tele-Direct or, on occasion, as agents of the advertisers. In the first case, Tele-Direct does not compete with itself or its own representatives and in the second, it cannot be considered to compete with its customers. Based on the evidence of Charles Mitchell, Tele-Direct's Director of Marketing Sales Support, they submit that, in fact, Tele-Direct has not competed for agency accounts since 1992. The Director argues that, unlike in *Ad-Vantage*, the Canadian CMRs are not agents of Tele-Direct. The Director submits that the evidence supports the proposition that Tele-Direct has consistently considered, and still does consider, the agencies as its competitors.

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[156] *Supra* note 150 at 58,484.

The initial point at issue is the exact contractual relationship between agents and Tele-Direct. In 1988, Tele-Direct required the agencies to sign new contracts with it. Under those contracts, the agent warrants that it is duly authorized to enter into the agreement on behalf of the advertiser. Further, the agency agrees that "it is not acting and does not purport to act as agent for Tele-Direct."[157] This is exemplified by the provisions that the agent agrees to pay for the advertising; to indemnify and hold harmless Tele-Direct from claims by the advertiser; and to warrant on behalf of the advertiser the truth of all assertions in the advertising. Tele-Direct's Corporate Secretary and legal counsel, Patrick Crawford, confirmed that these contracts have not been revoked and that the agencies were not agents for or of Tele-Direct.

The respondents argue that the 1993 YPPA agreements entered into by the agencies in order to be accredited as CMRs supersede the earlier contracts although no steps have been taken to repudiate or amend the earlier contracts. In the application to be accredited as a CMR, the agency agrees to "represent" the publisher in the same terms as quoted in *Ad-Vantage* from the NYPSA guidelines.[158] The YPPA guidelines, however, describe a CMR as a member of YPPA which:

> a. Represents to the users the Publishers' product, services and policies, while representing to the Publishers the customers' needs, desires and concerns.
>
> b. Develops a comprehensive national Yellow Pages advertising program for prospects and/or advertisers.

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[157] Confidential exhibit CJ-16 (blue vol. 7), tab 214 (public), art. 10.

[158] Exhibit J-5 (green vol. 3), tab 154 at 32277.

c. Compiles and provides current information pertaining to all Publishers' practices affecting an advertiser's national Yellow Pages program.

d. Develops market research and cost studies for the advertiser or its agency as a basis for making advertising proposals.

e. Provides Publishers on a timely basis with the authorized list of dealers for solicitation under Advertiser's Trade Item.

f. Pays Publishers' invoices without recourse within the time period set forth in the individual Publishers' credit terms, notwithstanding its own collection status with that advertiser or its agency, unless any individual Publisher provides otherwise.

g. Absorbs all adjustment amounts incurred as a result of its own acts, errors, or omissions which including (*sic*) among other things, failure to notify Publishers of cancellations of orders, unless any individual Publisher provides otherwise.[159]

What comes out of this somewhat contradictory documentation of the relationship is that agents are not agents or representatives of Tele-Direct in any sense that would preclude a finding that the two are in competition. The agents are not so allied with Tele-Direct as a publisher that they have no independent existence. Their relationship has elements of both co-operation and competition.

The agents rely on the Yellow Pages industry, as represented by YPPA, and Tele-Direct specifically, to provide information on the effectiveness of Yellow Pages advertising. They are

[159] Exhibit J-4 (green vol. 2), tab 99 at 28021-22.

accredited based on industry standards. With respect to accreditation and the promotion of the medium, the relationship between Tele-Direct and the agents is undoubtedly cooperative.

However, the thrust of the Tele-Direct internal documentary evidence is that Tele-Direct treated the agents as competitors of its internal sales force. Prior to the 1990s, Tele-Direct sought to protect its client base from the agents by selling advertisers on using its services instead, stressing the advantages that dealing directly with Tele-Direct offered, including monthly billing and later closing dates, as well as considering more positive initiatives like assigning representatives to large accounts for a longer period of time. During the early 1990s, when Mr. Mitchell was head of the national accounts group, Tele-Direct actively competed for agents' clients. Mr. Mitchell testified that as of 1992, the approach changed to one of protecting internal accounts and revenue only but the documentation does not bear this out. Certainly, one of the reasons for the creation of Tele-Direct (Media) Inc. in 1994 was to combat the loss by Tele-Direct of national accounts to CMRs. The only "contradictory" evidence on this point is a somewhat unclear statement by Wayne Fulcher of DAC that prior to the formation of its CMR, Tele-Direct did not "normally" try to take away agency "headquartered" accounts. However, Mr. Fulcher does think that Tele-Direct's CMR is in competition with his agency.

Perhaps the most telling point is that Tele-Direct requires that agencies pay at the time of issue of a directory for advertising placed on behalf of their clients. If agents were only agents of Tele-Direct, they would not be financially responsible for the obligation of third parties -- the advertisers. This is compelling evidence that the agencies do not act as agents of Tele-Direct.

The evidence is that Tele-Direct has always considered agents to be, and has reacted to them, as competitors.

Nor can the agents be considered to have no independent existence apart from the advertisers themselves that they also "represent" in the sense of placing orders for advertising on their behalf. Yellow Pages advertising is not a simple product to buy and advertisers desire assistance in making the purchase. Agents, however, are not *mere* "order placers" for advertisers or other advertising agencies employed by advertisers. The evidence before us, which is reviewed in more detail below, is that agents provide a range of services, including advice, layout, design and administration, for which they do not receive additional compensation beyond the commission paid by Tele-Direct.[160] Further, we have no evidence that much of the agents' business consists of simply placing orders for another advertising agency employed by the customer to do the remaining work involved in producing the advertising. Advertisers want these other services in relation to their Yellow Pages advertising from agents. Thus, for advertisers, agents have a separate existence from Tele-Direct.

The relationship between Tele-Direct and agents is complex. Tele-Direct treats the agents as independent businesses with which they cooperate to advance their own objectives but with which they also compete. While Tele-Direct apparently recognizes that agents can service certain accounts better than its internal sales force, by reason of its creation of a class of commissionable

[160] The evidence is that agents charged separately for artwork when the commission rate was 15 percent but do not do so at the 25 percent commission rate.

accounts, it is also its goal, or at least the goal of certain groups within the corporation such as the national accounts group, to keep as much revenue as possible in-house and reduce its dependence on agencies to the absolute minimum possible. We conclude that the business relationship between Tele-Direct and agents is not inconsistent with Tele-Direct and agents treating each other as competitors.

(c) Additional Economic Benefit

The respondents argue that there is an "exception" to tying recognized in the American jurisprudence where the seller of the alleged tying product does not receive an "additional economic benefit" from the sale of the tied product. They say that Tele-Direct gets no additional economic benefit from the sale of services in this case because there is no "separate charge" for services.

The respondents cite two cases on this point. The first is *Directory Sales Management Corp. v. Ohio Bell*,[161] a decision affirming summary judgment granted against the plaintiff in an antitrust suit by an independent directory publisher against the telco and its directory publisher. The two defendants were wholly-owned subsidiaries of the same parent. One of the allegations was that the defendants tied business telephone service (tying product) to a free Yellow Pages listing (tied product) by refusing to reduce the price of the telephone service if the subscriber chose not to be listed.

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[161] 833 F.2d 606 (6th Cir. 1987).

The Court noted that an illegal tying arrangement might exist if the telco in some way charged for the "free" listing indirectly in the bill for telephone service, even though it did not charge for the listing directly. The evidence was that there was no hidden charge for the listing as the telco did not pay the publisher for the expenses incurred in publishing the listing. The Court stated that if the telco did not receive a "financial benefit" from the tied product, there could be no tying arrangement.

The second case is *Beard v. Parkview Hospital.*[162] Dr. Beard, an osteopathic radiologist, was employed by a group of doctors that was the exclusive provider of radiological services to Parkview Hospital. Dr. Beard resigned from the group with the intention of providing radiological services on his own to patients at Parkview Hospital. The hospital did not permit him to do so and Dr. Beard sued, alleging that the exclusive contract for radiological services was an illegal tie of radiological services to other hospital services. Under the terms of the contract between the hospital and the group providing the radiological services, the group billed patients directly for its services and the hospital did not share in the fee. The lower court granted summary judgment for the hospital.

In affirming the dismissal, the appeal court approved the lower court's reliance on the requirement that the seller of the tying product must benefit directly from the sale of the tied product. The Court held that the requirement was also consistent with *Jefferson Parish*, which stated that an illegal tying arrangement is one where a firm with market power attempts to

[162] 1990-2 Trade Cas. (CCH) ¶ 69,154 (6th Cir. 1990).

impose restraints on competition in the market for the tied product, because the seller who "derives no economic benefit from sales of an alleged tied product or service is not attempting to invade the alleged tied product or service market in a manner proscribed by section 1 of the Sherman Act."[163]

Areeda explains the purpose of this rule in American case law and its relationship to tying as a *per se* offence:

> . . . a tie-in, though affecting a substantial volume of commerce in the tied product, is not per se unlawful when it does not foreclose any rival supplier or, perhaps, when any such foreclosure is inherently minor. . . .
>
> One convenient and frequent way to capture the concept of a relevant foreclosure is to ask whether the defendant has a financial interest in the tied product. In most courts, ties do not cross the threshold of potential power or effect when the defendant lacks an economic interest in the tied product, primarily because such a tie does not ordinarily enhance the defendant's power in the tied market or bring about any other consequences of the kind that the per se rule against tying seeks to prevent. "Foreclosure" there may be but not a relevant one.[164] (reference omitted)

Further, using the example of a defendant firm accused of providing its product *A* only to buyers who purchase *B* from a second, separate firm *T*, thus "foreclosing" other suppliers of product *B*, he explains:

> The defendant who gains not a penny, directly or indirectly, from firm *T*'s sales of product *B* is no "competitor" in the market for the tied product *B*. This much is clear, although there are difficulties ahead in deciding what type and magnitude of financial connection with firm *T* makes the defendant a "competitor" of those foreclosed suppliers.[165]

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163 *Ibid*. at 64,348.

164 P.E. Areeda, *Antitrust Law*, vol. 9 (Boston: Little, Brown, 1991) at 330-31.

165 *Ibid*. at 333.

Therefore, where there is no financial interest in sales of the tied product or in the tied market, the alleged tie-in does not cross the threshold for *per se* illegality, although the alleged tie does remain subject to review under the rule of reason.[166]

There are three points to be made regarding this argument of the respondents. First, the test of lack of any financial interest in the tied market or economic benefit from the sale of the tied product, however worded, is closely linked in American law to the *per se* nature of tying, which makes us reluctant to adopt it directly because Canadian law is based on a different standard, that of "substantial lessening of competition".

Second, there is some validity to the Director's argument that the question of economic benefit from the tied product, or of participation by the firm with market power in the tied market, only arises when two separate corporate entities are involved in the supply of the tying and the tied products. That was the case in both decisions cited and is not the case on our facts.

Further, in the *Beard* case it was abundantly clear that the hospital itself, the supplier of the alleged tying product, was not a participant in the radiological services, or tied product, market in any way as it did not receive any part of the fee for those services, which went directly from the patient to the unrelated doctors' group. In *Ohio Bell*, the situation was less clear as the two corporate entities were related but, in any event, the Court was definitive that there was no evidence of a "hidden" or "indirect" charge for the Yellow Pages listing in the telco's bill for

[166] *Ibid*. at 347.

telephone service. The telco, the firm with market power, was not attempting to, in the words from *Beard*, "invade" the market for the supply of directory listings.

In contrast, on the facts before us, Tele-Direct itself supplies both space and services to all advertisers, both commissionable and non-commissionable. We also have evidence that it considers both consultants (detailed elsewhere) and agencies, the alternate service suppliers, to be its competitors. Since Tele-Direct provides services, it must be compensated for them. As a rational firm it would not provide something for nothing. Therefore, it cannot be concluded that it receives "no additional benefit" from its own sales of the alleged tied product. The precise form of that compensation or "benefit" is not at issue here.[167] Whether Tele-Direct has succeeded in foreclosing any alternate suppliers in the services market is evidently a relevant question but that is not what this argument of the respondents focuses on. This argument is that Tele-Direct gets no additional economic benefit from the provision of services and that, therefore, any exclusionary effects in that market are irrelevant because of the lack of linkage to the firm with market power over the tying product. The facts do not support this hypothesis.

(d) Separate Billing/Separate Payment

The respondents argue that if a producer pays for the "components" of a "product" directly and then sells the "product" complete with "necessary inputs" at a specified price, there

[167] The element of no separate charge, or separate billing, for services, which the respondents appear to allude to as part of this argument, is another issue which is dealt with in the next section.

is no tying. They state that the concept of tying *only* applies where the customer pays *separately* for the alleged tied and tying products. In oral argument, this was expressed as the proposition that it is not a tie to bundle something because as long as there is only one "cost" to the buyer, what is being sold is the supplier's single "product".

A distinction was drawn between the case at bar and the facts in *Jefferson Parish*, in which the respondents submit the items found by the Court to be separate products were not "bundled" but were in "two pieces" because there were two bills. They argue that the patient in *Jefferson Parish* paid for both "parts", presumably hospital services and anaesthesiological services, and that if a buyer pays for two different things on two bills, there cannot be one product. Reference was also made to the case of *Collins v. Associated Pathologists, Ltd.*[168]

Turning to *Jefferson Parish*, the distinction drawn by the respondents between that case and the instant case on the facts relating to billing is not as apparent as argued. In *Jefferson Parish*, the hospital and Roux & Associates had a contract which provided that all anaesthesiological services required by the hospital's patients would be performed by Roux. The hospital agreed with Roux to provide an anaesthesia department, including space, equipment, maintenance and other services, drugs and supplies, and nursing personnel (subject to approval by Roux). The use of the anaesthesia department was restricted to physicians employed by Roux. As the Court said:

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[168] 1988-1 Trade Cas. (CCH) ¶ 67,971 (7th Cir. 1988).

> The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations. At East Jefferson Hospital the package includes the services of the anesthesiologist.[169] (reference omitted)

The Court describes the billing arrangement as follows:

> . . . The fees for *anesthesiological services* are billed separately to the patients by the hospital. They cover the hospital's costs *and* the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.[170] (emphasis added)

The majority of the Supreme Court did consider the "separate billing" of anesthesiological services" as a factor that entered into its determination of whether there were separate products. Yet, the actual billing arrangement, as described by the Court, looks very much like a combined bill for the tied product (professional anaesthesiological services) and part of the tying product (hospital services), much like Tele-Direct's bills for Yellow Pages advertising. Specifically, the amount billed included both a professional services portion for anaesthesiological services and a hospital-supplied anaesthesia equipment, facilities, support personnel and drugs portion. The fee is simply divided equally between the two, irrespective of the actual extent of professional services required in the particular case. It is not explicit separate billing of professional services.

[169] *Supra* note 137 at 18.

[170] *Ibid*. at 6 n. 4.

In any event, there is no indication in the Court's decision that the factor of "separate billing" is essential or even critical. The most that can be said is that it is one factor to examine. We agree with the Director that if the entire resolution of the one or two products issue could be determined simply by the pricing or billing arrangements, this would allow suppliers to immunize all activity from tying claims simply by refusing to quote separate prices for items provided as a package.

Further, the Director submits that the mechanism or the route by which the money ends up in the hands of the separate service supplier is not relevant. In the commissionable market, the separate service supplier is paid by commission. A payment by commission may be somewhat more circuitous than, for example, direct billing by the hour by agents for their services (allied with a discounted price for space provided by Tele-Direct to persons who did not use its services) but the end result is the same -- the advertiser pays for the services, the advertiser receives the services of an agent, the agency receives payment for the services provided. Payment to agencies by way of commission was historically, and to a large degree still is, a fact of life in all advertising media.

The significance of the reference to *Collins* in this context escapes us. The Court in that case found that there was no distinct demand for pathology services as a product separate from hospital services. The Court did not refer to billing arrangements at all in making its findings. It based its conclusion solely on the lack of consumer or patient requests for specific pathologists or perception of pathology services as separate from other hospital services.

In summary, none of the cases referred to convinces us that the approach we have adopted to the separate product question is inappropriate. Several were largely irrelevant because they dealt with completely different facts or different, non-tying, antitrust issues. To the extent issues were raised which we considered relevant, particularly in the other Yellow Pages cases, we dealt with them in that context. We will now proceed with the basic approach we outlined at the outset and consider the evidence and arguments relating to demand and efficiency.

(3) Demand by Advertisers

Are advertisers that fall in that portion of the market which Tele-Direct currently defines as non-commissionable interested in purchasing the services associated with creating and placing a Yellow Pages advertisement from a source other than Tele-Direct? In other words, does Tele-Direct's practice of bundling space and services for a single price "force" them to buy a product that they would rather not buy from Tele-Direct? Or, do they regard the two components as a package that they would rather not acquire separately in any event?

The Director called 19 advertiser witnesses; the respondents called two. All of the witnesses except the two called by the respondents expressed a desire to obtain the services associated with developing and placing Yellow Pages advertising from someone other than Tele-Direct. Seven of the 19 advertisers called by the Director are current agency clients; [171] the remainder of the advertisers are serviced directly by Tele-Direct representatives. Of those, eight

[171] One advertiser (Turpin Group Inc.) participates in a trade-mark advertisement for General Motors dealers for which General Motors, a national advertiser, uses DAC. Turpin's own advertising is treated as local and it deals with Tele-Direct's internal sales force.

use or have used a consultant. Three would like to use an agent but cannot qualify for commission.

Fourteen witnesses represent multi-outlet (whether franchised, licensed or corporate-owned), multi-directory advertisers. The geographic dispersion of the outlets ranges from a metropolitan area to country-wide. Three are single outlet but multi-directory advertisers because of the wide territory from which they draw business. The remaining four advertisers are single outlet, single directory advertisers. All of the witnesses called are spending above-average amounts in the Yellow Pages. Two were spending close to the average of $1,700 (at about $2,000 annually each); the remainder ranged from $7,000 to $300,000.

The respondents have not attempted to rebut the specific evidence of the advertisers who indicate that they would prefer to obtain advertising services from someone other than Tele-Direct. They called two witnesses to show that some advertisers prefer Tele-Direct's services, although one of those witnesses stated that advertisers should have the choice of dealing with Tele-Direct or using an agent. Counsel admitted in oral argument that in the "top end" of the market, some advertisers find the bundling of services and space by Tele-Direct problematic. He argues, however, that these advertisers constitute a "statistically insubstantial sample" and that there will always be a number of people "who would like to get something for nothing" and "as long as they aren't paying for it".

It is true that the customers called to give evidence constitute a very small proportion of total advertisers. They were not randomly selected and we do not treat them as a statistically significant sample. However, coupled with their anecdotal evidence of why they prefer to use agents is the evidence that in the current commissionable market, which includes grandfathered eight-market accounts, agents enjoy the lion's share of the business. When advertisers have the choice, the vast majority choose an agent, rather than Tele-Direct, for services. There is clearly separate demand beyond what Tele-Direct considers a "national" account (the 1993 definition) with respect to eight-market accounts, currently grandfathered. Moreover, there is no reason to believe that the line drawn by Tele-Direct between commissionable and non-commissionable accounts accurately reflects the boundary of demand; that those accounts that are commissionable prefer to use an alternate service provider while those who are not commissionable do not. Given the strength of demand for agents' services in the current commissionable market, we think it is reasonable to infer that the preference shown by the large majority of commissionable accounts for the use of agents extends down into the current non-commissionable market, at least to some extent. We are satisfied there is sufficient evidence before us to conclude that there is demand for separate advertising services below the existing commissionable market and that the advertisers called by the Director can tell us something about the nature of that demand.

Common amongst the Director's witnesses, whether single or multi-directory advertisers, was a preference for the advice or consultative services provided by an agent or a consultant over those of Tele-Direct. A recurring theme was that the agent or consultant provides an "overall" picture, reviewing all of the client's Yellow Pages advertising, including white pages listings, which headings were being used and which should be used, all the directories involved, what the client's competitors are doing and the nature of the business's markets. These service providers help plan the Yellow Pages advertising, including recommending headings and, in some cases where the level of expenditure is higher, budgeting. In the case of agents, a representative is assigned to the account for a long period of time and the clients have the perception that the agency "understands" its particular business. That these service providers tend to pay attention to the overall picture is suggested by the testimony of two advertisers, one the client of an agent and one of a consultant, that the agency or the consultant was the one to bring to its attention duplicative advertisements in its Yellow Pages program.

The advertisers using agents also mentioned creative services as one of the elements of the service provided. For the clients of consultants, creative services are at least equally important since by re-designing an advertisement and by substituting other design techniques, like, for example, screening, for the more expensive size and colour, the consultants are able to reduce the cost of advertising.

In the case of both agents and consultants, advertisers generally perceive that these "independent" service providers are more interested in helping them get more out of their Yellow Pages advertising dollar than is the typical Tele-Direct representative. Frequently, according to the advertisers, the Tele-Direct representative does not have time to sit down and consult with the advertiser. The advertiser has to accommodate itself to the schedule of the representative faced with a full schedule and deadlines in a particular canvass. Another recurring complaint is that the Tele-Direct representative is more interested in selling more colour or a larger size than in arriving at the level and type of advertising that is right for that client; representatives are perceived as quite aggressive and prone to "upsell". Most of the advertisers also recognize that these problems result from the way in which Tele-Direct operates its canvasses and compensates its representatives; their comments were not directed at the representatives as individuals. While the agencies are also paid commission, individual representatives are paid straight salary for servicing the agency's existing client base.[172]

The multi-directory advertisers also prefer the services of third parties because they provide "co-ordination" or "administrative" services. These multi-directory advertisers are primarily the clients of agents rather than consultants.[173] They testified extensively about the advantages of using an agency which will keep track of publication dates for the various directories, control the uniformity of the advertisements, company image and message across directories and, where applicable, organize the contact between head office and franchisees or licensees for approval of advertisements and billing. Promoting a uniform message and image is particularly important to franchisers whose franchisees may be quite independent of head office

[172] The evidence is that the agencies generally keep servicing existing clients and prospecting for new clients separate; adding new clients is usually the primary responsibility of one or more designated persons. Out of the five CMRs that testified, two pay commission for new clients; only one of those offers that incentive to all employees, the other has a vice-president who is responsible for new business.

[173] Only two of the multi-directory (leaving aside the one who is in only two directories) advertisers were clients of consultants and only one of those talked about uniformity of advertisements and co-ordinating dates and deadlines.

and also to those which had enrolled businesses to their network which operate the franchised business as only a part of their overall business.[174]

It might be argued that the administrative services provided by agents are not supplied at all by Tele-Direct.[175] On that reasoning, administrative services would not be a component of the advertising services at issue in the tying case. The argument would be that since Tele-Direct does not supply administrative services, it is not in competition with agents because it is supplying different services and customers who want administrative services are free to purchase them separately.

It appears that, in fact, Tele-Direct has made some effort to provide the administrative services emphasized by the advertiser witnesses who appeared before us (uniformity and co-ordination) through its national accounts group and with its efforts regarding continuity. Further, while it is possible that such administrative services could *conceivably* be purchased separately, there is no reason to believe that it would be efficient to do so. There is no evidence of agents providing these services to advertisers who use Tele-Direct for the remaining services, even

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[174] E.g., the "Autopro" line of automobile parts is offered by licensed Autopro mechanics and service stations across the country; the franchisees of Location Pelletier offer short-term vehicle rentals under that banner but usually operate another business as well.

[175] A similar conclusion was reached in the United Kingdom by the Office of Fair Trading ("OFT") in its 1984 report on the Yellow Pages industry: exhibit J-6 (green vol. 4), tab 282. When British Telecom withdrew all commission and internalized services through an exclusive sales contractor, the advertising agencies argued that they were placed at a disadvantage in competing to offer services to advertisers as the advertiser had to pay for the sales contractor's services, included in the rate card price, and then pay again to use the services of an agent. The OFT concluded that the "administration of the account" on the advertiser's behalf, by which they meant the day-to-day running of the account (negotiating claims, authorizations, proof-checking, paying bills) could not be carried out by the sales contractor and would either be done by the advertiser using its own resources or an agent. In respect of those services, therefore, the agencies were not competing with the sales contractor but rather with the advertiser's own resources.

though there is clearly a demand for them. The fact that Tele-Direct provides administrative services in some cases but not in others simply means that Tele-Direct and the agents are not providing precisely the same product. Indeed, one would not expect to find homogeneous packages of services. Otherwise, there would be no reason for customers to choose one service provider over the other. Therefore, we are satisfied that administrative services are a relevant and important aspect of advertiser demand for advertising services.

We now turn to the respondents' argument that advertisers only prefer agents because they are getting something for nothing or they are not paying for the agents. We do not accept this argument. The advertiser is paying for the advertising services whether provided by Tele-Direct or, if the account is commissionable, by an agent. With respect to the use of consultants, advertisers pay to use consultants as Tele-Direct's price remains the same but the consultant charges the advertiser a portion of the amount the advertiser saves by use of the consultant. Those savings would otherwise be for the advertiser to either spend on more Yellow Pages advertising or to pocket.

Even if we were to accept that the cost to advertisers of obtaining services is the same whether they choose Tele-Direct or an agent, we think it is still evidence of separate demand that where advertisers have the choice, the advertisers prefer to use agents. However, the evidence is, as will be explained, that when advertisers use agents, they bear costs additional to what they would have to bear if they placed their advertising through the Tele-Direct representative. Thus, it is apparent that customers prefer agents even if it is more costly to use an agent than to deal directly with Tele-Direct. This is strong evidence of demand for the services of agents by advertisers when they have the possibility of using them.

One source of higher cost derives from the billing practices of Tele-Direct. When advertising is placed through Tele-Direct's representative, the cost of advertising is divided into twelve equal parts and included in the Bell Canada telephone bill commencing upon issue of the directory. Advertisers who use agents are required to pay for their advertising on an issue basis, that is, to pay the full amount upon issue of the directory. When this occurs the advertisers' additional cost of using an agent is roughly one-half the annual cost of funds or, in other words, one-half of the commercial interest rate.[176] Given interest rates over the past 20 years, this has, depending upon the time, constituted approximately three to six percent of the advertising bill, a cost the advertiser does not pay if it uses Tele-Direct's services. In the words of Mr. Kitchen of Lansing Buildall, these advertisers are "paying a premium in terms of the payment schedule." While it is true that some advertisers that used agencies have arranged for periodic payments, no arrangement disclosed in the evidence is as favourable to them as the Tele-Direct monthly billing practice.

Another cost borne by some advertisers in order to use an agent is the placing of "extra" advertising in directories outside the areas from which the advertiser draws its customers so that

[176] Counsel for the respondents appeared to take the position that advertisers did not incur higher costs of using agents in those cases where the advertisers placed advertisements in a number of directories that were issued throughout the year. Although this argument has a superficial appeal because it appears that advertisers are paying on a periodic basis either way, it is not valid. Advertisers who use an agent must pay in advance for each directory as opposed to over a 12 month period if they use Tele-Direct.

the criteria for the eight-market rule (grandfathered accounts) are met. Five advertiser witnesses buy "extra" advertising. In one case, the cost of the additional advertisements is paid by the agent; in another the agent pays 15 percent of the cost of the additional advertisements. The other advertisers bear the full cost of the "extra" advertising.

How far down does the demand for separate services extend? We have evidence from a number of advertisers, both agency clients and clients of consultants, probably best described as large local or regional advertisers. Despite the amounts they are spending in Yellow Pages, these advertisers would not qualify even under the eight-market rule if they only advertised in the areas where they have locations or from where they draw business.[177] Since there are only seven market areas in Ontario and six in Quebec, that rule requires advertising outside the boundaries of each province.[178]

However, we did not hear from any truly "small" advertisers. Although two of the advertiser witnesses spend about average amounts in the Yellow Pages, they are the outlying examples. Most of the remaining witnesses, even those using consultants, spend at least $10,000

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[177] Of the seven agency clients, five, to all appearances, would not meet the eight-market criteria; the sixth apparently does but does not meet the 20-directory requirement for the 1993 rule. The seventh may meet the 1993 definition but as a group advertisement which is problematic for other reasons (see chapter "IX. Abuse of Dominant Position" under "D. Market for Advertising Services", *infra*). The three advertisers who currently use Tele-Direct but would like to use an agent are similar: a franchiser, a large regional advertiser and a company with three offices in two provinces.

[178] Among the agency clients, HOJ Car and Truck Rentals, for example, spends $125,000 annually and has 36 franchises, all located in southwestern Ontario. Location Pelletier spends $120,000 to $160,000 annually but its 60 licensees are all within the province of Quebec. Stephensons' Rent-all Inc., as Mr. Day of Day Advertising Group, Inc. testified, became non-commissionable when the eight-market rule came in and that was when it began to do the "extra" advertising. Stephensons has 38 retail outlets in southern Ontario and spends $140,000 on Yellow Pages advertising. Among the consultant clients, Canac-Marquis Grenier has 10 outlets across Quebec and spends $50,000 on its advertising; Tiremag Corp. spends $20,000 although it has only one outlet.

and most spend considerably more than that. Advertisers spending more than $10,000 annually represent only two percent of Tele-Direct's total advertisers by number and about one-third of its advertising revenues. There are, therefore, a vast number of advertisers representing a significant amount of revenue about which we know little regarding the character of their demand for separate advertising services.

The Director refers us to documentary evidence dating from 1975 when Tele-Direct changed to the eight-market commission rule to show that approximately 20 percent of the pre-1976 agency customers purchased less than $1,000 per year of Yellow Pages advertising. Many purchased as little as $500 worth of advertising annually. We have no reason to doubt the accuracy of these statements. We are reluctant, however, to reach conclusions about "small" advertisers based only on documentary evidence that is some 20 years old.

On the other hand, we have the views of Michael Trebilcock, the respondents' economist expert witness,[179] regarding "smaller" advertisers, which imply that these advertisers do not demand advertising services from a source other than the publisher. Based on the data provided in the report of the Office of Fair Trading,[180] he notes that for smaller advertisers, the cost of providing advertising services overwhelmingly comprises space and selling effort rather than advisory services. The reasoning behind these statements is sound and there has not been any evidence or argument to the contrary. It is certainly plausible that the lowest-cost

[179] Professor of Law and Director of the Law and Economics Programme at the University of Toronto.

[180] *Supra* note 175.

"advertisements", for example a bold listing, do not contain much, if any, creative content. We therefore accept that the general thrust of this argument is valid and that, for "smaller" advertisers, it is highly doubtful that a separate demand for advertising services exists.[181]

The evidence supports the view that there is buyer interest in obtaining advertising services from suppliers other than Tele-Direct over at least part of the spectrum of advertisers. While it is difficult to know where exactly to draw the line, we can conclude at this point that there is no evidence that would satisfy this threshold test of separate demand from "smaller", including new, advertisers. It is apparent that the larger advertisers would have the greater need for the services of agents or consultants based on the complexity of their advertising. Smaller, including new, advertisers whose advertising is relatively more simple likely would not have such need.

However, based on the evidence before us, we are not prepared to draw a firm line below which we could confidently say there is no evidence of buyer demand for services of independent advertising service providers. Therefore, at this point, we only conclude that there is evidence of buyer demand for advertising services for suppliers other than Tele-Direct for "larger" advertisers.

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[181] We note from Tele-Direct's 1994 Corporate Post Canvass Analysis Report that "new" advertisers, those using Yellow Pages for the first time or new businesses, are certainly among the smaller Tele-Direct advertisers. Selling effort is especially important with respect to new advertisers. The average *annual* expenditure by a new advertiser is $839, less than half the average for all advertisers. Less than one-half of one percent of new advertisers spend $1,000 or more *per month* where the corresponding percentage among established advertisers is about 3.5 times greater. Apparently, the typical new Yellow Pages advertiser starts with a small advertisement, in which case it is the value of the medium and the "sales pitch" which are important and not other advertising services.

(4) Respondents' "Efficiency" Arguments

Given the evidence of demand for services from suppliers other than Tele-Direct, is there evidence that efficiency considerations would dictate a single product? Based on the historical practices of Tele-Direct, the Director has ample evidence that the products can and were, in fact, sold separately. Pre-1975, a large percentage of advertisers could acquire services from a source other than Tele-Direct. Under the eight-market rule and the 1993 rule, any advertiser that qualifies or can make itself qualify by some extra advertising can acquire services separately from an agent. The respondents have put forward a number of efficiency arguments which, if valid, they say would lead to the conclusion that there is a single product and therefore, no tie. These arguments are largely based on the analysis and evidence of Professor Trebilcock, their expert witness. There were also profitability studies entered in evidence by the respondents and they will be dealt with in the next section.

(a) Impossibility of Leveraging: Fixed Proportions

Professor Trebilcock, for the respondents, is of the view that the Director's theory that Tele-Direct is attempting to leverage its market power (assuming it has market power) over space into the services market by bundling space and services is not valid. He states that such leveraging cannot occur because advertising space and advertising services are complements which are consumed in fixed proportions. There is agreement between the experts on both sides that complementary goods used in fixed proportions imply that the only profit-maximizing motive to bundle the two products is in order to minimize costs; all opportunities to exploit market power could be accomplished with control over either product. This implies that the bundling is socially efficient and it should be concluded that there is only one product.[182]

Professor Slade, for the Director, argues that space and services are at least partially substitutable. Professor Slade is of the view that:

> . . . it is possible to achieve the same impact by using a large ad or one that is cleverly designed. In addition, astute targeting of the "right" directories can substitute for purchasing space in a larger group of directories. More generally, an agency that provides service can often advise on ways to cut expenditure on space while maintaining the same level of advertising impact. In addition, it might even suggest ways of obtaining a higher impact from lower expenditure by, for example, substituting white knockout for colour.[183]

Because of the failure of the assumption of complementarity, she argues, leveraging is possible. Certainly the possibility of an extension of market power over a substitute, even if only a partial substitute, is one which causes concern and should be examined further.

The evidence supports variable rather than fixed proportions. To the extent that agents tend, compared to Tele-Direct representatives, to be less likely to promote increased expenditures on space, the additional expenditures on advertising services by agency clients (through the purchase of extra advertising, foregoing monthly billing) lead to the substitution of

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[182] We should note here that while the Director refers to space and services, Professor Trebilcock refers to three elements: space, consulting advice (design, graphics, layout, etc.) and selling effort (or pure promotion of the value of the medium). He recognizes that selling effort is clearly variable in relation to space. That is the genesis of the principal-agent problem dealt with later in this section.

[183] Expert rebuttal affidavit of M.E. Slade (28 August 1995): exhibit A-119 at 11.

advertising services for advertising space. Furthermore, once it is recognized that there is an issue of the quality and content of advertising services, as indicated by the evidence of advertisers and their willingness to pay more for agents than it would cost them to use Tele-Direct's representatives, even assuming the same expenditure on space using an agent or Tele-Direct, it is difficult to see how advertising services are being consumed in fixed proportions with advertising space.

The evidence regarding the activities of consultants also suggests that advertising services and advertising space are not used in fixed proportions, and that they are partial substitutes. The purchase of services from a supplier other than Tele-Direct results in reduced expenditures on space. An example provided by a consultant concerned a very large and apparently inappropriate existing advertisement for a taxi company in the Hamilton area. The existing full page advertisement included a large picture of an airplane and reference to airport service. The consultant (Serge Brouillet of Ad-Vice Communications) determined from his marketing needs analysis for the client that he actually did very little airport business. The changes proposed by the consultant were both less costly and appeared to be more effective.

We conclude that advertising space and service are not consumed in fixed proportions and it cannot therefore be assumed, as argued by the respondents, that only efficiency explains why they are bundled by Tele-Direct.

(b) Widespread Industry Reliance on Internal Sales Force

As part of his expert evidence on behalf of the respondents, Professor Trebilcock stated that any theory of the tying allegations in this case must explain four central facts. One of those facts is stated as:

> Almost all yellow pages directory publishers organize their selling functions in a similar way to TD i.e. by heavy reliance on an internal sales force.[184]

It is not in dispute that all North American publishers, whether telco-affiliated or independent, rely heavily on their internal sales force. The Director has, however, brought forward evidence indicating that where the line is drawn between accounts that are open to agency competition because they qualify for commission and those which are exclusive to the internal sales force differs from publisher to publisher. The Director further argues that Tele-Direct's current commissionability rule is one of the strictest in North America.

The respondents submit that Tele-Direct's national account definition simply represents the transposition of the YPPA national account definition (also referred to as the YPPA "A" account definition) into the Canadian context. The YPPA by-laws provide that, as a minimum standard, an advertising program involving two or more publishers, 20 or more directories, and at least three states with 30 percent of the advertising revenue outside the primary state is considered national Yellow Pages advertising. Publisher members must accept advertising

[184] Expert affidavit of M. Trebilcock (18 August 1995): exhibit R-174(b) at para. 27.

meeting those criteria as national. They are not precluded from accepting advertising meeting less stringent criteria as national. Each publisher decides on the level of compensation for advertising it defines as national.

While the *terms* of the YPPA definition are similar to those used by Tele-Direct in its definition, the evidence was that the effect of applying the definition in Canada is very different. Where there are about 6,000 directories in the United States, there are only about 350 in Canada. Tele-Direct is one of only seven or eight publishers in Canada and controls 70 percent of Canadian Yellow Pages publishing revenue. Tele-Direct's definition incorporates a minimum of two provinces instead of three states. Tele-Direct requires 20 percent of the published revenue outside the primary *publisher's territory*; the YPPA definition requires 30 percent of the revenue but outside the primary *state*. Under the YPPA definition, as long as two publishers are involved, there could be minimum revenue in the second publisher's territory. According to the agency witnesses, the 20 percent requirement is especially onerous given that Tele-Direct's territory includes the two most populous provinces. Overall, commission is currently paid on 13 to 14 percent of total directory advertising revenues in the United States as opposed to seven to eight percent of total revenues in Canada.

Although it is true that an account wholly within a large state such as California (with a larger population than all of Canada) might not be commissionable under the "A" account definition, according to the President of the YPPA, most publishers, including telco affiliates (RBOCs) pay commission on regional accounts, called "B" accounts. For example, the evidence was that Pacific Bell has a commissionable account which could include accounts wholly within the state of California.

In Canada, with one exception, all the telco publishers require advertising to be placed in two publishers' territories to qualify for commission at 25 percent,[185] usually with a minimum of 20 percent of revenues required outside the dominant publisher's territory. Effectively, this generally means that two provinces will also be required.[186] Since the other publishers have much smaller territories than Tele-Direct, their "two publishers" requirement is easier to meet.

Professor Trebilcock places great stress on the fact that independent publishers also rely heavily on an internal sales force because "many of these directories do not remotely possess any market power (however measured) in many of the directory markets in which they operate."[187] Therefore, he concludes

> *The stark and enormously significant implication of this fact is that the decision to vertically integrate advertising selling functions clearly has nothing to do with market power*. It must be explained entirely by the kind of efficiency considerations . . . outlined earlier in this opinion.[188]

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185 AGT Directory Limited only pays 25 percent on foreign numbers (as do all publishers) but pays 15 percent on *any other* advertising, including local accounts.

186 Except for Edmonton Tel: advertising in Calgary and Edmonton would qualify under its rule.

187 *Supra* note 184 at para. 27.

188 *Ibid*.

Based on the evidence from White and DSP, we know that, in Canada at least, despite the fact that they offer commission on all accounts brought to them by CMRs,[189] the independents rely heavily on their internal sales force. The evidence that we have is that an internal sales force is a *necessity* for their survival rather than a choice based on efficiency considerations. Despite the liberal commission rules, they receive a small proportion of their overall revenues from agents and must rely on their own sales force for the bulk of their revenues.[190] In fact, recruiting an effective sales force is one of the hurdles a new publisher has to overcome.

While we agree that the independent publishers are unlikely to have market power, we are reluctant to conclude solely on the basis of the fact that they rely on an internal sales force that the "bundling" of sales and service by a publisher with market power is competitively benign.[191] We would likely be willing to draw that conclusion if we had evidence that the markets in which independents are operating, particularly in the United States, are competitive. If they were, yet most sales by publishers were on a bundled basis, that would be a very strong indication that efficiency was dictating the bundling and that there was only one product at issue.

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[189] The evidence of Mr. Lewis of White was that White pays commission (in the United States and presumably also in Canada) on any account submitted by a CMR without restriction. The commission rate is 23 percent for established directories and 30 percent for newer directories. Likewise, DSP pays CMRs commission on any account.

[190] E.g., for White: eight percent of revenues in U.S. placed by agents; in Canada, one-half of one percent of revenues placed by agents.

[191] In circumstances where the dominant players are telco publishers and those publishers only pay commission on national and regional accounts, it follows that agents are active mainly in those sectors. They are not set up to service local accounts even if independents pay commission on those. Thus, because the dominant players do not want to use agents for local accounts, independents *cannot*, even if they wanted to, rely solely on agents but must use an internal sales force. Professor Slade is of the view that agents would tend to serve this market over time if the major publishers changed their policies and provided a broader market. Further, as the independent is usually the newcomer into a market dominated by the telco publisher, agents are reluctant to recommend a new directory, even for national and regional accounts where at least some of the major players pay commission, until it has proven itself.

The only evidence we have, however, is that those markets, like Tele-Direct's market, are dominated by the telco publisher. It was pointed out to us by the respondents that most RBOCs' prices are even higher than Tele-Direct's. We also referred in the section dealing with Tele-Direct's market power to testimony that indicates that American telco publishers also have sufficient profits to subsidize local telephone service. We are, therefore, not satisfied that widespread reliance on an internal sales force across publishers, including independents, dictates a single product on efficiency grounds because it may be a function of telco dominance in all markets.

(c) Agents' Views

The implication of finding and prohibiting the tied selling alleged by the Director is that agents would, one way or another, be permitted to offer their services to a wider range of accounts below the level of "national" accounts currently considered by Tele-Direct as commissionable. Professor Trebilcock is of the view that agents are not interested in servicing smaller accounts.

In interviews with agents that the Director's staff undertook in investigations prior to filing the application, the agents stated that they were not interested in the smaller accounts. As reported by Professor Trebilcock, who had access to the summary of the interviews prepared by the Director's counsel, the smallest accounts that any of the agents expressed an interest in ranged from those spending from $10,000 to $50,000 per year on Yellow Pages. A lower limit of

$10,000 excludes almost 98 percent of all customers and approximately 70 percent of total revenue but would represent a substantial increase over the amount of revenue currently commissionable.

When giving evidence the agents took a different position and stated that they would be interested in all customers but would handle the business differently. The only reasonable interpretation is that the early answers reflected the agents views given their current method of operation. Their answers when giving evidence, in contrast, reflected the willingness of businesspeople to consider any reasonable opportunity to turn a profit, including considering the possibilities of paddling into uncharted waters. On the whole, we regard their views during the interviews as the more reliable. Because the agents apparently have little or no interest in servicing smaller accounts, we infer that they regard themselves, at least in their current setup, as at a cost disadvantage *vis-à-vis* Tele-Direct in dealing with these smaller customers.

Therefore, we agree with Professor Trebilcock that agents are not interested in servicing smaller accounts, although neither he in his evidence nor the Tribunal at this stage can be more explicit than having regard to the $10,000 to $50,000 range about what constitutes "smaller" accounts.

(d) Justification for Tele-Direct's Practice of Bundling

Professor Trebilcock attempted the most complete explanation and justification of Tele-Direct's practice of bundling space and services over most advertiser accounts. Initially, he divides what the Director has alleged to be advertising services into selling effort and consulting advice regarding the advertisement (artwork, placement, etc.). He states that selling effort cannot be priced on its own as customers will not pay for a "sales pitch"; it must be bundled with either space or consulting advice. The overall problem facing Tele-Direct (and other publishers) is to exercise control over those selling its product and to motivate agents or internal staff, as the case may be, to provide an optimal mix of selling effort and consulting advice *from Tele-Direct's viewpoint*. The Tribunal agrees that there is what is known as a "principal/agent" problem at work here. The issue is the nature of the problem and whether Tele-Direct's viewpoint is the only relevant one or should be the operative one.

Professor Trebilcock divides his explanation concerning Tele-Direct's approach to commissionability into three categories: small advertisers, larger local advertisers (which presumably includes regional advertisers) and currently commissionable advertisers (larger national or regional accounts involving multiple publishers). We have accepted that it is likely that small advertisers have no separate demand for advertising services. New advertisers, with few exceptions, coincide with small advertisers. For the sake of completeness we continue with the "efficiency" or cost-side evidence for all advertisers including small advertisers.

Professor Trebilcock's primary explanation of why Tele-Direct prefers to rely on its own resources for servicing small customers is that it is highly likely that it is cheaper for Tele-Direct to service small customers internally. His view is that the most effective method of selling advertising to these customers, probably because of significant economies of scale, appears to entail "`blanketing' directory territories in concentrated time blocks on a sequential basis" as Tele-Direct currently does. It is, however, not self-evident that this approach results in lower per unit costs than using smaller numbers of representatives who take a longer time to do a canvass. There is simply no evidence.

Another factor cited by Professor Trebilcock that is likely to lead to attenuated efforts by CMRs regarding small advertisers is the possibility that advertisers would engage in opportunistic conduct. The difficulty Professor Trebilcock foresees is that once the successful selling effort has been made, which the customer is unwilling to pay for, the customer is in a position to ask for, and other sellers are in a position to offer, a discount because they need only provide the consulting advice and not the selling effort, for which the first seller will be uncompensated. He believes that this problem is most acute for small advertisers, including first-time buyers. For large advertisers, selling effort constitutes a smaller percentage of overall advertising services. In addition, larger customers might have more difficulty engaging in opportunistic conduct because they are more likely to become known to agents. Tele-Direct can avoid this "free riding" by small advertisers by bundling space and selling effort. This is a version of the free riding argument often made in defence of vertical arrangements such as resale price maintenance which may be valid in some circumstances. There is, however, absolutely no evidence that it applies on the facts in the instant case.

Professor Trebilcock also points to a divergence of interest between Tele-Direct and agents which leads to an incentive compatibility problem should Tele-Direct use agents to service small advertisers, otherwise referred to as the "completeness externality". This externality, compounded by advertiser opportunism as explained above, is also the principal explanation advanced for why Tele-Direct prefers to provide services internally for "larger local" advertisers. As Professor Trebilcock recognizes, a simple cost difference cannot explain the reluctance of Tele-Direct to offer a commission on these accounts as the agents would not service them, even if commission were offered, if they were at a cost disadvantage to Tele-Direct.

According to Professor Trebilcock, there is a positive correlation between the "completeness" of a directory and the value that users place on it. Advertisers are willing to spend on a directory to the extent that the users find it valuable. But since each individual advertiser benefits only minimally from their own contribution to completeness, they are unwilling to pay for this effect. Tele-Direct, as the publisher, is able to internalize this externality over the longer term (the more "complete" and useful the directory, the more valuable the advertising space and the higher rates it can charge).

While there is no doubt that publishers value "completeness" for the reasons stated, it is largely an undefined term. There is no explanation in Professor Trebilcock's evidence, for example, of why a directory is in any sense more complete when there are paid bold listings rather than unpaid listings in ordinary type. Nor is there any adequate explanation of why users would value more advertisements in colour or larger advertisements unless they provide more information. There were also indications from the evidence that there can be *too much* advertising from the viewpoint of users. In large centres such as Montreal and Toronto, it has been necessary to split directories because of their size. Thus, while it is indisputable that directories must have sufficient representation by advertisers so that the directory is considered to be a useful reference, it is far from clear that *all* increases in advertising contribute to this objective. This point is critical because if Tele-Direct is encouraging increased selling effort beyond the range where further advertising contributes to completeness in any meaningful positive way, then the ability of Tele-Direct to sell additional advertising through its own sales force cannot be assumed to be socially beneficial in providing users with additional value.

Professor Trebilcock is of the view that the completeness externality leads to two results. First, Tele-Direct has a stronger incentive than CMRs to recruit new accounts; CMRs will focus most of their efforts on attracting existing advertisers from Tele-Direct or other CMRs. Second, while Tele-Direct is interested in retaining customers over the long term in order to enhance completeness, CMRs will be more concerned with immediate returns. Thus, when Tele-Direct recommends the, in Professor Trebilcock's words, "optimal" advertising package, the CMR will have an incentive to convince the advertiser that a less expensive or "sub-optimal" package is equally useful in order to recruit the customer. The risk of dissatisfaction on the part of the customer is increased; the customer may stop using Yellow Pages because of informational imperfections which make it difficult to distinguish between weakness in the medium and bad advice.

Further, Professor Trebilcock is of the view that it would be difficult for Tele-Direct to structure incentives to CMRs to induce them to sell a "socially optimal" quantity and quality of advertising by way of contract because of significant transactions costs. On the other hand, Tele-Direct can and does motivate its internal sales force "to sell and advise clients to purchase optimal packages by offering training, encouragement, screening of advertising sales by managers, internal promotions, awards, a team ethic, etc."[192]

The Tribunal is inclined to agree with Professor Trebilcock that it is probably easier for Tele-Direct to create incentives that motivate its own representatives to sell more than agents. The more important question is whether leaving Tele-Direct the unfettered choice of when to use agents and when to service internally leads to a truly "socially optimal" result. We have already indicated some doubts that the unrestricted pursuit of completeness, while it may be in Tele-Direct's interest, is wholly in the public interest or "socially optimal".

The Director argues that Tele-Direct chooses to retain services in-house because this allows it to motivate its sales force to exploit better the "information asymmetry" it enjoys *vis-à-vis* its customers or, in other words, to "oversell". He submits that Tele-Direct's incentive structure results in its sales representatives convincing advertisers to buy more than they would if they were provided with balanced information or the possibility of obtaining an alternative viewpoint from another service supplier. Witnesses stated that they did not regard the advice from Tele-Direct's representatives as objective. We have acknowledged that, as a general matter,

[192] *Supra* note 184 at para. 22.

the effectiveness of marginal dollars spent on advertising is difficult to determine. This leaves customers somewhat vulnerable to the advice they receive. The incentive structure for Tele-Direct's representatives makes the Director's argument that they are motivated to "oversell" at least plausible. To the extent that the Tele-Direct representatives succeed in selling "too much" advertising to one advertiser, the effect would multiply throughout a heading, since, as the evidence revealed, many firms base their Yellow Pages expenditures on that of their competitors (the "prisoner's dilemma"). We, therefore, cannot accept Professor Trebilcock's critical assumption that the advertising a Tele-Direct representative sells is necessarily socially optimal.

With regard to recruiting new customers, we accept that a publisher would want to ensure that there was a thorough and efficient canvass of potential new customers, in the sense that all were approached and there was no duplication of effort. Since the prospective new Yellow Pages advertisers are easily identifiable from business telephone subscriber information in the hands of the publisher, it makes sense to assign them to specific persons rather than creating a "free for all". This can be done on an individual basis, by territory, or any other method that avoids multiple contact of the same prospect by different persons. The assignment is key; if customers are assigned it makes little difference whether the persons making the contact are employees or outside agents.

Professor Trebilcock also believes that a reason why Tele-Direct does not make larger local customers commissionable is that agents would curry favour with customers by recommending less than the "optimal" amount of advertising (or the amount that a Tele-Direct representative would recommend), with long-term detrimental effects, because they are primarily interested in immediate returns. While Tele-Direct may worry about the advice being given by agents, it is far from clear that the quality of their advice is a cause for concern with respect to satisfying the needs of consumers. The facts before us do not support Professor Trebilcock's view that agents tend to take a short-term view. When the actual relationships between customers and agents and customers and the internal sales force are considered, it is the former who have the long-term relationship. Until recently most Tele-Direct representatives, *unlike* agents, predominantly had a short-run relationship with customers. Professor Trebilcock also acknowledged that agents might be reluctant to be perceived as pushing current sales because customers might be inclined to switch agents. Tele-Direct's representatives do not have this concern because customers do not have freedom of choice. Much of the representatives' livelihood depends on increased sales to existing customers whereas the employees of the agents are on salary and receive no additional compensation for increased sales to existing clients.[193] Moreover, there is no evidence that agents' clients have tended to cancel advertising for any reason.

In Professor Trebilcock's view, the fact that Tele-Direct chooses to pay commission on multiple publisher accounts is evidence that Tele-Direct is motivated by efficiency considerations with respect to all its decisions regarding commissionability. Otherwise why would Tele-Direct choose to make any part of its sales commissionable? Professor Trebilcock

[193] Based on the evidence of the representatives of CMRs who testified; together those CMRs account for a large portion of commissionable sales.

interprets the fact that Tele-Direct pays commission on national accounts and that the bulk of sales to this segment is made by agents as proof that agents can more efficiently service this segment. While Professor Trebilcock believes that the tendency of agents to undersell and focus on existing advertisers and the possibility of opportunism are still present, the cost advantages of agents compensate for these weaknesses. These sophisticated advertisers are also better able to monitor whether they are being sold the "optimal" amount of advertising and the possibility of losing such a client effectively polices the agent. While the Director accepts that the agents are more efficient in servicing the commissionable segment, he disputes, as noted above, that agents in any circumstances sell "sub-optimal" amounts of advertising as defined by Tele-Direct's perspective. The Director takes issue with the view that Tele-Direct is more efficient in dealing with the rest of its customers. Detailed evidence on relative efficiency was placed before us and is the focus of the next section.

In summary, as indicated in the section on advertiser demand, we have accepted Professor Trebilcock's view that there is no separate demand for advertising services for "small" customers. With respect to those advertisers for which separate demand has been proven, called "larger local" advertisers by Professor Trebilcock, the Tribunal does not accept that either the completeness externality or the possibility of advertiser opportunism is supported on the evidence before us and, therefore, does not dictate that space and services are a single product with respect to those customers. The question of relative efficiency or cost advantages on the part of Tele-Direct with respect to servicing those advertisers will be addressed in detail in the next section.

(5) Comparative Profitability Studies: Agents/Internal Sales Force

The respondents have introduced evidence bearing on the comparative efficiency of Tele-Direct's representatives and agents to argue that the commissionability rules are, and always have been, efficiency based. The primary evidence is a comparative cost study dated 1995 created for these proceedings and entered through Michel Beauséjour, Tele-Direct's Vice-president of Finance. In addition, there are two other internal contribution-to-profit studies from 1974 and 1985, along with the descriptive evidence of Donald Richmond, Director of Manufacturing and Contract Administration for Tele-Direct, and Jan Rogers, Director of Corporate Methods and Support.

Before turning to a detailed discussion of the evidence it is necessary to consider its import with respect to the respondents' claim that its policies with respect to the payment of commission and the utilization of agents are dictated by efficiency considerations. While the studies referred to are relevant to the respondents' position, there are very important caveats that seriously weaken the conclusions that can be drawn from the evidence. Firstly, in an ordinary "make or buy" decision what is being compared is only the *cost* of producing a particular product in-house or buying it. This basic requirement (of looking only at cost) is violated when a comparison is made between the *contribution to Tele-Direct's profit* by the internal sales force and agents, i.e., revenue considerations enter.

More importantly, the products (i.e., the provision of services to commissionable and non-commissionable accounts) being compared in the Raheja study from 1974 and the 1995 study are very different. In fact, these studies are well described by the comparison of "apples and bananas". It is difficult to see what can be derived from the exercise of comparing the contribution to profit of agents and Tele-Direct's representatives who each deal with an entirely different set of customers. A significant percentage of the non-commissionable accounts are dealt with entirely over the telephone. Where representatives meet with customers, the customers' needs, for the most part, cannot be compared with the large multi-directory customers who rely on agents. What is the point of comparing the contribution to profit of agents, who are acknowledged to be relatively effective in serving complex "national" customers, with the contribution to profit of Tele-Direct's representatives in serving customers, many of whose requirements are relatively simple? While the comparison in 1985 between NAMs/NARs and agents might be considered to be a close, although not an exact comparison, the data are not current and not particularly detailed.

Overall, we have found these profitability studies not to be supportive of the respondents' position. The early studies are out-of-date (and Raheja is of limited relevance because of the difference in products being compared and an error in it), a critical point when considering current efficiency. At numerous points in the 1995 study, the differences in costs can be traced to differences in the characteristics of the customers being served rather than to any possible difference in the relative costs of agents and Tele-Direct's personnel. It also suffers from bias in favour of Tele-Direct because of its time frame and from methodological weaknesses.

For completeness, we will comment on the studies to further explain why, in our opinion, they are not reliable for the purpose advanced by the respondents, that is, to demonstrate that Tele-Direct's internal sales force is more efficient than agents.

(a) Raheja Study (1974) [194]

This study was prepared as part of a review of Tele-Direct's policy towards advertising agencies, including agencies specializing in Yellow Pages, which were a relatively recent phenomenon at the time, with a view to determining a commission payment. The study itself notes that the system of classifying accounts at Tele-Direct made it difficult to calculate profitability of the various components. Nevertheless, Mr. Bourke was of the view that management at the time placed sufficient confidence in the results of the study to make decisions on the basis of it. The study showed that in the "local market", defined as all sales within Tele-Direct's own directories, agency sales were less profitable. Although there is no evidence of the weight that the study played in the decision, in 1976 Tele-Direct sharply restricted the commissionable market by moving to the eight-market rule.

The odd thing about the exercise is that, taken on its own terms, there is an obvious error in the study: the commission to agents is counted both as a reduction from revenue *and* as an expense. When the error is corrected the comparative ratio is somewhat better for the agents than it is for Tele-Direct's own representatives. The respondents take the position that the existence of

[194] Confidential exhibit CJ-32 (black vol. 11), tab 83 at 132667ff.

the error is irrelevant; management acted on the information, proving that Tele-Direct was motivated by efficiency considerations and not by any other motive. While the study may suggest that Tele-Direct was at least *interested* in efficiency at the time, it is peculiar that so simple an error was not easily immediately detected by those supposedly basing decisions on it. In the circumstances, and having regard to the many qualifications in the study, the existence and results of the study are not of assistance.

(b) Profitability Study: National Accounts - Selling (1985) [195]

This study deals with the contribution to profit of national accounts serviced by agencies and NAMs in 1983 and 1984. Agencies included specialized and regular agencies while the NAMs included one Tele-Direct sales representative who dealt with high revenue potential customers and another who dealt with low revenue potential customers.

The study was entered in the record during the cross-examination of Mr. Beauséjour. Although the bottom line contributions to profit were noted, there was no examination of the study with the witness other than to establish that the then prevailing methodology regarding the payment to Bell Canada was employed. Based on the description in the document the only costs that were specifically attributed to the agents and NAMs were agency commissions and so-called sales expenses. The latter included the salaries of sales personnel in the national accounts group

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[195] Exhibit J-1 (red vol. 1), tab 61.

but also the personnel who processed orders submitted by agents.[196] All other costs were allocated on the basis of the net revenues generated by each of the two channels.

For the combined eastern and western regions, the contribution to profit as a percentage of total revenues generated for the agents and NAMs in 1983 was 18.7 percent and 17 percent respectively. In 1984 the contribution was 20 percent for both. While there are caveats,[197] the important point that emerges from the study is that Tele-Direct had no reason to believe at that time that it was less costly to rely on its own representatives who dealt with customers with the same or similar characteristics as those served by agents. The respondents did not bring to our attention any further study or any evidence whatsoever of internal consideration of relative efficiency leading up to the 1993 change in the commissionability rules. The only documentation on the record, and the evidence of Mr. Mitchell who was intimately involved in the preparation leading up to the change, focuses on effects on number of accounts and revenues that would be available to agents or the internal sales force under various scenarios.

(c) Profitability Study (1995) [198]

Towards the end of the hearing counsel for the respondents introduced through Mr. Beauséjour a document comparing the relative contribution to profit in 1994 of agents and

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[196] Total salaries were allocated to CANYPS, agencies, NAMs and GSF.

[197] To anticipate questions that might arise as a result of the discussion of Tele-Direct's latest contribution to profit study, the same percentage cost of customer service (the payment to Bell Canada) and "melt" is used for both agents and NAMs. There is some tipping of the scales in favour of agents with respect to the cost of customer service since it is applied net of commission in the case of agents. On the other hand, no account is taken of the fact that agents pay up-front and the customers of NAMs pay over a year.

[198] Confidential exhibit CR-185.

the internal sales force, including the national accounts group. The document was admitted over the strenuous objections of counsel for the Director. During discovery, Tele-Direct provided a cost of sales figure for its internal sales force of 12.3 percent of revenue. The basis for that figure was explored through detailed follow-up questions and further explanation. There was no indication from the respondents that a second study was being undertaken by Tele-Direct, and that it contained results that were different from those that had been given on oral discovery and in follow-up answers. On December 4, 1995, counsel for the respondents produced the second study to counsel for the Director.

While we found the timing of the production and, in fact, counsel for the respondents' conduct of this whole matter of the new study to be, to say the least, unfortunate, we admitted the document while allowing the Director further discovery and preparation time. Despite the inappropriate timing, we were of the view that the Tribunal should not forego receiving information that could have an important bearing on the case and which apparently went to the heart of the respondents' position that the bundling of space and services by Tele-Direct was dictated by efficiency considerations.

(i) Unrepresentative Timing of Study

Apart from the general difficulty, already highlighted, of comparisons being made between the servicing of very different types of accounts, there is another serious defect in the recent study. The period for which the study is done almost certainly creates a bias in favour of the internal sales force *vis-à-vis* the agents because of the state of progress of certain improvements Tele-Direct was making to its process. The study fails to take account of the fact that the application of technology is in a period of transition. While improvements favouring the internal sales force have been put in place, those favouring agents are on the immediate horizon. Despite this, the latter have been ignored in the study.

The system that Tele-Direct was putting in place in 1994 with respect to the publishing process was much more efficient for the internal sales force than the system that it replaced. More specifically, a computer system was introduced that allowed the electronic storage of advertisements, including finished artwork. This means that advertisements that renew without change, about 70 percent of all advertisements, are already in the computer. This is contrasted by Mr. Richmond with the previous system:

> . . . In the old system, when we used an outside supplier [for pre-press functions, e.g., layout, paste-up], if we got an ad from last year, we may or may not have found that artwork because it was kept in a filing cabinet somewhere. It meant that the next year we had to have an artist redraw the artwork to match what was in the book before. This was very inefficient. We had to store logos all over the place so that everybody could get hold of it.[199]

There are also savings when there are changes to the advertisement. Under the new system, minor changes can easily be made on the electronic version of the advertisement.

Although agents submit their advertisements "camera ready" (as "veloxes"), they must be scanned into its system by Tele-Direct. If there is no change in an advertisement from the

[199] Transcript at 34:7026 (7 November 1995).

previous year then it follows that it should be possible to avoid re-scanning the advertisement, as it is already in the system, so some savings should be possible. Mr. Richmond did not know the percentage of agents' advertisements that are repeated without change but he did state that *all* CMR advertisements are scanned, implying they are scanned even if there is no change. It is not clear why Tele-Direct does this.

Thus, until recently and certainly when commission was further restricted in 1993, the costs that Tele-Direct would have experienced for the internal sales force were those that existed prior to the introduction of the new system. Under the old system the fact that agents were submitting complete advertisements meant that the cost comparison in the publishing part of creating a directory was far more favourable to agents than is presently the case. According to Mr. Richmond the cost of implementing the new system is $26 million and the annual savings are of the order of $12 million, which would have made previous publishing costs for internally-generated advertisements almost twice as high as they were in 1994.

Using current data disadvantages the agents with respect to the near future. There would be no need to scan agents' advertisements if the advertisements could be transmitted electronically. Currently, newspapers and magazines have systems in place for this purpose. The Yellow Pages publishers are moving in this direction, according to Mr. Logan, the President of the YPPA. He foresees this capability on the VAN system, the electronic YPPA order system, in two to three years. The pay-off would be a smoother flow with lower costs for publishers and CMRs and a reduction in errors.

The other area within publishing where change can be anticipated is in how Tele-Direct receives orders over the VAN. Currently a clerk in Montreal and one in Toronto take the information off the VAN as hard copy. After the order has been dealt with in this form, it is eventually re-entered into Tele-Direct's system. Ms. Rogers stated that Tele-Direct had hoped to be able to transfer all orders received through VAN directly into the contract data base without re-keying but this did not happen. According to Mr. Logan of the YPPA, "[t]he bigger publishers, both independents and utilities, now are developing and I think probably most of them -- not everybody, most of them -- can take the information directly off the VAN and run it into their systems without re-keying".[200] For some reason Tele-Direct is lagging behind other North American publishers in taking advantage of the VAN, the system for which agents made significant investments and for which, in part, Tele-Direct agreed to raise commission rates from 15 to 25 percent over a two-year period. While there have been reductions in cost in processing agents' orders since the movement to VAN, according to Ms. Rogers these appear to be less related to the VAN than to internal reorganization and, therefore, this confirms that Tele-Direct has not taken full advantage of the VAN.

For all these reasons, we conclude that the study does not recognize the technological transition in publishing Yellow Pages and that failure to do so favours the internal sales force over the agents.

[200] Transcript at 36:7370 (9 November 1995).

(ii) Methodological Weaknesses

There are significant methodological problems with this study. The study is based on a "causal model". Costs were analyzed by Tele-Direct personnel to determine whether particular costs would be experienced in the absence of either agents or the internal sales force. If the answer was in the affirmative those costs were assigned to the group that caused the costs in question. Costs that could not be identified as caused by one or the other channel were treated as common costs and allocated to the two channels on the basis of relative revenue. This overall methodology was submitted to Tele-Direct's auditing firm for confirmation that the approach was sound. All cost assignments and allocations were performed by Tele-Direct personnel and the results were not audited by an outside firm. The testing of the results was done only through discovery and cross-examination during the hearing.

In the final result, the internal sales force's contribution to profit is shown to be approximately 13.5 percentage points higher than that of the agents. If we ignore for the moment the complications created by the difference in types of accounts serviced by each, this result would mean that in order for the agents to be competitive with the internal sales force the commission rate paid to them would have to be nine percent rather than the average of 22.5 percent that in fact is paid to them (22.5 less 13.5).

We turn first to the method used to allocate common costs. It is, in our view, valid to allocate these costs on the basis of revenue where the common costs can be considered to be related to the level of sales. This is true for an area such as manufacturing the directories, where the costs depend on the volume of advertisements and it may make little difference whether the advertisements are generated by the internal sales force or agents. This approach to allocating common costs is far less justifiable when the costs in question relate to personnel, e.g., the personnel department itself. This is important because sales representatives and all their support personnel are internal to Tele-Direct while the agents and their support personnel are not. In areas like these it would be more appropriate to allocate costs based on the relative proportion of employees identified as devoted to servicing the internal sales force and agents. Mr. Beauséjour admitted that this was an equally valid approach as using relative sales and that either method could have been used.

An analysis of each of the common cost areas to see whether it was more appropriate to use one or the other weighting procedure would have produced a more objective and defensible result. We note that Tele-Direct did depart from its approach to allocating common costs on the basis of revenue in at least one instance, which also happened to work in its favour.[201]

In the study Tele-Direct has violated its own methodology for attributing costs on a causal basis in a way that increases the costs of dealing with agents. As noted earlier, the current system of storing advertisements in a computer is in the process of being introduced. The cost of duplication between the old and new systems which would, on the stated approach, be attributed

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[201] Depreciation of the scanner (a common cost since it is caused neither by internal sales force or CMRs) is divided equally between internal sales force and agents based on relative volume of items by number scanned from these sources. Based on the revenue methodology otherwise employed most of the depreciation would be allocated to internal sales force.

to the internal sales force, was treated in the study as a "transition" cost and was subtracted from the total internal costs. Similar costs related to moving to the VAN system were, however, attributed to the agents. To be even-handed, they too should have been considered "transition" costs and subtracted from the agents' costs. Further, it is questionable that the large investment in the new system for dealing with internal orders should simply be ignored, as was done in the study, rather than amortized over several years. The effect of not doing so is also to understate internal costs.

Counsel for the Director questioned the validity of the cost attribution in the study in several areas where a relatively small percentage of costs was taken to be caused by internal sales force even though the internal sales force and its direct support account for 61 percent of total employees. With respect to the costs of the Personnel and Benefits department, Tele-Direct concluded that there would only be a saving of about 16 percent from eliminating the internal sales force and thus only 16 percent of the total cost was attributed to the internal sales force. Similarly, in the Labour Relations department the saving assumed was only 30 percent. In defence of these decisions, Mr. Beauséjour explained that there were certain basic requirements that would have to be maintained to service the remaining personnel even if 61 percent of the personnel were eliminated. In effect, this approach treats the present organizational chart as inviolate. We question whether Tele-Direct would approach such a massive change on an "avoidable cost" basis.

The Director's principal challenge to this study relates to the method of dealing with the "cost of customer service" ("CCS"), the 40 percent of net sales revenue that is paid to Bell Canada. In all past studies of profitability, CCS was treated as a cost. It was also so treated throughout the many months when there were successive drafts and refinements of the 1995 study, almost until the moment that the study was entered in these proceedings. As a result of the penultimate amendment to the figure for CCS, the contribution to profit of the agents changed from being slightly less than the internal sales force to almost five percent *more* than the internal sales force.[202] Subsequent to that, Mr. Beauséjour decided that there was no reason to treat CCS as a cost since Tele-Direct and Bell were part of the same corporate entity and it makes little difference whether Tele-Direct made payments to Bell in the form of CCS or as dividends. Despite the apparently fortuitous timing of this realization, we accept that the point is valid. It is one thing for Bell to insist that CCS be included as a cost in order to impose market discipline on Tele-Direct but it is another matter when a study of the relative costs of using agents and internal staff is being performed. It then makes better sense to treat Bell and Tele-Direct on a consolidated basis. This in itself is not a methodological weakness.

However, the same reasoning means that the Tele-Direct study should have taken into account the benefits accruing to Tele-Direct/Bell from the fact that agents pay up-front for advertisements whereas customers of the internal sales force pay monthly. Mr. Beauséjour recognized this benefit in cross-examination but it does not appear in the study. As discussed

[202] The reason why CCS has such a large impact is that under Tele-Direct's contract with Bell Canada the revenue from agents who are billed by Tele-Direct rather than Bell are not subject to the payment of CCS. Thus the average payment of CCS is much lower in the case of agents than of internal sales force.

earlier, the difference in timing of payment amounts to interest for about half a year, an appreciable difference of three to six percent per year.

(iii) Particular Examples of Problems Arising from the Difference in Products

The respondents advance this study as evidence which they say proves the different, and greater, "interface" costs that they incur when processing orders originating with external agents as compared to the costs of processing orders originating internally. As we indicated at the outset, it is extremely difficult, in conducting a study of this nature, to distinguish the genuine interface costs, costs that arise because Tele-Direct is dealing with agents rather than the internal sales force, from costs that arise from the nature of the advertising, and thus are not clearly related to the channel submitting the order and are not true interface costs. This problem permeates the study and, thus, it cannot prove relative interface costs in its present form as the respondents maintain it can.

That is not to say that we think the problems arising from the difference in the products, unlike the unrepresentative timing and methodological weaknesses already identified, consistently operate in the respondents' favour by lowering internal costs and raising agents' costs. As detailed below, this is sometimes the case; sometimes the reverse is true.

We turn to some examples. One relates to the interpretation and treatment of credits to customers as a result of Tele-Direct's errors. Customers using the internal sales force were reimbursed 1.3 percent of gross revenues as a result of errors made by sales representatives or during the publishing process. The rate of reimbursement to agents as a result of publishing error was 3.5 percent. This difference in the rate of Tele-Direct's errors is a factor in the overall lower contribution to profit of agents.

In the notes to the study it is stated that the difference is due to the fact that orders from agents are handled by more people, that is, CMR personnel and the national accounts publishing group of Tele-Direct. It is, however, irrelevant how many people in the CMR handle orders because only errors attributable *to Tele-Direct* are reimbursed. One possibility that may explain part of the difference in error rates is the greater knowledge and, perhaps, incentive that agents have to discover and complain about errors compared with the customers of the internal sales force. Mr. Beauséjour admitted this was a possibility. While this explanation would probably not change Tele-Direct's view that the higher reimbursement is a "cost", it would hardly be a reflection of lower efficiency in the use of agents compared to the internal sales force.

On the other hand, Ms. Rogers stated that the higher error rate in processing agents' orders was due to the larger, more complex advertising programmes submitted by agents. This suggests that the error rates are related to the nature of the advertising programmes rather than the channel through which they flow. To the extent that the principal reason for the difference is the difference in the type of accounts serviced by each channel, it cannot be concluded that the difference in error rate is a cost of dealing with agents.

The comparatively large error rate in dealing with agents' advertisements also shows up in other costs attributed to dealing with agents. A Tele-Direct employee checks the advertisements after the directories have been printed, a duplication of effort since the agents also verify their advertisements. In addition, there are the resources expended in error negotiations with the agents.

Apart from the difference in the size of advertising programmes mentioned by Ms. Rogers, we also know about one other respect in which there is a significant difference in the content of advertisements submitted by the internal sales force and agents. Approximately 80 percent of "trade-mark" advertisements are handled by agents. Three Tele-Direct clerks within the department which processes agents' orders are assigned to checking a proposed trade-mark advertisement to ensure it has been authorized by the owner of the trade-mark. This is a cost assigned totally to agents that depends on the nature of the advertisement rather than on the channel dealing with the advertisement.

In a related area, that of bad debts, the study may, in fact, underestimate the comparative cost of dealing with agents as opposed to the internal sales force. Over the years there is a regular, although fluctuating, percentage of unpaid bills to customers serviced internally. Until recently Tele-Direct has not had the same experience with agents. Mr. Beauséjour noted that Tele-Direct is currently owed money by an agent but no figure for non-collection from agents was included in the study. The area of "melt", bad debts along with discontinuance of phone service, which negatively affect the internal sales force contribution to profit, are probably due to the character of the clients served by the internal sales force rather than having anything to do with who is servicing them. This is consistent with the more "volatile" nature of smaller accounts commented on in internal Tele-Direct documents.

(d) Conclusion

The numerous points on which the various studies are subject to challenge confirm that they cannot be used for the purpose of comparing the relative efficiency of Tele-Direct's internal sales force and agents.

(6) Conclusion on Separate Products

The Director has alleged that tying is present over the entire demand spectrum, although counsel for the Director has, in effect, recognized that there may not be tying for "small" customers.[203] According to the respondents, there is no tying for any of their customers. The parties' positions represent the two extremes. The Director would have us order the respondents to offer space and services separately (whether by separate prices or expanded commission) to all their customers. The respondents would have us make no order, thus allowing them to offer the two separately only to those customers that they choose.

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[203] By proposing the further alternative remedy of reverting to the pre-1975 commission rule.

We are of the view that neither extreme is supported by the evidence. What we see is that customers or advertisers are not homogeneous in terms of their need for services, or demand, or in terms of the costs involved in servicing them, or efficiency considerations. On the contrary, they are very heterogeneous, ranging from an individual running a small business from home and spending a minimal amount on a simple advertisement in the Yellow Pages to large corporations advertising in a multitude of directories. Our view is that we cannot decide whether there is one product or two products for all these different customers in a blanket fashion. We must engage in an exercise of "line drawing".

We are of the view that the evidence on demand for separately supplied advertising services and the evidence and arguments relating to efficiency of supply indicate that advertising space and advertising services are separate products with respect to "large local" and regional advertisers. They are a single product for "small" advertisers. The difficulty is in knowing how reasonably or workably to distinguish regional and, more problematic "large local", advertisers from "small" advertisers, whether in terms of number of markets (as in the eight-market rule) or dollars spent on Yellow Pages. In approaching this task we have been mindful that the Director bears a burden in this regard of justifying any remedy granted. To the extent that the evidence and argument have left the matter unresolved, it behooves us to be cautious in our conclusions.

We know that in the current commissionable market, including grandfathered accounts, where advertisers have a choice, they overwhelmingly choose agents. We have found that demand extends well below the 1993 "national" definition and below the eight-market definition of commissionability.

The differences in the constituents of demand between the relatively smaller advertisers that employ the services of a consultant and those of larger, multi-directory advertisers that use agents or would use them if their accounts were commissionable are notable. The needs of the latter are more complex. In addition to advice and creative services, most require help in administration and in assuring uniformity of message. We infer that the intensity of demand, as measured by their willingness to pay, year after year, for these services by way of extra advertising or issue billing, is greater for larger customers that have multi-dimensional needs.

We turn to cost considerations to focus further on the appropriate dividing line. We have concluded that agents' interest, presumably driven by their view of their comparative efficiency *vis-à-vis* Tele-Direct, is primarily in customers with a minimum size ranging from $10,000 to $50,000 in annual expenditures on Yellow Pages advertising. This alone would dictate raising the bar for any unbundling of space and services to a minimum of $10,000.[204]

While the evidence that at least some independent publishers are willing to pay commission on any business brought in by agents could be interpreted to mean that it would be efficient to unbundle across the entire demand spectrum, we are not comfortable going that far. It

[204] We are referring to monetary amounts here because that is the way the evidence came in. Other criteria, such as number of markets, are more informative and other evidence was presented in that form. We attempt to relate the two measures below.

is far from clear that these publishers are guided by the relative efficiency of agents and in-house staff in servicing customers since for the most part their market position requires them to rely heavily on in-house staff despite their liberal commission rules. Their policy on commission could as easily be reflective of their desire to attract additional demand as of the relative efficiency of agents and in-house staff.

The approach of the large American publishers associated with telcos is to bundle space and services for all accounts smaller than those classified as national accounts or, for those who use a "B" account definition, for accounts smaller than regional accounts. We are not satisfied, however, that the publishers in question operate in competitive markets and that their choice of a dividing line is necessarily efficiency driven. As a result, we conclude that while unbundling of national and "B" accounts by them is probably efficiency driven, we cannot say that bundling for the balance of their accounts is motivated by efficiency and is conclusive on the dividing line for one versus two products.

Tele-Direct's studies are not helpful in drawing conclusions with respect to relative efficiencies of agents and Tele-Direct's employees along the demand spectrum. What we do know is that the eight-market rule was created by Tele-Direct primarily to capture more accurately "national" accounts than did the original 1958 definition and, at the time, Tele-Direct apparently considered this rule to be in its interest. Further, it is also clear that Tele-Direct did no studies and had no internal discussion of relative efficiencies when it further restricted commissionability in 1993. In doing so it ignored demand from existing eight-market customers (including those that were forced to buy unneeded advertising to qualify for eight-market status). Given that agents had served these types of customers over many years, that other publishers have "B" accounts, and that Tele-Direct at no time addressed the comparative efficiency of agents and the internal sales force for these accounts, there is no evidence of any efficiency offset which would lead us to conclude that space and services were not separate products for all the accounts within reach of the eight-market rule.

The eight-market rule was not specifically designed to deal with the needs of regional advertisers. This is obvious from the fact that there are seven markets in Ontario and six in Quebec. By almost any definition an advertiser covering all the markets in a province would be considered "regional" although such an advertiser would not be commissionable under the eight-market rule. Many of them likely managed to bring themselves within the rule with extra advertising. At a minimum, a firm that covers an entire province the size of Quebec or Ontario should qualify without more. We have no reason to doubt that the strong demand for advertising services from agents displayed by currently grandfathered eight-market accounts extends to advertisers that cover six markets, which would mean, for example, the entire province of Quebec. It is difficult to see that the efficiency implications for separately supplied advertising services at the six-market level are significantly different than for eight markets.

There is a rough relationship between the number of markets served and the amounts spent on Yellow Pages advertising. According to Tele-Direct's internal studies, the average amount spent on Yellow Pages advertising among customers served by Tele-Direct representatives but that were in the commissionable category under the eight-market rule was $54,000.[205] The comparable figures for accounts that would qualify under a seven-market and six-market rule, respectively, are $44,000 and $26,000. While some agents might find six-market accounts below their threshold of interest, the evidence is that they are within the range that some agents are willing to service, perhaps in anticipation of future growth.

We are cognizant that looking only on the demand side a case might be made for unbundling well below the six-market level. The evidence with regard to efficiency, principally the agents' views on accounts that they would like to service, does not support this conclusion. The Director suggests that there is no harm in unbundling across the board -- the market can be allowed to decide. If agents are more efficient, they will end up servicing the accounts. If Tele-Direct's internal sales force is more efficient, especially for smaller accounts, it will end up servicing those accounts. This implies a simple solution to a complex problem. In large measure, Tele-Direct is "the market" since the pricing of advertising services is inevitably its responsibility, whether it chooses to set commission rates for various types of accounts or to charge separately for the services of its internal sales force. Given widespread unbundling, Tele-Direct might well decide to set several different prices (or commission rates) for advertising services depending on the relative costs of servicing various categories of accounts. As the study on relative profitability showed, this would likely be a difficult task. It is not one that should be imposed without some greater certainty that there will be a significant overall benefit from the

[205] While the document is not explicit, the data were gathered in 1993 so we infer these are 1993 figures: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131635.

change. Therefore, we find that space and services constitute two products down to the six-market level and a single product below that level.

Addendum on Tying

At the outset of our discussion on tying, we indicated that another theory of the tying case was possible and we address that now. While some of the respondents' arguments and evidence are related, they did not adopt the precise approach which we outline hereunder.

One interpretation of the evidence is that advertising space and services are not demanded nor provided separately even in the existing commissionable market. Rather, larger advertisers either wish to purchase the bundle of space and services from Tele-Direct or from agents, in either case they are purchasing bundled space and services. Tele-Direct insists that the agents it deals with be accredited. The Director acknowledges that the placing of advertising in telephone directories is complex and accepts accreditation of agents by Tele-Direct. Indeed we do not necessarily envision advertisers purchasing space from Tele-Direct and providing their own services (except perhaps in the case of advertisers with accredited in-house advertising departments).

Following from the fact that accreditation means that only accredited services providers (including Tele-Direct's internal sales force) can place orders for space and they do so along with providing other services, it could be concluded that space and services must be bundled to be sold and that, therefore, they constitute a single product. Another way of viewing the matter would be that advertising space and services could be considered a single finished product on the basis that the real complaint respecting tying is not that advertisers are precluded from purchasing space and services separately, but that Tele-Direct has simply refused to supply unbundled space (i.e., at a discount) to agents which prevents them from selling to advertisers the same bundle of advertising space and services that is sold by Tele-Direct.

The evidence does not support this interpretation for the following reasons. First, we are satisfied that agents are not resellers of Tele-Direct's advertising space such that advertisers are purchasing the space *from agents* along with services. Agents do not carry an inventory of advertising space which they purchase from Tele-Direct for resale to advertisers. They assume no risks with respect to advertising space. Rather, when the agent's customer decides to purchase Yellow Pages advertising, the agent submits an order to Tele-Direct together with all other necessary information and Tele-Direct processes the order. The fact that Tele-Direct contracts with and bills the agents for the space, and treats the agents as the "buyer" in that sense, is not determinative of the relationship between the agent and the advertiser. We think that the fact that the agent does not have an inventory of space for resale is more consistent with the agent acting as an agent for the advertiser for the acquisition of space from Tele-Direct.[206] On this view of the evidence, the purchaser is not purchasing a bundle of space and services from the agent.

[206] Agents are agents for or "represent" advertisers in the sense that they place advertising on the advertisers' behalf but, as indicated earlier, agents have an independent interest and existence apart from advertisers in other aspects of service provision.

Second, the evidence does not indicate that advertisers wish to purchase advertising space from an agent as opposed to Tele-Direct. We think, all other things being equal, they are probably indifferent. However, there was evidence that they would prefer to pay Tele-Direct for space through monthly billing on their telephone bill rather than purchasing the space through agents on an issue billing basis. It is Tele-Direct that requires the latter arrangement, not the customer who demands it. This is not evidence that advertisers demand Yellow Pages space from agents as part of a service and space bundle. Nor have we been presented with evidence suggesting that efficiency would be adversely affected if Tele-Direct was to contract with and bill advertisers directly for space.

Finally, a purpose of the *Competition Act* is to encourage competition in order to provide consumers with competitive prices and product choice. There is evidence of demand for services from agents as opposed to Tele-Direct and efficiency considerations at the six-market level and above do not preclude facilitating such choice. For these reasons we have rejected this alternative interpretation of the evidence and have accepted that advertising space and advertising services constitute separate products.

E. TYING CONDITION

Having determined that there are separate products over at least part of the spectrum of Yellow Pages advertisers, we must now determine if those advertisers falling within that range were somehow "forced" to buy the products together rather than from separate sources. Since we have not found separate products below six markets, any references to the "local" market in this section refer only to that portion of the market from the current "national" definition down to six markets. In that range, where we have found separate products, we must establish that the two products were "tied" together as set out in subsection 77(1).

Paragraph 77(1)(a) provides one definition of tied selling. In essence, it is described as a practice whereby a supplier, as a "condition of" supplying the tying product to a customer, requires that customer to acquire another product from the supplier. Paragraph 77(1)(b) provides an alternative definition, the operative portion of which is that tied selling is a practice whereby a supplier "induces" a customer to meet the condition of acquiring another product from the supplier by offering to supply the tying product on more favourable terms and conditions if the customer agrees to acquire the second product.

The Director pleaded both the "requirement" or "condition" and the "inducement" in the application. The Director submits that, on non-commissionable accounts, the respondents require the customer to acquire their advertising services as a condition of supplying the space at a bundled price "and/or" the respondents induce customers to acquire their services by offering to supply space at no additional cost for the additional value if the customer also acquires their services.

It is undisputed that Tele-Direct does not segregate the charges for space and services in the non-commissionable market segment and that those "local" customers who get their services elsewhere than from Tele-Direct (for example, by using a consultant) or do not need any or some of the services, do not pay less or get a discount off the total price of their advertising. The Director submits that the effect of this is that "local" customers must buy space and services together from Tele-Direct; it is only economically viable to purchase services separately from an independent provider in the commissionable market. To do so in the non-commissionable market would require the customer to pay twice for services, once to Tele-Direct as part of the bundled price and once to the independent service provider that would actually provide the services. The Director argues that the effect of this is that it is either a "requirement" that both space and services be acquired from Tele-Direct or, perhaps the better fit on the facts, a compelling "inducement" to do so.

The Director points to evidence of the advertisers that recognize that if they use an independent service provider when commission is not available they will, in effect, be paying twice for services and this is why they stay with Tele-Direct despite dissatisfaction with the quality of service. Further, the Director emphasizes that Tele-Direct itself knew the value of this economic inducement and used claims that its services were "free" or included in the cost of the space to convince customers to choose its services.

The respondents advance a number of arguments relevant to the question of whether space and services are indeed tied together on the facts of this case. They argue that there is no "condition" involved because there is no contractual obligation to purchase services from Tele-Direct as local customers are free to acquire services from a CMR; however, Tele-Direct will not pay a commission on the account. They rely on the case of *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*[207] for the proposition that it is not an antitrust violation to sell components as a package where the same items can be purchased separately but at greater cost. They argue that there are no *more favourable* terms and conditions offered to customers that take Tele-Direct's services over those that do not because there is only one set of terms and conditions in the local market -- the bundle.

We see no reason to conclude that the references in the section to "conditions" or even "terms and conditions" require that these be embodied in an explicit contractual document. As we understand this requirement, it is to determine that customers are effectively forced or coerced to take the two products, which have been determined to be separate products, from the supplier of the tying product rather than acquiring only the tying product from that source and getting the tied product from someone else. This obviously can occur where there is an explicit contractual requirement to that effect. It may, however, also be equally present where there is a discount or other advantage that constitutes an inducement to acquire the two from the same source. The "conditions" or coercion referred to in the section mean more than contractual terms; they may be economic conditions which have the effect of precluding choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined on the evidence before us, not of the legal nature of the purchase arrangement.

[207] 1993-1 Trade Cas. (CCH) ¶ 70,266 (S.D.N.Y. 1993).

The *Ortho* case is of no assistance to the respondents. The case involved an application for a preliminary injunction by Ortho to prevent the implementation of a contract between the Council of Community Blood Centers and Abbott for a number of blood tests. Ortho alleged both monopoly leveraging and tying based on the theory that Abbott's pricing of various "packages" of blood tests forced any rational buyer to purchase all five tests from Abbott rather than buying one or more tests from competing suppliers like Ortho. The preliminary injunction was denied on the basis that Ortho had shown no irreparable harm.

The passages quoted to us by the respondents were simply the Court's summary of Abbott's arguments and authorities on the monopoly leveraging point.[208] The Court stated that Abbott's arguments gave it "pause" but all that it concluded in the end was that Ortho had shown that there were sufficiently serious questions on the merits to warrant litigation. On the tying claim, the Court, in fact, noted:

> There is some case law to support the position that a tie does not have to be explicit but can instead be inferred from the pricing structure of two products and the market power which the party has. . . .
>
> Absent an explicit condition in the contract, there is a question of fact for the fact-finder regarding the existence of the tie, and we are unable on this state of the record to determine if plaintiff is likely to prevail on the merits of the tying claims. What is evident however is that there are sufficiently serious questions going to the merits of the tying claim to make them a fair ground for litigation.[209]

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[208] *Ibid* at 70,333.

[209] *Ibid*. at 70,334.

Therefore, the relevant question for us is whether, on the facts before us, the customers of Tele-Direct were "forced" to acquire services from it or did they have the option of acquiring space alone from Tele-Direct. We conclude that the evidence of the advertiser witnesses and Tele-Direct's own behaviour amply support the position of the Director that the lack of commission in the "local" market operated as a powerful inducement to acquire both space and services from Tele-Direct.

F. SUBSTANTIAL LESSENING OF COMPETITION

Has the extent of the exclusion resulting from Tele-Direct's limitation of commission to "national accounts" as defined in the 1993 rule resulted in, or is it likely to result in, a substantial lessening of competition? It is first necessary to establish the relevant comparator that should be employed in evaluating the magnitude of the lessening involved. There is no purpose in comparing the six to eight-market accounts with all other accounts that are currently bundled and that we have decided may remain that way because demand characteristics and likely efficiency comparisons dictate a single product. The most relevant comparator is the size of the existing commissionable market under the 1993 definition because we are considering expanding that market. Eight-market accounts are currently commissionable but this could be discontinued at any moment without an order of the Tribunal so we include eight-market accounts as part of the tied portion of the market to evaluate substantiality. Further, grandfathering currently prevents accounts from "growing into" eight-market status.

In a word, it is clear that six to eight-market accounts constitute an appreciable volume of business that, without the tying practice, would be available for agents to service. The largest constituent is currently grandfathered eight-market accounts. In addition, there are the six and seven-market accounts now serviced exclusively by Tele-Direct. Based on the Tele-Direct documentation prepared in anticipation of the 1993 rule change and the evidence of Mr. Mitchell, both of which are far from being completely clear, we find that a fair approximation of the value of accounts which are now commissionable under the 1993 definition (thus, excluding grandfathered accounts and including "national" accounts serviced both by Tele-Direct and agents) is about $30 million. Our best estimate of the accounts which have been found to be tied, namely six, seven and eight-market accounts, and would be added to the commissionable market is about $19 million. Thus, the combined total of the accounts found to be tied adds up to well in excess of 50 percent of the current commissionable market. Both in relative and absolute dollar terms, the amount of revenue affected by the tie is undoubtedly sufficient to conclude that there is a substantial lessening of competition.

A final issue arises with respect to substantial lessening. The respondents advance in their written argument a "technical" argument based on the use of definite and indefinite articles in subsection 77(2). They submit that the substantial lessening of competition must be assessed in the market for the tying product, here the market for the supply of advertising space: has the tying of space and services impeded entry into or expansion of a firm or had any other exclusionary effect in the space market? This argument was not referred to orally.

While the definite and indefinite articles can be read in different ways, the section should be read in a way that makes sense. Since tying generally, and certainly in this case, involves "leveraging" from the tying product market to the tied product market, it is only sensible to assess the effects of the practice, or the substantial lessening of competition, in the target or tied product market.

G. REMEDY

Section 77 of the Act provides that upon a finding by the Tribunal of tied selling by the supplier of the tying product (Tele-Direct), the Tribunal may make an order "prohibiting [the supplier] from continuing to engage in . . . tied selling. . . ."

Prohibiting Tele-Direct from continuing to engage in tied selling means that the tying product, advertising space, and the tied product, advertising services for six, seven and eight-market accounts, must be unbundled by Tele-Direct. The "unbundling" may take the form of separate prices: Tele-Direct could quote separate rates for space and services. It may also take the form of an expanded definition of commissionable accounts to allow six, seven and eight-market customers to use the services of an agent, who would earn commission at an appropriate rate.

While we do not rule out the possibility of advertisers acquiring space from Tele-Direct (at the separately quoted space price) and then paying a separate fee for services to Tele-Direct or to an agent, we think this scenario is unlikely. There are practical implications arising from Tele-Direct's predominance in the publishing market and the accreditation of agents that suggest that the marketplace in an "unbundled" environment after our order will work largely the same as it does today except that the commissionable market will be expanded to cover six, seven and eight-market accounts. Advertisers that wish to utilize Tele-Direct's services would continue to buy space and services from Tele-Direct at one price.

Because of the specialized nature of the Yellow Pages industry, the respondents regard accreditation as important and the Director and his witnesses, for example, Ms. McIlroy and Professor Slade, support it. Thus, Tele-Direct would be justified in requiring that services, including the placement of orders, be provided by accredited service providers only. Unbundling does not require that advertisers be given the opportunity to interface directly with Tele-Direct to place their orders, if they do not wish to utilize Tele-Direct's services. Advertisers would either deal with Tele-Direct for space and services or with an agent for services and, through an agent, with Tele-Direct for space. This contributes to our view that in all likelihood, the structural arrangement that exists today would likely continue, changed only to permit agents to compete with Tele-Direct to provide services to six, seven and eight-market accounts.

The prohibition on tying, however, does not carry with it a requirement that Tele-Direct pay a specified commission to agents. It will be up to Tele-Direct to pay such commission as it chooses. Commission rates could be identical for all accounts or might be variable. However, the prohibition on tying implies that the price charged by Tele-Direct for its space and services together cannot, in relation to the price at which it offers space to customers using agents (i.e., its price for both space and services together less the commission to the agent) be an inducement to customers' using Tele-Direct's services rather than agents, thus continuing the tie. In other words, the price for space to customers of agents cannot be artificially inflated (or the commission paid to agents artificially reduced) so that space is not realistically available separately. Tele-Direct cannot make it economically non-viable for customers to purchase space from Tele-Direct and use an agent's services because in those circumstances the space effectively costs more than if the customer were to use Tele-Direct's services.

The intervenor agents (and the Director in the alternative) submit that the Tribunal should order Tele-Direct to pay a minimum 15 percent commission to agents. Although this proposition was advanced in the context of the Tribunal finding a tie across the entire market for Yellow Pages advertising in Tele-Direct's directories, in the context of our finding that there is only tying down to the six-market level, the minimum 15 percent commission would apply in respect of six, seven or eight-market customers serviced by agents. We have no difficulty with Tele-Direct voluntarily complying with our order prohibiting tying by paying a minimum 15 percent commission. A 15 percent commission rate has historical precedent and is well accepted in the advertising industry. It appears to be a workable "average" that would be simpler to administer than variable commission rates for each of the six, seven and eight-market accounts, should Tele-Direct choose to use it.

However, the setting of a commission rate by the Tribunal is not, in our opinion, envisioned in the powers given to it under section 77 of the Act regarding tying or in the general jurisdiction given to the Tribunal under section 8 of the *Competition Tribunal Act*.[210] The Tribunal is not a rate-setting body. The implication of rate-setting is an ongoing regulatory oversight which is the antithesis of the objectives of competition policy. To grant this remedy, the Tribunal would be required to hold itself open to revision to the 15 percent rate. We could not saddle Tele-Direct or the agents with a rate cast in stone forever and the alternative of ongoing rate regulation is, in our view, simply not part of the mandate of the Tribunal. It is true that the Tribunal issued the Consent Order providing for a 25 percent commission on national accounts, but that order was for a limited time and was on consent. It provides no justification for a gearing up of a general regulatory process implied by setting a rate for an indefinite period in this contested proceeding.

The Tribunal's order will therefore provide that Tele-Direct is prohibited from tying its advertising services to advertising space for six, seven and eight-market accounts. Should Tele-Direct choose to comply with the order by a commission arrangement with accredited agents at a minimum rate of 15 percent, the Tribunal would find such an arrangement acceptable compliance. Otherwise, Tele-Direct can price space and services separately or implement a commission arrangement for six, seven and eight-market accounts at an appropriate level or levels. The price Tele-Direct charges for its bundle of space and services, if it continues to offer them as a package, in relation to the price that it charges for space separately cannot be such that

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

it continues to tie space to services by way of an inducement offered to customers that take Tele-Direct's services. The order will specify that the parties may apply to the Tribunal for interpretation of the order or directions if they consider it necessary to ensure compliance.

IX. ABUSE OF DOMINANT POSITION

A. INTRODUCTION

For ease of reference, we set out again subsection 79 (1) of the Act, which deals with abuse of dominant position:

> 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.

Unlike previous abuse of dominance applications that have come before the Tribunal, where only one market was at issue, the Director here is putting forward two abuse of dominance cases, one involving the alleged market for the supply of advertising space and the second, the alleged market for the supply of advertising services.

One case is that the respondents have market power in the market for the supply of telephone directory advertising space, or publishing, and have engaged in a practice of anti-competitive acts which has resulted in a substantial lessening of competition in that market. This case involves the responses of the respondents to the instances of new entry by competing broadly-scoped publishers in local markets, most significantly the entry of White in the Niagara region and the entry of DSP in Sault Ste. Marie.

The second case is that the respondents have market power in the market for the supply of telephone directory advertising services or, in the alternative, that they are leveraging their market power in the space market into the services market, and have engaged in a practice of anti-competitive acts which have resulted in a substantial lessening of competition in the services market. Among the anti-competitive acts alleged to form a practice affecting this market are both acts directed at agents and acts directed at consultants. For example, one of the alleged anti-competitive acts is the bundling of space and services (restricted commissionability rules for agents) which forms the basis of the tying portion of the Director's application. Another is the alleged refusal by Tele-Direct to deal with consultants.

B. APPROACH TO SECTION 79 ANALYSIS

In dealing with the particular allegations in this case, the purpose of section 79 must be kept in mind. Neither party disputed that section 79 is not intended to condemn a firm merely for having market power. Instead, it is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power.[211] Such abuse includes, as pointed out by the Director, entrenchment and extension of market power.[212] It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even "tough" competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.[213]

The Tribunal established in *NutraSweet* that the list of anti-competitive acts set out in section 78 is not exhaustive. The Tribunal held that the common feature of the acts included in section 78 is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[214] The Tribunal's approach to assessing whether acts are anti-competitive was set out most recently in *D & B*:

> . . . in evaluating whether allegedly anti-competitive acts fall within section 78, the Tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market". The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition. The decision in *Laidlaw* makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions.[215] (references omitted)

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[211] Consumer and Corporate Affairs Canada, *Competition Law Amendments: A Guide* (Supply and Services Canada, December 1985).

[212] *NutraSweet, supra* note 4 at 47.

[213] *Laidlaw, supra* note 33 at 333.

[214] *NutraSweet, supra* note 4 at 34.

[215] *D & B, supra* note 31 at 257.

The Tribunal must determine the "purpose" of the act that is alleged to be anti-competitive. "Purpose" is used in this context in a broader sense than merely subjective intent on the part of the respondent. As counsel for the Director pointed out, it might be more apt to speak of the overall character of the act in question.

What the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, "exclusionary, predatory or disciplinary". Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary, may be informative in assessing the totality of the evidence. A "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue.[216] Further, the business justification must be weighed "in light of any anti-competitive effects to establish the overriding purpose"[217] of the challenged act:

> . . . The mere proof of *some* legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.[218]

In their argument, the respondents advance several propositions regarding the nature of an anti-competitive act that they submit the Tribunal must determine as a matter of law in this case. One of these propositions is particularly relevant to the case relating to the publishing

216 *Ibid.* at 261.

217 *Ibid.* at 262.

218 *Ibid.* at 265.

market. They state that certain acts constitute "competition on the merits" and cannot ever be anti-competitive acts. In another formulation, they state that objectively competitive conduct cannot constitute an anti-competitive act. They would define "objectively competitive" conduct as conduct which a non-dominant firm would have undertaken in similar circumstances.[219] Applying this argument to the specific case of the allegations involving the publishing market, the respondents say that the Director cannot allege, for example, that "zero price increases" are an anti-competitive act because competitive firms sometimes use zero price increases or even price decreases to compete.

We do not take issue with the proposition that section 79 is not intended to prevent dominant firms from competing on the merits. We do, however, doubt that it is possible to define, in the abstract, a list of acts that are "objectively competitive" and that could never, therefore, engage section 79. Competition on price is surely one of the hallmarks of a competitive market. Yet even the act of "price cutting" cannot be given absolute immunity from review under section 79 because of the possibility of predation. In our view, a case-by-case, factual analysis will always be necessary to determine if, in the particular circumstances, an act is anti-competitive. All the relevant factors must be weighed in deciding whether a particular act is, in the circumstances, competition on the merits or an anti-competitive act. That question cannot be answered as a matter of law in a vacuum.

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219 They rely mainly on *Clear Communications Ltd. v. Telecom Corp. of New Zealand* (1994), 174 N.R. 266 (P.C.).

C. MARKET FOR ADVERTISING SPACE - PUBLISHING

(1) Facts

The independent publishers DSP and White have already been discussed at various places in these reasons, largely in chapter "VII. Control: Market Power". We summarize here and add some further relevant facts.

Since 1993, DSP has produced a white pages and classified directory covering Sault Ste. Marie, Elliot Lake and Wawa in northwestern Ontario. Since January 1994, it has been a division of Southam Inc. but is still operated largely independently from the Southam newspapers in the area in question. Tele-Direct publishes three separate directories for the areas covered by the DSP directory.

The DSP Canadian directory is combined with a corresponding directory for the Sault Ste. Marie, Michigan area. The American portion is published by Noverr Publishing Inc. ("Noverr") which publishes several directories in the state of Michigan.

White publishes competing directories (Niagara Falls, St. Catharines and Fort Erie) to Tele-Direct's in the Niagara region in Canada. White also entered Canada in 1993. White is a wholly-owned subsidiary of the American company White Directory Publishers, Inc. which is a private company controlled by the Lewis family. The American company began operations in

1968 with a classified directory (yellow pages only) in the Buffalo area. A white pages directory was later added and then in the second half of the 1980s and early 1990s additional directories containing both classified and white pages were started in other areas of New York state and Pennsylvania. White's entry into Canada was followed by further expansion in the United States in 1994 and 1995, into Florida and North Carolina.

Both DSP and White first published "prototype" directories in Canada, DSP in January 1993 and White in November and December 1993.[220] DSP published its first revenue directory in November 1993. White began its canvass for its first revenue directory in late 1993 and continued in 1994. Its first revenue directory was published in late 1994.

In order to produce their directories, White and DSP had to generate subscriber listings for their white and yellow pages. As discussed earlier, despite the 1992 ruling of the CRTC, at the time of their entry DSP and White did not have commercially viable direct access to subscriber listings. They had to use the most recent Tele-Direct directories, re-key the data, verify and update each listing.

Included in the directories of White and DSP were features which were not present in the existing directories of Tele-Direct in either region, including audiotext, community pages, larger

[220] Advertising in a prototype directory is provided free to businesses. A prototype serves to lend credibility to a new publisher's claim that it will, in fact, produce a directory and affords the publisher an opportunity to prove to advertisers the value of advertising in its directory.

size print, three-column format, postal codes and additional colour plus a free smaller size copy in addition to the regular size directory (a "mini").[221]

Less detail was provided on the other two competitive markets referred to by the Director. In October 1994, a competing directory was published in Joliette, Quebec by Les Pages Soleil, a joint venture involving the company which publishes the Locator directories in Ontario. Les Pages Soleil also feature enhancements like community pages, postal codes and only three columns per page.

In Newfoundland, a company called Unifone Files Inc. ("Unifone") intended to publish a province-wide directory called "The Big Phone Book", apparently some time in 1993 or 1994. Tele-Direct (Services) Inc. publishes seven directories in Newfoundland for Newfoundland Tel (St. John's, eastern Newfoundland (four), western Newfoundland and central Newfoundland). In addition to its broader scope, the Unifone directory was to feature larger print, community pages and a "mini" directory. As of February 1994, however, Unifone was no longer in existence and it never did publish a directory.

The two entrants for which we had evidence on this point (White and DSP) priced advertising in their directories 30 to 40 percent below Tele-Direct's rates.

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[221] DSP also included a "reverse" directory -- listings by phone number first.

Tele-Direct responded to these various entrants using a number of initiatives, including price freezes, advertiser incentive programs, advertising and promotional expenditures, and directory enhancements. Tele-Direct was also involved in litigation or threatened litigation against the entrants in Sault Ste. Marie and Niagara. Further details on these responses follow.

Tele-Direct adopted a zero percent price increase or price freeze in Sault Ste. Marie in 1993. Except for 1994, when there was a general price freeze across all of Tele-Direct's territory, prices were increased annually in the vast majority of Tele-Direct's directories outside of the competitive markets.[222] In 1995, there were zero price increases in Sault Ste. Marie, Joliette and the Niagara region. The information on the record regarding 1996 prices is that all markets were subject to a price increase, including the competitive markets.

Tele-Direct has offered advertiser incentive programs of various kinds throughout its territory at different times. The critical distinction between the programs offered in the competitive markets and those offered in other markets is that in the competitive markets the incentives were available to advertisers who *renewed or increased* their advertising whereas in the other markets only those advertisers who *increased* their level of spending were eligible.

The advertiser incentive program in Sault Ste. Marie was first offered in 1993. While originally intended as a one-year program it was extended to three years, ending in 1995.[223] In

[222] The exceptions for Tele-Direct's directories were the neighbourhood directories and areas subject to rescoping or splitting of directories. At the request of other telcos, like Newfoundland Tel and Northern Tel, prices were also frozen in those directories in 1995.

[223] In the first year (1993), all existing advertisers renewing or purchasing advertising received the next size up or colour, if applicable, at no extra charge. In 1994, all advertisers who participated in the program in 1993 were offered the next size up free,

Niagara, a program similar to the Sault Ste. Marie advertiser incentive program was offered in 1994 and 1995. As of the hearing, no decision had been taken about proceeding to offer the program in Niagara for a third year. In Joliette, a program was offered in 1995 which provided that advertisers renewing or purchasing advertising would receive the next largest size advertisement or colour if applicable. In Newfoundland, the same program was offered in four directories in 1994. Mr. Beauséjour, Tele-Direct's Vice-president of Finance, confirmed that the program was instituted in response to the presence of Unifone.[224]

In each competitive market, Tele-Direct added a number of features to its directories that were introduced first by the entrant. Most of these features tend to be fairly standard in many American markets. For example, the enhancements used by White in its Canadian prototype are almost all standard features for it in its American markets. The features added by Tele-Direct in response are not generally used by it in its directories in other markets.

We have limited information about the Joliette and Newfoundland situations in this respect. Tele-Direct did add a community pages section to its Joliette directory. Mr. Renwicke thought that postal codes had also been added. A memorandum dated October 1993 records a

free colour or a 15 percent rebate if they renewed or increased their advertising. Those who had not participated in 1993 and new advertisers were given a 15 percent rebate. In the third and final year, the program became even more complex with different choices available to 1994 participants who were renewing depending on which option they had chosen (rebate/free size up or colour) in 1994. Non-advertisers and non-participants were again offered a 15 percent rebate as were 1994 participants who were increasing their advertising.

[224] In 1995, when Unifone was no longer present, advertisers were offered a 15 percent rebate if they increased their advertising but participants in the 1994 program could receive the rebate if they renewed their upsized or colour item.

recommendation by Tele-Direct (Services) Inc. that the Newfoundland directories contain "some enhancements starting with the central Newfoundland 1994 directory."[225]

In Sault Ste. Marie, Tele-Direct added enhancements to its directories similar to those offered by DSP, including four-colour format, postal codes, community pages and its own audiotext system (Talking Yellow Pages or "TYP"). Likewise, in Niagara Tele-Direct reacted to the entrance of White by adding enhancements similar to those of White to the Tele-Direct directories in that area. Tele-Direct did not introduce all of the enhancements included by the entrants. For example, it did not adopt larger type or distribute "mini" directories.

Some further detail is required about the audiotext system or TYP in order to understand the allegations advanced by the Director in this respect. Audiotext is an electronic technology which allows consumers with Touch-Tone phones to obtain access to audio messages which are stored on a computer. The directory publisher provides in its directory codes which can be used by consumers to gain access to the messages on topics of interest to the consumer. The provision of an audiotext service is comprised of both hardware components, the computer and satellite dish, for example, and the information lines which are fed to the satellite dish from a supplier. Depending on the information being offered, the lines are updated at regular intervals during the day, on a daily basis or on a monthly basis.

[225] Confidential exhibit CJ-87 (black vol. 14), tab 104 at 134481.

Tele-Direct introduced its first TYP in Kitchener in 1988 followed by Toronto and Quebec City that same year. Unlike the audiotext involving the provision of general information on various topics to consumers, the Kitchener and Quebec City services involved advertiser-specific information. The code was provided in the advertisement; the interested consumer could call for more detailed information regarding that supplier, for example, prices. These services were later abandoned for lack of advertiser interest; the Toronto service, which is of the general information type, is still offered. Since it first offered TYP, Tele-Direct's supplier of the information lines required has been a company called Perception Electronic Publishing ("Perception").[226] As of November 1993, Perception is owned by Brite Voice Systems.

When it entered the Sault Ste. Marie market with its prototype directory in January 1993, DSP provided an audiotext service. This was the first time such a service was offered in Sault Ste. Marie. The information supplier for DSP was Perception. During the first two months that it was offered, the DSP audiotext service was heavily used.

Tele-Direct introduced its TYP in Sault Ste. Marie in April 1993 in advance of its June 1993 directory, some three months after DSP published its prototype directory, also using Perception for its information feed. Tele-Direct used flyers to distribute the relevant codes to consumers. It was roughly at the same time as the Tele-Direct TYP were introduced that DSP began to experience deterioration in its audiotext service because the information was no longer being updated in a timely manner. DSP was in constant contact with Perception in order to get

[226] Formerly called BDR Audio Network.

the lines updated within an acceptable time frame, but with no success. The quality of DSP information feed from Perception remained poor until November 1993, which was essentially the same time that Perception was acquired by Brite Voice Systems.

Tele-Direct also engaged in large advertising campaigns in Sault Ste. Marie and Niagara. No detailed information was provided in this respect regarding the other two competitive markets. Compared with pre-entry levels virtually all of the advertising and promotional expenditures were new. In Sault Ste. Marie, Tele-Direct spent only about $50,000 on advertising in 1992 as compared to $215,000 in 1993. By 1994, expenditures had dropped back to $22,000. In Niagara, Tele-Direct spent $43,000 in 1992, $71,000 in 1993 and $28,000 in 1994.[227] In 1993, advertising expenditures in Sault Ste. Marie constituted approximately 11 percent of published revenues for that city; in 1993 in the Niagara area, advertising expenses amounted to less than one percent of published revenues.

Another circumstance relevant to the Director's allegations respecting publishers is that Tele-Direct initiated a suit against DSP in May 1993 for infringing the "walking fingers" trade-mark and Tele-Direct's copyright in the advertisements in the Tele-Direct directory with its prototype directory. In the spring of 1995, Tele-Direct notified DSP that it would also be challenging the 1994 and 1995 DSP directories. At the time of the hearing, the lawsuit had reached the stage of discoveries. A representative for Tele-Direct had been discovered and the discovery of the representative for DSP was scheduled for November 1995.

[227] Exhibit R-152.

Although no suit has been launched in relation to White, Tele-Direct made it abundantly clear to White early in 1993 that it would vigorously defend its trade-marks and its interpretation of its copyright interests arising from the advertisements in the Tele-Direct directories. In particular, Tele-Direct informed White that it could not make use of an advertiser's copy, layout or graphics as they existed in the current Tele-Direct directory in creating the first White directory.

(2) Control of a Class or Species of Business in Canada

The Tribunal has already found that the supply of telephone directory advertising constitutes a relevant product market and that the relevant geographic markets are local in nature. We have also found that Tele-Direct possesses market power in those markets. We are satisfied, therefore, that Tele-Direct has market power in the market for the supply of advertising space or the telephone directory publishing market and therefore controls the business in the relevant geographic markets.

(3) Practice of Anti-competitive Acts

(a) Allegations - Pleadings

The Director's application, as amended, says at paragraph 65 that the following acts together constitute a practice of anti-competitive acts affecting the market for advertising space, or the publishing market, which leads to a substantial lessening of competition in that market:

> . . .
>
> (g) targeting price reductions and other discounts to those markets in which entry by competing publishers has occurred or is occurring; and
>
> (h) causing, directly or indirectly, advertising agencies to refuse to place advertising in telephone directories published by competing publishers or otherwise discriminating against or causing independent advertising agencies to discriminate against competing publishers; and
> (i) making disparaging statements in regard to new market entrants.

In argument, the Director did not refer to the act set out in (i). Under the heading in the written argument, "Otherwise Discriminating between Publishers", the Director gathers evidence relating to the respondents' policy of not allowing the directories of competing publishers to count towards the 20 directory requirement of Tele-Direct's national account definition. Under the heading in the written argument, "Targeting/Raising Rivals' Costs", the Director refers to various actions by the respondents in response to entry by competing publishers in the local markets of Joliette (Quebec), Newfoundland, Niagara and Sault Ste. Marie which are alleged to constitute anti-competitive acts because of their targeted nature and intent and the degree or intensity of the response. The particular responses listed are zero price increases, incentive programs, advertising and promotional spending, directory enhancements, interfering with the DSP audiotext feed and litigation or threats of litigation.

The respondents say that the allegations involving directory enhancements, promotional spending and litigation or threats of litigation are not encompassed by the pleadings and cannot be relied on by the Director.

It is not in dispute that the evidence and the argument put forward by the Director on this issue must be supported by the pleadings, either by the specific words in the application or by reasonable inference therefrom. It is trite to say that the pleadings are intended to define the issues in dispute between the parties, to give fair notice to each party as to the case that it will have to meet and to assist the decision maker in considering and deciding the allegations that have been made. Where, as here, an argument about the scope of the application is only raised at the stage of final argument, we agree with the Director that regard may be had to interlocutory proceedings, discovery and the conduct of the hearing itself to determine what the *parties* considered were the issues raised by those pleadings. We need not restrict ourselves to the pleadings in a vacuum.

(i) Enhancements

Directory enhancements were not explicitly mentioned in the application. However, in its request for leave to intervene, White specified, in paragraph 9 of the request, those matters in issue which affected it. Item (e) reads:

> offering directory enhancements (community pages, an audio text system and postal codes) targeted to areas where competition or the threat of competition exists. . . .

As stated in the reasons of the Tribunal for granting leave to intervene, the respondents did not oppose the intervention. The respondents only objected to White being given leave to make representations with respect to certain issues which, the respondents argued, were outside the scope of the Director's application. The respondents submitted that the representations of an intervenor must be relevant to the proceedings and that relevance is defined by the parties' pleadings. The Tribunal agreed. The issues in White's intervention challenged by the respondents as being outside the scope of the application did not include item (e) "enhancements" but rather focused on six other items. The Tribunal accepted that four of the disputed six items were not supported by the application and excluded them from the purview of White's intervention.

If the respondents were genuinely of the view that the question of directory enhancements was outside the scope of the application as defined by the pleadings, then they would have challenged that part of White's intervention request. The question of what was and what was not supported by the pleadings regarding the alleged anti-competitive acts in relation to independent publishers was squarely in issue at the intervention hearing. The clear implication of the respondents' failure to challenge item (e) is that they considered that enhancements were within the pleadings.

Nothing occurred after the intervention hearing that would have led to any other conclusion. The Director requested the production of documents and conducted discovery on the question of enhancements. Eventually the relevant documents were produced, without objection.[228] The Director submits that Tele-Direct has taken this "about face" on the question of enhancements in order to provide an after-the-fact explanation for its belated production of a

[228] For a more complete discussion of this issue, see *infra* in this section on abuse of dominance in publishing under "(b) Alleged Anti-competitive Acts", "(ii) Targeting/Raising Rivals' Costs".

boxful of relevant documents relating to its responses in competitive markets. The Director called evidence at the hearing on enhancements, without objection. The respondents themselves led evidence on the question of enhancements. Tele-Direct cannot now change a position that it took on an interlocutory proceeding and maintained throughout discovery, the hearing and up until the commencement of its final argument. The entire case has been conducted on the basis that directory enhancements are fairly in issue. Enhancements are properly before the Tribunal.

(ii) Advertising and Promotional Expenditures

Unlike directory enhancements, advertising and promotional expenditures were not specifically addressed at White's intervention hearing. If we looked only at the words of the pleadings, it might be arguable whether those words would support the allegation. Again, however, we have a course of conduct that sheds considerable light on whether the parties themselves thought promotional expenditures were at issue as part of the allegation of anti-competitive acts. It is clear that they did. Oral and documentary discovery was conducted by the Director on this issue. Counsel for the Director referred to it in his opening address. The Director called evidence in chief on the issue and the respondents called responding evidence. Advertising and promotional expenditures are properly before the Tribunal.

(iii) Litigation and Threatened Litigation

Counsel for the respondents pointed out that the Director was not seeking any remedy specifically relating to litigation. Counsel for the Director did not address the respondents' argument that litigation or threatened litigation falls outside the pleadings. In argument on the merits, however, the Director took the position that litigation or threats of litigation contribute to the anti-competitive act of "targeting" or "raising rivals' costs".

The words of the pleadings do not obviously incorporate such a concept. The original application, at paragraph 65(h), contained a specific allegation of an anti-competitive act of "threatening or taking legal action to restrict competing suppliers of advertising space from gaining access to, or from utilizing, subscriber listing information". This allegation was later withdrawn. However, as with promotional expenditures, litigation was dealt with in the evidence and argument. In view of the specific withdrawal by the Director of the reference in the pleadings to litigation or threatened litigation, the respondents' position is somewhat stronger on this point than on the others. But, it is not necessary to decide the issue on procedural grounds. As will become apparent, we are not satisfied on the merits of the argument that litigation or threatened litigation constitute anti-competitive conduct in this case.

(b) Alleged Anti-competitive Acts

(i) Causing Agencies to Refuse to Place Advertising with Independents

The independent publishers' directories do not count towards the 20-directory requirement that forms part of the 1993 definition of a Tele-Direct commissionable account. The Director argues that the effect of the Tele-Direct policy in this regard is that CMRs do not recommend independent directories to advertisers when they would do so if those directories counted towards qualification as a commissionable account. Thus, it is submitted, this excludes independents from revenues that they would otherwise obtain.

The Director relies on the evidence of Mr. Lewis of White comparing the situation in Canada with respect to advertising placed in his directories by CMRs to that in the United States. In distinction to Tele-Direct's policy, in the United States publishers include the directory of any other YPPA member in determining whether an account qualifies for commission. White is a YPPA member and therefore its directories count towards the minimum directory requirement in the United States. Mr. Lewis testified that in that country eight percent of White's advertising revenues are placed by CMRs while in Canada less than one-half of one percent comes from CMRs.

The respondents respond that this testimony alone does not constitute proof of the requisite exclusionary effect. Because White has been operating in the United States for a lot longer, and is therefore more established than it is in Canada, they question the validity of the comparison being made. Further, they rely on the evidence of Stephanie Crammond of Media Nexus, a specialized Yellow Pages advertising agency, that if she had confidence in the distribution figures cited by the various independents, she would consider them. Likewise, Richard Clark of DAC stated that his position on independent directories was to "wait and see" if they were going to stay around and then base a decision on which directory had greater usage. He did point out that typically the telco directory has the greater usage and, therefore, if a competing directory is used, generally it is on a secondary basis, with the primary advertising dollars allocated to the telco directory.

On balance, we are not persuaded by the Director's argument. While we recognize that monetary incentives are bound to enter into an agency's recommendation to a client, the Director's argument implies that agencies are entirely driven by earning commission and will compromise the quality of the advice they give by omitting to recommend a good, independent directory merely because it would not help the account qualify for a Tele-Direct commission. The burden of the remainder of the Director's case, as it involves agencies, is that they are, among other things, independent suppliers of advice to advertisers and therefore provide a valuable alternative to Tele-Direct's captive salesforce. For the Director to suggest now that agencies would not provide good advice seems to be somewhat inconsistent with that position. But apart from this, the independents, of course, pay their own commission on advertising placed in their directories.

There are factors at play other than Tele-Direct's criteria in agents' decisions when recommending directories to their clients. As Mr. Clark's testimony indicates, an important reason why independent publishers in Canada may not receive a high volume of business from agencies is that, because Tele-Direct is the established publisher, it is rarely a choice *between* Tele-Direct's directory and the independent directory for a particular area. Rather, the agency will generally recommend the Tele-Direct directory as the primary directory for advertising because of widespread usage and then, if additional money is available, recommend the independent *also*.

In summary, we do not accept that Tele-Direct's policy regarding the 20-directory requirement discourages agency recommendations of independent directories.

One final observation in this area arises from the respondents' written argument at paragraph 590, that as a matter of law "[i]t cannot be an anti-competitive act for a dominant firm to decline to assist or give aid to a competitor." We agree with the general proposition that a firm is not, and should not be, required to "assist" its competitors. The respondents, however, add an additional element to the proposition when they submit that:

> Each of the anti-competitive acts listed in section 78 require the dominant firm to *actively initiate* some action. . . . None of the listed acts are triggered simply by the dominant firm *not doing something or refusing to assist*. . . . (emphasis added)

While the respondents did not advance this argument in relation to the specific allegation we are dealing with here (or, in fact, in relation to any specific allegation), it certainly seems relevant to the question of whether Tele-Direct should be obliged to recognize advertising in independent directories as counting towards Tele-Direct's commissionability requirement of a minimum of 20 directories. As stated above, as a general proposition, competitors should not be required to assist one another. But, this general proposition may be shown to be inapplicable in a given section 79 case by the Director proving that the "act" of the respondent meets the elements of that section and is an anti-competitive act leading to a substantial lessening of competition.

Then, any order of the Tribunal which may issue is, by definition, not an order to "assist" a competitor but rather, in the case of subsection 79(1), an order to cease and desist from anti-competitive conduct.

It is, therefore, not sufficient, in circumstances such as these, to argue the general proposition. Nothing can be determined by simply labelling the alleged anti-competitive "act" as "doing something" (active) or "not doing something" (passive). The anti-competitive effect of the conduct of the respondents, whether "active" or "passive", must be weighed against any business justification in order to conclude whether there has or has not been a substantial lessening of competition. That can only be done by reference to the evidence. On this point, Tele-Direct only argued the general proposition.

(ii) Targeting/Raising Rivals' Costs

Reaction of Tele-Direct

Before turning to the evidence it is necessary to consider what the Director means when he alleges that "targeting/raising rivals' costs" is an anti-competitive act. There is a growing body of literature dealing with "raising rivals' costs" ("RRC"). The theory was proposed as a similar but more credible route to market power than predatory pricing because it does not depend on short-term price cutting beyond what is profit-maximizing followed by later recoupment. With RRC, it is not necessary to cause the rivals to exit, no "deep pockets" are necessary and the additional profits are gained immediately.[229] Typically, an RRC strategy involves increasing rivals' costs by raising the price of some scarce input which in turn results in the rival reducing its output.[230] In other words, there is a relatively immediate output reduction in the market concerned. Only two elements of the act alleged by the Director seem to bear any resemblance to this conception of RRC -- the audiotext affair and litigation and threats of litigation. As we shall see, the remaining actions of Tele-Direct relating to pricing, incentives and advertising did not result in output reduction in the markets in question. The considerations involved in RRC can provide little assistance in evaluating the allegations relating to those reactions of Tele-Direct in competitive markets or the "targeting" aspect of this act.

The Director has not attempted to explain what is meant by targeting in any detail, perhaps regarding the term as largely self-explanatory. It is, however, far from being a household word in competition law. While we have no reason to discourage novel approaches to discerning potentially anti-competitive conduct that might fall within section 79, we do see considerable difficulty in applying the targeting concept. It is always difficult to distinguish between anti-competitive practices and normal competition. The conduct in question may be generally benign and it is only in certain contexts that it is anti-competitive. The difficulty is even more pronounced in this case, given the actions on the part of Tele-Direct that the Director would have the Tribunal, if not prohibit completely, certainly restrict.

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[229] T.G. Krattenmaker & S.C. Salop, "Competition and Cooperation in the Market for Exclusionary Rights" (1986) 76:2 Amer. Econ. Rev. 109.

[230] D.T. Scheffman, "The Application of Raising Rivals' Costs Theory to Antitrust" (1992) 37 Antitrust Bulletin 187.

In argument counsel for the Director described the nature of targeting as follows:

> The reason that acts of predation or near-predation can be anti-competitive is because the firm is dominant in a larger market. The danger is that, rather than bringing the public the benefit of competition in a limited area, what is happening is that in the long-term analysis the dominant firm is leveraging its market power from its broadly-dominated market into specific targeted areas where competition enters, with a view to either eliminate that competition entirely or, as in the situation here where the expressed intent fell a bit short of that, to ensure that the competition didn't move into any other markets and to raise their costs so that those companies would know that it was not going to be a profitable enterprise to continue their expansion.
>
> What we are suggesting is that this is really a test of degree, that we have in at least one of the markets evidence which is very close to predation. What we have is such a tightly focused and overwhelming marshalling of the dominant resources of the company to these targeted areas that there is a need for a remedy.
>
> . . .
>
> . . . While one may formulate various tests that would have different requirements in terms of the super-normal targeted response, this is probably the clearest case imaginable in terms of the absolutely overwhelmingly aggressive nature of the response to these targeted markets.[231]

Counsel clarified that "leveraging" in this context means the use of monopoly rents from other markets to subsidize near-predatory behaviour in the markets in question.[232]

One of the ordinary meanings of the word "target" is

> anything that is fired at or made an objective of warlike operations . . . [233]

[231] Transcript at 64:13167-68, 13170 (16 February 1996).

[232] *Ibid.* at 13169.

[233] *The Concise Oxford Dictionary*, 7th ed. (Oxford: Clarendon Press) at 1094.

In one obvious sense, therefore, "targeting" simply refers to focused or aimed rather than general responses. The facts show that Tele-Direct behaved differently in the competitive markets. If the Director is arguing that the actions of Tele-Direct constitute the anti-competitive act of targeting merely because its actions in markets in which broadly-scoped entry was occurring were different from those in markets where no such entry had occurred, we do not accept the argument. Targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition. Similarly there may be gradations of reaction depending on the nature of the competitive threats.

The earlier discussion regarding market power established that, whereas the broadly-scoped directories published by entrants in the "targeted" markets were considered by Tele-Direct as competition for its own directories, the same was not true of other publishers who sought market niches defined by geography or other specific characteristics of their intended audience (e.g., ethnic, religious, easy to read directories). Furthermore, both White and DSP introduced features into their directories such as postal codes, information about cultural events, coupons, etc., that provide value to users that could affect whether the Tele-Direct directories would be retained by telephone subscribers in those markets if Tele-Direct did nothing.

If "targeting" does not depend solely on differentiated responses, how is it to be distinguished from competition on the merits? We do not take the Director to be proposing that an incumbent, even one with a dominant market position, is precluded from responding to entry. Entry would obviously be *encouraged* if the incumbent accommodated the entrant. It is, however, doubtful that anyone would suggest that this is a desirable competitive outcome. Anything short of accommodation is likely to make the post-entry prospects of an entrant less attractive than the pre-entry benefits enjoyed by the incumbent. It is, therefore, not enough for us to find that Tele-Direct's responses made entry less attractive.

Indeed, the Director's position seems to be that a firm is free to act to discourage entry but that there is a limit to what it may do. This is reflected in the Director's proposed remedy, which would allow Tele-Direct to use two out of three of price reductions or discounts, enhancements and an advertising campaign in individual markets.[234] Once the incumbent passes this critical threshold, it is submitted that it has moved into the realm of anti-competitive conduct. The reasoning behind this, as we understand it, is that while what has been done in the particular markets may not be particularly harmful, the long-term harm caused by discouraging future entry outweighs any immediate benefit. In other words, the response in the markets where entry occurs is part of an effort to discourage entry into other markets by behaving in a fashion which is nearly, but not necessarily, predatory in the strict sense in which that word is usually used.

[234] Tele-Direct would be unrestricted in its responses if it implemented those responses throughout its territory.

In support of the position that Tele-Direct's response went beyond what is "normal", the Director relies on its expressions of corporate intent, the number, variety and degree of its responses and the intensity of those responses. As a standard for assessing how far Tele-Direct went the Director submits that we can look to the evidence that its response in Sault Ste. Marie caused Tele-Direct to incur losses, a comparison to the experience of independent entrants in American markets, and the difference between White's and DSP's expectations and their actual results and their future plans.

Counsel for the Director also suggests that Tele-Direct is using its monopoly rents from other markets to cross-subsidize its responses in competitive markets. This possible meaning of targeting would only apply, however, where the dominant firm is incurring losses in the targeted market. However, the Director does not appear to be suggesting that this is a necessary condition for the Tribunal to find that "targeting" is an anti-competitive act in this case.

First, we will examine the question whether what Tele-Direct did in the competitive markets was generally of benefit to consumers (advertisers) in those markets, largely neutral or, in fact, harmful. While Tele-Direct's actions clearly made it more expensive for the entrants than if it had accommodated them, seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off. The Director has not attempted to argue that Tele-Direct's responses caused harm to advertisers in the particular markets in which entry occurred. The Director did, however, submit that at least some of Tele-Direct's actions were of negligible or temporary benefit to those advertisers.

With respect to the zero price increases, there is no question that advertisers benefitted from this initiative. The evidence indicates that the advertiser incentive program in competitive markets was carefully designed to absorb customers' directory advertising budgets so that little would be left for the new entrants when they canvassed for paid advertising. Yet, it is difficult to conclude that these programs did not benefit advertisers, particularly when rebates were involved. Making its directories more attractive by adding enhancements and increased advertising by Tele-Direct would both tend to increase usage of telephone directories and, thus, benefit advertisers in those markets. There was evidence that some of the enhancements to Tele-Direct's directories were viewed by the company as temporary expedients. For example, the postal code feature in Niagara was designed to be easily removable.[235] Nevertheless, as no evidence was brought to our attention indicating actual removal of the postal code section, we can only conclude it has been maintained by Tele-Direct. Further, although the Director argued that much of Tele-Direct's advertising was "negative" advertising which only disparaged its competitors, we do not have enough information on the advertising campaign to be in a position to identify which portions were "negative" and if the negative outweighed the positive. Overall, the inescapable conclusion is that Tele-Direct's responses to entry resulted in an improvement for advertisers in the "targeted" markets.

[235] Mr. Bourke wrote to Mr. Renwicke stating that postal codes should be left as a section rather than integrated as part of the listing (as White had done), otherwise "we'll [n]ever get rid of it": confidential exhibit CJ-86 (black vol. 13), tab 101 at 134297.

What, then, about the likelihood of harm in Tele-Direct's territory as a whole because of the effect of these responses on future entry or expansion? There is evidence that Tele-Direct was not solely concerned with "meeting" competition in Sault Ste. Marie and Niagara. Tele-Direct also feared further entry into other areas, particularly from DSP which was associated with Southam and had the advantage of having local connections and organization through the publisher's newspapers. This is clear from the evidence of Ms. McIlroy, who was in a key position as Vice-president of Marketing at that time.

Ms. McIlroy testified that Tele-Direct designed its strategies first around the Sault Ste. Marie situation and then replicated them in Niagara when White appeared. She confirmed that one of her objectives in Sault Ste. Marie, as set out in document recording her notes for a presentation, was to "limit Southam motivation to continue Yellow Pages roll-out in Ontario".[236] She further explained that as a "counter-strategy", if Southam's intention to enter directory publishing was a long-term, well-funded strategy, then her second objective was to "make the cost of carrying on business against [Tele-Direct] market-by-market exceptionally high."[237]

But those were not the sole objectives. Ms. McIlroy also described Tele-Direct's strategy in the following terms:

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[236] Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133221A.

[237] Transcript at 21:4088-89 (17 October 1995).

> . . . the basic premise was to make it expensive for the competitor to compete with us and to focus on doing everything and doing it right in the Sault, putting whatever investments or resources that was necessary to avoid unnecessary market share [loss] and to protect our interest in that market.[238]

Similarly, in a presentation that she made to her fellow officers she set out the following points as constituting Tele-Direct's "challenge":

> • Protect usage and awareness - promotion
>
> • Add value to advertiser - incentive
>
> • Add value to user - product enhancements
> - size and colour
>
> • Sustain leadership profile
>
> • Compete on value vs. cost
>
> • *Make competition an expensive proposition*[239] (emphasis added)

Mr. Renwicke disputed whether the last point was ever accepted as corporate policy, but in matters of dispute between Ms. McIlroy and her fellow officers we accept her evidence. She left Tele-Direct on good terms and she has no discernible reason for colouring her evidence, particularly as she was the officer responsible for preparing tactics that the Director would have us label as anti-competitive.

It is only the reference to making competition "expensive" as part of Tele-Direct's strategy that raises any question of anti-competitive motivation. It is doubtful that Tele-Direct could make competition expensive without negatively affecting its own profitability. According

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[238] Transcript at 20:3918-19 (16 October 1995).

[239] Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133316.

to Ms. McIlroy the participants at the officers' meeting were taken aback at the cost to the company of making it expensive for the competition. They agreed to "spend what it took" with the proviso that the expenditures would be selective and the officers would be kept current on what was transpiring, even as frequently as on a weekly basis. The fact that Ms. McIlroy convinced her fellow officers to adopt a policy of making competition expensive even when doing so would be detrimental to current profits provides some indication that Tele-Direct was trying to influence its competitors' future conduct to some extent.

There is as well another consideration. The documents relating to Tele-Direct's responses in Sault Ste. Marie and Niagara were not provided during documentary discovery within the time frame ordered. They did not make their appearance until after Tele-Direct apparently learned that the Director had contacted Ms. McIlroy and that she would appear as a witness in these proceedings for the Director. Counsel for Tele-Direct attempted to blame the delay in the production of these documents on inadvertence. He said that the relevant box of documents got lost but that no one seemed to know where or why. If the documents were lost, a detailed explanation is in order especially given the controversial issue to which they pertain and that the content of some of the documents is clearly adverse to Tele-Direct's position. A vague explanation carries little weight. The belated production and inadequate explanation cause the Tribunal to make an adverse inference with respect to Tele-Direct's intentions on this issue. Tele-Direct apparently considered that it might have "gone too far" in its responses in those markets. This, along with the statements of corporate policy, provides support for the view that Tele-

Direct intended, in a subjective sense, to convey a warning about future entry as well as protecting its position in the individual markets subject to entry.

Nonetheless, the critical question is whether there is a reasonable likelihood that future entry will be discouraged by Tele-Direct's actions. If so, is that possible negative effect more compelling than the proven benefits in the individual markets from Tele-Direct's improving its product, freezing prices and increasing advertising expenditures, all of which contributed in some measure to increasing usage of telephone directories, which is generally seen as pro-competitive. A reasonable likelihood of significant long-run detriment must exist if these tactics are to be discouraged.

The Director relies to some extent on the evidence given by White and DSP, which will be canvassed below, regarding their intentions about future expansion, which he says shows that future entry and expansion *have been* deterred by Tele-Direct's behaviour. That evidence is, however, a small portion of the evidence put forward by the Director in support of his case. In effect, the Director asks us to *infer* from the "overwhelming intensity" of Tele-Direct's response in the markets where it faced entry that potential entry into other markets *will* be deterred.

Before we proceed to consider the more detailed arguments, we should indicate at the outset that we have serious reservations with respect to the overwhelming intensity approach adopted by the Director. The Director has not advanced any "objective" criteria by which the

Tribunal is to assess whether Tele-Direct's responses in the competitive markets have the overall anti-competitive character or "purpose" required for section 79.

Although the Director is not arguing that Tele-Direct's conduct was predatory, predation is certainly the closest analogy to what is put forward here. The essence of an allegation of predatory pricing is that the firm foregoes short-run revenues by cutting prices, driving out rivals and thus providing itself with the opportunity to recoup more than its short-term losses through higher profits earned in the longer term in the absence of competition. A predatory pricing allegation is difficult because, at least in the short-run, consumers apparently benefit from lower prices. In addition, predation can only succeed if the predator has greater staying power than its rivals and a reasonable prospect of recouping its losses. In order to distinguish competitive pricing action from predation, therefore, the "Areeda-Turner test" for predatory pricing[240] was developed and has been adopted by the courts.

Our difficulty here is that, unlike the predatory pricing case, no "test" or criteria of any kind were even proposed by the Director or his experts. Indeed, we acknowledge that the likelihood of being able to establish objective criteria to distinguish between harmful and beneficial conduct of the type in issue is remote. In effect, because of the absence of any criteria, the Tribunal is being asked by the Director to place itself in the shoes of a potential entrant with a view to assessing the credibility of the alleged "threat" being issued by Tele-Direct by its

[240] In brief, the essence of the test is that a price below reasonably anticipated short-run marginal costs is predatory while a price above short-run marginal costs is not. Because marginal cost data are often unavailable, average variable cost is generally used as a proxy. For a summary of the conclusions of Areeda and Turner on this topic, see *Antitrust Law*, vol. 3 (Toronto: Little, Brown, 1978) at para. 711d.

responses to entry. The Tribunal must determine whether the response in the initial markets in which entry occurred was so "overwhelmingly intense" that an entrant would be intimidated and future entry or expansion deterred.[241] What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).

While Tele-Direct certainly made very strong responses to entry in Niagara and Sault Ste. Marie, there is no certain way for the Tribunal to judge what magnitude of response Tele-Direct would have employed had it not been concerned, among other things, with discouraging further entry. To say that the response was greater than it otherwise would have been assumes that we can judge how much Tele-Direct would have done had it been acting competitively and that, therefore, we can determine, with reasonable assurance, to what degree the observed responses went beyond that and became anti-competitive. In trying to make this comparison urged upon us by the Director, it must be recognized that Tele-Direct was facing pretty stiff competition from

[241] There would evidently be little point in the incumbent pursuing an aggressive course of responses in every market subject to entry solely to make an impression or deliver a threat since that strategy would have already been defeated. If there was widespread response by the incumbent in all markets in which entry occurred or was threatened, consumers would benefit in the short-term with no discernible long-term negative effects.

the new entrants. The entrants' publications were initially superior with respect to features and they were priced up to 40 percent below Tele-Direct. While Tele-Direct's expenditures on advertising and promotion constituted a sea change from its previous expenditures, DSP spent more over the three years from 1992 to 1994 than Tele-Direct did, including large amounts in the local Southam newspaper.

The Director makes two broad arguments in support of the position that Tele-Direct's actions went beyond "normal" competition and, taken together, constitute anti-competitive acts. The first is that Tele-Direct's "bottom line" results in Sault Ste. Marie in 1993 reveal that Tele-Direct barely broke even in that market when the cost of introducing the improvements to the directory and the advertising and promotional expenditures are taken into account. This conclusion was not disputed by Mr. Beauséjour who agreed that the results shown were "very close to breakeven".

The analysis presented to the witness, however, included the payment to Bell Canada (CCS) as an "expense" deducted from revenue. When Bell and Tele-Direct are treated on an integrated basis, as we earlier found in the tying context to be appropriate when considering Tele-Direct's profitability study, it would be inaccurate to refer to Tele-Direct's results in Sault Ste. Marie as a "marginal profit" or "loss" situation. The pro-rated share of the payment to Bell would have to be added back to the Tele-Direct's results in Sault Ste. Marie. Given that the Bell payment is mostly contribution to profit and it is a substantial amount, this would move the Sault Ste. Marie results well above the breakeven point, even with the extra expenditures on enhancements and advertising. Indeed, it would appear that the payment to Bell constitutes the largest portion of the "profit" that attracts independent publishers to attempt to enter Tele-Direct's markets and which allows them to contemplate profitably pricing 30 or 40 percent below Tele-Direct. In the Niagara region, Tele-Direct earned a profit in 1993 even when the payment to Bell is treated as an expense.

The Director's second argument is that experience in the industry also demonstrates that Tele-Direct went beyond "normal" competitive responses. This includes the evidence regarding expectations of White and DSP versus their experience and their future intentions as well as evidence about how American telco publishers have responded to entry in their markets.

With respect to the experience of an American telco publisher responding to entry, Mr. Anderson, who was with NYNEX, testified in chief that when NYNEX perceived independent directory publishers as significant competition, it would make its sales force aware of their presence, possibly do more advertising, and consider the scoping of its directories and their features. He also pointed out that it had not been his experience that features would be introduced only in a competitive market. After a trial run, if the feature proved successful, it would be implemented "across the product line." In cross-examination, he admitted that NYNEX had never, at least to his knowledge, offered an incentive program similar to that used by Tele-Direct in its competitive markets in response to entry of a competing publisher. He gave the same response when asked about a specific market where, in response to entry, NYNEX might have frozen prices in specific markets in response to entry for two years, without rescoping. With respect to the remaining possibilities put to him by counsel for the Director, Mr. Anderson either had no knowledge (e.g., advertising as a separate budget item) or commented on the lack of applicability in the American context (e.g., telco publishers cannot offer audiotext, no trade-mark to protect through legal action). Without any knowledge about the marketplace in which NYNEX operates, we are unable to draw any conclusions about this evidence.

With respect to White, Mr. Lewis stated that his experience in entering markets in the United States had led him to believe that White would have larger sales in Niagara than turned out to be the case. In its first revenue year, White expected to capture between 30 and 40 percent of Tele-Direct's revenue.[242] In fact, White's revenue for its second directory (the first revenue-generating directory), published in 1994, was 17 percent of Tele-Direct's revenue. Revenue for the third directory (the 1995 directory) represented a nine percent increase from the previous year for a total of about 19 percent of Tele-Direct's revenue.

Mr. Lewis stated that his initial plans for expansion beyond the Niagara region in Canada had been put on hold indefinitely due to Tele-Direct's conduct *and* the inability to obtain complete subscriber listing information. At the time of the hearing, this matter of subscriber listings was on appeal to the federal Cabinet. Mr. Lewis also said that upon a favourable Cabinet decision on the privacy issue, he would anticipate starting a number of additional directories in the Toronto and Niagara region. Any conclusion that White was deterred from future expansion

[242] Anticipated sales are expressed as a percentage of estimated revenue of the existing directory. This does not mean that all sales are drawn from the incumbent as the demand for directory advertising is expected to increase when a second publication is introduced.

by Tele-Direct's conduct and that, therefore, that conduct passes an anti-competitive threshold would be difficult in light of this evidence and the subsequent Cabinet decision overruling the CRTC decision that was to the effect that consumers should be able to opt out of having their listing information released to independent publishers.[243]

In formulating its entry strategy, DSP factored into its business plan both the risk of legal action by Tele-Direct and the possibility of a Tele-Direct competitive reaction. DSP, erroneously as it turns out, anticipated little response from Tele-Direct based on that company virtually ignoring the entry of the Locator directories in a large number of communities. As we have discussed, the Locator directories are simply not close substitutes for Tele-Direct's directories. DSP's expectation for its first revenue-generating directory was to capture about 50 percent of Tele-Direct's revenue. In developing this estimate, DSP reviewed the American experience and consulted extensively with its joint venture partner, Noverr. Instead, the directory generated about half of the expected revenue in dollar terms. The revenues for the second revenue-generating directory, published in 1994, were once again considerably lower than expected. It was, however, anticipated that the revenues for the 1995 directory would be higher and marginally profitable.

DSP has also decided not to expand in Ontario even though that was the original plan. While Tele-Direct's conduct was said to have been the reason for that decision, the evidence

[243] For further explanation of this matter, see chapter "VII. Control: Market Power" under "A. Indirect Approach: Market Structure", "(2) Barriers to Entry", "(c) (i) Subscriber Listing Information", *supra*.

suggests that there were other reasons as well. In particular, it would appear that DSP's expectations were quite aggressive for a new business and, to some extent (in relying on the Locator experience), in error. The Director says that the Sault Ste. Marie, Michigan part of the DSP joint directory, which did not experience a response like Tele-Direct's, had been far more successful than its Ontario counterpart. However, that side of the publication also fell well short of what had been anticipated as a "normal" first year revenue, further suggesting that the DSP's expectations may not have been realistic.

We do not have enough evidence to arrive at any conclusion about the effect of Tele-Direct's actions on deterring entry or expansion in the Newfoundland and Joliette situations.

The remedy suggested by the Director changed from the application to final argument. In our view, the remedy, as currently formulated, illustrates the difficulty of dealing with "targeting" as an anti-competitive act. The notice of application, at paragraph 1(b)(xiii), requested that:

> the Respondents be prohibited from targeting price reductions and other discounts for advertising space to those markets in which entry by competing publishers has occurred or is occurring.

In oral argument, counsel for the Director explained that the remedy ultimately being requested by the Director would read as follows:

> that the respondents be prohibited for a period of five years from: (i) targeting a price, a price reduction, or other discount including any advertiser incentive program offering free colour, free size up, or a first time placement discount where there is no annual increase in advertiser spending; *and* (ii) targeting any

> directory enhancement, including audio-text service; *and* (iii) targeting any advertising campaign; to a market where entry by a competing directory publisher has occurred, is occurring, or is reasonably anticipated to occur unless such listed item is offered or applied uniformly and simultaneously by the respondents in the majority of their directory markets.

The "and" between the listed items is critical. The Director proposes that Tele-Direct be permitted to do any *one* or *two* of the three enumerated actions in any market where entry has occurred. However, if all three should be undertaken then they would have to be followed in a majority of Tele-Direct's local markets.

We recognize that the Director is likely attempting, by this compromise remedy, to recognize that Tele-Direct's responses are of benefit to consumers in the market in which they occur. This effectively highlights the difficulty of the "targeting" allegation. First, the number of competitive responses (one or two) that Tele-Direct is allowed is completely arbitrary. The Director has not provided the Tribunal with any rationale as to why one or two (but not three) responses would not be anti-competitive. Further, there is no suggestion that the Tribunal should limit the extent to which Tele-Direct could invoke the competitive responses to which it would be entitled. Yet, the Director alleges that Tele-Direct's responses in the competitive markets were anti-competitive in part *because of* their intensity and ferocity.

Considering the difficulty in circumscribing "targeting" so that it does not result in discouraging desirable competitive activity, we do not find that Tele-Direct's conduct with regard to pricing, promotion and changes to its directories in the competitive markets, in particular in the Sault Ste. Marie and Niagara areas, is anti-competitive.

Litigation or Threatened Litigation

Finally, we turn to the Director's argument that litigation or threatened litigation by Tele-Direct, when taken together with the other actions of Tele-Direct, contribute to targeting/raising rivals' costs.

The Director argues that Tele-Direct's use of litigation or threatened litigation "goes into the mix" to show intent and the excessive degree of the overall response to entry in the competitive markets. The Director does not rely on the nature of the litigation on its own. The Director does not argue, for instance, that the litigation was a "sham". "Sham" litigation, or litigation which the plaintiff knows is without foundation but uses to stifle or impair competition, can be a technique of predation.[244] In the words of Robert Bork: "As a technique for predation, sham litigation is theoretically one of the most promising."[245]

Since no argument is being made that the litigation started by Tele-Direct against DSP was "without foundation",[246] we need some other means to determine whether the litigation in question crossed the line to anti-competitive conduct. We do not consider that it is sufficient to look at the litigation only in combination with the other responses. There must be some evidence

[244] Sham litigation could include a claim with no reasonable cause of action which might be struck out at an early stage of proceedings or a claim based on facts that were untrue or otherwise not supportive of the claim, in which case, the litigation could be extensive.

[245] R.H. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978) at 347.

[246] Some mention was made that the copyright claim might be a "broad" interpretation of the existing American law but that is hardly definitive.

specific to the bringing or the conduct of the litigation itself that would lead us to conclude that the purpose was to contribute to the impairment of competition over the protection of property rights.

The Director points out that while Mr. Crawford, Tele-Direct's Corporate Secretary and legal counsel, originally testified that Tele-Direct defended any unauthorized use of its trade-marks and copyrights, it became apparent on cross-examination that this was not true. Tele-Direct overlooked unauthorized use on a number of occasions. Perhaps the difficulty with this witness's credibility on this issue and the fact that litigation seems only to be taken against specific competitors do lead to the view that Tele-Direct focused on those competitors. However, that alone is not enough if the litigation is not a sham.

On the facts of this case, we cannot conclude that Tele-Direct brought, conducted or gave warnings regarding otherwise apparently valid litigation in such a manner that its purpose was clearly to contribute to the impairment of competition in those markets where entry occurred rather than the protection of its intellectual property rights. There is no evidence, for instance, of undue delay. As of the date of the hearing, DSP had not yet been discovered but a major factor in this delay was the illness of Mr. McCarthy, the intended representative for DSP. Discovery of DSP was, however, scheduled for November 1995 with Mr. Campbell for DSP. Discoveries of Tele-Direct had been completed by the date of the hearing. There is no evidence that the litigation is following any other than the "normal" course. Unlike the *Laidlaw* case, there is no evidence of responding to an apparently minor matter in a "wildly overly aggressive manner" with multiple claims or of pointed threats to put a competitor "out of business" using, in part, the pursuit of legal action for which, as the Laidlaw representative informed the competitor, a large sum of money had been reserved.[247] While Tele-Direct did not proceed against White after its warning regarding possible litigation, it is certainly plausible that it did not do so because of the similarity of the issues to the DSP case. That litigation would seem likely to settle at least the copyright question once and for all, by establishing a precedent for Tele-Direct's dealings with other publishers.

The Tribunal, therefore, cannot accept the Director's submission that litigation or threatened litigation in this case can contribute to a finding of anti-competitive acts by Tele-Direct.

Audiotext in Sault Ste. Marie

The Director alleges that Tele-Direct used its power as a major buyer to influence the supplier of audiotext information in Sault Ste. Marie, Perception, resulting in a degradation of the feed to DSP. The respondents acknowledge in their written argument that the allegation could be an anti-competitive act, if proven, but dispute that it is supported by the evidence. The critical questions are whether Tele-Direct was merely asserting its contractual rights and what responsibility, if any, can be assigned to Tele-Direct for the quality of service delivered by Perception to DSP.

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[247] *Laidlaw*, *supra* note 33 at 298.

Did Tele-Direct have a contractual right to exclusivity?

The respondents state in their written argument, at paragraph 930, that "Perception recognized that Tele-Direct was entitled to the exclusive right to its only feed . . . ." This statement is not supported by the evidence. Up until January 1994, the only contract between Tele-Direct and Perception was for the Toronto area and it provided Tele-Direct with exclusive access to Perception's feed in the Toronto local calling area only. Perception had in fact refused to grant Tele-Direct exclusivity for other areas because of the limitation on its ability to market its service.

In the fall of 1992, when Tele-Direct became aware of the proposed entry into Sault Ste. Marie by DSP, including offering audiotext, Tele-Direct entered into negotiations with Perception to supply its TYP in that market. One of Tele-Direct's concerns was that the feed in Sault Ste. Marie be exclusive to it, that DSP not have access to the same feed. The evidence reveals that the parties did not, in fact, come to an agreement on exclusivity until much later. While exclusivity is mentioned in a letter in March 1993,[248] the draft contract sent by Perception to Tele-Direct in May 1993 is instructive. The letter enclosing the contract states that with "all the excitement of getting `the Soo' up and talking" Perception had neglected to send Tele-Direct the contract for Sault Ste. Marie. The contract clearly states that it is a "non-exclusive" licence to receive and store information.[249]

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[248] Confidential exhibit CJ-86 (black vol. 13), tab 96 at 134118.

[249] Draft contract and covering letter: confidential exhibit CJ-87 (black vol. 14), tab 114 at 134825-27.

The contract was never signed by Tele-Direct but nonetheless provides proof that Perception, at least, did not consider at that time that Tele-Direct had exclusive rights to its feed. They were certainly not *ad idem* in that respect. The final contract covering Sault Ste. Marie, which does provide for exclusivity, was not signed until January 1994.[250] A letter in September 1993 provides that upon acceptance of a new agreement by Tele-Direct, the "BDR Audio Network will be made available to only directory publishers in Canada and exclusively to Tele-Direct within Ontario and Quebec."[251] Peter Dolan, Director of Sales at Tele-Direct (Services) Inc., admitted, however, that Tele-Direct had to go "back and forth" with Perception a couple of times in order to get the wording regarding exclusivity re-inserted into the final contract. Tele-Direct does not appear to have had, until November 1993 at the earliest, a right to exclusivity with Perception and, therefore, had no right to insist or attempt to insist on exclusive service from Perception prior to that date.

Did Tele-Direct influence the delivery of service by Perception to DSP?

Upon becoming aware in late 1992 that Perception was supplying an information feed to DSP and that it had the same content as Tele-Direct's feed, Tele-Direct, through Mr. Dolan, expressed its displeasure to Perception. Perception agreed to remedy the situation prior to publication of the DSP directory. Mr. Dolan said that he thought Perception would acquire an

[250] Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131548-54.

[251] *Ibid.* at 131555.

alternate feed for DSP as a remedy. At the same time, Tele-Direct was pushing for exclusivity with Perception.

Tele-Direct's TYP were launched in mid-February 1993. Tele-Direct was not satisfied with Perception's response to its complaint regarding the feed to DSP, including an effort in early February whereby Perception started sending slightly re-arranged or reworded content to DSP. In cross-examination, Mr. Dolan indicated that Tele-Direct wanted a "superior feed" to that provided to DSP.[252]

A meeting was scheduled for February 23, 1993 with Perception. The agenda, which was provided to Perception, states that what Perception was doing with respect to the DSP feed was "not satisfactory" to Tele-Direct. Mr. Dolan explained that Perception was simply re-voicing the network and again stated that Tele-Direct was not satisfied because it wanted a "superior" feed. This concern was communicated to Perception at the meeting.

In re-examination, taking Mr. Dolan to clause 8 of the January 1994 contract with Perception which uses the word "superior", counsel for the respondents elicited a response that "superior" meant "of high quality" and that was the way in which Mr. Dolan had used the word in his cross-examination. Clause 8 of the contract reads:

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[252] Transcript at 42:8856 (20 November 1995).

> . . . Brite does commit that the BDR Audio Network will continue to be of the same exceptional quality as the affiliate has enjoyed. BDR will continue to be of superior quality and utilize its own personnel for the creation and dissemination of information.[253]

Clause 11.6, which was later brought to the witness's attention, is instructive:

> . . . Brite will continue to supply the superior level of programming that the Affiliate has come to expect. Other audio networks offered by Brite Voice Systems or any Brite subsidiary or related company, will not exceed the BDR Audio Network in measurable deliverables including, but not limited to, frequency of reports, quantity of content, program choice and diversity as well as voice quality. Brite will make every effort to avoid American colloquialism. . . .[254]

Even in the contract, therefore, it is apparent that the word "superior" is used in a comparative, rather than an absolute, sense.[255] When questioned by the panel about clause 11.6 of the contract, Mr. Dolan agreed that what the clause was meant to ensure was that nobody had anything *better* than Tele-Direct. We conclude, therefore, that, despite the later attempt at qualification, Mr. Dolan was using the word "superior" in its comparative sense throughout his testimony. Tele-Direct was pressing Perception for a better feed than Perception was giving DSP.

Of most significance, on January 25, 1993, Tele-Direct held out what can only be regarded as a major "carrot" to Perception. Mr. Dolan, on behalf of Tele-Direct, wrote asking Perception for its "advice and recommendations" on the most efficient way to provide a TYP

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[253] Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131550.

[254] *Ibid.* at 131551.

[255] The September 1993 letter also uses the word "superior" and essentially the same language about "measurable deliverables" (confidential exhibit CJ-31 (black vol. 10), tab 68 at 131555) as later appeared in the January 1994 contract.

service throughout Tele-Direct's territory.[256] There is evidence that by March of 1993, consequent upon a February 25, 1993 officers' meeting, these plans were scaled down dramatically. TYP installation was to begin only in markets currently or potentially threatened by a competitor, some ten markets. TYP were treated as a strategic tool against competition rather than a widespread innovation. In fact, after Sault Ste. Marie TYP were introduced only in Niagara Falls, in response to White, and in Windsor, where Tele-Direct was concerned both about potential entry by White and the fact that the Windsor Star is owned by Southam. It is difficult to escape the conclusion that Tele-Direct was using the promise of the roll-out of TYP service throughout its territory in order to gain the cooperation of Perception when it introduced its TYP service in Sault Ste. Marie in February 1993.

That the promised roll-out of the TYP service was a factor in the relationship between Tele-Direct and Perception is clear from the letter Perception wrote Tele-Direct on March 1, 1993, following the February meeting. In it Perception informed Tele-Direct that an "alternative audio source" for DSP would be provided by March 29, 1993. The letter concludes ". . . you are a very important client to us and we want to work with you as you roll out audiotex *(sic)* throughout your territory."[257]

The deterioration to DSP feed was coincident with its first revenue canvass in the spring and summer of 1993. (Its first revenue directory was published in November 1993.) Because of

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256 Confidential exhibit CJ-86 (black vol. 13), tab 95 at 134080.

257 *Ibid.* at 134107.

the poor quality of the feed, the audiotext lines were not used to nearly the same extent as in the first two months of operation. Because of the reduced volume, DSP could not use the record of the number of calls to its audiotext service as evidence of widespread use of its directory by consumers. As a result, the audiotext service was not as positive a factor as it might have been in selling its directory to advertisers.

Mr. Campbell said that it would have been virtually impossible for DSP to change its information supplier when it experienced problems. Despite what Mr. Dolan said, there was little reason for Tele-Direct to think that Perception was able, even if willing, to produce an alternative high quality feed for DSP. As matters turned out, the feed to DSP only became acceptable again once the merger of Perception and Brite resulted in another source of feed becoming available in about November 1993.

We are of the view that Tele-Direct used its bargaining power, stemming from its dominant position in the market for the supply of telephone directory advertising, to pressure Perception to, in effect, withhold supply from DSP for the purpose of frustrating or, at least, negatively impacting, the DSP attempt at entry in Sault Ste. Marie.[258] Unlike the other responses used by Tele-Direct in the competitive markets, the only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by

[258] Entry meaning the attempt by DSP to establish itself in the Sault Ste Marie market on an economic basis with a revenue directory; that is, not the publication of a prototype directory alone.

Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which sections 79 is meant to guard.

Did Tele-Direct engage in a practice of anti-competitive acts in relation to audiotext in Sault Ste. Marie? Based on the standard set out in *Nutrasweet*,[259] an "isolated act" does not constitute a practice. In the instant case the deterioration in the audiotext feed to DSP resulted from intensive and repeated efforts on the part of Tele-Direct that hardly qualify as an "isolated act". Nor do we find that the reasonably anticipated duration and seriousness of the consequences of the efforts by Tele-Direct suggest that they should be treated as "isolated" and thus outside the reach of section 79. We therefore consider that Tele-Direct's actions regarding the DSP feed for its audiotext service in Sault Ste. Marie constitute a practice of anti-competitive acts.

Further, we find no difficulty in concluding that the effects of the deterioration in the quality of the audiotext feed resulted in a substantial lessening of competition in the Sault Ste Marie market. In conducting its first revenue canvass, DSP was denied the anticipated marketing advantage of using its audiotext call volumes to prove usage of its directory to potential advertisers because the feed deteriorated just as the canvass started. Achieving credibility with advertisers is one of the biggest hurdles that an entrant publisher must overcome.[260] The audiotext problem was a serious setback for DSP in its initial effort to attract paid advertising. However, as the Director has not requested a remedy specific to the audiotext problem or, more

[259] *Supra* note 4 at 34-35.

[260] See further discussion, *supra* at 123.

generally, governing Tele-Direct's relationship with the suppliers, no remedy follows from this finding.

D. MARKET FOR ADVERTISING SERVICES

1) Class or Species of Business in Canada (Relevant Market): Agents

The Director alleges a number of anti-competitive acts which form a practice resulting in a substantial prevention or lessening of competition in the market for the supply of advertising services. These alleged anti-competitive acts affect agents and consultants or, in some cases, one or the other. The Director takes the position that when determining whether there is a substantial prevention or lessening of competition the effects of all of the listed acts found to be anti-competitive should be combined because they all affect the advertising services market. Further, one of the alleged anti-competitive acts is the tying of the provision of advertising services to advertising space, the same allegation we have already dealt with in the tying portion of this decision. Another alleged anti-competitive act which bears a striking resemblance to an allegation of tying is also included under the heading "Squeezing", namely, "further restricting the availability of commission [to other service providers] over time".

The respondents submit that, to the extent a separate "services" market exists, consultants and agents are in different services markets and acts affecting more than one market cannot be combined to form a practice and, thus, to determine whether there has been a substantial prevention or lessening of competition. A prevention or lessening of competition must take place *in a market* in the words of section 79. They also argue that Tele-Direct does not have market power in either services market.

As we have found that there is an anti-competitive tie covering only part of the alleged advertising services market, we cannot agree with the Director that there is one advertising services market in which both agents and consultants operate that encompasses *all* of Tele-Direct's customers. Customers meeting the 1993 commissionability rule are evidently included in the services market. The customer segment that we have determined is anti-competitively tied under section 77 -- namely regional customers -- is also included. (We will return below to the question of whether the tying practice should also form part of the section 79 case.) Agents are operating in this services market. And, Tele-Direct competes with the agents in providing services to those customers. Consultants do not.

It is difficult to see how acts taking place in different markets could be logically combined to determine if competition is substantially lessened or prevented in a particular market. Thus, only the acts affecting agents can be combined for the purpose of determining whether there has been a substantial lessening of competition in the services market.

Correspondingly, only acts affecting consultants can be combined to determine whether there has been a substantial lessening of competition in the relevant market in which they operate. It is a separate section 79 case. The details of the allegations against consultants will be dealt with below under the heading "Consultants".

Further, not all the alleged practices of anti-competitive acts respecting agents are of a sufficiently similar character so that they can be combined when assessing whether there has been a substantial prevention or lessening of competition in the services market. In particular, tying (and its restatement "restricting commission over time") differs significantly from the other alleged anti-competitive acts. The Director has brought the allegation of tying under both sections 77 and 79. The analysis and result are the same under both sections. Having found that tying results in a substantial lessening of competition by impeding entry of or expansion of agents into or excluding them from the part of the demand spectrum between six and eight markets, should this substantial lessening of competition be combined with the effects resulting from any other practice of anti-competitive acts that the Director succeeds in proving? If so, all anti-competitive acts so found would automatically lead to a finding of substantial prevention or lessening of competition by reason of our finding respecting tying.

In our view, it is not appropriate to combine the effects of tying with the effects of the practice of other anti-competitive acts. The other alleged anti-competitive acts (save for group advertising) relate to a specific historical market, the commissionable market including the eight-market grandfathered accounts. It is possible to evaluate the effects of the alleged anti-competitive acts in this well-defined context. The issue is whether there has been a substantial lessening of competition where agents have historically been competing. In the case of tying, the allegation is that the extent of the market itself has been limited.

In this case, there is a distinct difference between the nature and effect of tying and the other alleged anti-competitive acts, save for group advertising which we return to below. We note that this might not be true in other cases where there might be some interaction or a less distinct dividing line between the section 77 and section 79 claims. A finding that the respondents have engaged in tying does not act as a spring-board for a finding of substantial lessening in the market segment where the agents have been competing. Prohibiting tying should permit the agents to compete in the enlarged market as they have in the historically commissionable market. A finding of substantial lessening of competition in the historically commissionable market should therefore be based on a practice of acts with respect to that market.

Therefore, we need not deal with tying further under section 79. We will now turn to the allegations relating to the commissionable market and then the allegation regarding the prohibition on group advertising which is distinct.

(2) Control of the Existing Commissionable Market

It is evident that, despite the Director's submission to this effect, Tele-Direct does not have *direct* control or market power in the currently commissionable advertising services market.

It has a modest market share of approximately 25 percent in that market.[261] The Director also advances an alternative position that is not based on direct control by Tele-Direct but rather on the hypothesis that it is leveraging its control in the publishing market into the services market. We have found that Tele-Direct has control in the telephone directory advertising market which gives it market power in the publishing of advertising space. The Director argues that Tele-Direct is using this market power as a lever to obtain market power in advertising services through its alleged anti-competitive acts. We agree that this is an arguable theory that could, if proven, fall within the parameters of section 79. Whether Tele-Direct has, in fact, leveraged its existing market power must now be determined.

(3) Analysis Respecting the Existing Commissionable Market

The alleged anti-competitive acts are set out in full at paragraph 65 of the application. We paraphrase them here (not necessarily in the order set out in paragraph 65) as they relate to agents and alleged abuse of dominance only:

(1) "squeezing" the return available to agents by transferring functions to, withholding services from and making terms of supply to agents more onerous;

(2) discriminating against agents by providing space to them on less favourable terms than available to Tele-Direct's internal sales force, including:

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[261] See further discussion of market share below under "Analysis Respecting the Existing Commissionable Market".

- *group advertising* - prohibiting advertisements containing the name of more than one local advertiser, e.g., franchisees;

- *issue billing* - requiring agents to pay for advertising on behalf of their clients at the time of issue as opposed to payment on a monthly basis which is the payment method employed when sales of advertising are made through Tele-Direct's own sales personnel;

- *closing dates* - requiring that agents submit advertising for publication earlier than the date applicable to Tele-Direct's sales personnel;

- *tear sheets, etc.* - refusing or delaying to provide tear sheets and other information and material to agents; and

- *promotional programs* - delaying to inform agents of or refusing to make certain promotional programs available to agents' clients, including:

    - a program whereby an advertiser using Tele-Direct's sales personnel could obtain a subsidy towards the cost of Yellow Pages advertising if Yellow Pages are mentioned in advertising in other media;

    - cooperative advertising programmes whereby a supplier contributes to the cost of advertising of its customer or distributor;

    - keyed advertising in which a new advertisement with a new telephone number is placed in the Yellow Pages and the calls to that number are monitored to assess the effectiveness of the advertisement; and

    - other trial and test programs.

The Director submits that these acts have had adverse effects on agents and that there is no business justification that would exempt the acts from being found to be anti-competitive. The Tribunal would observe that some of these acts appear to have created some difficulty for agents and, in some cases, there does not seem to be an acceptable business justification. However, it is not necessary to embark upon a detailed act-by-act analysis to weigh their effects on agents against their business justification because of our conclusion that the Director has not demonstrated that the acts have or are likely to prevent or lessen competition substantially in the relevant advertising services market.

Both parties referred us to the statement set out in the Tribunal's decision in *NutraSweet* that:

> [i]n essence, the question to be decided is whether the anti-competitive acts engaged in ... preserve or add to ... market power.[262]

The Director's operative theory is that Tele-Direct is extending its market power from the space market to the services market through the alleged practice of anti-competitive acts. This means that the Director must demonstrate that Tele-Direct has or is establishing, or is likely to achieve, market power in the services market.

In order to assess whether Tele-Direct now controls the services market, we first look to market shares in the currently commissionable market. There is disagreement between the Director and Tele-Direct on the respective market shares of Tele-Direct and the agents. The parties rely on a variety of data that most supports their positions. Market share estimates range from 65 to 87 percent for agents and from 13 to 35 percent for Tele-Direct. We reject the extreme numbers put forward by the Director and Tele-Direct as not supportable on the evidence and, indeed, they were not seriously advanced by either side. While there are weaknesses in the

[262] *Supra* note 4 at 47.

data, we are satisfied that a market share of about 75 percent for agents and 25 percent for Tele-Direct is reasonably accurate.[263]

A high market share for agents and a correspondingly low market share for Tele-Direct would suggest that, even if Tele-Direct has engaged in anti-competitive acts, it has not been successful in obtaining market power in the advertising services market. Indeed, the fact that Tele-Direct's market share is as high as it is may well be attributable to factors unique to Tele-Direct but which are not anti-competitive, such as the desire of some advertisers to deal directly with the publisher. From the available data, it is apparent that, even on an individual basis, Tele-Direct does not have as high a market share as DAC/NDAP, which has about a 40 percent share. Based on all these considerations, we are satisfied that Tele-Direct's 25 percent share falls well short of a level that might be considered to indicate market power.

We must also consider whether there is any evidence of a trend towards a material increase in Tele-Direct's market share, which might indicate that it is in the process or is likely in the future to acquire market power as a result of the acts which the Director alleges to be anti-competitive. Certainly, there is anecdotal evidence of individual advertisers switching from an agent to Tele-Direct for some of the reasons which constitute acts which the Director submits are anti-competitive, for example, issue billing. We have no evidence, however, of any declining trend in market share for agents or increasing trend in market share for Tele-Direct over any

[263] Both sides agreed that the agents' market share in 1993 was about 80 percent: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131680. Adjusting to exclude sales into Tele-Direct's directories by agents based outside of Tele-Direct's territory, we arrive at approximately 75 percent for agents and 25 percent for Tele-Direct.

period of time. Further, it would not seem that the agency business is unattractive or that agents are in any way systematically going out of business. On the contrary, we have had evidence of additional agents being accredited in recent years and others who are still seeking accreditation.

Is there any reason to believe that in the future the alleged anti-competitive acts will have any *greater* deleterious effect on the agents than they may have had in the past? We recognize that a new element has been added to the interactions in the marketplace by the relatively recent creation of Tele-Direct's CMR. Could it be that, in combination with Tele-Direct (Media) Inc. which provides an additional vehicle for Tele-Direct to use practices like the alleged anti-competitive acts, the alleged anti-competitive acts will likely cause competition to be prevented or lessened substantially in the future?

We are unable to arrive at such a conclusion. We have no evidence of the competitive impact of the advent of Tele-Direct's CMR into the market. It has been competing since 1994 but we were provided with no evidence whatsoever from which to infer that the combination of its presence and Tele-Direct's alleged anti-competitive acts have resulted or will result in a materially lower market share to agents and a correspondingly higher share for Tele-Direct. One would have expected that if this was an important factor, we would have seen some significant movement of accounts from the independent agents to Tele-Direct's CMR. There was no such evidence. It is true that Tele-Direct's CMR is in its early years and it may not be as effective now as it will be later. To be valid, however, inferences about the future must be based on evidence.

Given the record before us, any conclusion about the future effect of Tele-Direct's CMR in combination with the alleged anti-competitive acts would be speculative.

The Director has the burden of proving a substantial lessening of competition. We conclude that while some of the disadvantages which form part of the Director's abuse of dominance case and were imposed on agents by Tele-Direct may have had some adverse effect on them, that effect could not have been and is not likely to be substantial or the agents would not hold 75 percent of the market or there would be evidence of a decline over time in the share held by agents.

(4) Group Advertising

Group advertising is display advertising consisting of the individual business names of a number of franchisees or distributors under a common logo or trade-mark.[264] This type of advertisement is now prohibited by Tele-Direct and to all intents and purposes is not sold by agents or Tele-Direct.[265] The revenues that might potentially be converted into group advertising are currently non-commissionable and are serviced by the internal sales force as local or individual business accounts.

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[264] The difficulty here is that some franchisees or licensees carry on a number of businesses besides the licensed or franchised one and they do not operate their business under a "corporate" name. They wish to be listed in the advertisement under their own name, which often has high recognition value in their community, while still participating in the group advertising to promote the licence or franchise. An example is the Autopro dealers: the licensed Autopro garages or service stations do not carry the "Autopro" name. Tele-Direct does not permit them to be listed under their individual names.

[265] There was evidence of an occasional advertisement that appears to be a group advertisement or something resembling a group advertisement but we are satisfied that it is Tele-Direct's policy not to permit group advertising.

The effect of the alleged practice of anti-competitive acts regarding group advertising is to prevent competition by limiting the size of the commissionable market available to agents, rather than limiting their ability to compete for existing commissionable accounts. Because of the difference in the nature of the allegations, whether there is a likely substantial prevention of competition as a result of Tele-Direct's practice regarding group advertising must be evaluated separately from the alleged practices of anti-competitive acts respecting the existing commissionable market.

We believe that Tele-Direct's policy on group advertising is dictated by its concern with a net revenue loss should advertisers abandon or reduce individual advertising in favour of group advertising. The incidental effect is to deny a type of advertising that would primarily be of interest to larger advertisers, for example, franchisers, some of whose accounts are likely targets for agencies. Although we heard anecdotal evidence of how certain advertisers would prefer to participate in group advertising, we were not presented with evidence as to the magnitude of the effect of this restriction. In the circumstances relating to agents we are of the opinion that such information should have been provided. Without such evidence, we cannot conclude that the prohibition against group advertising constitutes a substantial prevention of competition.

(5) Conclusion

We are unable to conclude that the evidence demonstrates that the acts alleged to be anti-competitive in the existing commissionable market and in respect of group advertising have had, are having or are likely to have the effect of preventing or lessening competition substantially. As a result, the Tribunal is without jurisdiction to grant a remedy under section 79 of the Act. It is, therefore, not necessary to consider in detail whether the individual acts complained of are anti-competitive and whether separately or in combination they amount to a practice.

We are not unmindful that some of Tele-Direct's actions in respect of agents seemed wilful and senseless. However, the Competition Tribunal does not exist to regulate industry practices generally. Rather, it has jurisdiction only to remedy the substantial prevention or lessening of competition and where this has not been proved, no remedy can be ordered.

E. CONSULTANTS

(1) Introduction

At paragraph 65(b) of the application, the Director alleges that Tele-Direct engaged in anti-competitive acts by refusing to deal directly with consultants as agents for advertisers purchasing space from Tele-Direct. The paragraph continues:

> The Respondents have issued guidelines to their advertising space sales staff which provide that the customer must deal with the Respondent's salespersons and no consultant can deal with the salespersons as a customer's agent.

The following, more specific, aspects of refusing to deal directly with consultants were provided in the written argument at paragraph 297:

[I.]
(a) written instructions: refusal to act upon written instructions received from consultants on behalf of advertisers;

(b) oral instructions: refusal to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same;

(c) follow-up: refusal to deal with consultants on subsequent errors or problems.

In paragraph 65(c)(v) of the application, the Director alleges that Tele-Direct also engaged in anti-competitive acts by providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems which would not result in delay or rejection of orders from Tele-Direct's own sales representatives. As set out in paragraph 296 of the written argument, the specific aspects of these acts are:

[II.]
(a) delivery and processing problems: refusal to acknowledge or accept delivery of orders involving consultants or denial of delivery resulting in the delay or rejection of same, refusal to process such orders or the return of such orders to the advertiser or consultant;

(b) alleged errors: the identification of errors or problems in such orders which would not result in the delay or rejection of orders handled by the Respondents' own sales staff;

(c) oral instructions: refusal to meet with the advertiser to take instructions originating in advice from consultants;

(d) consequential acts: rejecting or delaying the processing of consultant orders, permitting or facilitating the following consequential actions:

- (i) informing advertisers that their orders may or may not be processed if prepared by consultants or that consultants are "scam artists", have committed errors or similar threats or derogatory comments;
- (ii) inducing breach of the contract between advertisers and consultants.

The final alleged anti-competitive acts of relevance to consultants are found at paragraph 65(e) of the application. The Director maintains that Tele-Direct is engaging in anti-competitive acts by refusing to supply specifications to consultants for the placing of advertisements in its directories.

We will deal with the alleged anti-competitive acts under the headings (a) refusal to deal directly with consultants, (b) discriminatory acts and (c) specifications, starting in "(5) Anti-competitive Acts", below.

(2) Allegations - Pleadings

The respondents argue that the "consequential acts" listed under II. (d) above do not fall within paragraph 65(c)(v) of the application and should not, therefore, be considered by the Tribunal. They also submit that one of the remedies requested by the Director, pertaining to copyright in advertisements, was not pleaded. The Director conceded that the case for including the remedy is not strong and we will not deal with it further.

On the question of the construction of the pleadings and what may be considered as fairly within them, once we have reached the stage of final argument we have indicated that what is determinative is what the parties considered to be in issue, looking at the proceeding as a whole. We will use the same general approach to the arguments here.

Counsel for the respondents admitted that aspects II.(a) and II.(b) were clearly in the application and II.(c) might be reasonably inferred from the application but II.(d) was outside the pleadings. The elements of (d) which were emphasized in oral argument by the respondents regarding their objection related to the question of inducing breach of contract and what was termed the "bad mouthing" claim or the making of disparaging remarks about consultants. In reply, counsel for the Director stated that the Director was not seeking a remedy with respect to the consequential acts and that there was little point in addressing whether they were part of the case. We have some difficulty with this position. The Director is clearly seeking a remedy for the alleged anti-competitive acts of providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems, of which II.(d)(i), at least, is a subset. The Director also accepted, however, and we agree that any issue of counselling breach of contract is a matter for the civil courts so we will not deal with it further. The remaining acts listed in II.(d) were addressed by *both* parties through evidence and argument. Based on their conduct of the proceedings, the respondents were aware that these acts were in issue and there is, therefore, no prejudice to them by the Tribunal dealing with them on the merits.

(3) Competition Between Consultants and Tele-Direct

For the Director to succeed in any of the allegations, it must first be shown that Tele-Direct and the consultants are competitors. The respondents submit that consultants do not "sell" anything; they merely "unsell". They describe consultants as being in the business of providing independent (or non-partisan) advice to disgruntled, local Yellow Pages advertisers. They say that Tele-Direct does not operate in this market since advertisers recognize that Tele-Direct's advice is partisan and not independent.

The Tribunal accepts that while the relationship between Tele-Direct and the consultants is not that seen in the more usual competitive context, they are nonetheless competitors. It is true that consultants exist by downselling, while it is highly unlikely that Tele-Direct representatives would offer the same type of advice. It is also true that consultants' advice is independent while Tele-Direct representatives are, by definition, partisan. Further, consultants normally do not have an ongoing relationship with an advertiser and their remuneration arrangement takes a different form than that for Tele-Direct. There may be other differences of detail.

At bottom, however, both consultants and Tele-Direct representatives provide services which a customer can use to achieve the final result of an advertisement in the Yellow Pages. As we have seen from the evidence put forward in this case, a customer may choose to use either a consultant or the Tele-Direct representative to obtain these services. In this sense, they are substitutes for one another and compete to serve the advertising customers. There was substantial evidence put before us that Tele-Direct, in fact, views consultants as significant competitors, monitors their progress and takes action to attempt to limit their inroads on its revenues.

This is not to say that consultants (and Tele-Direct) operate in the "separate" services market, an argument which we have already rejected. Both consultants and Tele-Direct are participants in the broad telephone directory advertising market. Tele-Direct controls that market, as set out in the chapter entitled "VII. Control: Market Power", above.

(4) Facts

(a) Consultants and their Method of Operation

Three directory advertising consultants testified before the Tribunal. Jim Harrison of Tel-Ad Advisors Ltd. ("Tel-Ad") has serviced the Ontario market from an office in the Toronto area since June 1984. Prior to that time, Mr. Harrison was an employee of Dominion Directory. Serge Brouillet, previously in sales and also training and promotion with Tele-Direct, started Ad-Vice Communications ("Ad-Vice") in mid-1989 in Sudbury to service northern Ontario. In the fall of 1990, he sold the northern Ontario operation to Charles Blais to be run as Ad-Vice North and moved into the Toronto market. Mr. Blais also appeared as a witness. Mr. Blais operated the Ad-Vice franchise in Sudbury from November 1990 to December 1992 when he sold it back to Mr. Brouillet who ran it in 1993.

A summary of the *modus operandi* of consultants in general will provide context for the relations between consultants and Tele-Direct and for the Director's allegations. Consultants operate on the basis that many Yellow Pages advertisers can reduce their Yellow Pages spending without reducing the effectiveness of the advertising. In other words, they target customers who are dissatisfied with the amount that they are spending with Tele-Direct and are willing to pay a fee to lower it. Consultants recruit customers by going through the Yellow Pages and identifying likely candidates for their services, those for whom they can save money. Two of the major factors are the size of the advertisement and the use of colour; number of headings and number of directories are also reviewed.

After contacting the client by telephone to determine interest, the consultant or an employee of the consultant meets with the client and makes a presentation showing the client various options for changing the advertising. The potential for conflict with Tele-Direct and its commissioned sales representatives is obvious from the outset. The consultants' income depends on reducing customers' expenditures on Yellow Pages. Thus, they attempt to convince the customer that the extra amount spent for options like larger size and colour is not worth paying. To do this, they might bring to the attention of the customer how much more those options cost and question their effectiveness for the customer. Tele-Direct's representatives, of course, emphasize the value and effectiveness of colour, size and the like by drawing on arguments and evidence put together by Tele-Direct to show that they are worth the cost.

With respect to submitting customers' orders to Tele-Direct for processing, when it first commenced operations Tel-Ad sent orders to Tele-Direct on behalf of customers. These were rejected by Tele-Direct. Then Tel-Ad sent in the orders on a generic order form with no identifiers; these were also rejected and returned either to Tel-Ad or the customer. Attempts to submit orders with a letter of power of attorney from the customer also failed. Eventually, Tel-Ad simply left the orders with the customers to be submitted to Tele-Direct. In July 1984, Tel-Ad started legal action against Tele-Direct for refusing to accept advertising orders directly from Tel-Ad. Tel-Ad also sought an interlocutory injunction requiring Tele-Direct to accept orders submitted by Tel-Ad on behalf of advertisers. The injunction application was denied on the basis of no irreparable harm and the action was later abandoned. Tel-Ad's activities led to the first version of Tele-Direct's guidelines for dealing with consultants, drafted in 1986. Tele-Direct's guidelines are reviewed in some detail below.

(b) Tele-Direct Reaction - General

The existence and activity of consultants strike at the trustworthiness of advice provided by Tele-Direct's sales representatives and place highly profitable revenues in jeopardy. Tele-Direct does all within its power to eliminate any possibility of consultants gaining the ear of its customers. It has taken out advertisements warning customers to beware of consultants. The same message is conveyed by the representatives and by letters to customers telling them to call Tele-Direct if contacted by consultants.

According to the 1986 Tele-Direct guidelines for dealing with consultants, the "official" line on consultants to be conveyed by representatives is that their objective is to reduce Yellow Pages advertising which will reduce the effectiveness of the advertising and likely adversely affect the customer's business, based on studies conducted by Tele-Direct. Emphasis is placed on the fact that consultants are only paid if the customer reduces Yellow Pages spending, implying that consultants are likely to give biased advice, and that Tele-Direct will perform the "same" service as the consultant (advice and artwork) and "not charge a fee".[266] Tele-Direct also encouraged its representatives to point out to the customer that while Tele-Direct was concerned with the long-term, consultants do not have a continuing relationship with the customer and therefore have no incentive to take into account the possible negative repercussions on the customer's business if their advice is followed.

There is evidence that at least some sales representatives went considerably further in their efforts to discredit consultants, calling them "scam" artists and other epithets, saying they were unfamiliar with Tele-Direct's specifications and showing poor photocopies of artwork done by consultants to customers in an attempt to cast doubt on the ethics and professionalism of the consultants.

Tele-Direct has also taken other, positive steps to combat consultants by improving elements of its service to its customers. For example, Tele-Direct has attempted to create a better working relationship with customers through "consultative" selling and by assigning representatives to customers for up to three years rather than changing each year. While the changes made by Tele-Direct were not in response to consultants alone, they were rooted in customer dissatisfaction with Tele-Direct's service.

[266] These assertions ignore the fact that Tele-Direct representatives would rarely, if ever, give advice on how to reduce spending.

(c) Tele-Direct's Consultant Guidelines

The guidelines set out Tele-Direct's procedures and directives to its sales force for dealing with orders for advertising originating with consultants and for handling customer contact once involvement of a consultant has been detected or suspected. This stage of the relationship between consultants, customers and Tele-Direct forms the focus of the Director's allegations of anti-competitive conduct. While the application of the various guidelines has been somewhat erratic and interpretation of their terms varied, it is clear that Tele-Direct has at no time dealt directly with a consultant acting *on behalf of* or in a representative capacity for an advertiser. Tele-Direct has always insisted on visiting a customer suspected of using a consultant even after an order was received from the customer and obtaining the customer's signature on its own documents. The package provided by Mr. Brouillet of Ad-Vice to his clients, following futile attempts on his part to avert the visit of the Tele-Direct representative by providing Tele-Direct's contract or a similar document to his clients himself,[267] advises the client that the Tele-Direct representative will be in contact to transfer the advertising program onto the Tele-Direct forms.

(i) 1986 Guidelines and Their Application

As general rules, the 1986 guidelines provided that:

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[267] Tele-Direct threatened him with legal action, apparently for breach of copyright in its contractual terms and conditions.

> (c) Tele-Direct will not accept insertion orders directly from directory consultants who have not been granted accredited agency status by Tele-Direct.
>
> (d) Tele-Direct sales representatives should continue to contact their customers directly and request that the customers actually sign the Tele-Direct contracts and layout sheets so as to ensure the accuracy of the Yellow Pages advertising proposal prepared by a directory consultant.[268]

While the Tele-Direct policy of refusing to accept orders directly from consultants may have been followed in Tele-Direct's western region, it was not followed in the eastern region, in particular in Montreal, Sudbury and Ottawa. Letters sent in 1989 by Tele-Direct to Consultant en publicité annuaire et communication (CEPAC 2000) Inc. (" CEPAC 2000 ") in Montreal and Ad-Vice in Sudbury and in 1990 to Steven White of Tel-Ad in Ottawa[269] outlined for the consultants in question the procedure to follow in submitting orders to Tele-Direct.[270] The orders had to be delivered to named Tele-Direct managers in the relevant offices, accompanied by proper authorization by the advertiser on the advertiser's company letterhead.

Paul de Sève, Tele-Direct's Vice-president of Sales for the eastern region, confirmed that, although Tele-Direct's policy was not to deal directly with the consultant on the advertiser's behalf, in the eastern region at least, it was accepting orders from consultants. Orders were not automatically rejected and returned to the consultant even though Tele-Direct was aware of consultant involvement. The orders were taken as an indication that the customer wanted to

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[268] Confidential exhibit CJ-10 (blue vol. 1), tab 5 (public).

[269] Not affiliated with Mr. Harrison.

[270] Initially, Tele-Direct refused to accept orders from Mr. Brouillet, until he obtained a copy of the letter sent to CEPAC 2000.

change its advertising and a Tele-Direct representative would visit the advertiser and deal with him or her directly. In Tele-Direct's own words,

> . . . Regardless of whether the "cut agent" or the customer was directing insertion/change/cancellation of Yellow Pages advertising through letter or order form, we would accept this information as notification that the customer wished to renegotiate his Yellow Pages advertising. The Tele-Direct representative would deal directly with our customer, using our forms and contracts in the setting up of Yellow Pages advertising.[271]

(ii) 1990 Policy and Application

Tele-Direct implemented new consultant guidelines in December 1990. The opening words of the revised guidelines state that:

> We changed our operating procedures on dealing with "cut agents" effective December, 1990, to further strengthen and reinforce our direct servicing philosophy with our customers.
>
> These changes were made to ensure that we did not act on "cut agent" instructions, for the insertion/change/cancellation of our customers' Yellow Pages advertising. Furthermore, these changes were intended to leave no doubt in the minds of our customers that we do not do business with "cut agents".[272]

The "general procedures" established by these guidelines were as follows:

> • we will always accept letters/packages sent or given to us by customers and act in accordance with their wishes.

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[271] Operating procedures prior to December 1990: confidential exhibit CJ-11 (blue vol. 2), tab 58 at 107788 (public).

[272] Operating procedures, December 1990: *ibid.* at 107792 (public).

> • to the best of our knowledge, we will not accept, nor act upon, information sent or given to us by "cut agents" on behalf of our customers, nor accept or act upon information sent or given to us by customers containing directives from "cut agents."
>
> Instead, our procedure will be to not accept packages from "cut agents" or from customers for "cut agents" and in the event that a package is accepted in error, its contents will be returned to the "cut agent" with a covering letter designed for this purpose.[273]

The guidelines then provide more detail on the procedure to be followed in particular situations. The gist is that if, upon external examination of a letter or package, it became apparent that it was from a consultant or from a customer working with a consultant, the letter or package would be returned to the consultant. If the letter or package was apparently from a customer, with no external indication of consultant involvement, the letter or package would be opened but if further examination of the contents revealed the involvement of or a directive from a consultant, the letter or package would be returned to the consultant. Even when the letter or package appeared to come from or was, in fact, dropped off by the customer, if it was rejected because of consultant involvement, the customer would not be informed that the order had been returned to the consultant.

Mr. de Sève admitted that the procedures set out above represented a dramatic change from the 1986 guidelines, at least with respect to how the Montreal, Sudbury and Ottawa offices had been operating.[274] It is also clear from his testimony that the principal reason for the change was that Tele-Direct was having second thoughts about having "legitimized" the consultants to

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[273] *Ibid.*

[274] There is some question as to whether the consultants affected were notified specifically of the change in policy or of the exact terms of the new policy. Messrs. Brouillet and Blais said that they were not.

the extent they had by writing the letters referred to above in 1989 and 1990. The 1990 strike by Tele-Direct's sales representatives meant that the consultants were particularly active in the fall of that year.

The 1990 guidelines were adhered to strictly in one respect. At no time did Tele-Direct accept orders that were not submitted on the customer's letterhead. Other aspects of the guidelines appear to have been unevenly applied. Despite the statement that Tele-Direct would *always* accept orders from its customers and "act in accordance with their wishes", there was evidently considerable uncertainty within Tele-Direct as to how the guidelines were to be applied with respect to rejecting customers' orders for consultant involvement. Some orders containing indications of consultant involvement or where a consultant was known to be involved were accepted without incident or accepted after an initial rejection. Yet, Mr. de Sève's evidence, which as Vice-president of Sales for the eastern region we take to be an "official" application of the guidelines, was that where there was doubt, it was *assumed* that the documents came from a consultant and they were returned to the consultant without advising the customer.

This is what happened in the summer of 1991 in the case of a package containing 23 orders under customers' signatures which were, in fact, prepared by Ad-Vice North (Mr. Blais). An internal Tele-Direct document dealing with how it should respond to a complaint by Mr. Blais about this incident indicates that packages were being returned to Ad-Vice North by the Sudbury office *even though* Ad-Vice North was not mentioned in any of the correspondence and *regardless of* the fact that the letter of direction was from the customer because the employees recognized the Ad-Vice "format". Mr. de Sève stated that consultant involvement was probably assumed because of the number of orders in one envelope.

Mr. de Sève also confirmed that in 1991 Tele-Direct adopted a further policy of not processing orders received at the closing date according to the customer's instructions if they originated with a consultant even though it would do so for orders coming from its own sales force. Tele-Direct would instead rely on its last year's contract with the customer or the latest contract signed by the customer.

(iii) 1992 Policy and Application

The difficulties with and the inconsistency in application of the 1990 guidelines led to the most recent Tele-Direct guidelines for dealing with consultants, dated February 1992. These guidelines are currently in force. The operating procedures in those guidelines state that they are designed to "formalize our existing policy of dealing directly with customers." Two important aspects of that policy are:

> . . . Tele-Direct will not accept a customer's appointment of a consultant to act on his/her behalf in dealings with Tele-Direct; and, Tele-Direct will not knowingly take instructions from a consultant acting on behalf of a customer.[275]

The detailed procedures provide that when correspondence is received from a consultant, whether by mail, courier, delivery, etc., it is opened and the contents examined to determine what action (from a list of A to D) should be taken. According to the procedures, any correspondence

[275] Confidential exhibit CJ-12 (blue vol. 3), tab 105 at 109796 (public).

from a customer appointing a consultant to act on his/her behalf is to be returned to the customer with a form letter indicating that Tele-Direct will only deal with its customers directly (B). Any "directive" from a consultant is to be returned to the consultant with a form letter which simply states that the material was received "in error" (C). A second form letter is to be sent to the customer explaining that the material has been returned to the consultant without being processed and stating Tele-Direct's policy of only dealing with the customer directly. The guidelines also state that any correspondence from a consultant regarding problems with or errors in published advertising are to be ignored altogether and the matter resolved directly with the customer (D).

Most importantly, if the correspondence contains instructions from a customer regarding his/her advertising, the procedures provide that the instructions should be accepted and handled "in the normal fashion, i.e., deal directly with the customer" (A). The evidence of Messrs. Renwicke and de Sève regarding when correspondence will be considered by Tele-Direct to contain instructions "from a customer" and will be accepted and handled in the "normal fashion" reveals that the guidelines are still open to interpretation. Mr. de Sève testified that even if the instructions are from the customer, on the customer's letterhead, if they include any reference to consultant involvement, the order will not be accepted. He was of the view that such a case fell within B or C set out above. Mr. Renwicke, on the other hand, first stated that such an order would be accepted. He then qualified this by saying that it depended on the "tonal quality" of the letter and of any references to a consultant. According to him, the defining criteria is whether it was perceived that the consultant "is going to be seen to or is actually playing a leadership role for that account".[276]

Assuming that the order is accepted, the guidelines also set out a "protocol" for customer contact by sales representatives when dealing "directly" with customers which reveals that little weight is given to the order already received from the customer. The representatives are to conduct themselves throughout in a "business-like and professional manner" but are expected to "only provide Yellow Pages selling services *directly to a customer*." While Tele-Direct's representatives are permitted (but not required) to meet with a customer when a consultant is present, they must decline to take *any* instructions from a consultant even if the customer insists. The protocol provides that all instructions must come directly from the customer. If the customer refuses to deal with the Tele-Direct representative directly, the representative is to review with the customer the customer's legal obligations under the existing Tele-Direct contract, i.e., that the previous year's advertising will simply be renewed. If this approach fails, the sales representatives are advised to try again later to re-convene the meeting but if the customer still refuses to deal directly, then advise the customer that the contract will remain in force in accordance with its terms.

Mr. de Sève admitted that under this protocol, where a customer handed the Tele-Direct representative a package containing instructions prepared by a consultant and asked the

[276] Testimony of P. de Sève: transcript at 44:9123-27 (22 November 1995); testimony of D. Renwicke: transcript at 46:9630-34 (27 November 1995).

representative to follow them, that would lead to a termination of the interview and the instructions would not be followed. He also admitted that, in fact, Tele-Direct representatives would refuse to meet with the customer in the presence of the consultant because they would not be able to discuss with the client "one-on-one" the merits of the change in the advertising program.

(d) Specific Incidents

The Director relies on numerous specific incidents involving consultants and their customers as evidence in support of his allegations. The respondents dispute that some of those occurrences took place or if they took place, took place as related by the Director's witnesses.

We accept that there were times when Tele-Direct went beyond simply rejecting or returning orders from customers where consultant involvement was suspected and treated these in an extremely cavalier fashion. On one occasion in 1989, a package of customer orders prepared by Mr. Brouillet, including one from Ad-Vice's law firm, was left with a secretary who threw it out of the Tele-Direct office and into the hallway. The lawyer was able to confirm after a number of phone calls that his order had been retrieved and was processed. He inquired about the remaining orders but Tele-Direct refused to inform him of the fate of the other orders in the package.

On another occasion in 1990, when the manager designated to receive orders from Ad-Vice in Sudbury was not in the office, the process server left the package on the counter and the receptionist threw it in the garbage. Apparently the order was not processed in accordance with those instructions, according to the respondents, because the advice was delivered late. The only evidence brought to our attention on this point was a recently written note by the Tele-Direct representative that stated "delivered past deadline - did not use their material".[277] The affidavit of service sworn contemporaneously, however, indicates that the package was delivered on August 16, 1990. Mr. de Sève's evidence was that the closing date for Sudbury was in November. We therefore do not accept that the package was delivered late.

We accept the evidence of incidents in which orders from customers who had used a consultant were subject to "errors" in processing by Tele-Direct. In three cases Tele-Direct acknowledged to the customers that errors had been made and provided a credit. These included Todd Optical Ltd. (mistake in telephone number and location), Adler Moving Systems (advertisement in the Elliot Lake directory omitted), Forest Products and Builders (advertisement did not appear), all customers of Mr. Brouillet. The owner of Todd Optical Ltd. had written a letter of support for Ad-Vice. We note that these errors all had potentially serious adverse consequences for the businesses involved.

Another customer of Ad-Vice, Lockerby Taxi Inc., whose owner appeared as a witness, experienced an odd error when an unpaid "filler" advertisement was published featuring

[277] Confidential exhibit CJ-27 (black vol. 6), tab 33 at 128522.

Lockerby's name with the query "Sales Down?" in the background. Mr. Flinn was never provided an explanation or apology for the error. His attempt to obtain compensation was denied by Tele-Direct because he could not prove damage to his business.

The Director also called evidence that Tele-Direct informed customers that advertising prepared by a consultant did not comply with its specifications on the slimmest of pretexts.[278] Several of the examples related to clients of Mr. Brouillet, who testified that to his knowledge the advertisements were in accordance with existing specifications. The respondents called no evidence that the advertising did not meet specifications. In one case, the respondents admitted that the advertisement prepared by CEPAC 2000 did, in fact, comply with specifications.[279] We conclude that Tele-Direct would not have objected to these advertisements had it not been for the involvement of a consultant in each case.

As noted above, Tele-Direct's admitted practice is not to act on a customer's order, where a consultant is believed to be involved, until the customer has been visited by a Tele-Direct representative. Instead, Tele-Direct treats the order from the customer merely as an "indication" that the customer wants to change his or her advertising. Thus, in every case of suspected consultant involvement, the customer will be visited by a Tele-Direct representative. At the point of a meeting between the Tele-Direct representative and the customer, usually the customer

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[278] E.g., Postime Distributors (wrong paper, wrong size), Paul's Quality Woodcraft (non-compliance with specifications in general), M & L Service (wrong paper) and Canac-Marquis Grenier (borderless advertisement not allowed).

[279] The advertisement was for Canac-Marquis Grenier.

would have already signed a contract with the consultant approving the changes recommended by the consultant and agreeing to pay the consultant's fee. The respondents deny that there was any tendency within Tele-Direct to delay visiting a customer who was known or suspected to have used a consultant until the last minute and to use the visit as the occasion to make disparaging remarks implying that the customer had been "taken advantage of" by the consultant or to use other tactics to pressure the customer into changing his or her mind about the program recommended by the consultant.

We accept that these types of tactics were fairly widely used by Tele-Direct's representatives. Last minute contact resulting in pressure on the customer and some confusion as to what the customer had to do to ensure the advertising would run as originally ordered occurred in several examples put before us. Mr. Harrison recounted the example of Mr. Kantor of Tiremag Corp. Mr. Kantor's order was delivered by registered mail to Tele-Direct in April 1993. Mr. Kantor was contacted by the Tele-Direct representative six months later, close to the closing date for the Brampton directory, and informed that no order for that directory had been received and that unless something was done, his advertising for the previous year would have to be used. Mr. Kantor insisted that he had already given them his instructions but Tele-Direct never located the package. The previous year's advertisement was run, then Tele-Direct located the package and admitted it had made a mistake. Similar problems occurred for Pat's Party Rentals, a client of

Mr. Brouillet.[280] Other examples are the Britannia Restaurant & Banquet Hall, again a client of Mr. Brouillet, and the Muskoka Riverside Inn, a client of Mr. Blais.[281]

Eric Beesley of Georgetown Quik-Lube Ltd., who appeared in person, testified that, having submitted his order much earlier, he was contacted by the Tele-Direct representative the day before the closing date to attempt to persuade him to stay with his existing program. Then on the final day, he was called again and advised that he had to attend at the Tele-Direct office in person to make the changes. Mr. Beesley, however, was aware of the contractual clause allowing him to make changes in writing by a certain date, pointed out that he had complied with it and the advertising was processed as he had ordered.

There is only one documented case in the evidence in which a Tele-Direct representative counselled a customer *outright* not to honour a contract with a consultant.[282] Tele-Direct's guidelines explicitly warn Tele-Direct representatives not to provide advice with respect to customers' legal obligations. There is, however, abundant evidence of instances where customers

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[280] The order was sent in under her signature on July 15, 1991. On September 30, 1991, the client received a form letter from Tele-Direct stating that the material had been returned to the consultant without processing. (As of that date, Ad-Vice had not received anything back.) The customer panicked, thinking her advertising would not appear. Mr. Brouillet was unable to obtain confirmation that the advertising would appear as ordered. The client ended up dealing directly with Tele-Direct and Mr. Brouillet had to sue to recover his fee.

[281] The Britannia Restaurant & Banquet Hall order was sent in on August 2, 1991. On September 25, 1991, shortly before the closing date, Tele-Direct faxed the client its contract documents, which described the previous year's program. The client simply signed the documents, thinking they represented the new order. The old program appeared, the client protested, Tele-Direct insisted on full payment, the client refused to pay and was eventually barred from placing further advertising in Tele-Direct's directories. A Tele-Direct notation on a document relating to this customer indicates some concern even on its part about what transpired. The Muskoka Riverside Inn submitted its order prior to the deadline for making changes. The order was returned to the consultant and the client notified he had to send the order himself. The client missed the deadline for changing artwork and Tele-Direct ran the old advertising.

[282] L.J. Sunshine Hardwood Flooring. Ad-Vice has sued the customer for breach of contract. In his defence, the customer claims that the Tele-Direct representative advised him that he had been "misrepresented" and should stop payment on his cheque.

refused to pay consultants following a meeting with the Tele-Direct representative. If the customer refuses to pay, the consultant is obliged to take legal action to recover the fees owed.[283] In general, where the consultants have gone to court, they have been successful in having the contract honoured. While it might be argued that the persistent refusals to pay by customers indicates dissatisfaction with the consultants' services rather than reflecting any tactics employed by Tele-Direct's representatives, on the evidence we accept that there is a link between the visit by the representative and the instances of refusal to pay the consultants' fees.

The issue in many of these incidents is whether Tele-Direct made innocent errors, or whether the climate in Tele-Direct towards consultants resulted in what was, in effect, sabotage of the consultants and their customers. An important reason for concluding that there was more than innocent errors at work is the evidence that Tele-Direct was willing to sacrifice the interests of customers by putting them in the middle of Tele-Direct's struggle against consultants. There is more than a hint of malevolence in the formal and explicit decision in the 1990 guidelines not to inform customers when orders submitted on their behalf were being refused (although this was changed in the 1992 guidelines).

(5) Anti-competitive Acts

The Director alleges a number of anti-competitive acts by Tele-Direct involving consultants relating to Tele-Direct's refusal to deal directly with consultants on behalf of advertisers, its discriminatory treatment of customers and customers' orders originating with

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[283] Or, evidently, write off the account or accept a reduced fee in settlement, as Mr. Blais did on one occasion.

consultants and its refusal to supply specifications to consultants. None are specifically listed in section 78 of the Act. As the list is not exhaustive, there is no reason not to assess the actions characterized by the Director as anti-competitive acts by Tele-Direct to see if they have the requisite exclusionary, predatory or disciplinary purpose.

The respondents argue that the challenged conduct cannot be anti-competitive because it was generally in accordance with the Tele-Direct guidelines for dealing with consultants, which they say were not intended to and do not prevent the consultants from doing business but rather render Tele-Direct's dealings with consultants "fair and consistent". They further submit that they have valid business reasons for their policy. These "business justifications" will be dealt with in detail for each alleged anti-competitive act.

In a related argument, the respondents submit that, to the extent that the Director is able to prove that Tele-Direct engaged in any of the alleged acts, those acts ceased in 1992 with the implementation of the most recent guidelines for dealing with consultants which have been consistently applied, unlike prior versions. They submit that any practice cannot be caught by section 79 as more than three years have elapsed since it ceased. We do not see validity in the argument. The 1992 guidelines are obviously still in force. The Director has not alleged that it is only the failure to follow the guidelines that is anti-competitive but that certain actions of Tele-Direct, which may not be contrary to the guidelines (refusal to deal directly with consultants on behalf of advertisers) or are simply not dealt with in the guidelines (some discriminatory acts, refusal to supply specifications), are anti-competitive. To the extent that the guidelines sanction conduct that the Director is alleging is anti-competitive, then the Director is, in effect, challenging the guidelines and their application also. The guidelines certainly do not prohibit (and may actually encourage) the particular conduct by Tele-Direct that is the subject of the allegations.

(a) Refusal to Deal Directly with Consultants

The respondents here repeat the argument that we dealt with earlier under the section concerning the abuse of dominant position with respect to publishers and the 20-directory requirement. They argue that a refusal *cannot* be an anti-competitive act and that they are not required to assist their "detractors" by dealing with consultants as that would be akin to placing a positive duty to act on the respondents. As we stated in that section, semantic arguments about whether the act in question is active or passive do little to advance the real issues in dispute. We will therefore proceed to analyze the more substantive arguments without further comment.

The evidence is clear that Tele-Direct has engaged, since the advent of Mr. Harrison and Tel-Ad in 1984, in the specific aspects of refusing to deal directly with consultants on behalf of customers set out under I. in the introduction above. Tele-Direct has refused to act on written instructions received from consultants on behalf of advertisers; refused to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same; and refused to deal with consultants on subsequent errors or problems.

In the eastern region between 1986 and 1990, Tele-Direct acted in contravention of its own 1986 guidelines by *accepting* orders from, at least, CEPAC 2000, Ad-Vice and Tel-Ad, as evidenced by the letters. Even those letters, however, make it clear that the order must be accompanied by a letter *from the customer on the customer's letterhead*.

There is also evidence that Tele-Direct refuses to accept oral instructions from consultants. The 1992 guidelines are clear that the Tele-Direct representative must not accept instructions, even indirectly, from anyone other than the customer. While the current guidelines allow the representative to meet with the customer with the consultant present, the representative is not required to do so. The evidence was that most of the time the representative refuses to meet with the customer with the consultant present. Likewise, Tele-Direct would not deal with consultants on follow-up matters on behalf of customers.

We must weigh the anti-competitive effects of the acts against the business justifications put forward by the respondents. There is no doubt that Tele-Direct was trying to make life difficult for the consultants by refusing to deal with them directly on behalf of advertisers. Tele-Direct did not want the consultants to have any legitimacy in their dealings with its customers. The 1990 guidelines were brought in to eliminate the slight leniency that had developed under the 1986 guidelines, which had placed letters from Tele-Direct in the hands of various eastern region consultants confirming that orders coming from them would be accepted and processed by Tele-Direct.

There are two possible types of adverse effects that might arise from Tele-Direct's refusal to deal with consultants acting on behalf of customers. The first is the possible increase in costs to the consultants that would result from having to do business in a somewhat roundabout way, rather than submitting orders directly. The second, and more important, effect is the effect on the consultants' credibility with customers when they have to explain to customers that they are not permitted by Tele-Direct to submit orders directly on their behalf but must use an indirect procedure. This might put the consultants in a negative light in the eyes of the customer, particularly if the customer is already generally aware of the background of acrimonious relations between Tele-Direct and consultants. Against that backdrop, the indirect procedure that the consultants must use for submitting orders to Tele-Direct might appear as a form of subterfuge.

The evidence does not indicate that cost increases to consultants from Tele-Direct's refusal have been a real issue. The consultants' businesses have experienced ups and downs. While Mr. Harrison was unable to grow his business between 1986 and 1992, servicing an average of 60 new accounts a year, in the last few years he has expanded and is now handling 200 to 250 new accounts a year. Mr. Brouillet testified that Ad-Vice revenues from Yellow Pages consulting were at a high between 1992 and 1994 but dropped roughly to 50 percent of that amount in the last two years. He has also diversified into other businesses in recent years. Mr. Blais eventually gave up and left the business.

Although all three of the mentioned consultants testified at the hearing, none of them expressly linked whatever difficulties that they might have experienced to an *increase in costs*.

Even Mr. Blais did not do so. Undoubtedly, the consultants would like to have the advantage of being able to deal directly with Tele-Direct on behalf of advertisers. We find it instructive that Mr. Harrison has been operating since the mid-1980's, and still operates, in spite of Tele-Direct's refusal to deal directly with him in a representative capacity. Evidently, he, and other consultants no doubt, have managed to find an alternative to direct submission of orders that does not impose significant increased costs, or any increased costs at all, on their businesses. We cannot, therefore, identify any adverse cost effects on consultants resulting from Tele-Direct's refusal to deal with them acting on behalf of advertisers.

The question of possible negative reputational effects or damage to consultants' credibility arising from Tele-Direct's refusal to deal with them acting for customers is complex. To the extent that consultants lose reputation or credibility, customers will be less likely to demand their services. We do have evidence from the consultants that they have suffered negative reputational effects. For example, Mr. Brouillet testified that he could not keep sales help because of the negative environment; sales personnel felt they were regarded by advertisers as not legitimate, as "scam" or "con" artists.

Unfortunately, it is difficult to determine whether these effects result from the refusal by Tele-Direct to deal directly or from other actions of Tele-Direct that are not alleged to be anti-competitive. The Director has not challenged as anti-competitive Tele-Direct's general hostility towards consultants, as manifested by the placing of advertising warning customers about consultants, writing letters to customers and sending out its representatives to their premises with messages to the same effect. In our view, the negative reputational effects on consultants are due largely to the general environment created by Tele-Direct rather than the specific refusal to deal directly with consultants acting for advertisers. Any connection between the negative reputational effect or loss of credibility on the part of consultants and the refusal to deal directly is very weak.

We turn to Tele-Direct's business justifications for its consultant guidelines and, thus, for its refusal to accept written or oral instructions from consultants or deal with them on follow-up matters. The respondents' general position is that their refusal to deal with consultants "is clearly an efficient response to the damaging effect of the consultants on their business". They point out that the objective of the consultants is to decrease directory advertising which is exactly the opposite of the respondents' objective, which is, in their words, to sell directory advertising "in order to increase the usage of their directories and produce a more complete directory." Because the consultants generally serve customers on a one-time basis, the respondents take the position that consultants have a "perverse" incentive to "undersell", which detracts from the completeness of the directories.

We have already dealt with the "completeness" argument as part of the analysis of tied selling. As we concluded there, it is far from clear that all increases in advertising (especially size and colour which are targeted by consultants for reduction) contribute to completeness. Therefore, the "upselling" of size and colour by Tele-Direct representatives cannot be assumed to be socially beneficial, nor can the "downselling" of those attributes by consultants be assumed to be socially detrimental. The optimal situation is one in which both points of view are freely available to advertisers so that the advertisers themselves can make the choice.

At paragraph 840 of their written argument, the respondents have also provided the following more detailed justifications for issuing and following their consultant guidelines:

> (i) the consultants do not accept responsibility for payment for the advertising;
>
> (ii) to ensure that the customer is fully informed with respect to the advertising they are purchasing and their available options;
>
> (iii) to ensure customers understand with whom they are dealing;
>
> (iv) to prevent the conflicts that may occur if the Respondents' sales representatives were to take instructions directly from the consultants;
>
> (v) to ensure that advertisers are aware of new programs and initiatives.

We need only deal with the first point. The Director has in effect admitted the validity of the respondents' first business justification, that consultants do not accept financial responsibility for the advertising, by the remedies he seeks. At paragraph 69(b)(iii) of the application, the proposed remedy was:

> . . . that the Respondents accept orders for advertising space on behalf of any party that can satisfy the Respondents' reasonable requirements of evidence of authority to act on behalf of an advertiser and *capacity to pay for the space requested*. (emphasis added)

At paragraph 391 of the written argument, the following further remedy was added:

> . . . that the Respondents be prohibited from requiring that customers who choose to utilize the services of a third party to place advertising be required to enter into a contract directly with the Respondents where the third party who has satisfied the Respondents' reasonable requirements of evidence of authority to

> act on behalf of the advertiser and *where the third party has guaranteed payment on behalf of the principal.* (emphasis added)

These proposed remedies imply that in the Director's view it is reasonable for Tele-Direct to insist on financial guarantees if Tele-Direct is to deal with consultants as representatives of the customer. The consultants do not currently accept any financial responsibility. What the Director has done is to suggest an alternative method of operations for Tele-Direct in its dealings with consultants. He is proposing, in effect, that Tele-Direct begin to deal directly with consultants acting for advertisers by creating a new third sales channel (in addition to the internal sales force and agents).

There is evidence that dealing directly with the consultants would require Tele-Direct to set up an additional interface to deal with them. As described by Mr. Logan of the YPPA, this was the experience of US West, which set up a group of specially trained employees to deal with consultants to avoid problems with its sales force when it dealt directly with consultants. Such direct dealing, therefore, would obviously entail an additional cost to Tele-Direct. Further, Tele-Direct does not currently deal with guarantees in the sense proposed by the Director. Agents, of course, simply pay up front. A system would have to be set up to accommodate this new procedure.

In the circumstances, we think that the additional costs that Tele-Direct would incur if it were forced to deal with consultants directly on behalf of advertisers is a valid justification for not doing so, given that no adverse cost effects on agents were proven and that any negative reputational effects that are attributable to the refusal to deal directly are, at best, weak. We conclude, therefore, that, overall, Tele-Direct is not engaging in anti-competitive acts by refusing to deal directly with consultants on behalf of advertisers and, in particular, by refusing to accept written or oral instructions from, or engage in follow-up communication with consultants acting on behalf of advertisers.

(b) Discriminatory Acts

The discriminatory acts involve Tele-Direct's actions after the customer has submitted an order based on a consultant's advice and the effects that flow therefrom. Notwithstanding Tele-Direct's stated policy, orders submitted by a customer are sometimes returned because Tele-Direct believes a consultant was involved in the preparation of the order. There is no justification for Tele-Direct precluding an advertiser from seeking the advice of a consultant if the advertiser so chooses. Indeed, that is what one part of Tele-Direct's written guidelines states. Yet, the guidelines, even the 1992 guidelines, also mandate the return of certain customer orders. The fact that Mr. De Sève, a senior executive of Tele-Direct, is aware, and apparently condones, the return of customer orders for suspicion of consultant involvement proves that these were not merely isolated instances or errors.

Further, the history of the 1990 guidelines underlines the fact that Tele-Direct was fully aware of and, in fact, sanctioned the foreseen negative consequences of those guidelines for its advertisers. The advertisers' interests were sacrificed in order to hamper the consultants. The effect of the 1990 guidelines, as Tele-Direct itself recognized when they were first drafted, was to place the advertiser in the middle of the battle between Tele-Direct and the consultants, to the detriment of the advertiser.

A document attached to the guidelines identifies "perceived weaknesses" in the guidelines which were to be reviewed with the legal advisors. The first related to the fact that Tele-Direct would be rejecting any package delivered by a consultant or bearing any external indication of consultant involvement even if delivered by the customer or also bearing customer information on its face. Packages would therefore be rejected even though they might contain instructions from the customer on the customer's letterhead. A second concern was whether it was a reasonable business approach not to notify customers that the letter/package delivered to Tele-Direct had been rejected and returned to the consultant. In spite of these misgivings, the new policy was put in place.

The internal document dealing with the incident where 23 orders prepared by Mr. Blais were rejected even though they were under customers' signatures states that legal counsel, in fact, recommended against the procedure in the guidelines which permitted this type of rejection. Counsel, as reported in the letter, was of the view that the customers had the right to deal with whomever they wished in designing their advertising and further had the right to send Tele-Direct their instructions on their letterhead and expect that they would be acted on as coming from them, provided that Tele-Direct was not required to deal directly with the consultant and the correspondence did not carry any consultant identification.

The respondents did not attempt to provide a business justification for rejecting or returning customer orders where there was no evidence of non-compliance with specifications or of late delivery. In the circumstances, we find that the rejection, return, denial of receipt or refusal to process customer orders involving consultants constitute anti-competitive acts.

As noted earlier, the Director is not of the view that Tele-Direct's insistence on visiting a customer after the customer has signed a contract with a consultant and submitted an order to Tele-Direct is by itself an anti-competitive act. He says that the issue relates to what the representative tells the customer and how the order received from the customer is treated. We agree that this is the crux of the difficulty. The anti-competitive acts are those that lead the customers to believe that they will be disadvantaged or that actually harm them because they have used a consultant. These include suspicious errors, last minute contact resulting in confusion for the advertiser about what must be done to have the new advertising run or resulting in missed deadlines, identifying errors or problems in the advertising that would not otherwise be a problem and informing customers that their orders might not be processed. We accept that such incidents occurred and that there is no assurance that they will not be repeated whenever consultants are seen as a threat.

The respondents argue that they were trying in all cases to ensure that their business operated efficiently by requiring consultants to meet deadlines and specifications. We have found that non-compliance with specifications and deadlines were largely pretexts for an attempt to pressure customers into changing their minds about a consultant's recommendations. Most of the incidents in evidence are more accurately characterized as highly disruptive because of the negative impact on customers rather than ensuring the smooth operation of Tele-Direct's business as argued. We have no hesitation in finding that statements or actions by Tele-Direct to discourage advertisers from dealing with consultants by expressly or implicitly indicating that advertisers will thereby be disadvantaged by Tele-Direct constitute anti-competitive acts.

The Director alleges that the respondents discriminate against consultants by refusing to meet with customers to take instructions originating in advice from consultants. On its face this looks very much like the allegation listed in I.(b) and forming part of the refusal by Tele-Direct to deal directly with consultants on behalf of advertisers. Presumably, the discriminatory act being alleged here is a refusal to accept oral instructions from customers using consultants while oral orders from customers not using consultants are accepted and acted on. As has already been noted, Tele-Direct requires that customers using consultants sign Tele-Direct's documents. In and of itself, this is not an anti-competitive act. It might, however, be a discriminatory act if customers not using consultants are not required to sign a contract in like circumstances.

However, the evidence of Mr. Giddings is that, by and large, all of Tele-Direct's customers sign its documents. In fact, Mr. Giddings testified that the only contracts which do not require signing are those contracts renewing advertising worth less than $100. Further, Mr. Giddings indicated that for those contracts which are not signed, if there is a conflict between the customer and the representative as to what advertising was actually ordered, which results in a "write-off", the representative is financially responsible for the write-off. This policy does not seem unreasonable on an operational basis. With respect to orders which Tele-Direct will accept orally from customers dealing with its representatives (that is, those under $100), there is no evidence that consultants deal with or are interested in obtaining clients whose orders are so small. We do not find this allegation to constitute an anti-competitive act.

There is no doubt that those discriminatory acts of Tele-Direct which we have found to be anti-competitive constitute a practice. They are not "isolated acts".

(c) Specifications

The Director submits that Tele-Direct's refusal to supply specifications to consultants is an anti-competitive act. He argues that consultants cannot adequately advise the customers who choose to use their services without up-to-date access to basic technical information. The Director points to evidence of Tele-Direct using alleged non-compliance with specifications to delay orders or discredit consultants in customers' eyes.

(i) Majority View (Rothstein J. and C. Lloyd)

The majority of the Tribunal are unable to agree with the Director for the following reasons. We see the refusal by Tele-Direct to provide specifications to consultants as another manifestation of Tele-Direct's general aversion to having any relationship with consultants. Looking at the experience of consultants and Tele-Direct's refusal to supply specifications to them, the evidence is that this has not adversely affected their ability to compete. Consultants have been in business since 1984 and we have heard of no difficulty experienced by them because Tele-Direct refused to provide them with specifications.[284] In one way or another, they were aware of what Tele-Direct's specifications required.

As to whether Tele-Direct not providing specifications to consultants would cause a problem in the future, Mr. Brouillet stated:

> . . . If there were changes in their specifications and we were not informed about it, then obviously, there would be a problem. If there was really a problem, the client only had to call us within 24 hours, we could fix what was wrong and forward that to Tele-Direct.[285]

There is no evidence before us that suggests that Tele-Direct's specifications change frequently. If anything we are left with the contrary impression from the absence of evidence from consultants that frequent changes were a problem. Mr. Brouillet stated that once a problem is pointed out it can be quickly fixed. On the basis of this evidence, we are satisfied that any

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[284] This is not to say that Tele-Direct did not reject some orders based on non-compliance with specifications. This may have been the fault of the consultant not to conform to the specifications of which he was aware or because Tele-Direct, without justification, wished to create difficulty for a consultant. But Tele-Direct's rejection of orders was not attributable to consultants not being aware of what Tele-Direct's specifications required.

[285] Transcript at 15:2762 (6 October 1995).

changes to specifications will become known by consultants quickly. We, therefore, have no basis upon which to infer that refusal to provide specifications to consultants will, in any material way, adversely affect their ability to compete in the future.

The respondents did not argue the business justification "that customers understand with whom they are dealing" to justify the refusal to supply specifications to consultants, although this was raised as a justification for other acts. However, we are of the view, based on the evidence, that this business justification is applicable here. There is evidence before us of a number of instances in which there was confusion on the part of advertisers as to the exact relationship of a consultant with Tele-Direct.[286]

We infer from the way in which some consultants operate that this confusion could be exacerbated if a consultant, on visiting a proposed customer, is armed with up-to-date specifications obtained from Tele-Direct. There are indications in the evidence that in their initial contact with advertisers, consultants do not go out of their way to distinguish themselves from Tele-Direct. In some cases, the evidence is that the customer remains confused as to the exact relationship between the consultant and Tele-Direct.[287] In other cases, it is apparent that while an advertiser may initially be confused, the fact that the consultant does not represent Tele-Direct

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[286] Evidence of Mr. Lee of M & L Service, Mr. and Mrs. Jovandin of L.J. Sunshine Hardwood Flooring, Mr. Fox of Fox & Partners Limited, Mr. Harmic of Dominion Springs Corporation, Mr. McMaster of H.R. Home Renovations. Of course, the consultants blamed Tele-Direct for the confusion and Tele-Direct blamed the consultants. We cannot say for certain how the confusion about the relationship between Tele-Direct and consultants arose in each case but it does appear there was confusion in the minds of some customers.

[287] E.g., Mr. Lee of M & L Service.

eventually becomes apparent. It may become apparent in conversation between the advertiser and consultant or when the advertiser is requested to pay the consultant separate from Tele-Direct. In the case of Ad-Vice, a follow-up letter makes this clear.[288]

However, in our view, it is the initial confusion that creates the difficulty. We do not think consultants should be "getting their foot in the door" of advertisers because of such initial confusion. Being provided with specifications by Tele-Direct could be used by them as a form of "calling card" signifying a relationship with Tele-Direct that does not really exist. Notwithstanding that in many cases the confusion is eventually cleared up, we do think customers are best served when they know from the outset precisely with whom they are dealing and in this case, the relationship or lack of relationship between Tele-Direct and a consultant. We therefore think that Tele-Direct is justified in refusing to provide specifications to consultants and conclude that such refusal is not an anti-competitive act.

While we are not satisfied that the Director has made a case that the refusal to provide specifications to consultants is an anti-competitive act, we are not unmindful that ultimately it is the advertisers that might encounter difficulty if they retain the services of consultants who use incorrect specifications. It is for this reason that we have, in providing for a remedy for discriminatory acts against advertisers, required Tele-Direct, at its option, to take positive steps to revise a customer's order that is not submitted in compliance with its specifications so that the

[288] The package provided by Mr. Brouillet to his clients advises the client that the Tele-Direct representative will be in contact to transfer the advertising program to the Tele-Direct forms.

order complies or advise the customer what is wrong and how the customer may revise the order in accordance with its specifications.

(ii) Minority View (F. Roseman)

In my view, the refusal to supply specifications is an anti-competitive act. While differing from the majority in their conclusion, I accept that there is little evidence of past harm to consultants from the refusal. Nevertheless, consultants may suffer adverse effects in the future should Tele-Direct change its specifications. The consultants will eventually learn of the changes through trial and error but this leaves a considerable degree of uncertainty during an indeterminate transitional period. Therefore, there is the likelihood that the consultants will be significantly hampered so that the refusal to supply specifications should be considered an anti-competitive act given the complete absence of any sound business justification for the refusal.

The respondents have not advanced any valid business justification. They argue that the refusal is justified by the uniqueness and complexity of Tele-Direct's business and its desire to maintain the value and quality of its product. It is difficult to see how avoidable errors in orders prepared by consultants (and submitted by customers) contribute to quality.

I do not accept the majority's view that the evidence supports the conclusion that the availability of specifications to consultants would result in increased confusion on the part of customers as to the consultants' identity and purpose. I agree with the majority that it is impossible to identify the source of the confusion that apparently arose for some customers.[289] However, it is noteworthy that none of the incidents of confusion referred to by the majority was linked to Mr. Harrison[290] but only to Mr. Brouillet. Yet, it is Mr. Harrison who has been able to obtain ongoing access to Tele-Direct's specifications from YPPA through an affiliate in the United States. Because I am of the view that refusal to supply specifications will likely significantly hamper the consultants' ability to compete and that there is no valid business justification for the refusal, I conclude that the refusal constitutes an anti-competitive act.

(6) Substantial Lessening of Competition

The competitive effectiveness of consultants has been reduced as a result of Tele-Direct's practice of discriminatory acts. Consultants incur higher costs as a result of being forced to defend themselves before customers and by having to seek the aid of the courts in enforcing their contracts. These activities require time and expense that could otherwise be spent in attracting and serving customers.

In addition, the consultants' ability to attract new business is negatively affected when their customers are inconvenienced or harmed by Tele-Direct's discriminatory acts. Customers so

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289 *Supra* note 287.

290 *Ibid*. All of the incidents cited related to clients of Ad-Vice except for Mr. Fox of Fox & Partners Limited, who was not linked to a specific consultant.

affected are unlikely to be repeat customers or to recommend the services of consultants to other Yellow Pages advertisers.

Although consultants currently service a small portion of the total telephone directory advertising revenue, they are competitively significant. Tele-Direct was forced to respond positively to the presence of consultants by improving its servicing of its customers. Thus, consultants have had and can continue to have a significant positive influence on Tele-Direct's level of service to its customers as Tele-Direct legitimately strives to offset the inroads that consultants make into its sale of Yellow Pages advertising.

It is difficult to arrive at a numerical determination of the effect on consultants of the practice of discriminatory acts we have found to be anti-competitive because the acts are intermingled with other forces that hamper consultants. What we know, however, is that the consultants' ability to compete is limited and fragile as compared to Tele-Direct's virtual monopoly through its control of publishing. Consultants, by the nature of their services, have little ongoing business and must convince advertisers to pay for their services when these advertisers could place advertising in directories without incurring such expense, i.e., the market for their services is necessarily a "thin" one.

Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with.[291] In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial. Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition substantially in the market.

(7) Remedies

The Tribunal recognizes that consultants' interests are antithetical to Tele-Direct's and that Tele-Direct should not be forced to assist consultants. However, consultants must be able to compete with Tele-Direct to provide services to advertisers. Tele-Direct cannot use its market power to impede consultants' activities and to disadvantage customers who wish to retain the services of consultants. On the other hand, Tele-Direct must not be restrained from competing fairly with consultants.

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[291] The approach we adopt is implicit in *Director of Investigation and Research v. Imperial Oil Ltd.* (26 January 1990), CT8903/390, Reasons and Decision at 16, [1990] C.C.T.D. No. 1 (QL) (Comp. Trib.) and in U.S. Dept. of Justice/Federal Trade Comm'n, *Horizontal Merger Guidelines*, (2 April 1992) at 1.51. Although dealing with a consent order, *Imperial* in effect addresses the issue of what constitutes a substantial lessening of competition when there are varying initial degrees of market power by evaluating what is required to cure the alleged substantial lessening of competition. Similarly, the Guidelines view any numerical increase in concentration more severely the higher the initial market share of the acquiring firm.

We have concluded that Tele-Direct's refusal to deal with the consultants directly on behalf of advertisers is not an anti-competitive act. No remedy is provided in this respect. Nor is any remedy provided for Tele-Direct's refusal to provide specifications to consultants.

We have found that Tele-Direct engaged in a practice of discriminatory acts against consultants and customers who use consultants resulting in a substantial lessening of competition. While many of the acts in evidence occurred more than three years before the filing of the Director's application, the practice continues. The practice of these acts is prohibited. Customers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants.

For greater certainty, we elaborate on this remedy. Where a customer uses a consultant and the customer submits an order for advertising in the Yellow Pages, Tele-Direct is prohibited from rejecting the order. Tele-Direct may accept the customer's order without revisiting or contacting the customer to attempt to change the customer's mind. It will be open to Tele-Direct to act on the documents submitted by the customer or, if it considers it necessary, require the customer to sign a Tele-Direct document. If Tele-Direct decides to accept the order as it is, Tele-Direct is prohibited from not processing it or unduly delaying its processing and from refusing to confirm to the customer that the order will be processed as submitted. If the order is accepted and it turns out there is non-compliance with Tele-Direct's specifications, then the order must be processed in accordance with a revision made by Tele-Direct that complies with the specifications or the customer must be advised promptly that the order does not comply with specifications and informed of the exact problem and how to rectify it.

Alternatively, Tele-Direct has the option of providing further advice to the customer to try to convince the customer to change the order submitted. It may do so, including visiting the customer, but it is prohibited from employing the techniques that we have condemned as anti-competitive when doing so. For example, Tele-Direct may not delay until close to the closing date for submitting orders for a directory to contact the customer about alleged problems in the order. Tele-Direct may not advise the customer who used a consultant that the order does not conform to Tele-Direct's specifications or is otherwise unacceptable unless there is a material problem, in which case, Tele-Direct must provide the necessary information so the customer can cure the problem. Tele-Direct cannot use problems with the order in such a way as to leave the customer only with the option of reverting to the prior year's advertisement or having no advertisement appear. Nor may Tele-Direct delay until close to the closing date so that if the Tele-Direct's representative is able to convince the customer to change the order from that recommended by the consultant, that the customer does not have the opportunity of contacting the consultant if the customer wishes further advice from that source.

Subsequent efforts by Tele-Direct to resell the advertisers should be restricted to the merits of the advertising recommended by the consultant. Tele-Direct is prohibited from having its representatives discuss the role of or advisability of using a consultant at this time. We recognize that it may be difficult to distinguish between legitimate "puffing" of Tele-Direct's service and disparaging comments or inferences about the consultant's service. In view of the instances of disparaging comments by Tele-Direct that have occurred, we caution Tele-Direct to ensure that its instructions to its representatives are clear that in their follow-up meetings they are not to disparage consultants. What would be of concern would be evidence of systematic continuous representations that are untrue or that disparage consultants in these follow-up meetings.

For example, it is simply untrue that customers would receive the same advice from Tele-Direct for no cost as from a consultant who charges a fee because Tele-Direct representatives will rarely if ever recommend a reduction in advertising, which is the essence of the consultants' advice. The fact that consultants have a short-term relationship with a customer may be true but comments to this effect are disparaging if made with a view to causing a customer to lose confidence in a consultant's advice, not based on the merits of that advice. Tele-Direct should ensure that in these meetings its representatives restrict their selling effort to the merits of the advertising.

Observation by C. Lloyd and F. Roseman

We would have preferred to see a prohibition on attempted reselling by Tele-Direct's representative after an order was received from a customer. In our view, Tele-Direct has ample opportunity to establish a situation of trust and confidence between its customers and its representatives. If it fails to use its opportunities and customers choose to take the advice of a consultant because they perceive that they have not received quality service from Tele-Direct, then, ideally, that would be the end of the matter for that directory year. We have chosen, however, not to dispute the Director's concession that Tele-Direct should not be precluded from visiting advertisers after they have submitted an order.

X. ORDER

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

Definitions

1. In this order,

(a) "market" shall mean a market as defined by Tele-Direct for purposes of its commissionability rules prior to the filing of the application in this matter, and, for greater certainty, there shall in future be no fewer than six markets in Quebec and seven markets in Ontario;

(b) "consultants" shall mean firms which advise telephone directory advertisers on how to increase the effectiveness of and reduce expenditures on telephone directory advertising, primarily in the Yellow Pages, and which assist advertisers in the placement of orders for telephone directory advertising, but does not include firms which are accredited advertising agencies.

Tied Selling

2. The respondents are prohibited from continuing to engage in tied selling, namely tying the supply of advertising space by them to the acquisition of advertising services from them, for customers advertising in six, seven and eight markets.

Abuse of Dominant Position

3. The respondents are prohibited from engaging in the practice of discriminatory acts relating to consultants and customers of consultants.

Remaining Allegations

4. The remainder of the application of the Director is dismissed.

Interpretation

5. The Director or the respondents may apply to the Tribunal for directions or an order interpreting any of the provisions of this order.

Confidentiality

6. As required by paragraph 11(1) of the Confidentiality (Protective) Order issued by the Tribunal on March 30, 1995, the panel determines that a "reasonable period" for the retention, in a secure and organized manner, by the respondents of those protected documents returned to them by the Director upon completion or final disposition of this proceeding and any appeals relating thereto, shall be five years.

DATED at Ottawa, this 26th day of February, 1997.

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

(s) Marshall Rothstein
Marshall Rothstein

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PUBLIC 0770

Future of Canada's Competition Policy Consultation – What We Heard Report

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I. Introduction

On November 17, 2022, the Minister of Innovation, Science and Industry launched the Consultation on the Future of Canada's Competition Policy, the latest major step in the Government's efforts to modernize the *Competition Act* (the Act) and its enforcement regime. This initiative followed a significant increase in the Competition Bureau's (the Bureau) funding introduced in Budget 2021, and targeted amendments to address those shortcomings in the law that were readily identifiable, enacted in June 2022.

Against the backdrop of a changing economy and concerns over the effects of business concentration, notably on affordability, Canada's innovation performance and the resilience of supply chains, the Government sought input from Canadian individuals and organizations on the possibility of further and broader changes to the Act. Ultimately, input was sought on how best to position the legal framework and equip the Bureau to better protect consumers and enhance public trust in the contestability and reliability of the marketplace. The public consultation period concluded on March 31, 2023, and this report summarizes the feedback received and raises some considerations around what the government heard from stakeholders.

II. Who we Heard From

The public consultation garnered significant interest, receiving over 130 submissions from identified stakeholders, as well as more than 400 responses from members of the general public. These submissions raised over 100 potential reform proposals. Among the identified stakeholders were academic experts (7%); law practitioners (7%); labour unions, consumer groups, public interest organizations(18%; businesses and their associations (53%); government entities (5%) and others of varied background and experience (10%).

III. Overall Comments from the Public At Large

Interested parties had the option of making unattributed submissions as individual members of the public, responding to thematic questions contained in a scene-setting document. These responses tended to be of a more general nature and reflect the personal experience of members of the public. Summaries of this input are as follows.

1. The Role and Functioning of the *Competition Ac*t

The comments received from individual members of the public generally raised what participants largely considered to be the ineffectiveness of the Act in preventing corporate monopolies and oligopolies, leading to challenges for Canadians such as higher costs, reduced choice, decreased innovation, and increased political power for large corporations.

The general sense emanating from the submissions was that the Act must be revised, having failed to prevent concentration from forming in various industries, and resulted in lacklustre enforcement. Suggestions included revising the Act's objectives, updating the law to prevent further acquisitions by dominant companies, and establishing clearer guidelines on collusive conduct. A portion of the participants called for stricter regulations on the proportion of market share that a given company can control.

Many individual respondents stated that they felt that the Act is not being enforced effectively, and that large corporations are gaining too much control over the market, and its essential goods and services. They further believe that the government should have the power to regulate mergers and acquisitions that surpass a certain percentage in market share to ensure that no individual company gains too much power in the marketplace. Many suggested that companies be required to prove that their merger will improve the market for Canadians, and any merger that decreases consumer choice or facilitates collusion should be prevented.

2. The Role and Functioning of the Competition Bureau

There was a concern that select corporations may have an undue amount of power within and control over markets, leading to a lack of consumer choice and high prices, especially in the telecommunications and grocery industries. Accordingly, a large proportion of individual respondents asserted that the Bureau should have a broadened role with more enforcement authority to protect consumers and promote healthy competition. In their view, recent examples, such as the Rogers-Shaw merger, indicate limitations in the current governance and accountability framework. Some respondents felt that the Bureau needs to have more transparency, education, and public input to make informed decisions.

3. The Effectiveness of Remedies and Private Redress Mechanisms

The consensus among the individual responses received is that new or stronger tools are needed to promote compliance with the Act. A common perception was that cases were not being decided in a way that benefits Canadians and that remedies for harmful conduct are not strong enough to restore competition to desired levels. Some participants suggested looking to the European Union as a model.

4. Challenges of Data and Digital Markets

Many individual responses called for stronger regulations to ensure fair competition in critical digital markets, and that sector-specific mechanisms should be should be considered alongside an update of antitrust laws for the digital age. While not principally questions of competition law, consumer privacy and data protection were central themes, with some participants remarking that companies should be held more accountable for damage caused by data breaches and identity theft.

5. Other Pro-Competitive Policies

Many individual respondents believed that there is a lack of competition in the marketplace and want the government to take action, including actively breaking up perceived monopolies. Suggestions included providing more support for small business, including new and simplified grants, promoting green initiatives and reducing subsidies to established businesses.

Strengthened consumer protection legislation, though principally under provincial and territorial jurisdiction in Canada, also arose. Comments also touched upon tax policies, public utility models for certain major players, and wage disparities between executives and workers.

Many individual participants also argued that the Government of Canada should do more to promote competition in industries such as telecommunications and media by opening them up to more foreign competition and updating outdated sectoral legislation.

IV. Feedback on Specific Reform Proposals from Stakeholders

Mergers

Merger review, as the first line of defence against market concentration, draws arguably the largest focus from antitrust experts and casual observers alike. A diverse array of stakeholders shared views on various aspects of merger review raised in ISED's consultation paper, with clear themes emerging about the need to guard against further concentration in certain critical industries (such as grocery or telecommunications) to preserve affordability and consumer choice, while also minimizing administrative burden and unnecessary intervention.

Notification Rules

What we consulted on: While all mergers are reviewable by the Bureau to ensure that they will not cause a substantial lessening or prevention of competition (SLPC), only those that surpass a $400-million threshold for the size of parties, and an annually-indexed threshold for the size of the transaction ($93 million in 2022 and 2023), are currently required to provide advance notification to the Bureau and delay closing until the lapse of statutory waiting periods. The Government is considering the revision of pre-merger notification rules to better capture mergers of interest.

What we heard: There was a general consensus that a modernization of the notification rules would be beneficial, with the majority of debate centred around whether the Bureau should be made aware of a greater number or a different subset of transactions. Many stakeholders felt that any changes leading to increased notification would only increase regulatory costs for smaller businesses being acquired, unnecessarily burdening the Bureau itself, and disincentivizing investment into start-ups, among other chilling effects. Common recommendations ranged from an increase in the size-of-parties or size-of-transaction thresholds, new exemptions (i.e. upstream oil and gas or real estate), and removing the asset standard entirely. There was more tolerance for including sales into Canada in threshold calculations as long as requirements were relaxed in other ways.

Those in favour of more notifiability were especially concerned over "creeping acquisitions", i.e. a series of smaller acquisitions that might not be individually notifiable on their own. They made recommendations such as: requiring all acquisitions to be reported when a firm exceeds a certain number of acquisitions per year or holds a certain amount of market share; lower thresholds in specific markets of concern; better accounting for assets such as data control; and simply lowering the size-of-transaction threshold. Some requested that parties be required to supply their data behind the transaction size determination.

Other comments recommended: a filing fee proportional to transaction size; collecting new data points at the time of notification; notification only for transactions where both parties have a presence in Canada; longer waiting periods after filing; and separating out direct acquisitions of Canadian assets from global transactions that happen to have a Canadian component.

Limitation Period

What we consulted on: In 2009, the limitation period was reduced from three years to one, to complement the new two-stage merger review system that allowed the Bureau to receive more vital information earlier and as a matter of course. However, no such consideration applies to non-notifiable mergers, which also benefited from the shortened period. The Government is considering an extension of the limitation period for non-notifiable mergers (e.g. three years), or tying it to voluntary notification.

What we heard: Submissions were divided on whether the limitation period to seek a merger remedy should exceed the current one year duration, although many recognized that an extension could be justified for non-notified transactions only, with a voluntary notification scheme being available to attain greater certainty.

Those in favour of change agreed that one year was too short to determine the true impact of a merger, and some felt that businesses can easily delay the clearest signs of lessened competition, such as higher prices, for a year before leveraging their increased market power. Preferred length varied, with proposals to extend the limitation period only in the case of "serial acquisitions", while some suggested beginning the limitation period only upon the Bureau's discovery of the merger. Others felt that there should be no limitation period at all, as even three years is too short to assess the real competitive effects of a merger, and parties will always be incentivized to conceal anti-competitive effects until the expiration of the period.

Those who opposed any extension gave various reasons to maintain the status quo. They argued that a longer limitation period could chill merger activity and decrease investment in Canada due to increased uncertainty, unjustly penalize dealmakers for market conditions outside of their control, and undercut the pro-innovation and pro-competitive effects of the merger by delaying its full consummation.

Interim Relief

What we consulted on: By statute, the Bureau only has 30 days from the provision of information to decide whether a merger must be challenged, at which point it can also seek interim relief to prevent the merger pending litigation (s. 104). The Government is considering easing of the conditions for interim relief when the Bureau is challenging a merger and seeking an injunction.

What we heard: On the question of injunctive powers to prevent a merger from closing before challenge is made, a majority of those who commented were business and legal stakeholders expressing concerns over a more permissive process for issuing an interim injunction under s. 104. Several did not feel the current test was unduly onerous for the Commissioner of Competition (the Commissioner) to meet, and pointed to the potential impact on due process if the Commissioner were empowered to act unilaterally. Comparatively little feedback was received with respect to safeguards during the brief period before an application is heard, however. Some stakeholders outside the business community were in favour of easing conditions and earlier interventions in the name of preventing irreparable harm and ensuring the Bureau can carry out its mandate.

Efficiencies Exception

What we consulted on: The Act's efficiencies exception in section 96 – allowing an anti-competitive merger to avoid challenge where it generates efficiencies great enough to offset the effects of harm to competition – has long been a polarizing issue and focus of claims that the Act is too weak. The Government is resolved to examine possible reform to this exception, from changes to aspects of the defence to its abolishment.

What we heard: The majority of stakeholders supported major changes to the provision, with the divide most visible between larger businesses and civil society groups. However, several voices from within the business community also supported the abolition of a defence that facilitates anti-competitive mergers.

Most called for a full repeal of the provision, but even from those who disagreed there was large scale recognition that the way that the exception is applied must be modified. Those in favour of an efficiencies defence felt that efficiencies are a very important consideration, if not a core tenet of the Act, and felt that Canada continues to require a unique approach to ensure that its firms can scale up and be internationally competitive. They also saw it as an important check on over-enforcement. Most of those who supported maintaining a defence nevertheless suggested reversing aspects of the Supreme Court of Canada's 2015 Tervita decision, that placed a heavy quantification burden on the Commissioner, so as to render the provision more workable.

Those opposed to maintaining the exception felt that the threat of invoking efficiencies in merger review has long dominated Canada's enforcement framework. They cited a lack of clear proof that the trade-off is ultimately beneficial or that all the efficiencies asserted are ever realized, and even if so, took issue with at whose expense they would come. Many felt that an Act allowing anti-competitive transactions undermines the central purpose of competition policy – in which competition itself promotes efficiency over the longer term – and is inconsistent with how it is applied in other jurisdictions. Most if not all opponents of the defence felt that the current quantification burden is unworkable, and that the merging parties have a data advantage over the Commissioner, making the exception too easy to invoke.

Standard for Merger Remedy

What we consulted on: There are at least two possible substantive challenges to applying the merger provisions' competitive effects test to acquisitions in fast-moving digital markets. The first concerns where harms to non-price dimensions of competition, such as innovation, may be difficult to quantify and are, accordingly, given less weight by the Competition Tribunal or appeal courts. The second challenge is the substantive requirement that the Bureau show, on balance of probabilities, that harm to competition is "likely" to happen within a "discernible" time frame, and that this harm would likely be "substantial". Given the complexity, dynamism and pace of change in many markets, especially digital ones, these specific tests may be highly impractical. The Government is considering revisiting the standard for a merger remedy to better protect against prospective competitive harm.

What we heard: There was significant engagement on whether or not the merger substantive test for a remedy, "substantial lessening or prevention of competition" or SLPC, should be changed, reinterpreted or nuanced. Those in favour had a variety of reasons. Some felt that the 'substantiality' element of the test limited how protective the Bureau could be of emerging harm, with some preferring a "balance of harms" approach considering both likelihood and severity of harm. Many asked for non-price effects to take greater prominence in the competitive analysis – particularly with respect to the amalgamation of data, the decrease in product quality, the effects on labour markets, and/or the effects on marginalized people and consumers generally, among other possible elements. Several also felt that the burden on the

Bureau was too great to prove a 'prevention' of competition even when the number of potential competitors was clearly decreasing following a transaction. These views implied that the Competition Tribunal (Tribunal) may be too focused on the shorter-term plans of current market participants rather than the foreclosure of future chances for market entry.

Conversely, many expressed the view that the SLPC test is a well-recognized international standard, and deviation from it not only risks bringing Canada out of sync with major partners, but could also invite the Tribunal to block mergers for nebulous or speculative reasons. Apprehension was expressed, for example, about an "appreciable risk of harm" approach, with critics feeling that it amounts to a carte blanche to block most mergers. Many felt that the Bureau is more than capable of bringing non-price effects into its analysis already, particularly after 2022 amendments to the Act emphasized them further.

Mirroring the question of notifiability, the topic of serial or "creeping" acquisitions by larger firms was often raised in the context of remediability as well. Many commenters felt that the law must be able to account for the cumulative effect of these, even if individual acquisitions are too small or uncertain to be able to prove an SLPC. Those who disagreed felt that such patterns were inevitable and valuable in the innovation process, and intervening more easily may risk disrupting the exit strategies of start-ups, forcing them to look for outside sources of capital or face failure.

There was also significant engagement on the possibility of using presumptions in merger review. Most submissions raising this prospect sought to use market shares as a starting point. Some felt that the SLPC test should instead be reversed to proving a lack of harm once a firm reaches a certain market share, with others feeling that surpassing a certain market share should result in a total prohibition on acquisitions. Some called for a combination of both approaches. The market share percentages suggested for these presumptions ranged from 20% to 65%.

Views opposing presumptions indicated that market shares were too imperfect in predicting competitive effects, particularly in innovative or dynamic markets. Their relevance should instead be one of the issues considered by the Tribunal. There was concern that presumptions would lead to a lack of due process unless parties had more access to information held by the Bureau. There was also a sentiment that any market share presumptions simply reframe the legal battle as one of market definition instead of market effects.

Labour Effects of Mergers

What we consulted on: The Act considers the effect of a merger or proposed merger on competition and, as discussed above, on efficiency gains. With the importance of human capital as a unique input, and Canada's commitment to inclusive growth, one may fairly question whether effects on labour ought to have a more prominent role in the equation. The Government is considering revisiting the standard for a merger remedy to better account for effects on labour markets.

What we heard: The substantive merger test in s. 92 of the Act already considers both upstream and downstream effects of a merger. Nevertheless, given a clear historical focus on downstream markets, ISED's consultation paper raised the question of whether purchasing competition, especially for labour, should factor more explicitly into merger review. Commentators were divided on this area. Numerous respondents felt that the statute poses no obstacle to a full consideration of upstream effects and that competition law is not well-suited or an appropriate instrument to address labour concerns directly. For example, some noted that downsizing following mergers is an express feature of the reallocation of resources that pro-competitive mergers allow, ultimately reducing deadweight loss in the economy. Meanwhile, other legal regimes are specifically dedicated to addressing related or even directly resulting labour issues.

However, others highlighted the particularly significant impact that mergers (and other business actions subject to antitrust scrutiny) have on labourers, such as the fact that efficiencies claimed in mergers are often derived from layoffs. Moreover, they feel that effects on labour markets are simply not receiving due consideration in merger analysis, and some felt the Bureau ought to examine employment contracts to appreciate likely effects following a merger. Some noted that more active probing by the Bureau under its existing mandate may mean there is no need for an amendment. Both sides of the debate commented on the Bureau's labour expertise, with some noting that it does not possess enough to bring a new labour lens to merger review, while others hoped that establishing such expertise, including by way of dedicated analysts, would be in the Bureau's future.

Merger Remedies and their Evaluation

Beyond issues related to the standard of review, a significant amount of commentary on merger remedies was received. Some called for more straightforward and direct remedies – such as divestitures – rather than relying on less certain behavioural commitments, including an ability to separate different lines of business. Certain of these commentators reflected a central concern over preserving the competitive process above all, with harm flowing from a lack of competition being a greater problem than overenforcement. This included a proposed requirement, shared by the Bureau itself, that remedies seek to restore competition to its full pre-merger levels rather than just to eliminate the "substantiality" of a substantial lessening. Critics of this approach, however, felt that such a requirement is unworkable and unrealistic, particularly as mergers that lessen competition in a less-than-substantial manner are not even subject to remedy under the law.

Understanding the results of mergers and the remedies applied to them has been central in competition policy discourse, and a particular concern of the Bureau as well. The majority of stakeholders offering comment on this point felt that the Bureau required better access to information to know whether the outcomes are proving beneficial. Many expressed concern over a lack of accessible post-merger data to make this assessment, particularly as impacts of a merger may take a long time to materialize.

Responses included recommendations for information-seeking powers that may be sought to review past mergers on occasion, while others called for a mandatory review after 10 years had elapsed for large enough transactions. Some wished for these results to be reported to Parliament, or disclosed publicly. Opponents feel it is unfair to subject merging parties to further scrutiny and administrative burden when anti-competitive concerns should already have been mitigated at the outset.

Other

Other themes that emerged from stakeholder submissions included: granting the Bureau more power at first instance, subject to appeal; public and provincial input into the review of large mergers; and extra scrutiny on the digital sector and the control of data.

Considerations

Stakeholder reaction in this area established a common theme that would be observed in each of the subsequent topics considered. While there was a broad consensus on the societal value of more competitive markets, a divide emerged between two general perspectives on priorities for immediate reforms. On the one hand, those concerned with having the system better equipped to ensure beneficial outcomes – contestable, dynamic and unconcentrated markets – wished for more oversight and suspicion of mergers generally. They were of the view that the Act was currently underenforced leading to a detrimental entrenchment and accumulation of market power. The desire was to put greater emphasis on the broader public interest before the narrower private interests of merger parties. Above all, these views were held by consumer groups, civil society, most academics as well as several sectoral business associations. On the other hand, a second perspective – held mostly by cross-sectoral businesses associations and legal practitioners – prioritized preserving certainty in compliance and predictability in doing business, fearing that undue government intervention could chill investment and disrupt the natural functioning of markets and innovation.

It was apparent that many felt that the law, in its present application, tended to "miss the forest for the trees" by focusing too narrowly on individual markets, forecasting the fates of specific firms or calculating efficiencies over the short term, while missing deepening concentration across the country and loss of economy-wide efficiency over the long term as a result. Others insisted there was no justiciable alternative in a credible and predictable system.

There should be ways in which both sets of concerns can be accommodated, by adjusting the parameters of merger review to better confront enforcement shortcomings, without letting go of a principled, evidence-based system. For instance, some of the blind spots of a one-size-fits-all legal test may be mitigated by modifying the amount of leeway that the Bureau has to act on less foreseeable harm before it is too late for any other recourse under the Act. Meanwhile, granting the parties the means to obtain certainty sooner in exchange for cooperation could respond to concerns of both sides. This may also lessen the need to introduce new statutory presumptions, particularly if additional guidance is offered to the Tribunal through clearer definitions or considerations, to help guard against perceived gaps. Similarly, while the standard for granting temporary injunctions may be well-established and appropriate, temporary safeguards before the matter can be decided may help to ensure that the system functions as intended.

While SLPC continues to be an international standard as the threshold for a remedy, this further means that the government must be confident that any exceptions from its broad application do not undermine the Act's effectiveness in reaching its ultimate objectives. It is also clear that highly technical adjustments, for example to notification criteria, may benefit from ongoing dialogue with the parties most invested in this aspect of the law, and potentially a more flexible system to allow adjustments in the future.

6. Unilateral Conduct

A running theme in stakeholder commentary on unilateral conduct was that more countervailing power was necessary to ensure that small numbers of firms could not dictate the terms of Canada's economy. It was clear that many consumers and small businesses had strong concerns about becoming passive or marginalized players in the market, while others cautioned against drifting into a "big is bad" approach that would result in protecting competitors over competition, to the ultimate detriment of productivity and innovation.

Dominance and Oligopoly

What we consulted on: Harm to competition can arise through the actions of firms that may not be unmistakably dominant, but together exert substantial influence on the market, whether as vendors or purchasers. The Government is considering better defining dominance or joint dominance to address situations of de facto dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market.

What we heard: A division was apparent, mainly as between civil society and business groups, on the prospect of broadening the application of the dominance threshold. Those in favour felt that Canada has an oligopoly problem, and that by focusing on a situation more akin to monopoly, the current law is ill-suited to tackle anti-competitive conduct in highly concentrated markets. A singularly dominant target may not be present, and in practice the law does not seem to be able to capture any form of joint dominance, thereby unable to address markets suffering from the effects of conscious parallelism or soft competition among a few major players.

Those opposed to change worried that an expansion of joint dominance could disincentivize good parallel conduct or the following of standard industry practices, forcing companies to monitor competitors and come up with alternative strategies to avoid administrative monetary penalties. In this vein, some submissions insisted that smaller market players would necessarily have to be beyond the scope of any joint dominance. Some felt that effects of joint dominance have not been shown to exist or have not proven harmful, while others felt it was best addressed by the courts, with existing guidelines being sufficient.

Substantive Remedy Test

What we consulted on: The requirement for the Commissioner to prove that the anti-competitive practice is resulting in, or likely to cause, an SLPC may be unduly strict. For similar reasons that market dynamics in an evolving economy may complicate merger analysis (such as disruptive but small start-ups, zero-revenue or low-asset models), the assumptions behind competitive effects may need to be revisited. The Government is considering crafting a simpler test for a remedial order, including revisiting the relevance of intent and/or competitive effects.

What we heard: The current test for an abuse remedy in s. 79 requires that the Bureau prove both that a dominant company intended to leverage its market power against competition or competitors, and that it succeeded or was likely to succeed in creating a measurable anti-competitive effect. In light of the historical difficulty in bringing cases, a division among stakeholders was apparent as to whether the standard was too rigid. Proponents of change, including the Bureau itself, felt that as long as the provision is meant to safeguard competitive markets, establishing only one or the other should be sufficient grounds for intervention. This was consistent with calls to increase the social welfare rationale of the provision, focusing it ultimately on consumer needs in the market. Others felt that presumptions that shift part of the burden would make application of the tests more reasonable. Some also expressed the view that limiting business justifications for conduct with likely anti-competitive effects would be worthwhile.

Those opposing change felt that broadening the test would chill business conduct, making business agents uncertain of the legality of their actions and refraining from making otherwise pro-efficiency or pro-competitive business decisions. Many felt that the amendments made in June 2022, broadening the understanding of intent, were enough to correct course and that the government should await the results before further action. Some took issue with an "anti-competitive by object" standard, and felt that without effects, there is no prerogative for state intervention. Others viewed intent as the core element, separating justified from unjustified means of achieving the same result. Others still felt that effects and intent together function as a safeguard against government overreach.

There were some requests to include a variety of new business practices in the non-exhaustive list of "anti-competitive acts" in s. 78 that illustrates the intent component. Some stakeholders wished for more recognition for monopsony abuses, or the leveraging of power in one market to affect adjacent markets, as well as digital economy hot topics like self-preferencing and misuse of customer data. There were also requests to include refusal by manufacturers to provide repair data, as well as any obstacles to interoperability between devices.

Other comments on the substantive remedy standard included concerns that digital markets required new considerations, including that the Bureau should look beyond price and focus on data ownership and diffusion, product quality, and impediments to interoperability and data portability.

Bright Lines or Presumptions

What we consulted on: Increasingly, legislators are turning to the possibility of preventive rules or presumptions applied to dominant firms or platforms, with respect to both acquisitions and business practices such as self-preferencing and data use, rather than conducting extensive economic analyses in each case. The Government is considering creating bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction.

What we heard: Many stakeholders had views on whether certain practices should be prohibited outright or presumed harmful, and much attention was paid to self-preferencing by platforms in particular. Most businesses, their associations and law practitioners were generally united in opposing the idea of bright-line tests over case-by-case analysis. Joined by certain academics and economists, they saw this as a recipe for over-correction and inefficient outcomes, as most targeted forms of behaviour are not inherently harmful. For example, self-preferencing in app platforms is consistent with a proprietary storefront, and establishing one's own ecosystem in products like smartphones or computers can result in better and more innovative technology overall. There was concern about sacrificing real, short-term benefits to guard against more uncertain and distant harms. There was also a fear that hard rules or presumptions would ultimately be designed to protect competitors over the competitive process, which involves winners and losers. This would be risky in dynamic industries, especially as rules evolve and change too slowly for the market, risking drags on productivity or innovation.

Other stakeholders including consumer groups were more open to introducing bright-line rules and presumptions to various degrees, some calling for further studies or a carefully measured approach in designing the rules. There was a sense that the Bureau was too unable to curb harmful conduct by dominant companies, as well as some suggestions that the current framework did not sufficiently address threats to dynamic competition. It was recognized that per se bright line rules might reduce flexibility, but would increase predictability.

In addition to self-preferencing behaviour, some presumptions or bright-line rules raised were market share thresholds resulting in a reversal of burden of proof, mandates for interoperability and data portability, a block against serial acquisitions, and exclusive dealing leveraged against competitors. There was also a major concern that dominant platforms have the power to misuse their collected data, such as impacting adjacent markets, and that they may be deserving of additional commercial rules.

Separate Unilateral Conduct Provisions

What we consulted on: The Act contains other provisions that deal with specific forms of unilateral conduct (e.g. exclusive dealing and refusal to deal). While previously, private cases could be brought to the Tribunal only under these provisions, since June 2022 this recourse is available for abuse of dominance as well. The discussion paper therefore raised the question whether these provisions had become redundant, whether their subtle differences meant that they remained useful, or whether they might even be repurposed as marketplace conduct rules without a competitive effects test. In this sense they would be more akin to the Act's deceptive marketing approach, or some of the "unfair trade practices" regimes seen abroad.

What we heard: There was not a great deal of feedback on these points. Some recognized utility in folding the Act's other forms of unilateral conduct into the abuse of dominance provision, expecting that it would simplify enforcement and compliance, and discourage overly narrow interpretations. Others were concerned about a loss of clarity and jurisprudence in the absence of clear guidance from the Bureau, or that the net result would be a lowered burden – such as the "widespread in a market" standard – yet with stronger abuse remedies.

There was also noted support for better accommodating after-market repair in a designated provision, if not in abuse of dominance itself. Some called for a provision that could be invoked to enable would-be repairers to bring cases, such as a refusal-to-deal framework focused on access to necessary parts or data to enable repair. Some also mentioned protection against the use of intellectual property rights to prevent repair.

Uneven Business Relationships

What we consulted on: The discussion paper also noted that some foreign competition authorities administer "unfair competition" provisions, such as with respect to unconscionable conduct in Australia, or abuse of superior bargaining position in several jurisdictions.

What we heard: A modest number of stakeholders wished for the law to recognize a broader scope of unfair behaviour by large firms, less in the sense of proscribed business practices as discussed under the previous heading, but rather covering exploitative relationships with other firms or consumers. Some competition authorities abroad enforce provisions with respect to unconscionable or exploitative conduct by dominant firms, or abuses of dependency or superior bargaining position. Certain stakeholders felt that similar rules in Canada could help protect more vulnerable consumers, workers and small businesses, acting as a check on unmitigated market power. Comments made reference to 'excessive pricing' and the imposition of unclear or unfair contract terms on workers or client businesses, although recognized that up-front clarity on what this would entail would be essential.

Those opposed argued that defining the limits of these forms of conduct is challenging if not impossible, and risks overlap with other areas of law such as consumer protection or sectoral regulation. They also cautioned that such an expansion in mandate would tempt the Bureau or Tribunal to seek or make orders that protect competitors rather than competition, or deny substantial consumer benefit gained through aggressive competition.

Other

Other themes that emerged from stakeholder submissions included: relaxation of the limitation period for abuse of dominance; unambiguous rules around tied selling, self-preferencing and algorithmic transparency by dominant firms that are vertically integrated; special scrutiny for dominant digital firms; ensuring that the regulated conduct defence is not available for abuse of dominance; codes of conduct for concentrated industries; various views on the intellectual property rights carve-out from abuse of dominance; proscribing planned obsolescence.

Considerations

It is clear that there is a great deal of concern among stakeholders about the ability to ensure that powerful firms are held in check, and that their business practices do not lead to a sub-optimal marketplace. Obviously there is a fine line between "harm to competition" and "harm to competitors", with many submissions blurring the two in how they wished for the law to be applied, and others expressing concern about such an outcome.

As with feedback on mergers, the divide between those seeking better or more equitable outcomes through a strengthened law stood in contrast to those preoccupied by ensuring predictable compliance, and being free from undue government intervention. Feedback in certain areas was largely inconclusive, such as with abusive conduct presumptions or uneven business relationships. Yet on some of the core concerns around the Act's legal tests for unilateral conduct, there appear to be paths forward to enable more responsiveness to problematic markets without bringing to bear the full force of the law on unwitting actors.

It must be borne in mind that the purpose of civil competition law enforcement is primarily to protect markets for the benefit of the public, not to censure individual firms for wrongdoing. As with any government oversight, this means that intervention may be warranted in the name of protecting the public policy goal – in this case competition – even when affected parties may not be solely responsible, or specifically aiming, for the undesirable result. By analogy, being ordered to move one's vehicle to allow maintenance on a road is not the same as receiving a ticket for parking unlawfully. Similarly, the threshold for, and consequence of, remedial intervention can be recalibrated with balance in mind to enhance the Bureau's public interest function without resorting to the most onerous consequences in every case.

7. Collaborations

In contrast to mergers and unilateral conduct, observations on the competitor collaborations provisions of the law were more focused on principle, and ensuring the ability for the law to respond effectively when called upon, more so than relief from ongoing market circumstances.

Deemed/Inferred Collaboration

What we consulted on: Conduct by non-human actors may raise a number of enforcement challenges. The Government is considering deeming or inferring agreements more easily for certain forms of civilly reviewable conduct, such as through algorithmic activity, especially given the difficulty of applying concepts like "agreement" and "intent" in the age of AI.

What we heard: An overwhelming majority of those who opined on the question called for caution with respect to deeming or inferring agreement between parties, e.g. when coordination results from the effects of artificial intelligence. Several commentators insisted that the issue would be better addressed by, or in collaboration with, the future AI and Data Commissioner (proposed under Bill C-27). Those in opposition pointed to potential overenforcement and chilling effects it may have on procompetitive conduct such as price-monitoring and price-matching that are ultimately beneficial to consumers and the overall economy. Others were concerned more broadly about chilling future research and development of AI and other technical software. Even those in favour also urged for caution that any reform on this front should be accompanied by sufficient evidence of negative effects of algorithmic activity on competition and consumer outcomes. There was also a suggestion that supported expanding the relevance of circumstantial evidence in both criminal and civil provisions.

Past Conduct and Remedies

What we consulted on: Unlike the Act's other civil enforcement provisions, the collaborations provision in s. 90.1 only applies to ongoing and future conduct, but not past events, and offers only a prohibition order remedy (other than by way of consent) without further consequences. The Government is considering broadening and/or strengthening this section of the Act to discourage more intentional forms of anti-competitive conduct, including through examining past conduct and introducing monetary penalties.

What we heard: While the current provisions arguably reflects the civil review function of protecting markets rather than punishing wrongdoers, many stakeholders – including the Bureau itself – feel that it falls short of its potential. The concern is that the current framework essentially absolves market participants from taking into account the likely impact of any collaboration that falls short of a criminal conspiracy, and invites non-compliance until detection, as well as a return to non-compliance in the absence of a prohibition order or consent agreement.

Stakeholders favouring reform expressed that the provision ought to have more scope and teeth if the Bureau is to be able to tackle harmful collaborations when called upon. In this respect it is notable that Canada's approach is an outlier compared to most international counterparts, such as the United States or European Union, where authorities are not limited to naked cartel conduct in being able to review past conduct or seek penalties. Those in opposition warned of a potential chilling effect on procompetitive collaborations were the scope of enforcement to be expanded. Generally, the opposition was more vocal about the introduction of administrative monetary penalties rather than the review of past conduct as such, with some acknowledging that the latter may be appropriate with a limitation period and the possibility of non-monetary remedies to restore competition.

Vertical Collaborations

What we consulted on: Limiting civil review to collaboration between competitors (i.e., horizontal collaborations) shields potentially anti-competitive conduct by other entities (i.e., vertical collaborations, such as supply, licensing or franchise agreements) from the Bureau's scrutiny, unless they fall under a different provision of the Act, such as tied selling. The Government is thus considering whether s. 90.1 should also apply to collaborations by entities that are not direct or potential competitors if an SLPC can nevertheless be demonstrated.

What we heard: Stakeholders were relatively evenly split on this matter. Some felt that other provisions of the Act such as abuse of dominance could adequately fill any gap (although there are more criteria to prove under this provision), and the other unilateral conduct provisions such as price maintenance or tied selling may even be relevant. Several of those opposed felt that the competitive risks of vertical conduct are too low to merit scrutiny, in light of the possibility that procompetitive efforts would be chilled. On the other hand, those in favour of expanding the law found it unprincipled that an

SLPC stemming from a business collaboration should not be reviewable simply because of the relationship of the parties involved. The origin of the harm is not particularly consequential to consumers, and making such a distinction risks leaving arbitrary gaps in the law. Notably, most other jurisdictions do not make the vertical/horizontal distinction, but are empowered to take action to address any anti-competitive collaboration. The example of restrictive covenants between businesses and landlords to preclude entry from possible competitors in a given neighbourhood was raised as an example of vertical conduct that may not fit cleanly under other provisions of the Act.

Buy-Side Collusion

What we consulted on: The Act's lack of mirror-image criminal provisions to the vendor cartel provisions in s. 45 – that might address coordination on price, territory or volumes by competing purchasers – has been noted by commentators in the past, most notably the Bureau itself. The most classic example of buy-side coordination, wage coordination by employers, has been addressed through a 2022 amendment to the Act, but other market distortions by purchasers are currently only remediable civilly where an SLPC can be proven. The Government is thus considering reintroducing buy-side collusion – beyond only labour coordination – into the Act's criminal conspiracy provision, or introducing a civil per se approach to it.

What we heard: Of those stakeholders who commented on this area, a significant majority were opposed to the introduction of a new criminal provision, or alternatively a novel civil provision that did not require proof of an SLPC. While the consultation paper specifically addressed carving out pro-competitive buying groups (i.e. similarly to bid-rigging, the concern revolves around secretive collusion, not up-front arrangements), many commentators nevertheless felt uncomfortable with amendments that might be seen to proscribe a form of activity most closely associated with a pro-competitive rationale, especially where small and medium enterprises (SMEs) may be alarmed or dissuaded. The fact that private lawsuits for loss recovery are permitted under the Act for criminal conduct was an additional consideration in exposing unsuspecting businesses to liability. These stakeholders cited Parliamentary intention behind decriminalization in 2009, where only the most unambiguous cartels were made per se illegal. Several of these commentators also believed that civil review under s. 90.1 was adequate to address harmful buy-side collaborations causing an SLPC. Others also noted that the 2022 wage-fixing amendment was sufficient to address the main buy-side concerns, and experience should first be gained with this provision.

The minority who believed that reform was appropriate found that civil review with an SLPC test was insufficient to capture or deter cartel-like behaviour by purchasers, and that the distortions to competition caused by buy-side collusion were of no less consequence for the market than that among vendors. Some therefore called for either a criminal or per se civil approach, with adequate carve-outs for pro-competitive activity. Others acknowledged that strengthened remedies under s. 90.1 could help fill any gaps instead.

Notification of Certain Agreements

What we consulted on: The Government is considering introducing mandatory notification or a voluntary clearance process for certain potentially problematic types of agreement, such as pharmaceutical patent litigation settlements, so as to ensure detection and review.

What we heard: Comments in favour of introducing either mandatory notification or voluntary clearance for certain potentially problematic types of agreement were cast more generally and broadly. These stakeholders were open to the idea in the abstract, subject to further detail on what might be included.

Those in opposition were aware of the traditional focus on the pharmaceutical industry, and argued that so-called "pay for delay" arrangements between patent holders and generic manufacturers are already adequately addressed by a web of pharmaceutical regulatory regimes, and that movement toward notification risked singling out a single industry. Many noted that the Bureau is not prevented from challenging any of these agreements under s. 90.1 once detected, that third-party complaints may still occur, and that court records were publicly accessible in any event. Some also noted that the Canadian regulatory regime incentivized settlement in a way that differed from the United States, where such settlements are notified, and it would be unfair to regard the results with suspicion. Additional concerns were raised about the possibility of making adverse inferences from non-notification under any voluntarily system, as well as the risk of a chilling effect on procompetitive collaborations. As an alternative to notification, some also suggested reinforcing the Commissioner's advisory opinion function under s. 124.1 of the Act as a form of preclearance.

Environmental Collaborations

One area not canvassed in the discussion paper, but raised by numerous stakeholders, was the creation of an exception for collaborations with an environmental purpose, that may otherwise run afoul of the Act's criminal or civil provisions. A number of environmental organizations, and a selection of other stakeholders, recommended allowing an exception to the application of s. 90.1 where there are benefits to the environment greater than the effects of any prevention or lessening of competition. There was also a call to decriminalize collaborations directed at protecting the environment under s. 45. These stakeholders highlighted the importance of encouraging collaborations aimed at establishing environmental standards, coordination to reduce environmentally harmful substances, and sharing the costs of environmental protection measures. Referring to the Australian public interest model, some suggested that as long as these agreements generate sufficient and substantiated environmental benefits and competition is not completely eliminated, the restriction on competition is worthwhile to attain the benefits.

Other

Other topics explored by stakeholders ranged from calls to eliminate the efficiencies exception under s. 90.1, private access to the Tribunal (canvassed below), and repeal of the dedicated provision for financial institutions, among others.

Considerations

Business collaborations are another area where it should be possible to accommodate those concerned with improved outcomes, without introducing an undue amount of compliance uncertainty. The bedrock requirement for an SLPC in civil cases ensures that Bureau enforcement action is only taken where a public protection rationale is present, and it is not unreasonable to expect the Bureau to have the right tools to ensure that result, even if instances are not frequent.

It is clear that Canada's approach to several aspects of reviewing competitor collaborations are noticeably out of step with international practice. A short record of case enforcement cannot on its own be held out as a reason why the law does not need improvement, since its current limited scope may very well be one of the main reasons for a lack of enforcement opportunity or justification. Similarly, a contention that most collaborations are beneficial is no reason not to ensure that the law is better equipped to deal with those that are not – the same reasoning applies to merger review, for instance.

The question of new exceptions from the law for public policy objectives raises its own considerations. Outside of the two efficiencies exceptions and protection of intellectual property rights, the Act generally allows for competing objectives to be realized through the exercise of other governmental authorities, such as a regulated conduct doctrine – ensuring that conduct authorized by other laws will not be prosecuted – or empowering an official such as the Minister of Transport or Finance to grant approvals in the public interest. This ensures that the entire market operates under the same ground rules, and it is not left to self-interested private actors to determine whether their action is, on balance, beneficial to the public. The government can explore different possibilities in order to determine how or whether special dispensation for certain types of collaborative agreement may be offered.

8. Deceptive Marketing

Most questions raised in the consultation paper pertained to concerns around antitrust policy often raised by stakeholders, with a focus on corporate concentration and exclusion of competitors. Truthful information is still an essential ingredient to ensure that business performance is rewarded for the right reasons, and feedback was sought on a more general level in the area of deceptive marketing.

Additional Tools, Clarifications or Presumptions

What we consulted on: The emergence of new technologies and digital platforms in recent years has created new opportunities for businesses to sell their products, while also giving rise to the potential for novel deceptive marketing practices. The Government is considering adopting additional enforcement tools suited for modern forms of commerce.

What we heard: Submissions demonstrated a variety of views on whether the Act's deceptive marketing provisions were sufficient. Those who were satisfied felt that the Bureau need only release enforcement guidelines as necessary to provide enhanced clarity. Some felt that to the extent new provisions were necessary, the government should first work with stakeholders to establish where gaps lie, and then later seek to make additions. By contrast, some felt this process was better handled by other agencies or legislative regimes altogether. Some stakeholders expressed support for a more explicit standard of consumer aptitude in the Act. Certain stakeholders argued that purchasers are today better-informed than ever, and therefore thorough in their understanding and intentional in their purchases, while to the contrary, the Bureau itself has called for the law to presume a more credulous consumer. SMEs and associations representing them also warned that it is often their members who may be more likely to err in representations to the public, and so any increase in severity may hit that sector the hardest.

Certain topics raised by stakeholders included the burden involved in proving an ordinary selling price and addressing failure to disclose material facts. Practices specific to digital commerce, such as the use of personalized advertisements, opt-out services, and deceptive "dark patterns" in website design, were also raised. There were also requests for greater transparency on the Bureau's enforcement decisions and plans, greater focus on representations pertaining to product quality, and more leniency for smaller businesses and first time offenders. General calls were also heard for a more readily enforceable regime or expeditious results. The possibility of a contract annulment remedy was also raised by certain stakeholders, including the Bureau itself.

Some voices cautioned that business practice regulation was not appropriate in the Act where the concern was not deceptive marketing. For example, concern over the use of personalized ads is a separate question from false or misleading representations, and these can carry consumer benefits. On the topic of digital commerce, some felt it unnecessary to focus on disciplining platforms who are both already incentivized to filter out bad conduct, and more likely to design flexible and innovative solutions.

Greenwashing and Sustainability Claims

While the focus of the consultation paper was on emergence of new technologies and digital platforms, numerous organizations highlighted a desire for the Act to be stronger in its response to deceptive or unverifiable environmental or sustainability claims, so called "greenwashing". These stakeholders were fervent in wanting to see additional and more prescriptive measures. Stakeholders felt that under the present regime there is a massive lack of enforcement, allowing companies to profit from sustainability related claims that are not backed by sufficient evidence, misleading well-intentioned consumers into thinking their choices help the environment and disadvantaging companies who are more scrupulous about their publicity, or who truly have undertaken pro-sustainability measures. Emphasis was placed on the inability of individual consumers to identify the false or misleading nature of most sustainability claims following a purchase, unlike many other forms of deceptive marketing, and therefore necessitating more protective rules.

Suggestions for reform frequently alluded to the need to establish recognized environmental standards that could be enforced, the enactment of specific regulations for greenwashing, a need to publicly and proactively substantiate any environmental claims and disclose climate risks, and larger penalties or more tailored remedies for deceptive marketing that leads to environmental impact. There was also a request to implement specific prohibitions, such as making generic claims like "environmentally-friendly" or against planned obsolescence. A common concern was also a need for updated and more prescriptive enforcement guidelines from the Bureau.

Some also recognized the more regulatory and standalone nature of such proposals, believing it must be the product of a whole-of-government effort, with direct input and involvement from domestic and international standards associations.

Other

Other topics surfaced under the general rubric of deceptive marketing included: clearer definitions of concepts in the Act; anonymous online sales; advertisement of stolen goods; clarity in setting monetary penalties where zero-price goods and services are concerned; marketing to youth; deception in business-to-business contracting; inter-agency cooperation in enforcement; and representations as to employee pay and benefits.

Considerations

With the exception of calls for additional greenwashing measures, most felt that general-application provisions supported by practical Bureau guidance continued to be appropriate for an economy-wide framework law such as the Act. While some voiced concern over emerging deceptive practices in the digital economy, there was not an obvious conclusion to be drawn that the Act's current provisions were unable to tackle these instances, insofar as they truly involved deceptive marketing, as opposed to other concerns over consumer well-being. Rather there was more of a recognition that novel facts or circumstances may be more difficult to identify, and enforcement efforts may be challenging.

The government is committed to reviewing all levers available to it to protect and promote environmental sustainability. An example is the ongoing efforts by Environment and Climate Change Canada to develop a regulatory framework for plastic packaging and labelling rules for recyclability and compostability. ISED notes in this respect that the establishment of external legal regimes, at both federal and sub-federal levels of government, also helps to fix the legal landscape against which the truthfulness of vendor claims can be measured under the Act.

9. Administration and Enforcement of the Law

The functions of the Bureau and enforcement procedures are an overarching topic in the background of any discussion of reform to substantive enforcement provisions. Stakeholders offered a variety of views on many different topics, with a select few garnering the most interest.

Bureau Decision-Making Authority

What we consulted on: Canada's system is highly adversarial and adjudicative: the Bureau must seek authorization to compel any form of information other than a supplementary information request in merger review, and it has no ability to render binding decisions or set down rules. The Government is considering giving the Bureau more leeway to act as a decision-maker, e.g. through simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct.

What we heard: A majority of submissions commented that the Bureau already has sufficient tools to fulfill its role as an enforcement agency, despite the need for third-party oversight of most binding decisions. The burden involved in seeking authorizations, for example in the context of information production orders, was not seen to be unduly onerous or out of step with reasonable expectations for a law enforcement agency. There were concerns expressed about jeopardizing the separation between investigative and adjudicative decisions, raising issues with respect to procedural fairness, institutional bias and vulnerability to politicization.

While other models abroad do make use of an administrative system with a decision-maker of first instance, it was noted that these agencies largely contain other mitigating aspects, including functional separation between roles, internal checks, and decisions made by a multi-member council. Those who advocated for change often suggested adopting a model similar to the U.S. Federal Trade Commission to contain any added authority. Some stakeholders also expressed interest in positioning the Bureau as an agency to oversee industry codes of conduct and making more practical use of the Act's s. 124.1, through which the Bureau can issue legally binding opinions upon request.

Market Studies

What we consulted on: Unlike its G7 counterparts, the Bureau does not have formal market study powers to support its role as a competition advocate. The Government is considering pursuing a reasonable path with respect to the collection of information outside of the enforcement context, such as for the purpose of market studies, taking both public value and private burden into account.

What we heard: There was a great deal of interest around this proposal. While the Bureau already conducts studies periodically, it must rely on voluntarily provided information from industry players. The Bureau's market study into the retail grocery sector coincided with the consultation period, and was known to be enduring mixed results in terms of industry cooperation, and these facts undoubtedly provoked many reactions in the submissions received.

More than two-thirds of stakeholders who commented on the possibility of information-seeking powers to conduct market studies were in favour of such a change. This included some voices who were otherwise unenthusiastic about reforming enforcement provisions. There was a great deal of value placed behind the analysis and recommendations that the Bureau would be in a position to make with more complete information, and the positive experiences in international jurisdictions were noted. Some suggested that healthier competitive behaviour throughout markets could be expected with increased monitoring, and that studies would also reveal additional matters to target in investigations, while others wished for the Bureau to be able to impose remedies following the conclusion of a study. Few opinions opposed every aspect of a market study framework – many acknowledged the utility that can come of such an exercise. However, several submissions were concerned with potential overreach, the risk of politically-motivated fishing expeditions, and the resource drain that studies could impose on companies not alleged to have breached the Act. Several expressed a willingness to contemplate the question, provided that sufficient guardrails are established, such as judicial oversight, clearly defined terms of reference, confidentiality, and due process.

Private Enforcement

What we consulted on: While private parties are now able to bring abuse of dominance cases directly to the Competition Tribunal, at present there does not appear to be a strong incentive for them to do so. The Government is considering allowing private parties to seek compensation for damage suffered from civilly reviewable (non-merger) conduct under the Act.

What we heard: Albeit in various degrees, a significant number of stakeholders who commented on the issue of private enforcement agreed that reform is needed to recalibrate the balance of incentives associated with the current framework. The Bureau is limited in resources and must prioritize cases of national importance, which inevitably leads to many smaller or less certain matters going unchecked. Privately initiated cases before the Tribunal are largely intended to help bridge this gap in some forms of civil enforcement, with a focus on securing corrective orders – i.e. assuming the Commissioner's usual role – rather than seeking compensation for damage. The latter is available only under private lawsuits allowed by s. 36 of the Act for losses suffered due to criminal conduct.

To date, no successful private case has been litigated at the Tribunal, and many stakeholders pointed to the absence of strong financial incentives as one of the reasons why they so rarely occur. The other most often cited reason was what the stakeholders perceived as a particularly rigid leave threshold that the Tribunal has interpreted to mean a substantial effect must be apparent across an applicant's entire business, and not merely one part of it.

For the most part, this requires businesses to be injured to such a degree that they may no longer be in a position to undertake a case, while other parties – affected consumers or public interest groups, for example – have no standing at all.

Many submissions therefore recommended allowing the Tribunal to award damages alongside remedial orders, or else opening up civil conduct to lawsuits for damage recovery through s. 36 (or a similar provision), or some combination of both. A less strict leave threshold was also sought, so as to enable new and larger classes of applicant. A majority of those in favour of reform also suggested expanding the scope of civil provisions available for private enforcement to include competitor collaborations under s. 90.1, drawing no distinction between harm caused by a single dominant firm or two or more firms together.

Many voices, particularly among the larger business community and among legal practitioners whose practice was not focused on litigation, preferred the status quo. They expressed concerns that the threat of private challenges under s. 90.1 would result in chilling legitimate and pro-competitive collaborations, and that allowing financial awards either by the Tribunal or in court proceedings for damages could open up the floodgates for unmeritorious, frivolous, and strategic litigation that is not currently incentivized to the same extent. There was an objection expressed about the legal inconsistency of allowing financial compensation based on conduct that is not actually unlawful in the manner of a tort, but only subject to correction under the Act based on economic effects. However, there are stakeholders who would resolve this conflict by simply declaring anti-competitive conduct to be unlawful as such.

Some concerns were also expressed about the level of expertise of the general courts in relation to that of the Tribunal, the potential burden on the judicial system, and the unease with which private and Commissioner-led actions could co-exist, particularly if heard in two different fora. These stakeholders argued that should changes be considered, a high bar to obtain leave must be maintained and the Tribunal, as gatekeeper, be allowed to award costs against leave applicants as a potential deterrent to unfounded settlement-hunting. A few suggested the lack of jurisprudence may be attributed to the fact that access was unavailable for abuse of dominance before 2022, and the effects of this development should be monitored before proceeding further.

Tribunal Procedure

Ensuring an efficient and rapid litigation procedure without compromising procedural fairness has long been a preoccupation of all sides of the competition policy community. The longstanding challenge has always been in devising a means to achieve this result. Stakeholders put forward an array of ideas for improvement, most often the imposition of statutory timelines for Tribunal proceedings. A number of stakeholders referred to the Canadian International Trade Tribunal for inspiration, with its strict timeframe for the release of decisions and reasons. These stakeholders called for a limited duration for litigation (unless extended by mutual consent), and a deadline by which the Tribunal must issue its decisions and reasons.

The role of lay members was a common theme as well, with some comments calling to remove this aspect of the Tribunal in favour of external experts or consulting economists, more akin to court proceedings. Some called for the elimination of the Tribunal itself, with recourse in competition matters placed in the hands of general courts. Some saw the Tribunal instead transformed into a commission with expanded access for private enforcement and public participation. Those who favoured keeping lay members had varying views. Some held views that membership should reflect a broader cross-section of society – e.g. representing SME, Indigenous, labour, non-profit, civil society or other interests. An opposite view was also heard, that lay members are meant to assist judges in understanding economic evidence, and should if anything dutifully avoid imposing external values.

Certain stakeholders called for an ability for private parties to refer questions to the Tribunal, particularly on time-sensitive merger matters where obtaining certainty is at a premium.

Decriminalization

Since the Act's origins as the penal Combines Investigation Act, a gradual move toward civil enforcement has been underway. A hybrid approach was first instituted with the new Act in 1986, a civil deceptive marketing regime was added in 1999, and then 2009 amendments saw a move away from criminal enforcement of non-cartel collaborations and certain pricing practices. Only a handful of stakeholders commented on the possibility of further decriminalization, with those expressing favourable opinions showing a general openness to further movement. It is widely understood that civil enforcement allows for more responsiveness than criminal prosecution, with its bifurcated structure (Bureau and Public Prosecution Service of Canada) and exacting evidentiary requirements. Some however cautioned against additional compliance burden for businesses from differing or duplicative requirements, and cited the possibility of a resource drain for the Bureau.

Although specific proposals were scant, some commentators suggested that it could be useful to have civil provisions that address the same cartel behaviours in s. 45, retaining its per se approach without requiring proof of anticompetitive effects, or else subject to a rebuttable presumption of harm for this conduct.

Bureau's Place within Government

Although not a common area of comment, a few commentators argued that the Bureau should be completely separated from the ISED portfolio, such that the Commissioner would report directly to Parliament and be fully responsible for the Bureau's budget. Notwithstanding the Bureau's independence in enforcement, these stakeholders found it problematic for the Bureau to be under any influence from the Department in charge of industrial policy. Others called for legislative authorization for the Bureau to collaborate further with other government agencies such as the Office of the Privacy Commissioner on investigations or other matters of compliance with the law.

Transparency of Bureau Activity

A number of submissions called for greater transparency, oversight, or public participation in Bureau activity. Some requested more detailed annual reporting, similar to that of the U.S. Federal Trade Commission, through which annual performance plans with strategic goals, targets, metrics and results could be communicated to the public. In addition, there were a number of calls to disclose or publish more information about investigations, reasoning informing decisions (including with respect to matters not pursued), as well as outcomes and retrospective analysis. Some other notable comments included providing better and clearer resources to help SMEs, more input from provinces and territories, regular working groups to canvass stakeholder opinion, and additional disclosure on how Bureau activities support Canada's environmental and climate goals.

Other

Other comments received falling generally under the category of administration and enforcement included further funding to the Bureau to increase its research capacity; granting the Minister of Innovation, Science and Industry additional oversight powers in certain aspects of the Act; and incorporating additional lenses, such as for sustainability or labour, into all aspects of the Bureau's enforcement efforts.

Considerations

Unquestionably, the greatest volume of feedback received pertained to two main areas: market study powers and private enforcement.

While no item of discussion approached complete consensus among stakeholders, the introduction of market studies backed by information-collection powers appeared to be the one with the greatest alignment, particularly as this is a common feature of competition regimes worldwide. In any framework, it would be possible to accommodate concerns of burden or overreach through appropriate safeguards that could cover a triggering procedure, transparent terms of reference setting out scope and duration, opportunities to contest various decisions, and limits on the use of information collected. All of these considerations will undoubtedly be relevant as the government considers how to proceed.

The question of privately-led cases and financial compensation also elicited a great deal of enthusiasm among a diverse set of stakeholders. In considering next steps, the Department once more recognizes that it would be possible to consider reforms designed, on the one hand, to better serve the goals of private enforcement than the narrow provisions featured in today's Act might, while placing appropriate boundaries on any new framework to reduce the potential for exploitation by cynical actors.

With regard to some of the other suggestions put forward, notably having the Bureau oversee industry codes of conduct, it is worth reiterating that direct management of business conduct is in many cases reserved for provincial and territorial jurisdiction in Canada's federal system.

10. Other Areas of Comment

Purpose

The Act's purpose clause in s. 1.1 contains a single primary purpose – "to maintain and encourage competition in Canada" – with the list of objectives that follow being desired results of that competition, not alternative purposes. This being a largely aspirational statement rather than a legal direction, the discussion paper did not devote a great deal of discussion to the topic. The Act's enforcement provisions are largely self-contained and directly govern marketplace behaviour, and therefore occupied a much larger share of the discussion.

Many commentators nevertheless offered opinions on the clause, with views generally divided on whether amendments were desirable. The general consensus among those who were comfortable with the status quo was that the purpose of the Act has stood the test of time for the past several decades, and efforts to alter it appeared to be an attempt to introduce non-competition concerns that could lead to business uncertainty or unpredictable enforcement. Other policy tools remained available to layer on top of a statute focused on promoting competition. Others who favoured updating the purpose clause were divided between those who would narrow it, such as an explicit focus on economic efficiency, and those who advocated for broadening the scope to include other considerations. These factors ranged from general calls to consider "fairness", "inclusive growth", and "political and social problems", to more specific requests to include mention of items such as the environment, climate change and labour.

Big Tech Regulation

While many commentators noted the particular and often unique challenges to traditional economic models that arise in the digital context, there was limited support for embarking on a program of comprehensive digital platform or "Big Tech" regulation, as is currently underway in the European Union with the Digital Markets Act. While some stakeholders proposed specific rules or presumptions linked to digital dominance in the context of discussing existing enforcement provisions of the Act, only a select few felt that a new rules regime was warranted. More commonly, stakeholders preferred to observe developments in Europe before following in its footsteps, or felt that standard competition law remained flexible enough to confront novel situations of competitive harm. Several commentators opined that Europe's efforts were not pro-competitive but in fact likely to stifle innovation and the natural competitive process. Most appeared to recognize that any attempt to establish rules governing large platforms fell outside the boundaries of competition law as such, but rather was more likely a form of sectoral regulation.

Enforcement Matters

Several stakeholders raised allegations of anti-competitive conduct in the marketplace, as understood under the Act in its present state. While ISED has no jurisdiction to take enforcement action, the Department encourages anyone with information about a form of behaviour that may be remediable under the Act to bring its concerns to the Bureau. Its complaint form can be found online at this link.

Other Policy Areas

Submissions also detailed recommendations touching upon other statutes and policy areas, including taxation, support to business, privacy and personal data governance, artificial intelligence, beneficial ownership transparency, intellectual property, labour regulation and telecommunications, among others. Where appropriate, ISED will convey viewpoints to the appropriate government agencies.

V. Conclusion

Engagement in ISED's consultation was highly encouraging, demonstrating that Canadians are invested in the important issues at both the heart and margins of competition policy. Diverse in origin and perspective, well-articulated and poignant, the feedback received raised numerous questions. Affordability, consumer protection and concerning levels of concentration in certain sectors of the economy were top of mind, as were issues related to maintaining a framework conducive to investments and environmental sustainability.

Some of the questions raised are not easy to resolve to the satisfaction of all. This was not an unanticipated result: the Government proceeded with a first set of amendments to the Act in 2022 in large part because the debates around those matters had already played out in various public and private fora, and solutions to specific problems were apparent to policymakers. The remaining items, almost by definition, were likely to yield starkly contrasting views among different stakeholders. This is precisely what occurred: ISED was informed both that the Act and its enforcement regime were toothless and outdated, but also that any attempts at modernization threatened to chill investment and innovation. The Act was, to some, glaringly inadequate when held up for international comparison, yet others insisted that it was exemplary and top-of-the-line when measured against Canada's foreign partners. Some groups explained that their members were suffering under the status quo, while others foretold negative economic consequences in the event that the status quo were abandoned.

What became clear to ISED in reviewing feedback is that the participants were, in many respects, speaking about different things. Those most vocal in calling for reform were generally focused on outcomes that the law was expected to deliver – a better quality of life, lower prices, more contested markets, and strengthened agency for their constituents, with less concern as to how the law went about this task or what that meant for the businesses operating under it. Those cautioning against reform were, for the most part, focused on precision and certainty, to ensure that the route to compliance and the advice formulated to arrive there could be clear and unambiguous.

The Department is mindful that a framework law must apply broad, yet understandable principles. It cannot be the vehicle to resolve every shortcoming in the free market, to address every consumer grievance or perceived unfairness that may occur between businesses. Crucially, it cannot dictate specific outcomes, particularly in the unique legal environment of Canada's federal system and its separation of powers between the federal and sub-federal levels.

At the same time, it is clear that a wide variety of stakeholders – individual Canadians, consumer groups, unions, civil society organizations, academics, as well as several sectoral business associations – felt that the current Act and its enforcement framework had not consistently achieved its objectives and led to suboptimal outcomes. Providing the Bureau a modern and relevant set of tools to carry out its mandate and establishing a sound framework for the promotion of dynamic markets is paramount to meet the concerns of Canadians, notably with regard to affordability. It is also key to ensure that businesses of all size can win and grow when they innovate and offer superior goods and services at better prices.

Legal improvements can, do and must happen regularly in order for our laws to evolve with the economy, technology and society. The task at hand is to consider how best to rebalance the regime to better limit concentration and deter anticompetitive practices, while avoiding overcorrection and preserving certainty in compliance. Thanks to the broad and thoughtful participation in this public consultation, the government now feels it is appropriately equipped to develop well-calibrated proposals for Parliamentary consideration.

Date modified:

2023-09-20

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Notice of clarification to drug manufacturers and sponsors - Risk Management Plans - Update

August 13, 2020

Purpose

This notice is being issued to clarify to drug manufacturers and sponsors that elements of Risk Management Plans (RMPs) required by Health Canada, such as controlled distribution programs, are not intended to restrict access to Canadian Reference Products (CRPs) for generic drug manufacturers for the purposes of conducting comparative testing. Any RMP elements should not delay or hinder comparative testing with generic products or hinder their ability to enter the market.

Implementation of RMPs in Canada

In February 2009, Health Canada announced the implementation of risk management planning and in June 2015 released the Guidance Document *Submission of Risk Management Plans and Follow-up Commitments*.

Quick Facts on RMPs

An RMP is a document that outlines pharmacovigilance activities and interventions to identify, characterize, prevent or minimize risks related to drug products. The RMP also contains an evaluation of the effectiveness of such risk minimization measures.

Risk minimization measures in an RMP aim to optimize the safe and effective use of a drug throughout its life cycle (e.g. appropriate labelling). However, for certain drugs with serious risks, more restrictive measures may be required when labelling alone is not enough to ensure the benefits outweigh the risks. For these drugs, Health Canada may require more restrictive risk minimization measures, such as a controlled distribution program. Under such programs, drugs may only be distributed through certain channels, and pharmacies, physicians, and patients may need to register to access the drug.

RMPs and Access to CRPs for Generic Drug Manufacturers

Before a generic drug can enter the market, a generic drug manufacturer must prove that the drug is safe and effective by submitting comparative testing to demonstrate that it is pharmaceutically equivalent to the branded drug. To complete this testing, the manufacturer needs access to samples of the branded drug, also known as the CRP. These studies are then submitted to Health Canada for regulatory approval to market the generic drug.

Manufacturers of branded drugs cannot use elements of an RMP, such as a controlled distribution program, to prevent generic drug manufacturers from conducting comparative testing. A branded manufacturer that provides samples of the branded drug to a generic manufacturer to conduct comparative testing is not violating the RMP.

Moreover, comparative testing by a generic manufacturer falls under the clinical trial regulatory framework. This framework contains ways to protect the safety of clinical trial participants. See Part C, Division 5 of the Guidance Document - *Drugs for Clinical Trials Involving Human Subjects*.

Health Canada is committed to making sure that RMPs continue to contribute to patient safety. It also reminds sponsors that RMP elements should not be seen as a reason to delay or stop comparative testing with generic products, or to prevent them from entering the market.

For inquiries related to this communication, contact Health Canada at:

Marketed Health Products Directorate (MHPD)
E-mail: mhpd-dpsc@canada.ca
Telephone: 613-954-6522
Fax: 613-952-7738

Date modified:
2020-08-13

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HOUSE OF COMMONS
CANADA

A Plan to Modernize Canada's Competition Regime

Report of the Standing Committee on Industry, Science and Technology

Walt Lastewka, M.P.
Chair

April 2002

Also available on the Parliamentary Internet Parlementaire: http://www.parl.gc.ca

Available from Public Works and Government Services Canada — Publishing, Ottawa, Canada K1A 0S9

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THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

has the honour to present its

EIGHTH REPORT

Pursuant to Standing Order 108(2), the Committee proceeded to a study of Canada's competition policy and framework, including the *Competition Act*. After hearing evidence, the Committee agreed to report to the House as follows:

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CHAIR'S FOREWORD

In June 2000, the House of Commons Standing Committee on Industry, as the current Committee was then known, produced an *Interim Report on the Competition Act*. This report followed an independent review of the anticompetitive pricing provisions of the *Competition Act* and the Competition Bureau's enforcement record, as was requested by the Bureau at the insistence of The Honourable John Manley, Minister of Industry. Professors J. Anthony VanDuzer and Gilles Paquet, both of the University of Ottawa, conducted this in-depth study dealing with predatory pricing, price discrimination and price maintenance. Their work, entitled *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, and subsequently known as the VanDuzer Report, was completed and presented to the Committee in October 1999.

After receiving this report and while the Committee was conducting its hearings process, the Bureau engaged the Public Policy Forum (PPF) — a non-profit, non-partisan organization dedicated to improving the quality of government in Canada — to consult the Canadian public widely on changes to the *Competition Act* and the *Competition Tribunal Act*. The changes contemplated in its consultations were those proposed in four Private Member's bills: Bill C-402, Bill C-438, Bill C-471 and Bill C-472. Two of these bills covered much the same policy ground as the Committee's study. Because the Committee did not want to prejudice this consultative process, it decided not to provide an opinion on any of the specifics of these bills and to make its report an interim one. The Committee would weigh in on these matters only after these consultations were complete and a report issued.

In December 2000, the PPF published its report, entitled *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations*, which summarized both the written submissions it had received and the discussions at the roundtables it had held. The Government of Canada then decided to wrap some of the contents of the four Private Member's bills into a government bill. The government chose the parts where a consensus could be obtained, including selected inputs from both this Committee's *Interim Report* and the PPF's report. All these efforts culminated in Bill C-23: *An Act to Amend the Competition Act and the Competition Tribunal Act*, which was assigned to this Committee for study after First Reading in the House of Commons. This course of action, rather than the traditional procedure of assigning the bill to a parliamentary committee only after Second Reading, permitted a more thorough review of the bill and the Acts that it sought to modify. This procedural route also allowed the Committee to study more deeply the changes contemplated and, if necessary, to recommend additional changes.

The bill dealt with four issues: (1) creating a new offence for "deceptive prize notices," including "scratch and win cards"; (2) facilitating cooperation with foreign competition authorities for the enforcement of civil competition and fair trade practices laws; (3) streamlining the administrative processes of the Competition Tribunal by providing for cost awards, summary dispositions and references; and (4) broadening the scope under which the Tribunal may issue temporary orders. After extensive consultation with competition law experts and selected business interests, the Committee subsequently amended the bill in two important ways. The bill, if it receives Royal Assent as amended, will permit private parties to have access to the Tribunal for resolving disputes on a limited number of business practices that are considered civilly reviewable by the Acts. The Tribunal will also now be able to impose an administrative penalty of as much as $15 million if an air carrier is found guilty of abuse of dominance (sections 78 and 79 of the *Competition Act*, which would include acts of predatory behaviour).

The Committee believes that Bill C-23 amendments to the two competition Acts provide a good start, but more amendments are needed to address contemporary antitrust concerns. In some cases, the *Competition Act* captures too many business practices, which leads to a “chilling effect” on perfectly legitimate, pro-competitive behaviour on the part of Canada’s most productive firms. At the same time, and in other cases, both competition Acts fail to capture and properly address many business practices that at least appear to be anticompetitive and may even constitute egregious anti-social behaviour. Therefore, more change is necessary, and the Committee agrees with the government’s multi-stage approach to reform. Looking beyond the immediate horizon, the Committee undertook four roundtables that included more than 20 eminent competition law experts, as well as formal and informal meetings with the Bureau and members of the Tribunal, respectively, to suggest options and a timetable for reform.

Although interesting and varied opinions exist amongst competition policy experts on a number of business practices and their current legal status, as well as the way in which they should be reviewed and pursued by the Bureau and Tribunal, these views were not so diverse as to prevent a consensus. The Committee believes this consensus is captured in this report. However, the first-time reader of this Committee’s reports is encouraged to read our *Interim Report* before tackling this one; a better understanding and appreciation will be gained on the necessary trade-offs in objectives presented by competition issues.

At this time, I would like to thank those who participated in our extensive hearings process and who shared their insights with us. I am confident that the public will agree that this report reflects both their concerns and common Canadian values and priorities in the domain of competition policy, law and enforcement. Finally, on behalf of the whole Committee, I wish to express our appreciation for the dedicated efforts of Ms. Susan Whelan, the former Chair of the Committee, and to acknowledge her important role in the creation of this report.

PREFACE

Competition legislation, or antitrust legislation as it is sometimes called, has existed in Canada for more than 100 years. While the name or title of the governing Act has changed several times over the years,[1] each revision has refined it and made it a more effective instrument of the public interest. These revisions were necessary to fill major breaches in the Act because serious limitations in its enforceability became obvious almost immediately from the law's earliest contested cases. Canada was the first industrial country out of the gate to adopt an antitrust law in 1889 but, from a practical sense, Canada fell well behind most major industrialized nations fairly early on in the realm of competition matters. In the intervening years between the original Act of 1889 and the current Act of 1986, Canada's competition law could hardly have been touted as being on the vanguard of competition policy; much more work had to be done, and on a limited number of important issues still remains to be done, to realize such a lofty status.

The primary goal of the legislation — from the first to the latest — remains the same: the quashing of conspiracies and monopoly-making restraints of trade (except those created by federal and provincial legislation). The Committee's *Interim Report on the Competition Act* (hereinafter the "*Interim Report*") provides some limited chronology of the revisions taken to date. In this report, the Committee wants to limit the amount of rehashing of this history. Our point of departure will be the adoption of the *Competition Act* and the *Competition Tribunal Act* in 1986; in the interest of brevity, we will revisit only the most significant amendments to these Acts and the economic conditions that spawned them.

At the outset, the Committee observes five relatively recent economic trends that are becoming pervasive in today's society — trends that, in all probability, cannot be divorced from the knowledge-based economy that we are building. These economic phenomena include: (1) a shift in corporate strategies that seek a competitive advantage through the attainment of economies of scale and scope and towards innovation; (2) the organizational drive to delayer many large corporate hierarchies through spinning off non-core activities to separate businesses and the forging of strategic allies or, alternatively put, the development of business networks in the hopes of raising productivity; (3) the adoption of new technologies, particularly digital technologies, that require substantial up-front investments with low or next-to-zero incremental unit costs that may lead to very aggressive pricing policies in economic downturns; (4) the adoption of products, most notably software programs such as Microsoft Windows, that may eventually develop into an industry standard, which will often be accompanied by network

1 The original Act was called *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* in 1889, which was repealed and replaced by the *Anti-Combines Act* of 1915. This new Act was repealed and replaced by two Acts: the *Board of Commerce Act* and the *Combines and Fair Price Act* in 1919, which were later ruled *ultra vires*. These Acts were then replaced by the *Combines Investigation Act* of 1923, which was in turn repealed, thoroughly reworked and replaced by the *Competition Act* of 1986.

effects[2] and may consequently lead to unusually high levels of market concentration (including near-monopolization); and (5) the internationalization of commerce — trade and investment — in the wake of new transportation and communications technologies, with their attendant lower costs, and government policy favouring the removal of significant tariff barriers to trade around the globe. Each of these new developments has been a catalyst for changes to the *Competition Act* and the *Competition Tribunal Act*.

These economic phenomena and the competition concerns that they raise can be seen as the main causes of a flurry of government and Private Member's bills that have made it to the *Order Paper* of the House of Commons. Indeed, one of the best barometers a democratic country has for measuring the public's dissatisfaction with what is going on in the marketplace may be found in the number of bills or amendments for change. In the case of amendments to the *Competition Act* and the *Competition Tribunal Act*, nine Private Member's bills and two government-sponsored bills (Bill C-26 of the 36th Parliament and Bill C-23 of 37th Parliament) have arisen in the last two years alone.

The Committee suggests that the almost simultaneous appearance of these bills and the above-cited economic trends are no accident; there is a causal relationship flowing from economic trend to *Competition Act* amendment. For example, the local telephone network is the perennial case of a "network economy or externality." Cable television, rail freight services, electrical power and natural gas distribution also belong to this special industrial species, as is the recently deregulated airline industry. Some of the technologies used by airline companies also display very low incremental unit costs relative to total costs. The traditional way of handling these cases of near or "natural monopoly" has been to regulate them. Since the late 1980s, however, airline, rail freight, long distance telephone and international telecommunications services have been partially deregulated because technology developments suggest that they no longer harbour the natural monopoly characteristic. Only the deregulation of the airline industry has proven controversial. Here, the relatively small Canadian market and the federal government's maintenance of foreign ownership restrictions on the operation of air carrier services have conspired to produce a highly concentrated market, frustrating both the travelling public and would-be start-ups in the industry. Bill C-26, an amendment passed in the 36th Parliament in 2000, was an attempt to address this problem subsequent to the imminent failure of Canadian Airlines International Inc. and its merger with Air Canada Inc. The failure of many smaller airline companies in the past few years (Royal Airlines, Greyhound Airlines, Canjet, Canada 3000) and the sheer dominance of Air Canada in the Canadian market were the stimulus for an amendment to Bill C-23. This amendment would give the Competition Tribunal the power to assess an administrative penalty of as much as $15 million if an air carrier is found guilty of abuse of dominance. As such, the

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[2] A "network effect," or as it is sometimes called a "network economy," refers to an enhanced value an individual already subscribing to a business network would assign to the service with the addition of more customers. Using the local telephone network as an example, the larger the number of telephone subscribers to the local network, the greater the willingness to pay for service on the part of each subscriber. Such a "network economy" is also often referred to as a "network externality" because it is a value that is external to the firm but internal to the industry. Regulatory agencies across the world have been notorious in capturing and exploiting this externality through mandatory and implicit cross-subsidy pricing regulations.

government is departing from the traditional approach of arming the industry's regulator with the necessary powers to directly control these aspects of competitive behaviour. The government has instead taken a "special rules for special industries" approach, which calls into question the claim that the *Competition Act* is framework legislation, justifying it on the grounds that this industry comes under federal regulatory jurisdiction.

Bill C-23 addresses the increasing internationalization of commerce in two important ways. First, this bill would facilitate cooperation between the Competition Bureau and foreign competition authorities for the enforcement of civil competition matters now that monopolization practices can transcend country boundaries. Second, the Committee amended this bill to give private parties access to the Competition Tribunal for resolving disputes on a limited number of business practices that are considered civilly reviewable by the Acts. This amendment should comfort many small- and medium-sized businesses that may have to combat large multinational enterprises which attempt to abuse their dominant position.

Finally, increased innovation across most sectors of the economy demands quicker resolution of disagreements between private parties and the Bureau on controversial competition issues. Bill C-23 responds to such demands by proposing to streamline the Tribunal's administrative processes through the provision of cost awards, summary dispositions and references.

Bill C-23 will provide a good first step to strengthening the *Competition Act*. More steps, however, must be taken. Industry and competition experts complain that the law is over-inclusive in some areas of antitrust, but under-inclusive in other areas. The typical example of over-inclusiveness has been the law's inability to properly distinguish between a strategic alliance and a conspiracy to raise prices to the detriment of the public, which has a "chilling" effect on some profitable and competitively benign opportunities that the business sector would otherwise undertake (despite the development of the Bureau's bulletin: *Strategic Alliances Under the Competition Act*). Conventional thinking suggests that a strategic alliance is preferred to a full-blown merger as a means of gaining cooperative behaviour between rival companies with distinct core competencies. The perennial example of the law's under-inclusiveness is found in the term "unduly" in section 45 of the Act — again dealing with a conspiracy — which makes it hard to obtain a conviction in a contested case; this is true even when the case is, for all intents and purposes, a "naked hard-core cartel" with no redeeming social value.

Furthermore, a growing number of stakeholders believe that the *Criminal Code* is not well suited to distinguish between anticompetitive conduct and perfectly legitimate pro-competitive conduct when it comes to price discrimination, predatory pricing and vertical price maintenance practices. Shifting these pricing provisions over to the civilly reviewable side of the Act deserves further consideration. Competition Bureau resource issues, including the thresholds for merger review, are also a cause for concern and so are the processes and powers of the Competition Tribunal. Resolution of these issues is the task of this report.

LIST OF RECOMMENDATIONS

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of crime detection with a view to improving its existing record of success.**

2. **That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.**

3. **That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.**

4. **That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).**

5. **That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.**

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to the proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

7. **That the Competition Tribunal, in consultation with the Tribunal-Bar Liaison Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that**

will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.

8. **That the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79).**

9. **That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part VII.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.**

10. **That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.**

11. **That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.**

12. **That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.**

13. **That the Government of Canada repeal the term "unduly" from the conspiracy provision (section 45) of the *Competition Act*.**

14. **That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a**

broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the "beyond a reasonable doubt" standard, for such an exception would be placed on the proponents of the agreement.

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under subsection 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections of the *Competition Act* covering essentially the same conduct.

16. That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the same treatment as the merger review provisions (sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

17. That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.

18. That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.

19. That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the Act. That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition,

failing which the applicant is deemed to have been granted a certificate.

20. **That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.**

21. **That the Government of Canada repeal paragraphs 50(1)(*b*) and 50(1)(*c*) of the *Competition Act* and amend the Act to include predatory pricing as an anticompetitive act within the abuse of dominant position provision (section 79).**

22. **That the Government of Canada repeal the price maintenance provision (section 61) of the *Competition Act*. In order to distinguish between those practices that are anticompetitive and those that are competitively benign or pro-competitive, that the Government of Canada amend the *Competition Act* so that: (1) price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provision (section 45); and (2) price maintenance agreements between a manufacturer and its distributors (i.e., vertical price maintenance) be reviewed under the abuse of dominant position provision (section 79).**

23. **That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(*a*) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.**

24. **That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(*a*).**

25. **That the Competition Bureau revise its *Enforcement Guidelines on the Abuse of Dominance Provisions* in order to be consistent with the addition of the anticompetitive pricing practices (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) to section 79 of the *Competition Act*.**

26. **That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or**

share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.

27. That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.

28. That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act,* and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.

29. That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

INTRODUCTION

Canada's original competition law was born out of the public's dislike for some of the business combinations that were being formed just prior to the turn of the 20th century. However, as history would later show, the large-scale businesses that were fashioned from key mergers and acquisitions in related activities at that time were, for the most part, an organizational response to innovation in products and processes that resulted in vast economies of scale. These scale economies dictated new business strategies based on massive investments in physical capital as well as a commitment to building integrated operations extending backward into core raw materials and forward into marketing and distribution networks. Furthermore, these strategies could only just then be implemented with the opening up of more distant markets as integrated railway and telegraph networks were developed.

I … encourage the Committee to rise to the challenge and provide a more ambitious blueprint for the modernization of our Act … It's my hope that this blueprint will form the basis of a government white paper that will … launch the next round of amendments. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

Unfortunately, this good came with the bad. The unprecedented cost advantages bestowed upon large-scale operators led to the elimination of many small-scale merchants. So the world's first antitrust law — Canada's *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* — was enacted in an attempt to assure the public on two grounds: first, this industrial transformation would occur in an orderly way, only the inefficient would be driven out of business and not efficient small-scale operators through predatory means; and second, in the end, the ultimate beneficiaries of technological and organizational change would be consumers. The original antitrust legislation, as well as the three Acts that would replace it, had three targets: conspiracies to raise prices; mergers and acquisitions that would monopolize markets; and a dominant firm's abusive business practices and predator policies that would injure, rein in or drive out its smaller rivals.

[Y]ou … need amendments … to make the Act more effective in addressing anti-competitive conduct and … to reduce the chilling effect the Act … has on a broad range of pro-competitive conduct, whether it's these pricing practices …, or horizontal cooperation, which … in the vast majority of circumstances is pro-competitive once you get outside this limited category of hard-core criminal cartel conduct. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:45]

The modern version of the original antitrust Act, now known as the *Competition Act*, is a well-crafted economic instrument designed to preserve and enhance the process of competition. It is a law of general application; it applies to

I think the proposals for the two tracks, criminal versus civil in section 45, is something that will have to be done … it's the sensible thing to do. [Jeffrey Church, University of Calgary, 59:10:55]

The difficulty with the reform of section 45 is not … that there's any disagreement around the evil of hard-core cartels. The difficulty is whether you can … write … a law that is not massively over-inclusive. [Neil Campbell, McMillan Binch, 59:12:55]

[W]hy do we not have a Microsoft case in Canada? Seventeen states in the U.S., the federal government in the U.S., and Europe have all looked at that. There's no argument that the impact in Canada … is any different. … [T]he answer: We don't have the funding to take that abuse case in Canada. [Robert Russell, Borden, Ladner & Gervais, 59:09:50]

all industries in equal measure (except those provided an exemption by federal or provincial legislation) and puts the interest of no one competitor or class of competitor ahead of those of any other. Canada's *Competition Act*, the Competition Bureau and the Competition Tribunal have supplemented the competitive process in producing an economic environment in which non-compliance with the law is more the exception than the rule. This has been accomplished by:

- establishing a broad competition framework, thereby setting "the rules of the game";
- making the guidelines of the enforcement agency — the Competition Bureau — widely available to the business community;
- having the Bureau fulfil its advocacy role at many regulatory hearings and other public events, thereby making the rules known to all players; and
- judiciously enforcing the many provisions of the Act under the watchful eye of the referee — the Competition Tribunal — so that the game is called according to the rules.

At the turn of the 21st century, a similar set of circumstances to that of the turn of the 20th century appears to be unfolding. The source of change is again innovation, but this time it has less to do with cost advantages of scale and scope associated with new physical capital and more to do with creative advantages associated with "human capital." Rather than exploiting the size and scope of a firm, or more succinctly, the efficiencies obtained through central direction of an industrial hierarchy, the business corporation is focusing on being lean and nimble. Many modern corporations are, therefore, spinning off non-core competency activities, while weaving ever-larger webs of business networks. This organizational structure — which relies on independent, highly specialized, interdisciplinary work teams — provides focus to the firm at a time when the currency of the so-called "Information Age" is the creative talents of the workforce. The business sector is thus banking on increased productivity through a strategy of creative competitive advantage. When one combines these corporate developments with innovations (such as containerization in transportation and digitalized broadband in wired and wireless telecommunications) and policy shifts to more liberalized trade and deregulated industries, the business landscape is increasingly becoming global rather than national.

My own reading of what the Bureau has … in the merger area is that … they are probably pretty well funded … The user fees have provided a cashflow to assist in that. [Neil Campbell, McMillan Binch, 59:12:35]

Firms using today's newest business models, such as "just-in-time" production and "Big Box" retailing, are exerting tremendous pressure on small and medium-sized businesses that are not adjusting. As a result, new stresses and fracture points in the competition policy framework are appearing once again. Although the *Competition Act* is a modern piece of legislation that reflects contemporary economic thinking and provides a balanced approach to enforcement, there are signs that it can be made more effective in certain areas and, where it is already effective, can be made more efficient. Amendments to selected provisions of the *Competition Act* and to the administrative processes of the Competition Tribunal are the order of the day.

The Committee began answering the call for a modern and effective competition law regime in its *Interim Report*. We broached, amongst other issues, the private right of action in respect of some civilly reviewable matters, such as refusal to deal (section 75), exclusive dealing, tied selling, and market restriction (section 77) and delivered pricing (section 80). With the Public Policy Forum's subsequent finding of a favourable consensus (provided that adequate safeguards against vexatious and frivolous suits were put in place), the Committee amended Bill C-23 in favour of such rights (excluding section 80). Consequential amendments were also necessary. The Committee further amended section 75 to ensure that an "adverse effects on competition" test was added, which would eliminate any incentive for frivolous commercial disputes, given that the Commissioner would no longer be the gatekeeper of these sections.[1]

In terms of … enforcement … there are really three things that can be dealt with … There is this question of funding … the question of alternative enforcement mechanisms like private access, which … for civil cases would help the Bureau a great deal by taking some of the workload away from them. The other area on the agenda … is … reform of the Tribunal process. [Margaret Sanderson, Charles River Associates, 59:11:20]

1 Typically, the "competitive effects test" used in the Act is that of a "substantial lessening of competition." Section 75 will, however, use an "adverse effects on competition" test. The meaning of "substantial lessening of competition" has been refined to a degree by judicial interpretation and the meaning of "adverse effect on competition" will have to be similarly clarified. The use of the "adverse effects" test in section 75 is to permit small and medium-sized enterprises the opportunity to have their cases heard in the new private access regime. In the case of a firm with a small market share, a refusal to deal might not "substantially lessen" but still "adversely affect" competition. The requirement to show a "substantial lessening of competition" in a market would be likely to exclude private action in all but the largest cases.

The Committee's actions will not stop there; we intend this report to become a blueprint for a government White Paper that will launch the next round of amendments to the *Competition Act* and the *Competition Tribunal Act*. The report will identify both the relevant sections of the two Acts needing reform and the pertinent issues related to the options under consideration. Once these options for reform are clarified, the Committee will weigh them, look for consensus amongst the various stakeholders, and recommend a course of action; where warranted, a timetable for reform may also be provided. The reasoning for the Committee's preferences will be spelled out in detail where possible, as the Committee finds transparency an essential ingredient to the reform of complex issues involving competition policy and its many varied stakeholders.

[T]here's been a tendency to describe private action as … a … way of helping the Commissioner out, … putting more resources into his pocket and doing some of his work … but I don't see it that way … [O]ne has to think much more broadly about private action … [as] a way of … enlarging the scope of competition cases. … [W]e should get a much richer case law and a much richer body of decisions from which to draw. [Roger Ware, Queen's University, 59:11:35]

Although the Committee is not under the illusion that only one combination of reforms is possible or desirable, we do caution both the reader and policy-maker that the recommendations offered here are a package of reforms that are not easily cherry-picked due to the *Competition Act*'s complex set of interrelationships within its different sections. Attempts to select among these recommendations to craft a different competition framework or different strategy are not without consequences.

[T]here's a theme percolating that jurisprudence is just inherently good and we should have lots of it. I'm concerned about that, because it's a very costly way to create law, relative to legislation that's fleshed out by regulations or guidelines, which have their imperfections but can also play a much more efficient and faster role in many areas. The real question … is how do we ensure that we get good, economically sound competition law enforcement …? [Neil Campbell, McMillan Binch, 59:12:15]

The plan of this report is as follows. In Chapter 1, the Committee picks up the discussion on the historical background of competition law and policy and the key economic developments that are challenging Canada's competition framework today, as set out in this introduction, by placing it in three settings. We first venture into the proper role of competition law given our understanding of the workings of the process of competition and the impacts of other complementary government policies. Gaining an appreciation for the interplay of these influential factors, we are able to establish a suitable role for competition law in Canada. In the second setting, a comparative analysis of different competition law provisions, involving both criminal and civil matters, is undertaken; this analysis suggests an optimal enforcement strategy for a mid-sized, open-trading economy — the Canadian circumstance. Finally, the merits of framework law versus "special provisions for special industries" approach are debated, concluding in favour of a return to a framework law, but one that is bolstered by more general enforcement powers than in the past.

In Chapter 2, the Committee reports on the state of competition in Canada and the state of enforcement. In analyzing the latter's contribution to the former, we distinguish between the Bureau's array of enforcement instruments, enforcement guidelines and resources, and its Commissioner's independence and accountability structure. We also evaluate the role of the Tribunal and the courts, the deterrence incentive structure of fines and jail time, as well as the enforcement potential that private rights of action are likely to provide. In Chapter 3, the Committee discusses the role of the Competition Tribunal and its decision-making procedures.

Innovation is a lot faster. Transactions are taking place in nanoseconds, as opposed to quill pens on parchment. The pace of market behaviour is so fast today that it really imposes a very difficult challenge on an enforcement agency. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

In chapters 4, 5, 6 and 7, the Committee addresses the important provisions of the *Competition Act*: conspiracy; the anticompetitive pricing practices; acts constituting abuse of dominance; and merger review. In each chapter, we assess the economic content of the law, the merits and appropriateness of whether the relevant practices should be placed in the criminal or civil part of the Act, the substantive elements of each provision and the Bureau's administration. The contentious issues will be identified, sorted out and thoroughly assessed in light of modern economic exigencies. The Committee will advance reforms where a consensus can be reached; where it cannot, further study is recommended.

[I]t would be very helpful if your final report provided a strong endorsement of the principle that competition law as framework legislation ought not to be expanded to include a hodgepodge of industry-specific amendments. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

In Chapter 8, the Committee considers a narrow but important issue dealing with the application of the refusal to deal provision (section 75) in gasoline retailing. That industry presents particular competition concerns because independent retailers must necessarily depend on large, vertically integrated producers who both supply and compete with them. Could a large, vertically integrated producer restrict competition by withholding supply to a competing independent retailer in the case of a general supply shortage? And, if so, how would the *Competition Act* respond? Answers to these questions are necessary because there may be competition implications for other sectors of the Canadian economy where vertical integration is also a structural characteristic. Finally, in the Conclusion, the Committee summarizes its recommendations for improvement of the competition policy framework.

CHAPTER 1: CANADA'S COMPETITION REGIME IN CONTEXT

Competition and Competition Policy Interplay

The interplay between the process of competition and competition policy and law is an interesting one. Competition is a means to an end, not an end in itself. We have competition so the business sector can deliver the best combination of products at the best prices to consumers. The best deal a consumer can receive comes from a free and open market, one with as few barriers to entry by new competitors and as few exit barriers,[2] including government-imposed barriers such as product, investment or trade regulations.[3] Indeed, certain government policies other than competition policy deliberately or inadvertently restrict competition, and competition policy (although sometimes controversial) is required to restore some sort of balance. However, even in the absence of government-imposed barriers, unfettered competition alone may not be enough. A complementary competition law is required in circumstances where, owing to technological barriers, competition will not automatically and immediately flourish.

[T]here's a need for something to be said about competition policy being broader than simply the competition law. There's a need to extend our competition policy to address the broader range of federal, provincial, and municipal government restraints to competition. In aggregate, these have a far greater adverse impact on consumers, small businesses, and large businesses in Canada than all private restraints combined. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:20]

I think the theme or principle behind the Competition Act*, which is that competition as a process is going to generate tremendous benefits, is a valid one that applies across industry segments.* [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

This interdependence of the process of competition and competition policy also runs in the opposite direction when governments adopt policies that, deliberately or inadvertently, foster competition. For example, trade liberalization provided by the Canada-United States Free Trade Agreement (FTA), followed by the North American Free Trade Agreement (NAFTA), was not only good trade policy, but also good competition policy. The deregulation and privatization of key industrial sectors of the economy,

[T]he Competition Act *is intended to and should protect the competitive process, and it is intended to ensure market conditions where a good company … can survive and do well … it should not be protecting any individual company.* [Donald McFetridge, Carleton University, 59:10:00]

2 This last condition is particularly relevant in recent years to the retail sector with the move to the "Big Box" sales format, and, in particular, gasoline retailing given the exit barriers presented by environmental laws governing the decommissioning of underground gas tanks.

3 Government policies — such as CRTC telecom and cable and satellite television regulations, the dairy and poultry quota systems, airline ownership and cabotage services restrictions, Ontario's beer and liquor distribution system, first-class postal mail and interprovincial trade restrictions — represent a number of such barriers.

while proving controversial as an industrial policy, has in general been good competition policy.

[A]n open international trade policy is in many ways a better way of creating competition than through a legal enforcement of one's own competition laws and, I should add, open foreign investment policy. [Roger Ware, Queen's University, 59:13:05]

Regulated markets, or deregulated markets where the proper institutions for fostering competitive entry are not put in place in the transition period, can also distort a competition policy regime. Indeed, twisting the competition law to accommodate an anticompetitive regulatory environment is likely to compromise and even corrupt competition law. In the 1980s, Canadians witnessed the intervention of their competition authorities in what otherwise might have been an efficiency-enhancing merger of dairies (*Palm Dairies Ltd*.) because of production quotas and interprovincial trade barriers that limited competition in the downstream sector. In the 1990s, Canadians again witnessed their competition authorities intervening in book retailing (the merger of SmithBooks and Coles Book Stores Ltd. in 1995 to form Chapters Inc. and in 2000 with the merger of Chapters and Indigo) because of entry barriers that were built by government-imposed ownership restrictions. Today, Canadians are witnessing the enactment of "special rules for a special industry" — the air carrier services industry — into a framework law, as a result of the absence of a suitable deregulatory framework.

There are at least two cases that have preoccupied the resources of the Competition Bureau and the Competition Tribunal in the last five years that might not have even been there had we had a more open, continent-wide approach to these industries. I'm referring, of course, to airlines and book retailing. [Roger Ware, Queen's University, 59:11:35]

In general, we have this problem that when we move from regulation to deregulation, the regulator is involved, and it takes an active role in making sure that the right policies are in place to facilitate competition. We haven't had that in airlines. I don't think you should be looking for the Commissioner to save Canadian consumers … You should be looking at … Transport Canada. [Jeffrey Church, University of Calgary, 59:10:30]

An Optimized Competition Framework

Any competition framework, if it is to improve consumer welfare and economic efficiency, must incorporate the most up-to-date economic analysis. There is, nevertheless, considerable room to manoeuvre in the choice of framework. Competition law usually reflects the country's culture, business customs, legal history, political philosophies, as well as its geographic size and demographic makeup.

The statute is still … an economically sophisticated law, and is recognized as such around the world. [Lawson Hunter, Stikeman Elliott, 59:10:50]

For example, the United States antitrust agency — the U.S. Federal Trade Commission — begins to get tough on mergers at much lower levels of industrial concentration than does Canada's Competition Bureau. This approach is taken because in the much larger

U.S. economy, there is much less risk that firms will not achieve the necessary economies of scale and scope to be efficient. Furthermore, Canada's competition legislation is unique in that it provides an efficiencies defence which explicitly requires that the review of a merger balance the anticompetitive effects against the "gains in efficiency." Whichever of the two impacts is greater determines the merger proposal's acceptability or unacceptability.[4] This provision appears to be more lenient than in the United States, where the efficiency gains must be so great that prices will not rise as a result of the merger. However, the Committee heard evidence to suggest that even Canada's consideration of efficiencies is not adequate.

I don't think the system is irreparably broken. I think it is a system we can continuously improve … We should be doing that on an ongoing basis. [George Addy, Osler, Hoskin & Harcourt, 59:12:55]

Although the much smaller Canadian economy dictates a less vigilant merger enforcement framework than exists in the United States, it could be argued that Canada ought to have a more vigilant conspiracy enforcement framework than the United States to achieve similar levels of enforcement. This view follows from two realities: Canada is a smaller market that is more susceptible to technological barriers to competition; and its economy is subject to more government-imposed regulatory barriers to competition. As such, leniencies found in Canada's merger review process can be made up elsewhere, for example, by having a more stringent provisions on: conspiracy, anticompetitive pricing practices, market restriction, tying and abuse of dominance. A careful balancing of factors is required to produce an optimal competition policy mix.

Certainly in 1986 we were able to hold up the Competition Act *at that time in a very proud manner and point to a number of aspects of the legislation that really did bring it to the attention of other jurisdictions. But one of the ongoing deficiencies continues to be section 45 … it is out of kilter in relation to hard-core, naked cartels. It's out of kilter with other jurisdictions …* [Calvin Goldman, Davies, Ward & Beck, 59:09:40]

Indeed, the needed balance can be a subtle one, particularly at the enforcement stage. For example, one witness appearing before the Committee in early 2000, a former Director of Investigation and Research at the Bureau of Competition Policy (as the title and the agency were known prior to the mid-1990s) said that not enough attention was paid to the significance of the consolidation going on in the refining sector in the oil industry in the 1980s. The Bureau allowed the consolidation to take place, and this development explains, in part, why we are today experiencing many problems in the downstream petroleum

4 This interpretation has been put into doubt due to recent events, i.e., the Federal Court's ruling on appeal of the *Superior Propane* case.

products sector.[5] If this view is indeed correct, then the organizational structure of the oil industry may present an almost unsolvable competition problem, far too complex for the anticompetitive pricing provisions of the *Competition Act*. Yet, at the same time, the Committee recognizes that the government has and continues to work on improving this situation. In any event, this hypothesis, whether correct or not, confirms the importance of correctly crafting the competition framework — one that fits Canada's unique economic circumstances.

You could give the Bureau as many resources as you wanted, and that wouldn't address the basic point that it's very difficult to establish beyond a reasonable doubt that any competitive predatory pricing has occurred. It wouldn't address the point that if someone chose to contest a section 45 case — we're talking about hard-core criminal behaviour … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:50]

According to many competition policy and law experts, the above problem is more widespread than is generally perceived. Some witnesses immediately pointed to the newspaper and grocery retailing industries as examples. Whether right or wrong, these comments suggest that Canada may indeed have a less-than-optimal competition enforcement strategy than what is required by a small, regulated or mixed economy.

When you're running an operation like that [Competition Bureau], you're constantly worried about two things. You're worried about … the "type one" errors, where you haven't taken enforcement action when you should have. You're also worried about the "type two" errors, where you have taken enforcement action in a benign case that may have caused narrow damage to those parties or a chilling effect on the marketplace. Dealing with those challenges in the environment we face in today's business climate is very, very difficult. [George Addy, Osler, Hoskin & Harcourt, 59:13:00]

Many competition law experts have three perennial criticisms of the *Competition Act*. First, Canada's conspiracy law, relative to other countries, is ineffective due principally to overly restrictive wording found in the provision (section 45). Consequently, the Commissioner of Competition has a poor record in contested conspiracy cases relative to the competition authorities in other jurisdictions. Second, Canada's conspiracy provision is both over-inclusive of some business arrangements in some circumstances and under-inclusive in others. In other words, the conspiracy provision is a very blunt instrument (see Chapter 4).

5 However, these events may themselves be inadvertent consequences of federal government regulations imposed on product formulas related to environmental emissions and export controls on crude petroleum in the 1980s that forced Canadian refiners to rely more heavily on the more costly heavy crude oil feedstock. The ensuing lower productivity levels may thus have meant that greater efficiencies through rationalization were needed to remain competitive with U.S. producers in what is a North American market for petroleum products.

Third, the Competition Bureau focuses its resources too heavily on merger review and too little on conspiracy enforcement.[6]

With respect to the second inference — the right mix of enforcement priorities — one would think that a small economy such as Canada would have a less vigilant merger enforcement regime than a large country such as the United States, relatively speaking and holding overall competition objectives the same, for the reasons already stated; and exactly the opposite situation in terms of conspiracy enforcement. Yet if the above complaints are true, Canada either has an inappropriate mix of competition law enforcement for its particular circumstance, or it is simply more lax on competition matters than are other major industrialized countries. This position further suggests that those who heralded the *Competition Act* as a watershed advancement over that of the *Combines Investigation Act* were much more critical of the predecessor Act than is commonly understood. In any event, consensus opinion appears to support that Canada moved from having a relatively ineffective competition statute prior to 1986, due principally to the higher burden of proof associated with the Act's criminal rather than civilly reviewable approach, to having one that, although more up to date in its economic content and legal treatment, is still somewhat misguided in a strategic sense. The Committee's report will, therefore, devote its efforts to correcting this defect. We will propose reform to the conspiracy provision that will make it more effective. Upon such change, we want the Bureau to aggressively pursue conspiracies against the public. The Committee, therefore, recommends:

[T]he Bureau's approach to merger review over-commits it in this area. If you examine statistical data, as compared with the U.S. experience with Hart-Scott, we're spending longer on cases, there are more cases, and they're getting extended reviews. This is absorbing a tremendous amount of time. I think we need to recognize that a very small proportion of them really do raise any significant issues. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:55]

I think a lot of the resource emphasis within the Bureau has been placed on merger review. Part of that is understandable. … From an enforcement perspective, I would like to see increasing attention paid to other provisions of the Act … [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

1. **That the Competition Bureau designate conspiracies as one of its highest priorities and that it allocate enforcement resources consistent with this ranking. That the Competition Bureau continue implementing existing enforcement strategies that target domestic and international conspiracies against the public, independently and jointly with competition authorities of other jurisdictions. As a matter of routine, that the Competition Bureau review its tactics of**

[6] However, if the first two complaints are indeed correct, then the third may not be correct.

crime detection with a view to improving its existing record of success.

Framework Legislation and Special Provisions

[A]s has been stated many times, the Competition Act *is a statutory general application. I'm not sure it's still true, with specific provisions now dealing with travel agents and so on, but I think it should be.* [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

The *Competition Act* is framework legislation; it applies to all industries in equal measure (except those monopolies created by the federal or provincial legislations). There are both good economic and legal reasons for this. The economic reasons are the long-standing belief that, by and large, free and open markets provide the best combination of products and services at the best prices to consumers. Except on occasion, when the *Competition Act* or some other (usually industry-specific) statute is needed, the process of competition disciplines suppliers in their decision making and thereby induces them to fulfil the needs of consumers in the most efficient manner. In the cut and thrust of competition, efficient firms survive and prosper, and inefficient firms fail and withdraw. The outcome of this dynamic is that only the interests of consumers and efficient suppliers are protected. The legal reasons are simply that, for constitutional reasons, most industries fall under provincial jurisdiction.

Generally speaking, the *Competition Act* only operates when: (1) the marketplace fails to deliver on the above expectations; and (2) compliance with the Act would produce a better outcome. Such situations arise only occasionally when, owing to technological and/or regulatory barriers, the pre-conditions for healthy competition are not present. In such cases, the Commissioner of Competition does not regulate the outcome, but instead lays the groundwork for a more competitive outcome.

There are industries that warrant special treatment. To the extent that they are regulated, there is a principle of regulated conduct, which is somewhat uncertain in its operation. I think it would be helpful if there were clarification of its operation, but to the extent that an industry is regulated, it is withdrawn from the coverage of the Act. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:55]

Firms in special industries requiring special dispensation from selected provisions of the Act and/or from competition itself are not ordinarily provided refuge through special rules in the Act. Rather, specific statutes and regulatory regimes, which are usually industry- or firm-specific, are permitted to override the *Competition Act*

This is how the regulated conduct defence was born; although the boundaries of the defence are not clear. More jurisprudence will, perhaps, provide greater clarity in time.

At least this was the case for 111 years of antitrust law in Canada. In 2000, however, the Government of Canada departed from this principle and adopted special provisions that armed the Commissioner with the extraordinary power to issue an interim injunction (section 104.1), or an interim cease and desist order as it is often called, against any air service provider, as defined in the *Canada Transportation Act*, to prevent any anticompetitive behaviour (predatory pricing, paragraph 50(1)(*c*), and abuse of dominant position, section 79). Bill C-23 would extend the duration of this order (beyond a maximum of 80 days if all renewals are put into effect) to allow for good faith, but belated information exchanges between the contesting parties; the bill would also subject an airline company guilty of such offences to an administrative penalty of up to $15 million. The government justifies these measures on the grounds of the current crisis in the competitive structure of the airline industry in Canada.

[T]he government felt that there was a need to add some definition in terms of the airline industries is because of the special characteristic of the airline which is somewhat unique. You've got an industry where you have an overwhelming dominance by a carrier, you've got some restrictions in terms of the amount of foreign ownership that you can have in the industry, you've got assets that can be moved fairly rapidly which could be targeted at new entrance. [André Lafond, Competition Bureau, 64:09:40]

Specialists in competition policy and law are not convinced by the government's arguments. They claim many reasons why special airline provisions are not credible: (1) the crisis is partly of the government's own making, the foreign ownership restrictions prevent competitive entry that would discipline Air Canada's pricing behaviour, moreover, the government also failed to provide the proper institutional framework during the industry's deregulatory transition period; (2) although the cost and pricing structures of airline services are prone to seasonal and other forms of price cutting to equilibrate demand and supply, possibly (but only rarely) leading to predatory price cutting, so are most other transportation services — rail, bus, cruise liners — that are conveniently handled by Canada's transportation regulator, the Canada Transportation Agency; (3) the sheer dominance of Air Canada, with a market share exceeding 80%, is not out of line with that of incumbent local telephone and cable television companies that are currently being deregulated under supervision from the Canadian Radio-television and Telecommunications Commission (CRTC); and (4) the precedent these measures set for other industries seeking

Although every industry … is unique in some way, by and large the kinds of competition problems are fairly generic. You have problems of price fixing and you have problems of abuse of strong market position. You worry about mergers in any kind of industry, so in principle these problems come up or could come up in any industry. [Tom Ross, University of British Columbia, 59:10:15]

[C]ompetition legislation as it exists in many parts of the world is designed to be a protector of free markets — a referee, so to speak — not a regulator. Regulation is done in industry-specific statutes, and when you mix the two you risk creating not only a hodgepodge but also a series of matrices that may not be effective in accomplishing either generic goal. [Calvin Goldman, Davies, Ward & Beck, 59:10:35]

special treatment, namely the grocery and newspaper industries, is a slippery slope. These very compelling objections are not exhaustive.

In its *Interim Report*, the Committee sided against special provisions for the newspaper industry and suggested an alternative approach modelled on the special banking and financial services provider statutes. The Committee also suggested other ways of realizing the government's stated objectives in providing the Commissioner with special interim cease and desist powers with respect to the airline industry — and with respect to all other industries, for that matter — through expanding Competition Tribunal powers under section 100 to cover abuse of dominance and predatory pricing provisions. This option would at least preserve the Act's general application.

I think this is very dangerous … turning this from framework legislation into a regulatory regime put in the hands of somebody who not only doesn't have the resources but who, frankly, is very ill-equipped to deal with it. [Stanley Wong, Davis and Company, 59:11:30]

Although the government has not responded to the Committee's *Interim Report*, its decision not to revoke section 104.1, when Bill C-23 would generalize this power in the hands of the Competition Tribunal, suggests that other policy considerations are at work. For example, although the time required for the Commissioner to seek an interim order from the Tribunal may be quite short, this delay could, in some circumstances, be critical. In any event, the government appears adamant to any return to direct regulation of air services and fares or to unilateral free trade in air carrier services, and is steadfast in its decision to attempt to correct structural problems within the industry through the *Competition Act*.

We have a scenario where we're not quite at the framework model and we're not into regulation, and we're asking the Commissioner, in exercising his powers, to straddle the fence. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

At this time, the Committee acknowledges that the special provisions related to the airline industry are temporary measures that will be removed when healthy competition is realized within the industry. At the same time, the Committee is deeply concerned that this expectation will be long in coming, as even the United States (with about ten times the population of Canada) appears to be able to sustain only five or six nationally hubbed airline companies. Without the removal of the ownership and cabotage services restrictions, the industry may be destined to dominance by Air Canada for a protracted period. As such, the Committee is apprehensive about the government's move from a law of general application to one that includes special provisions for a specific industry when other equally effective options may be available through forward-looking reform. Moreover,

[Y]ou either have to go in and regulate the business — and if you're going to regulate it, you shouldn't be regulating just Air Canada — or you're going to have to stand back and say "This is a dynamic business … and the chips will fall where they may." Unfortunately, at the moment we're in this really untenable halfway house ... [Lawson Hunter, Stikeman Elliott, 59:10:30]

the government's current policy course is possibly undermining the credibility of Canada's competition regime. Many competition specialists — including international organizations such as the Organisation for Economic Co-operation and Development (OECD) — are beginning to question the Competition Bureau's independence from Parliament and government. The Committee will broach this issue in some detail in the next chapter.

[W]hat I would actually urge the Committee to consider is to look at the airline-specific regulations we have, and look at them for general application. It just happens to be that crisis precipitates change. That's happened before with the Competition Act*, and it's now happening again. But we shouldn't leave it like that. It shouldn't be that Air Canada is bound by special rules, but the Act should be able to deal with any conduct we need to deal with in a partially deregulated industry.* [Robert Russell, Borden, Ladner & Gervais, 59:10:35]

In this report, the Committee will be proposing changes in the abuse of dominant position and predatory pricing provisions (respectively, section 79 and paragraph 50(1)(*c*)) that should satisfy the government, competition lawyers and economists, while providing balanced competition enforcement to the business community and the consuming public. These changes will permit the return of the *Competition Act* to law of general application, with no "special provisions for special industries."

CHAPTER 2: COMPETITION LAW ENFORCEMENT

The State of Competition

At the outset of this report, and in the *Interim Report* as well, the Committee asserted that Canada's economic environment could be characterized as one in which non-compliance with the law is more the exception than the rule. We paid tribute to the *Competition Act*, the Competition Bureau and the Competition Tribunal for this state of affairs. To this list, we could have added the litany of competition lawyers and economists who keep these government institutions abreast of developing trends in the marketplace and the newest analytical techniques used to judge economic behaviour.

I think right now in Canada, when you look at our position … in the world and the economy we're in today, we should be proud of the fact that we have a productive and efficient economy. I think that our Act has served us well in trying to get there. [Robert Russell, Borden, Ladner & Gervais, 65:10:30]

This belief is supported by: the testimony from economists who tell us that, in the main, the *Competition Act* uses modern economic analysis; the Competition Bureau's staff of economists who are well qualified and competent to the task at hand; and the Competition Tribunal's unique expertise in this complicated field. Competition lawyers tell us that, by and large, the *Competition Act*, the Bureau and the Tribunal provide us with as close to an optimal level of due process and economic justice as one could expect. Adding all of these inputs to competition policy and enforcement to the fact that Canada is a relatively open marketplace, we are confident that competition reigns in Canada.

At the same time, the Committee would be remiss in its obligation to the public if it were to conclude that all is well in the competition regime. In fact, the Committee's study of competition policy over the past three years has demonstrated deficiencies and that the regime can be made to work better. But before addressing these systemic issues and making suggestions for improvement, it is worth reviewing the statistical data on enforcement for clues on where our efforts for reform would best be applied.

It may be that in a number of areas we simply don't have that many meritorious cases. [Neil Campbell, McMillan Binch, 59:12:15]

The Enforcement Record

Evaluating the enforcement record of the Competition Bureau requires understanding of both what is being asked of it and, in particular, what market behaviour it can pursue from a practical sense. We are asking the Bureau to pursue all four objectives listed in the purposes section of the *Competition Act*, as well as to uphold the spirit of this Act. Section 1.1 states that the purpose of the *Competition Act* is to maintain and encourage competition in Canada in order to:

- promote the efficiency and adaptability of the Canadian economy;
- expand opportunities for Canadian participation in world markets and recognize the role of foreign competition in Canada;
- ensure that small and medium-sized enterprises have equitable opportunity to participate in the Canadian economy; and
- provide consumers with competitive prices and product choices.

It was my experience that one or two litigated cases by the Bureau, especially if they're large cases, could pretty much wipe out the litigation enforcement budget … This means the Bureau has to be extremely selective in terms of the kind of cases it can actually take on, especially if they're likely to be cases that get complex in a hurry. [Douglas West, University of Alberta, 59:10:10]

These objectives are mostly qualitative in nature and are not amenable to objective measurement; only subjective evaluations are possible. This is why we ask the Commissioner of Competition to report annually on his agency's enforcement and advocacy activities, rather than on his effectiveness in realizing the objectives of the Act. People are then left to form their own opinions on the Bureau's effectiveness in enforcing the Act and realizing its purpose.

In the Committee's view, an evaluation of the Competition Bureau's enforcement record cannot be divorced from the costs of litigation. The Committee was told on several occasions that the Bureau incurs enforcement costs, on average, of approximately $1 million per litigated case.[7] This cost presumably varies according to the type of case, whether a criminal or civilly reviewable practice, a merger or an abuse of dominant position case, an

[7] These comments were confirmed in a recent study commissioned by the Competition Bureau, entitled *Study of the Historical Cost of Proceedings Before The Competition Tribunal (1999),* which involved section 75 and 77 cases.

anticompetitive pricing practice or a conspiracy case, etc. More importantly, however, this large enforcement cost drives a huge wedge between the goal of complete compliance with the law and the economic behaviour we observe in the marketplace; so this cost must, among other factors, figure into the Bureau's enforcement strategy.

I would like to … talk about the generic necessity of ensuring … that the Bureau's resources and institutional framework are indeed as strong as they should be, so the mandate can be carried out in an efficient and effective manner. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

We must clarify what we are asking of the Bureau. The Committee is not asking the Commissioner and his staff to pursue every case with a positive net economic benefit; nor should the Commissioner strictly engage in profit maximizing law enforcement. Rather, the Commissioner should pursue those meritorious complaints with a substantial economic impact. This will deter egregious anticompetitive behaviour given the resources the government is able to allocate.

There are good reasons to take the last of these three approaches. The first approach would require the Commissioner to pursue all cases that would generate fines in excess of the public enforcement costs. This could require unlimited resources, which taxpayers would be reluctant to pay given the limited benefit each would receive. The second approach, which involves fines reflecting, not their deterrence value, but their profit-making potential, would undermine the public good, which the government and Parliament are entrusted to promote. Canada wants no part in such a litigious society. The Committee is not willing to sacrifice economic justice, nor is it prepared to live with the "chilling effect" on economic activity, which such an unwavering approach implies.

I want to commend the Committee … in setting the scene — the market context within which this market behaviour is being assessed, enforcement decisions are having to be made, and discretion exercised by the Commissioner. [George Addy, Osler, Hoskin & Harcourt, 59:12:55]

In the realm of law and economics, optimizing the benefits of competition requires a balanced enforcement approach, where balance refers to the appropriate measure of pursuit of compliance with the Act. Such an approach recognizes that neither the threat of prosecution nor the education and voluntary compliance measures are by themselves the most effective enforcement strategy. The Committee is convinced that the Competition Bureau is appropriately armed with the array of enforcement instruments needed to ensure compliance with the Act. These instruments range from education through publications, communications and advocacy to voluntary compliance through monitoring, advisory opinions, advance ruling certificates to concerted action through negotiated settlements, consent orders and prosecution. However, such a balanced approach will be very subjective; outsiders will find it difficult to distinguish good judgment from bad judgment — precisely because the law and economics of market behaviour is not an exact science; and, even if it were, there are numerous other pitfalls in collecting evidence in support of any position on any questionable activity. For all these reasons, the Committee will draw only cautious or the most obvious conclusions from the current enforcement record.

[T]he enforcement of the law would benefit from more resources … Underlying that question is a bigger question — namely, what is the role of the Commissioner, the role people are seeking to have funded? Obviously, there's always the overriding question … that amongst all the other competing public policy priorities, how much do we as Canadians want to invest in the enforcement of competition law? [George Addy, Osler, Hoskin & Harcourt, 59:12:40]

Table 2.1
Competition Bureau Enforcement Record
By Selected Provision in the *Competition Act*

Provision	Complaints	Disposition of Complaints		
		Investigations or Inquiries	Alternative Case Resolution	Formal Enforcement Proceedings
s. 50(1)(*a*)	88	5	4	0
s. 50(1)(*c*)	382	7	9	0
s. 61	461	7	77	3
s. 75	304	27	4	1
s. 77	214	28	7	0
Total	**1,449**	**74**	**101**	**4**

Note: Data on the pricing provisions (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) cover the five-year period commencing 1 April 1994 and ending 31 March 1999. Data on refusal to deal (section 75) and tied selling, exclusive dealing and market restriction (section 77) cover the four-year period commencing 1 April 1997 and ending 31 March 2001.

Sources: J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice*, 1999; Competition Bureau, undated letter to the Committee in response to hearings on Bill C-23.

Table 2.1 provides a partial statement of the Bureau's enforcement record over the past few years by selected provision in the Act. The Committee is aware that many conclusions can be drawn from data, including diametrically opposing conclusions. For example, based on the number of complaints, one might conclude that more vigilant enforcement should be directed against price maintenance violations than any other anticompetitive practice (i.e., refusal to deal, and tied selling, exclusive dealing and market restriction). However, one might just as reasonably conclude that, based on the number of investigations relative to the number of complaints, the Bureau is relatively lax, and possibly too lax, on predatory pricing, refusal to deal, and tied selling, exclusive dealing and market restriction complaints. Both views are possible given the lack of critical and pertinent facts to each case.

Obviously, the Committee is in no position to quantify the economic fallout of each case. Neither can we assess the relative merits of cases according to the different provisions in the Act; and nor can we gauge the exact legal or economic inadequacies of each provision in the Act. We do understand that different marketing and pricing practices spark different public reactions, and thus lead to different levels of reporting; but there is no way of knowing the exact correlation between the outrage and the number of complaints for a meaningful evaluation. Is the ratio of investigations to complaints with each provision in the law related more to the cost of litigation, merit, economic impact or the clarity of terminology used in the Act?

If we have a lot of behaviour that is offside … it can be reined in by litigated cases or it can be reined in when the Commissioner gets somebody to stop their behaviour because that party knows the alternative is to face litigation. You see the Commissioner settling cases with alternative case resolutions all the time, and that's highly, highly cost-effective for all of us. [Neil Campbell, McMillan Binch, 59:12:15]

The VanDuzer Report broached these very issues in terms of the anticompetitive pricing provisions, and we see no reason to second-guess its main conclusions. The report assessed the Bureau's case selection criteria. There are four, not equally weighted, criteria to which points are assigned to each complaint based on the facts. The criteria are: (1) economic impact; (2) enforcement policy; (3) strength of the case; and (4) management considerations. The Committee highlights the following excerpts from the VanDuzer Report:

> The statistics show that few cases have been pursued to resolution, except through ACR's [alternative case resolution] in price maintenance complaints. The relative absence of formal enforcement proceedings raises several concerns regarding the certainty and, ultimately, the effectiveness of the law. More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it. More cases would also expose the weaknesses in the law which would, in turn, be an important catalyst for law reform. One might hope and expect that increasing certainty brought about by greater formal enforcement activity by the Bureau would encourage greater interest in private actions under

What has obviously happened is that the Bureau has essentially built into its internal case prioritization the principle that cartels are viewed as quite a problem, and price maintenance and price discrimination laws, for example, are viewed as laws that are not economically sound, that are overreaching, and that should not be enforcement priorities. [Neil Campbell, McMillan Binch, 59:11:25]

> section 36. To date the possibility of civil actions alleging violation of the criminal provisions has been little used.[8]

> A disjunction is created between the expectations of people complaining to the Bureau about pricing practices and what the Bureau is prepared to deliver. This is most serious, in relation to price discrimination and predatory pricing, where the complete absence of formal enforcement actions opens the Bureau to the charge that it is choosing not to enforce the Act. This suggests either that the case selection criteria be revised so as to minimize impediments to bringing pricing cases and that the Guidelines be revised to more closely follow the Act or that the provisions be reformed to provide clearer direction for bureau enforcement policy. Either way, the result would be closer coincidence between what the law says and the Bureau's enforcement policy.[9]

I believe they can and do win conspiracy cases in both big and small settings, particularly in the modern environment, with their current immunity program, which allows them to approve the agreements they used to have so much difficulty approving in the 1980s. The pre-1992 statistics really aren't relevant in helping you decide whether you need to do something in that area. [Jack Quinn, Blake, Castles & Graydon, 59:12:40]

More generally, the Committee would like to report that, given the rather steady and holding trend in both the number of all complaints and investigations in the four- and five-year periods considered in Table 2.1, at a time when economic activity was buoyant and growing steadily, the business community has been relatively more compliant with the law. However, we cannot because even the number of complaints is dependent on people's knowledge of what an offence is under the law and their perceptions of the attention the Bureau will give their complaint. Because these important factors are not known nor recorded, we cannot adjust the data accordingly.

In terms of … enforcement issues, there are really three things that can be dealt with … There is this question of funding … There's also the question of alternative enforcement mechanisms like private access … The other area on the agenda … is we need to radically reform the Tribunal process. [Margaret Sanderson, Charles River Associates, 59:11:20]

The record level of fines collected by the federal treasury as a result of the Bureau's recent intensive pursuit of conspiracies could be interpreted as a sign of greater vigilance that will soon pay off in a more robust economic activity based on more efficient firms and the adoption of aggressive, competitive pricing policies. But even here most of these fines can be attributed to convictions made from international conspiracies. The Bureau might be just riding on the coattails of competition authorities of other jurisdictions. Furthermore, guilty pleas in conspiracy cases are just as likely to reflect the high cost of litigation and the potential for private information to be transferred to the public domain in other jurisdictions such as the United States where rivals may seek treble damage awards. These

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8 J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act*: *Theory, Law and Practice*, p. 70.

9 Ibid., p. 71.

facts suggest guilty pleas are more likely to reflect the cost benefit of going to trial in Canada than actual guilt or the deterrent effectiveness of the law.

It's even more expensive to deal with a criminal proceeding because of the criminal standards. So decriminalization, in some respects, and going to a per se approach should cut the cost down, because overall it's a cost to society. [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

Given the foregoing analysis, the Committee will concentrate its efforts on reforms that will directly lower the cost of enforcement, without unduly compromising legal rights, and thus reduce the wedge between the goal of complete compliance with the law and the economic behaviour we observe in the marketplace. First on everyone's list as a means of reducing enforcement costs is the Tribunal's current processes; these will be discussed in the next chapter. The development of jurisprudence and the Bureau's enforcement guidelines also have a direct bearing on enforcement and litigation costs; their examination will immediately follow this section.

The Committee will also examine indirect impacts on the cost of enforcement. We will review the most contentious provisions of the Act to ensure their legal treatment appropriately reflects their economic motivations and consequences. As such, any shift of important provisions from the criminal to reviewable section of the Act, quite apart from a reduced chilling effect on economic activity such a move might have, may reduce the overall cost of enforcement (see chapters 4 and 5). Furthermore, such changes would undoubtedly shift the burden of enforcement from the Attorney General of Canada to the Commissioner of Competition, and this may, in turn, have consequential budgetary and resource impacts on both these government agencies. In terms of enforcement tactics and formal powers, the Committee will evaluate the merits of a cease and desist order relative to an award of damages and fines as means for deterring anticompetitive conduct, in particular predatory behaviour. Finally, the Committee will examine the impact of granting private rights of action on a limited number of practices covered under the Act's civil section as set out in Bill C-23. The Committee will, at the same time, review the adequacy of resources provided to the Bureau for enforcement of the Act.

Part of the debate … around splitting section 45 into both a per se and a civil offence … [is] … that, it will be more costly for the Commissioner to prosecute a civil offence. Under the criminal model now, responsibility is split between two departments, so there are two budget funds to address the cost of prosecution. The Commissioner's office acts as an investigator, and the Department of Justice acts as the prosecutor. To the extent the role of the Commissioner is revisited, part and parcel of … that should always include the resource implications … to the Bureau. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

Jurisprudence and Enforcement Guidelines

[T]he way the law evolves is decision after decision … it gets fine-tuned that way. What seems to happen in Canada is a decision that leaves a fair amount of uncertainty, and then nothing happens for eight or ten years. [Donald McFetridge, Carleton University, 59:10:50]

The enforcement of any law, including that of competition, cannot be conducted in a vacuum. Anchors upon which behaviour is assessed are essential; moreover, clear markers distinguishing acceptable from unacceptable market behaviour are required. The economic content of the written law is simply insufficient. Jurisprudence and enforcement guidelines are required to flesh out the sometime abstract economic thinking on which the law is based. Indeed, when jurisprudence and enforcement guidelines properly reflect economic theory, they serve to guide the business sector in voluntarily complying with the law and the Bureau in enforcing it.

I think we need far more testing of the interpretations of the Act made by the Commissioner … not just more powers for the Commissioner. [Stanley Wong, Davis & Company, 59:11:30]

Competition law experts appearing before the Committee reached virtual unanimity on this score. In their opinion, there is simply insufficient jurisprudence to properly guide market participants. Uncertainties in the law and its application abound. Where these competition law experts begin to differ, however, is in terms of the principal cause. Some suggest a weak law is the culprit, while others suggest a risk-averse Competition Bureau is to blame. The rift widens when it comes to the proposed solution of providing greater financial incentives to develop the needed jurisprudence. Some maintain that it would be worthwhile to do so, yet others believe this is an expensive way of realizing greater certainty in the law, preferring instead more clarity in the Bureau's enforcement guidelines. For its part, the Committee will come down the middle on both these issues. We believe that more jurisprudence is needed and this might be partially realized with the implementation of private rights of action, as prescribed in the amended version of Bill C-23. In addition, the Committee recognizes that refinements in the enforcement guidelines are needed.

First, nobody really wants to have to go to court or before the Tribunal for the sheer sake of providing jurisprudence for others. That's kind of a public service that perhaps nobody necessarily wants to provide. [Donald McFetridge, Carleton University, 59:10:50]

The Bureau's enforcement guidelines are meant to fill the cracks in the public's understanding of the law left by insufficient jurisprudence. As the VanDuzer Report, in terms of the anticompetitive pricing provisions, put it:

> Through its Price Discrimination Enforcement Guidelines and Predatory Pricing Enforcement Guidelines the Bureau has attempted to provide, for enforcement purposes, a coherent rationale for enforcing the criminal provisions dealing with price discrimination and predatory pricing. … [F]or the most part, this has been a very effective approach to enforcement. Guidelines are significantly more cost effective than litigation for the purposes of clarifying interpretive uncertainty relating to the provisions of the *Competition Act*. As well, they can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law and the analysis may be tied to the facts of each case. Guidelines increase the likelihood of consistent and accurate decision making by commerce officers who make the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACR's and, more generally, will ease the compliance burden for business.[10]

[I]f there had been more cases, we would not … have so many guidelines. We would not … consider, for example, in section 78, all the illustrative anti-competitive acts or abusive acts that a dominant firm can do. This could have been explored before the Tribunal, and we would see that in the jurisprudence. [Donald McFetridge, Carleton University, 59:10:50]

From the business community's perspective, the guidelines are not reassuring. The guidelines have never been binding on courts, the Competition Tribunal or the Bureau. It was reported to the Committee that the Tribunal routinely ignores the guidelines; recently, the Competition Bureau abandoned its own merger enforcement guidelines in the *Superior Propane* case. The Committee finds this disconcerting; we can only conclude that the enforcement guidelines need to be revised. The VanDuzer Report made a number of specific recommendations on the Bureau's enforcement guidelines, which, in general, we support; however, the Committee will sort out each in later chapters. The Committee also agrees with the VanDuzer Report's recommendation 16 that deals with the enforcement guidelines in a general sense. This recommendation follows from the recognition of a general shift from an industrial economy to a knowledge-based economy characterized by innovation and industrial structures in which market dominance, when it occurs, is likely to be relatively short-lived. The Committee, therefore, recommends:

I think the elements are in the Act. I think the interpretations are very poor. I don't think you need separate rules for separate industries. But I do think you need clear and consistent application of clear guidelines. [John Scott, Canadian Federation of Independent Grocers, 59:09:45]

10 J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 86.

Our experience is that the guidelines are … ignored when it comes to a specific case. We have the example recently of the Competition Bureau abandoning its merger enforcement guidelines when it came to arguing the Superior Propane case. We have other cases in which the Tribunal has taken no notice of guidelines. … But to think that guidelines … will necessarily result in less uncertainty … I think only jurisprudence can do that, and we don't have a heck of a lot of it. [Donald McFetridge, Carleton University, 59:10:05]

2. **That the Competition Bureau review its enforcement guidelines, policies and practices to ensure appropriate emphasis is placed on dynamic efficiency considerations in light of new challenges posed by the knowledge-based economy, including factors such as: (1) high rates of innovation; (2) declining or zero marginal costs on additional units of output; (3) the possible desirability of market dominance by a firm where it sets a new industry standard; and (4) the increasing fragility of dominance.**

Once these revisions are completed, we expect the Commissioner of Competition to keep to the enforcement guidelines. Major deviations from them are not acceptable. If further changes are required, the enforcement guidelines should first be amended then enforced, not the other way around.

"Time is of the Essence" Enforcement Tools

On a number of occasions before the Committee, the Commissioner of Competition has argued for amendments to the law granting him new powers to issue cease and desist orders of his own right, without allowing the affected party a right to be heard prior to the making of the order, and without any authorization from the Competition Tribunal. Such a power was granted under section 104.1 of the *Competition Act* in respect of any domestic air service, as defined in the *Canada Transportation Act*, in terms of any anticompetitive behaviour (predatory pricing, paragraph 50(1)(*c*), and abuse of dominant position, section 79). Bill C-23 would extend the duration of this order (beyond a maximum of 80 days if all renewals are put into effect) to allow for good faith, but belated information exchanges between the contesting parties. Bill C-23 would provide this same power (adding a new provision, subsection 103.3(2)) to the Competition Tribunal in respect to all industries and all civilly reviewable conduct in the Act.

If you were on the inside and if you saw the difficulty and extent to which they have tried to comply with this law, I think you would come to the conclusion that the answer is, yes, it is effective, the Commissioner is very vigilant, and Air Canada has struggled daily with trying to understand what they can and can't do under the current regime. [Lawson Hunter, Stikeman Elliott, 59:09:45]

A new subsection 103.3(2) in the Act specifies the circumstance in which the Tribunal may make an interim order. The order may issue if:

- An injury to competition will occur that cannot be adequately protected by the Tribunal.
- A person is likely to be eliminated as a competitor.
- A person is likely to suffer: a significant loss of market share; a significant loss of revenue; or other harm that cannot be adequately remedied by the Tribunal.

I just want to distinguish between two ways of dealing with predatory pricing. One is the cease-and-desist type of power the Commissioner has and is maybe trying to have enhanced … to a "Don't even think about it" power, which would be issuing orders in advance of the incumbent firm even doing anything. That's one way to go, and it can have the virtue of appearing to protect a specific competitor and make sure they don't get hurt in the short run. I think it's definitely the wrong way to go, whether it's airlines or any other industry. [Donald McFetridge, Carleton University, 59:10:40]

Critics mention that the *ex parte* procedure — without notice to any other party — presents, as a *fait accompli*, an order that has the same force as a court order and a breach of which is punishable by fine or imprisonment. Once the order is made, the party may bring an application to set the order aside. In normal litigation practice, motions and applications made *ex parte* are the exception rather than the rule. Moreover, the test that is asked of the Tribunal in granting the order, particularly that of a significant loss of market share or a significant loss of revenue, is so low a hurdle that it treads on having the Commissioner cross over the boundary of protecting the process of competition to protecting individual competitors. This concern is supported widely across the economics field because of the strongly held belief that competition by its very nature means that there will be winners and losers in terms of revenues and market share. Thus, the *Competition Act* now risks interfering with the competitive process. As an alternative, these critics argue in favour of an award of damages and possibly fines as the appropriate method of deterring anticompetitive behaviour.

I think the way to deal with predatory pricing is to wait and look at the offence. I think where we have a problem in this country is that it doesn't do much good after finding that an offence has been committed if we take the civil branch and abuse of dominance and say, "Well, don't do it again", and then issue an injunction. That type of remedy is simply insufficient. I think what we really want … is to use the civil branch and use fines. And ultimately, perhaps … damage awards. [Donald McFetridge, Carleton University, 59:10:40]

For his part, the Commissioner believes that these extraordinary powers are necessary owing to the inadequacy of the procedures and/or the remedies currently available to the Bureau to use against the threat of price predation and other anticompetitive conduct in a timely fashion. The *ex parte* procedure is adopted because the alternative of providing notice of the proceedings would impose a process that would involve the Commissioner in time-consuming litigation before the Tribunal in support of the interim order, which would significantly reduce the "time is of the essence" aspect for which the power is being sought.

There's the predatory pricing. Clearly, you need a remedy besides cease and desist. A remedy based on damages and fines seems to be a sensible deterrent. [Jeffrey Church, University of Calgary, 59:10:55]

In wrestling with these arguments, the Committee recognizes that, in a perfect world where all predatory and other anticompetitive behaviour could be easily detected and there would be no uncertainty in the application of the law, there could not be any predation or anticompetitive behaviour. The cease and desist order would stop this anticompetitive behaviour the minute it started and an award of damages and fines from the Tribunal would remove any incentive to engage in such anticompetitive conduct in the first place. Both enforcement methods — an interim cease and desist order and an award of damages and fines — have a similar impact in such an environment. However, in our imperfect world, enforcement methods are not equivalent; each has a different impact. In a world where "Type 2 errors" are possible (where an enforcement action is taken but should not have been), the interim cease and desist order will impair the process of competition and impose losses on consumers by forcing them to pay higher prices for the period of the order. On the other hand, in a world of uncertain application of the law or a flaw in the design of the law, damage awards and fines may chill rivals from engaging in aggressive but pro-competitive pricing strategies. Clearly, these impacts are not the same.

[T]here's a fallacy in … saying … that the cease-and-desist powers … because they act very quickly, are necessarily desirable. … It is perfectly possible to have an enforcement provision against predatory pricing through the Act, working through the normal process with the Tribunal, not using any injunctive relief. Provided one introduces fines and makes the disincentives for a conviction high enough … [Roger Ware, Queen's University, 59:12:15]

In assessing the pros and cons of these "time is of the essence" enforcement tools, the Committee looks to the data, which clearly show that predation is often alleged but seldom occurs. Between 1994 and 1999, there were 382 cases of alleged predatory behaviour, but the Bureau found only 7 deserved investigation. Nine were solved by alternative case resolution (ACR) and none justified prosecution. Although the high incidence of allegation would favour the damages award and fines enforcement method, the Bureau's decision to investigate only seven cases brings somewhat back into balance the choice of either method (assuming that we are willing to live with prosecutorial discretion to achieve this balance, rather than a systemic basis for balance). At the same time, the Committee is unaware of any incidences of the "chilling" pro-competitive behaviour that the current competition regime has had on the business sector, let alone what incidences of chilling might arise from a deterrence system based on an award of damages and fines.

Although lack of information does not permit the Committee to judge which of the two enforcement tools would be better, other considerations suggest that this debate need not be framed in an either-or context. Adopting both enforcement methods has a number of advantages: (1) a cease and desist order would help mitigate damages in egregious predatory cases; (2) an award of damages and fines would rebalance the incentive structure to better deter such behaviour when anticompetitive opportunities present themselves (in turn reducing the opportunities for the exercise of prosecutorial discretion); and (3) the special airline industry provisions would become redundant and thus could be repealed. This third advantage is particularly appealing to the Committee, as it would hasten the return of the *Competition Act* to a law of general application. With the adoption of other reforms, as laid out in this report, the Committee is convinced that more jurisprudence would reduce both any uncertainty in the law and its chilling effect on aggressive but pro-competitive pricing practices. For all these reasons, the Committee recommends:

You need to create that type of penalty in the abuse-of-dominance provisions of the Act to retain the deterrence effect of the law. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:20]

3. **That the Government of Canada empower the Competition Tribunal with the right to impose administrative penalties on anyone found in breach of sections 75, 76, 77, 79 and 81 of the *Competition Act*. Such a penalty would be set at the discretion of the Competition Tribunal.**

These changes will permit the return of the *Competition Act* to law of general application, with no “special provisions for special industries.” For this reason, the Committee recommends:

What we have right now is a Commissioner of Competition who by statute is independent and reports to the Minister of Industry but who takes no direction from the Minister of Industry other than for the purposes of starting an inquiry. [Stanley Wong, Davis & Company, 59:11:30]

4. **That the Government of Canada repeal all provisions in the *Competition Act* that deal specifically with the airline industry (subsections 79(3.1) through 79(3.3) and sections 79.1 and 104.1).**

Commissioner Independence and Accountability

What we have now is really decision-making in the hands of a single individual who is really unaccountable. Every time we see an unsuccessful case, there is immediate pressure to amend the Act. [Stanley Wong, Davis & Company, 59:11:30]

A particularly surprising (and disturbing) issue — that of the Commissioner's independence from government — surfaced around the time of the Committee's first set of hearings in 2000. This issue continued to percolate and has since boiled over to include questions of accountability. Doubts on the Commissioner's independence first arose when the Commissioner conducted a review of his own merger enforcement guidelines, as they would apply to the banking sector at the request of the Minister of Finance, suggesting that he too had reservations on their general application. The questions began to multiply as the Commissioner acquiesced to the government a second time when he sought extraordinary cease and desist powers to deal with potential predatory behaviour on the part of Air Canada — once again putting into doubt the Act's general application. More recently, in the *Superior Propane* case the Commissioner abandoned the very merger enforcement guidelines that he confirmed as fit to the Minister of Finance.

Essentially what's happened in … cases, where speed is of the essence, such as predatory pricing … the Commissioner has been concerned that the process doesn't work expeditiously enough; therefore he's sought additional powers, turning his own office into an investigator and an adjudicator. As soon as a single body is performing both of those functions, concerns are going to be raised about independence. So if we can solve the adjudication model, if we can have the Tribunal play a more active, effective role as an independent check, and procedurally allow it to balance these concerns … its very important that there be … an expeditious process and … a full due process for the various parties. [Margaret Sanderson, Charles River Associates, 59:11:55]

However, the Committee does not share all these views and believes that it is important to distinguish perception from reality. In terms of independence, a consensus within the competition law community appears to have formed on the belief that the Commissioner is indeed independent from government in terms of case selection, administration and disposition. The Commissioner is not independent from government in terms of his budget and reporting obligations.

On the matter of enforcement direction, no one could point to any case where the government intervened in the Commissioner's enforcement decision making. On the matter of the Competition Bureau's organization within government, the Committee understands that the Commissioner is subordinate to the Minister of Industry and Cabinet so that, at the end of the day, the government can be held to account to the people for the actions of the Commissioner, one of the most influential public servants in Canada. For example, from time to time, competition experts have judged the Commissioner's enforcement record based on what they call Type 1 and Type 2 errors. A Type 1 error is defined as not taking an enforcement action when there should have been (the market behaviour in question was anticompetitive). A Type 2 error, on the other hand, is defined as taking an enforcement action when one should not have occurred (the market behaviour was benign from a competition perspective). However, there is also a Type 3 error. The Committee will define this error as wasting the taxpayer's money through inefficient enforcement action. After accounting for deficiencies in the law, at the Competition Tribunal and in his budget, for which the government may be held accountable, any remaining deficiencies in enforcement may be attributable to the Commissioner and his administration of the Competition Bureau. This error can only be corrected by executive decisions and thus institutional independence from government is not advised.

There are really two important things about enforcement policy … One is independence and the other is accountability. The Commissioner needs to be independent, needs to have the resources required to do the job, but needs to be accountable, too. That means we have to be able to go to Tribunal and test the Commissioner's decision. That's one way of keeping him accountable. [Jack Quinn, Blake, Castles & Graydon, 59:11:45]

On the matter of accountability, competition law experts identified a number of ways the Commissioner might be held to account for his enforcement actions. We have already mentioned his accountability to the people through the government of the day. He is also accountable to the people through Parliament — and specifically by way of appearance before this Committee. Beyond bureaucratic means, the Commissioner is accountable for his enforcement decisions to the Competition Tribunal, which can rescind or vary all civilly reviewable decisions he makes, as well as judge his request for a cease and desist remedy.

The Commissioner is independent today in exercising enforcement direction. He is not independent from an institutional perspective. The deputy minister owns his people, so the staff and organization budgeting is all subject to the Department of Industry's priorities. … [W]e should ensure he has both institutional and enforcement independence. [George Addy, Osler, Hoskin & Harcourt, 59:12:00]

If there is weakness in the accountability regime, it has been in decisions not to take an enforcement action with respect to civilly reviewable matters. However, the Committee is confident that forthcoming private rights of action — with the adoption of Bill C-23 — will partially address accountability with respect to sections 75 and 77. In terms of mergers — that is, on the release of private information relating to a merger proposal where no enforcement action is taken — the Commissioner must perform a careful balancing act. He must weigh the merger participants' privacy rights with that of the public's right to know. According to the competition law experts appearing before this Committee, there is little issue here, but they do note that both U.S. and European competition authorities are more forthcoming in providing information than Canada's Competition Bureau. However, the Committee must reiterate the point that Canada, as a small market, is and should be more lenient on mergers relative to larger

The Commissioner … is one of the most highly accountable officials in the Government of Canada, and that comes in part from his oath under the Act and it comes in part from … your ability to take him to court on a judicial review. It comes in addition from the fact that any six residents can force him to conduct an inquiry and can go to the Minister of Industry and ask … to reopen an inquiry that's been discontinued. [Neil Campbell, McMillan Binch, 59:11:55]

Another very important part of his accountability comes from this committee, which has put the Commissioner under a spotlight for the last three years. We've had numerous studies and we have the Commissioner appearing and taking questions and justifying what he does and does not do on a literally monthly basis … You play a very significant role, and you should be continuing to ask him how he's performing with respect to policy and the general administration of the Act. [Neil Campbell, McMillan Binch, 59:11:55]

jurisdictions, including on issues of information disclosure. At the margin, strategic market information released to the public is of less value in larger and less concentrated markets. Finally, this leaves only section 79, the abuse of dominant position provision; here, the public itself has been most vocal, and parliamentarians have heard them loud and clear and this has spurred many amendments for reform.

Private Rights of Action

A limited private right of action currently exists in respect of criminal matters, but such action has been rarely initiated. Under section 36 of the *Competition Act*, a person may bring an action for damages (and costs) if the person has suffered loss or damage as a result of either: (1) conduct contrary to Part VI ("Offences in Relation to Competition"); or (2) the failure of a person to comply with an order of the Competition Tribunal or of another court under the Act. Accordingly, a right of private action for damages may arise in three circumstances:

[W]e do have a leverage problem in the context of a merger or in the context of an abuse-of-dominance inquiry, where the Commissioner's say-so often governs, particularly for parties who are in a small market and have difficulty looking at the current costs and time of a Tribunal proceeding. That is why it's important to streamline the Tribunal process. [Neil Campbell, McMillan Binch, 59:11:55]

1. The Department of Justice successfully prosecutes a violation of a criminal provision under Part VI (conspiracy, bid rigging, price discrimination, price predation, false advertising, deceptive telemarketing, double ticketing, pyramid selling, or price maintenance).
2. After the Commissioner and a party have entered into a consent order, a court has issued the order, and the party fails to comply with it.
3. If an aggrieved party succeeds in a private prosecution.

Under current law, the Commissioner of Competition is the only party with standing to make an application for civil review before the Competition Tribunal. But this is about to change. After considerable study, the Committee amended Bill C-23 to allow private parties to have access to the Tribunal for resolving disputes on a limited number of civilly reviewable business practices: refusal to deal (section 75); and tied selling, exclusive dealing and market restriction (section 77).

One other way to bring more resources into enforcement and to get more jurisprudence is the issue of private actions and allowing standing for private actions before the Tribunal. [Donald McFetridge, Carleton University, 59:10:55]

Witnesses appearing before the Committee on Bill C-23 were generally supportive of amendments leading in this direction. The main argument against private access was the potential for abuse in the form of "strategic litigation" that is, legal action commenced not for the purpose of seeking a remedy to anticompetitive behaviour, but rather to gain an advantage over a competitor. The Committee, however, is satisfied that the safeguards included in Bill C-23 adequately address these concerns.

Throughout the Committee's hearings on the *Competition Act* there was broad agreement on the principle of granting private access to the Tribunal; there was less consensus on the relief that should be available. Many witnesses did support a right to claim for damages, yet others did not. The Committee therefore ran with the consensus it did obtain, proposing to limit the plaintiff to injunctive relief. As previously stated, the primary reason for denying claims for damages would be to discourage strategic litigation. In the longer term, however, we believe damages and maybe even fines will be necessary to realize effective enforcement.

I'd just point out that the costs for a plaintiff to bring a case to a conclusion are very substantial, and that is all the more an issue for small and medium-sized enterprises. So they most definitely will need to continue to use the Commissioner as the point of first contact on competition cases. I don't think private actions will be a solution to the resource issue, or indeed really to the accountability issue. [Neil Campbell, McMillan Binch, 59:11:55]

The expected benefits of private enforcement differ slightly based on whom you believe. Some argue it will bring a litany of cases which the Bureau does not have the mandate or resources to pursue. Private enforcement will complement public enforcement and, perhaps, generate savings that will stretch the Bureau's current enforcement budget. Yet others believe it will bring only a very limited number of cases; however, these will be pivotal cases that will enrich our body of jurisprudence; bring more certainty into the law; and discourage anticompetitive behaviour that might otherwise slip between the cracks of law and practice.

The Committee believes that, with only injunctive relief as the carrot, private parties in most cases may only be exchanging the costs associated with the alleged anticompetitive conduct for litigation costs (hopefully less than $1 million per case on average with reforms in Tribunal processes). Indeed, if this scenario does in fact unfold over the next few years, it will very quickly become common knowledge across the business sector and Canada will be no further ahead. Rights with no value attached to them are but window dressing — something that, as many observers have described, has adorned Canada's antitrust Acts for too long.

Competition Bureau Resources

[W]hen the mandate itself was unfolding — and the mandate was not as broad as it is todal — I can assure you the challenges that face one individual at the top of the Competition Bureau are such that … they warrant consideration of a three-person body. [Calvin Goldman, Davies, Ward & Beck, 59:09:15]

A number of witnesses suggested that the enforcement problems in competition policy being encountered by Canada are not solely the result of inadequate legislation, but also stem from a lack of sufficient enforcement resources allocated to the Bureau. Moreover, some witnesses claimed that the Bureau has staff retention problems due principally to low salaries compared to what some of its veteran staff could earn in the private sector doing similar work, or following other pursuits. In fact, these commentators identified a number of reorganization models to get around this recruitment and retention problem, but they failed to provide an assessment on any weaknesses from which these models are likely to suffer. The VanDuzer Report further pinpointed a shortage of, and consequently the need to acquire and develop, industry-specific expertise to complement enforcement officers and ensure that they can make accurate assessments in a timely manner. In these witnesses' opinion, learning on the job is not always efficient.

I would suggest that the Bureau cannot be effective … without adequate resources in trying to administer a law of general application in an environment that is increasingly deregulated. They need the resources to act in a properly informed manner. That doesn't necessarily mean bringing many more cases. [Calvin Goldman, Davies, Ward & Beck, 59:10:50]

However, the Committee is also aware that part of the enforcement problem over the past decade was the result of uncontrollable factors such as the deregulation and liberalization of transportation, telecommunications and energy sectors. Increased funding in this period did not match the increased responsibility that these developments imposed on the Bureau. A second uncontrollable factor was the unforeseeable merger wave, which, as a number of witnesses remarked, seems to be abating and is mostly behind us now. The Committee believes the Competition Bureau does need additional enforcement resources to fulfill its mandate in an effective manner and, therefore, recommends:

5. **That the Government of Canada provide the Competition Bureau with the resources necessary to ensure the effective enforcement of the *Competition Act*.**

Deterrence: Crimes, Fines and Jail

Probably the single most important enforcement instrument in Canada's competition policy toolbox is the court fine. Unlike cease and desist orders that prohibit future use of a practice, fines levied by the Court have the dual purpose of punishing the assailant and deterring others considering the same anticompetitive activity. Jail time — which is also an important deterrence weapon — has played a relatively minor role. Together these enforcement instruments are used only in the most egregious criminal cases.

When we've had $150 million worth of fines under this section in the last few years, you need to be careful about saying that the law doesn't have sufficient strength. [Lawson Hunter, Stikeman Elliott, 59:09:20]

In Canada, corporations or individuals found in contravention of the general conspiracy provision (section 45) may receive fines of up to $10 million per offence, and individuals can face up to a five-year jail term. These fines are among the most severe found in the world. Fines for bid rigging (section 47) are set at the discretion of the Court, which is not constrained by a maximum monetary penalty. On the other hand, an historical examination of actual fines assessed by the Court shows that they had not even come close to the maximum permitted; however, the most recent past is marked by a sharp increase.

In 1990, the Manitoba Court of Appeal held that the earnings of the accused are relevant in assessing a fine and promptly raised the initial fine from $100,000 to $200,000 in a case involving price maintenance (paragraph 61(*a*)) and gasoline distribution. In terms of bid rigging, eight flour milling companies were assessed fines totalling $3.4 million in 1990. Furthermore, the largest conspiracy case in Canadian history — an international cartel to fix prices of bulk vitamins — netted the government $91.5 million in 1999-2000. Finally, the aggregate data indicate that, since 1980, convictions in 32 cases under the conspiracy provision (section 45) yielded fines totalling $158 million; $14 million in penalties was levied under the foreign directives provision (section 46); and a further $8.8 million was levied under bid rigging (section 47). More than 80% of these fines were collected in the past two years alone as a result of guilty pleas by large multinational corporations engaged in global conspiracies.

When you think about the biggest multinational companies in the world coming and paying attention very closely, after the United States, to Canada, paying huge fines and having individuals pleading guilty to crimes in Canada, that is fairly remarkable. I think the Bureau is a very credible enforcer on the world stage on cartels. It has also done perfectly well on local cartel activity in Canada. It has sent people to jail. It has obtained convictions. [Neil Campbell, McMillan Binch, 59:12:55]

The Committee is pleased with Canada's recent enforcement record. Although we remain concerned that some conspiracies could possibly earn more than the $10 million maximum fine they would be subject to pay if caught, the Bureau contends that the business community does not take these fines as a “licence fee” or as simply another cost of doing business.

CHAPTER 3: COMPETITION TRIBUNAL

Tribunal Organization and Composition

The Competition Tribunal was created in 1986 as part of the major reform of Canada's competition law that saw the *Combines Investigation Act* replaced with the *Competition Act*. The Tribunal is a specialized court combining expertise in economics and law that hears and decides all applications made under Parts VII.1 and VIII of the *Competition Act* (including merger review, abuse of dominance and other reviewable trade practices). It is an adjudicative body, operating independently of any government department, and is composed of not more than four judicial members and not more than eight lay members. Judicial members are appointed from among the judges of the Federal Court, Trial Division, while lay members are appointed by the Governor in Council on the recommendation of the Minister of Industry.

You should look going forward at opening up the system to allow participants more access to the Tribunal. I find it hugely ironic that in an act devoted to competition the Commissioner has a monopoly or near monopoly on access [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Tribunal deliberates on complex questions of economics and law, and makes decisions affecting not only the rights and economic well-being of the parties, but having implications for businesses and consumers in Canada and abroad. In order to be able to adjudicate on these matters, the Tribunal is given the same powers found in a superior court of record, including the power to hear evidence, summon witnesses, order production and inspection of documents, enforce orders, and generally to do whatever is necessary to exercise its jurisdiction. Ultimately, these procedures serve one aim: to ensure that the Tribunal is able to gather the evidence it needs to make a just and correct decision on the facts of the dispute. The Tribunal does not gather evidence or facts; rather, it relies on the parties themselves (or more commonly, their lawyers) to collect and present the evidence it needs to make a decision. Parties adduce their evidence, each trying to prove their case. Parties are also given the opportunity to "test" their opponent's evidence in cross-examination. This system — known as the "adversarial" model — is used commonly by Canadian courts as well as by other adjudicative bodies.

By and large, most and virtually all of the experience of the Tribunal is on the part VIII side, in particular mergers. Remember, in the 1986 amendments mergers were decriminalized, put into the non-criminal section, and given into the exclusive jurisdiction of the Competition Tribunal. [Stanley Wong, Davis & Company, 65:09:10]

[T]he Tribunal doesn't have a lot of experience. This body was created in 1986 and really started operating in 1987. The first contested case of mergers went in 1990. Now, we've not had that many cases. If you look at the experience of the United States or even the European Union, we don't have a lot of cases, so the significance of every case is magnified. [Stanley Wong, Davis & Company, 65:09:10]

[W]hen we talk about truncating the procedures or having special procedures for the Tribunal, we should not forget that what we're dealing with is commercial litigation within a certain sphere. We have a lot of history in our courts, if not in our Tribunal, on how to manage those things, and we have various models, not only in Canada, but in other jurisdictions like the U.S., where they have started to manage commercial litigation more effectively and more efficiently. [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

In a lot of the thinking about what sort of process we want to have in the Tribunal, there is typically an attempt to impose a full-blown traditional trial model. That kind of enforcement activity is not appropriate in a public law enforcement context. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

In the "adversarial" tribunal system, the Commissioner of Competition is one of the parties, initiating cases by making an application to the Tribunal. Therefore, the Tribunal and Bureau operate in a manner wholly independent and separate from each other. There is no sharing of resources or consultation on proceedings outside of the formal dispute resolution process. Indeed, this strict separation of functions is considered essential to preserve the integrity of the decision-making process. The Committee is aware that other jurisdictions (notably the European Union) employ a different model, one that fuses the role of investigator and adjudicator. The Committee is of the view that our current model is correct and appropriate, having regard both to the operational dynamics of our system of law, and to the requirements of the Canadian Charter of Rights and Freedoms*.* Moreover, the separation of functions in the adversarial system produces consistently good and just results. However, the system can be quite slow and procedurally intense. The proceedings are also frequently made more complex by the presence of multiple parties and interveners, as well as the need to consider interlocutory motions on issues of procedure. Contested proceedings often involve very complex issues of economics, i.e., determining market definition, market power, barriers to entry, etc. Parties will frequently retain many experts to address every facet of the economic debate. These experts may produce reports and may give evidence before the Tribunal that will be subject to cross-examination. At least in some measure, the high cost of proceedings before the Tribunal is attributable to what appears to be an increasing trend towards hiring more and more experts. Some witnesses, however, remarked on an increasing tendency of expert witnesses to advocate on behalf of their client, i.e., asserting conclusions of law, rather than limiting themselves to their proper role of assisting the Tribunal in arriving at correct findings of fact.

The Committee is particularly aware that the high cost of Tribunal proceedings may discourage small and medium-sized enterprises from bringing meritorious cases to the Tribunal. The Committee heard little evidence on costs awards, but the Tribunal appears to have broad discretion in this regard; in fact, the Tribunal need not award any costs in a proceeding. Perhaps, the public would benefit from an expressed policy on costs awards. Accordingly, the Committee recommends:

6. **That the Competition Tribunal develop and articulate a policy to allocate costs in a fair and equitable manner having regard to the resources available to the parties to the proceeding. That such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.**

I have perhaps been a lone voice in suggesting that this is a tribunal where judges have not played a helpful role in the sense that they have formalized and judicialized it. I would prefer to see a tribunal that really is administrative and that could make decisions more quickly on an expert basis. [Neil Campbell, McMillan Binch, 59:11:25]

Many of the witnesses appearing before the Committee, both in the context of the study in June 2000 leading to the *Interim Report* and during our most recent roundtable meetings, expressed a measure of dissatisfaction with the Tribunal adjudicative process. At the same time, however, witnesses were quick to point out that the system is, on balance, a very good one, and not in need of major reform. The timeliness of interim relief as well as the time required to reach decisions were two problems identified. Furthermore, the costs of bringing a case to the Tribunal appear to many to be excessive, owing in some part, it seems, both to an overly procedural discovery process, as well as to the lengthy lists of expert witnesses the parties are permitted to call to give evidence.

Timeliness

With respect to the criticism that the Tribunal fails to provide interim relief in a timely way, the Committee anticipates that this problem will be addressed in great measure by the new powers conferred on the Tribunal in section 103.3 of the Act by Bill C-23. The new powers will permit the Tribunal to make an interim order to prevent certain anticompetitive practices. The legal test for the granting of the order is quite low — the Commissioner is not required to show that competition will be irremediably harmed, but merely that a person is likely to be eliminated as a competitor, or that a person is likely to suffer a significant loss of market share, revenue or other irremediable harm.

[O]ur ability to get good enforcement in the sense of formal proceedings does depend in part on streamlining and improving the Competition Tribunal proceedings without undermining the ability of people to make a defence for the particular activity they have. … [A]n administrative tribunal, an expert tribunal, would be a much more useful structure. [Neil Campbell, McMillan Binch, 59:11:25]

The Committee believes that granting any manner of relief — interim or final — merely on the grounds that a

[T]he Tribunal decisions have taken far too long. … The most recent consent case, which was done with agreed statements of facts and a high degree of collegiality among counsel on both sides, took something like 18 months on a consent basis. It took 18 to 20 months on a merger. [Stanley Wong, Davis & Company, 59:11:30]

competitor is losing revenue (something which happens all the time, and which is not, in itself, evidence of any anticompetitive activity) represents a serious departure from the well-established and important principle that competition law aims at protecting competition, not competitors. However, the relief contemplated here is *temporary* and is meant to allow the Commissioner to prevent a competitor from suffering immediate and irreparable harm, i.e., being forced out of the market. So, although the interim order may, on occasion, result in inefficiency by protecting an uncompetitive competitor, this impact will, in any case, be temporary. The Commissioner or applicant will still be required ultimately to prove the substantive elements of the relevant section in order to get an order in the final result.

The Tribunal process needs to be streamlined and improved quite dramatically. … There have been four contested mergers before the Competition Tribunal. The average time the Bureau has dealt with those transactions has been about eight and a half months … [and] the average was 19 months from the start until the remedy. [Margaret Sanderson, Charles River Associates, 59:11:20]

Still, the Committee is concerned that setting the bar for interim relief so low may prompt the Commissioner to seek interim relief in cases of questionable merit, with perverse results on competition. In a normal civil proceeding, this would be less likely to occur because the party who applies for the injunction does so subject to an undertaking that, if he loses the case in the final result, he will have to pay the damages accruing to the other person as a result of the injunction. This rule is designed to prompt the party seeking the injunction to take a hard look at the merits of the application. However, this important disincentive does not appear to exist in the *Competition Act*. Moreover, even if such a rule were implemented, it would not necessarily have the desired effect, since the damages payable by the Commissioner to the injured party would be payable out of government revenues, not out of the Commissioner's own pocket (as would be the case with a private litigant in normal civil proceedings). As such, the Commissioner has very little "downside" to seeking an interim order and there is little to make the Commissioner accountable for his decision to seek interim relief.

By having a rules committee, you don't have to have a wholesale set of rules drafted, which may take five years to do, because this is a complex area. You have an incremental process to move the rules along with the change in the law, with the change in procedures, with the change in technology that allows us to adapt to that. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

In addition to the issue of the timeliness of *interim* relief, there is also the issue of the timeliness of *final* relief, the Tribunal's final order. In the case currently before the Tribunal involving the Commissioner's allegation of abuse of dominance by Air Canada, we see that interim relief was swift. The final resolution of the matter, however, appears to be a long way off. The Commissioner issued a section 104.1 order on 12 October 2000 and extended it for a further 30 days on 31 October 2000. The Tribunal subsequently extended the order to 31 December 2000. The Committee is disturbed to learn that the hearing is not scheduled to commence until fall 2002. Justice delayed is justice denied. We believe that the resolution of this matter is important for all Canadians.

What has fuelled a lot of the acrimony in litigation before the Tribunal is the sense that there is an imbalance of information and power between the Commissioner … and respondents … This concern is very pointed at the moment, or will become so by virtue of the amendments to Bill C-23, because Parliament has seen fit to give the Commissioner the power to seek an interim order on very limited grounds, ex parte ... [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

Procedural Fairness

Owing to its "high stakes" proceedings, the Tribunal aims to ensure that the procedures it implements are sufficient so that litigants receive the appropriate degree of procedural fairness. "Procedural fairness" refers to the rights and obligations that flow from a party's right to have "due process" (as it is called in the United States) in an quasi-judicial adjudicative setting. Procedural fairness, at a minimum, usually involves the right of a party to tell his story to an impartial (i.e., unbiased) decision-maker; and the right to expect that the decision-maker will act in accordance with applicable laws. If the decision-maker does not act according to his legal authority, then the party would have a right to apply to a court for judicial review (reconsideration of the issue by a court).

The lawyers always argue for more protections, more safeguards, more hearings, and more redeterminations. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

The essential question of procedural fairness is: how far does it go? Does it permit the rule maker (in this case, the Tribunal) to make rules limiting the scope of examination for discovery, or the time to complete it? What about time limits on presenting one's case? Or limits on the number of expert witnesses one can call to give evidence? Indeed, can "corners be cut" at all without prejudice to the rights of parties?

By providing the appropriate degree of procedural fairness, the Tribunal aims to ensure that parties appearing before it are able to present their case adequately. Traditionally, each party has the right to determine how best to present its case; courts are generally reluctant to intervene unless it is absolutely necessary.

Whichever side of a case we're on, we can be unhappy. We always do that in the courts, but nobody has ever suggested we abolish the courts or limit the powers of the courts in their area of jurisdiction. We seem to have a tendency every time somebody doesn't like a decision of the Tribunal to immediately say, gee, now shouldn't they do something less? [Stanley Wong, Davis & Company, 65:09:15]

When it comes to the question of procedural protection, there cannot be said to be any definitive answer to the question: "how much is enough"? As a general rule, the "higher the stakes" for the parties, the higher the degree of procedural protection to which they should be entitled.

For example, proceedings which could lead to jail time would attract the highest degree of procedural fairness (that of a criminal court, with the criminal procedures, rules of evidence and a "beyond a reasonable doubt" burden of proof). At the other end of the continuum, small civil matters (such as licensing decisions) would warrant a lesser degree of procedural protection. However, "small stakes" for a large firm may, in fact, be very "large stakes" for a small firm. For that reason, procedural protections must also address the concerns of small business.

The Tribunal, like any court, should have the flexibility to manage its docket as it sees fit. That is what the Tribunal has at this point, albeit there seems to be an ever-increasing desire to put fixed time limits around various activities in the pre-litigation phase. But that discretion to determine the appropriate balance between expedition and fairness should be left with the Tribunal going forward. [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

Questions of "how much fairness is enough?" seldom admit easy answers. As an example, it would seem reasonable to suggest that a person is entitled to be put on notice if a legal proceeding is commenced against him. It offends our sense of justice to think that a court proceeding could take place — and an order made against a person — without that person having any notice or chance to respond. Indeed, the right to notice is an important principle often reiterated by civil courts. For that reason, courts generally permit applications without notice (*ex parte*) only in exceptional circumstances.

But when we pursue the idea of the "right to notice" a little further, it becomes less clear. First, giving "notice" of a proceeding is meaningless if the person being put on notice (the respondent) can do nothing to influence the outcome of the proceeding. For the notice right to have any kind of meaning or purpose, there must at least be some opportunity to affect the outcome of the proceeding. This is done by permitting the respondent to challenge the evidence upon which the applicant seeks to rely. But to do that, the defendant will need to have some way of "discovering" the applicant's case, and so the discovery process becomes necessary. And what will be done if one party refuses to disclose the information the other requests? There must be some way to compel the parties to disclose their documentary evidence. Also, there must be a procedure in place to allow the parties to settle disputes over the proper procedures to apply in a proceeding. This is done by way of motions. Each of these motions must be properly resolved on their merits. Furthermore, the respondent should be given the opportunity to present evidence on his own behalf, and this will likely involve hiring expert witnesses. In this way, the simple right to notice may develop into an extensive set of procedural and substantive entitlements. The adversarial

The difficulty is if we insist too much on this full due process system, which takes tremendous time, and for which we have this judicial model … [S]ometimes you wonder, is this process really designed to get to the truth? If we could solve that side of things, that would go a long way to dealing with questions of independence and so forth. [Margaret Sanderson, Charles River Associates 59:12:00] process produces results that are consistently fair and just, but frequently at very high cost.

Out of consideration for principles of procedural fairness, the Tribunal aims to provide more, rather than fewer, procedural protections. This means that parties are generally given the time they need to complete the proceeding "in the fullness of time," without strong direction from the Tribunal. As well, parties will often agree to timetables for dealing with cases, production of documents, etc., and these time frames may be quite lengthy in complicated cases.

Case management also means limiting witnesses. You might be interested to know that in the Microsoft case … they had only 24 witnesses and the decision was 46 pages long. The Superior Propane case that you've heard about a lot had 91 witnesses and a 109-page decision. I think, frankly, that's reflective of something short of aggressive case management. [George Addy, Osler, Hoskin & Harcourt, 59:11:35]

Case Management

The Committee shares the concerns of those who complain that Tribunal proceedings are long and expensive. Commentators focused on several areas where procedures could be improved:

- the time in which the steps in the proceeding must be completed;
- the time allocated for, and the scope of, examinations for discovery; and/or
- the amount of expert evidence the parties may adduce.

The Tribunal currently has authority, under section 16 of the *Competition Tribunal Act*, to make general rules (subject to the approval of the Governor in Council) regulating the Tribunal's practice and procedure. Those rules currently exist in the *Competition Tribunal Rules*,[11] which set out a complete code of procedure for the adjudication of disputes before the Tribunal, including the substantive steps the parties must complete and the time within which the steps must be completed. The steps in the proceeding include the exchange of pleadings, discovery, the pre-hearing conference, granting of interim relief, applications by interveners, interlocutory motions and the hearing itself.

Frankly, many of my colleagues … fought tooth and nail, saying, "Well, that's not justice. Justice means you can have as many witnesses as you want, you can plead as long as you want, and you can get whatever adjournments you want." I think the hesitancy on the part of the Tribunal to do more is because there's this view of a private bar to say the model is like court. [Stanley Wong, Davis & Company, 59:12:20]

11 SOR/94-290 as amended SOR/96-307; SOR/2000-198.

The Tribunal is aware of these criticisms and has made, and continues to make, constructive efforts to address them. Most notably, the Tribunal established a Tribunal-Bar Liaison Committee in 1997 comprised of Tribunal members, members of the Competition Law Section of the Canadian Bar Association and the General Counsel of the Department of Justice's Competition Law (who represents the Commissioner of Competition). The Liaison Committee reviews Tribunal procedures to determine how they might be refined and improved. At the time of drafting of this report, a number of procedural improvements are anticipated. One set of procedures will replace The current discovery process — traditionally the part of the process that takes the most time and results in the most interlocutory litigation — will be replaced with the following set of procedures:

The tendency is always to say, well, let's tinker with the Tribunal process rules, and hopefully that will solve the problem. That's not always the case. That can help, but there also has to be aggressive case management on the part of the Tribunal as well. By way of example, a recent case, one of the many involving Air Canada, was adjourned for six months without any reasons being given. [George Addy, Osler, Hoskin & Harcourt, 59:11:30

- a reciprocal obligation upon the parties to deliver a disclosure statement setting out a list of the records upon which they intend to rely at the hearing;
- "will say" statements of non-expert witnesses who will be appearing at the hearing;
- a concise statement of the economic theory in support of the application.

Moreover, the new procedures will permit certain information provided by the respondent to be read into evidence rather than having the witness testify.

Equally important, the new procedures will depart from the traditional model of permitting each party to adduce all of its expert evidence in turn. Instead, the Tribunal will group experts on a particular issue together in panels. Each expert will make a statement setting out his opinion, which will then be subject to cross-examination by the other experts, rather than by their lawyers. Counsel will still have the right to question experts in a limited manner. Apparently, this approach has been used in Australia with some success reported.

I would urge that the Tribunal continue to maintain a broad and flexible discretion to manage cases in both the parties' and the public interest. I am concerned about the attempt by the rules and by members of the Tribunal to think that this can be done by fixed rules, which mostly relate to the timing of when things should be filed and the like. In my judgment that is simply tinkering at the edges of substance. [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee is also aware that the Tribunal-Bar Liaison Committee is preparing a discussion paper to explore the possibility of creating similar rules with respect to mergers. These amendments would relate to electronic filing and hearing, attempting to limit the number of witnesses to be called at the hearing, and the introduction of time limits (four months or less from the date of filing of the notice of application) for the issuance of reasons and orders by the Tribunal. The new procedures are aimed not only at reducing the time for the matter to be resolved, but also to bring a greater degree of certainty to the proceedings, which will ultimately benefit the parties in conducting their affairs.

In my judgment, the Competition Tribunal is now managing its caseload very effectively, and recent litigation before the Tribunal evidences that. That's not to say that there won't be long cases in the future; indeed there will be. If there are, I don't believe this committee should engage in hand-wringing over that process. It's in the nature of litigation. [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee commends the Tribunal for its timely and thoughtful reforms, and encourages it to continue the process. However, the Committee cautions that any contemplated limits on the right of a party to present its case fully and fairly must always be approached with special consideration for established principles of fairness and justice. Restricting the number of witnesses that a party may call, for example, or the amount of time within which the party must complete their submissions, always runs the risk of creating the reality or appearance of injustice.

The Committee has assessed several possible options to address the issue of perceived shortcomings in Tribunal proceedings. We could, for example, recommend that the government amend the *Competition Tribunal Act* to impose procedural limits on Tribunal proceedings; or we could recommend that the government amend the Act in order to require the Tribunal itself to change its rules to create limits on its proceedings.

[Y]ou have to be able to say to the parties, "I want experts on this issue and this issue, and you'd better file experts in this area," instead of saying, "You do what you want, you do what you want, and then you can reply and you can reply." That is not case management in this area. This is one where you have to be extremely aggressive, running the case from the first day it comes into the Tribunal. The Tribunal can do that without amendment to the process. Every time you have amendment, it leads to more jurisprudence about what it really means. The framework is good enough for the Tribunal to make these changes. [Stanley Wong, Davis & Company, 59:12:20]

The Committee, however, believes the first option is problematic for several reasons. The Committee has no direct experience with, and no particular expertise in, the conduct of Tribunal proceedings. Furthermore, the *Competition Tribunal Act* clearly anticipates that Parliament originally intended for the Tribunal to determine its own procedures, and it appears to be actively engaged in doing so. For these reasons, the Committee does not find that there is a compelling reason to depart from this model.

The second option would impose an obligation on the Tribunal to make rule changes, but would leave the consideration of how exactly to do so in the hands of the Tribunal. Again, however, it is clear that the Tribunal already has the necessary authority under its statute to impose case management procedure, and is actively considering ways of doing so.

[A]s we strengthen the Tribunal process and improve the adjudication mechanism through the Tribunal, we should not at the same time give the Commissioner powers to avoid the Tribunal. I think the interim injunction provisions that have been granted to the Commissioner in the context of airlines are a special case, but if one wants to have separation of investigation and adjudication, one should have a revitalized Tribunal. It doesn't help to give, at the same time, the Commissioner powers whereby he can avoid the Tribunal. [Margaret Sanderson, Charles River Associates, 59:12:30]

Ultimately, the Committee believes that the Tribunal is in the best position to enunciate the rules governing its procedures. For that reason, the Committee recommends:

7. That the Competition Tribunal, in consultation with the Tribunal-Bar Liaison Committee, continue its ongoing review of procedures with the aim of creating an adjudicative system that will ensure "just results" in an expeditious and timely manner. Such procedures should aim at reducing parties' costs, as well as the time required, in bringing contested cases to a conclusion while, at the same time, continuing to ensure that due consideration is given to principles of procedural fairness and the appearance of justice.

Balancing the Incentives: Damages, Court Costs and Fines

I believe that administrative penalties and damages are something that are necessary to make our Act effective. Currently, abuse of dominance is a provision that can be read this way: do it until you're told not to. And what's the cost of that? The advice we have to give is that it's not unlawful until the tribunal says so. Of course, the clients can potentially read into that, do it until they say no. [Robert Russell, Borden, Ladner & Gervais, 65:09:35]

The relief available to a prospective applicant is a critical factor in determining whether to proceed with a case to the Tribunal. Although, with the adoption of Bill C-23, the right to bring a private action before the Tribunal will exist in a limited sense, the incentives contained in Bill C-23 are clearly designed more to discourage than to encourage the applicant to commence private proceedings. The absence of any remedy of damages is the most obvious incentive against litigating cases. Denying the plaintiff what would be, in most civil cases, the most important available remedy might reasonably be expected to have an impact on the decision of whether or not to start an application, i.e., is the remedy (an order) worth the time, effort and expense? The possibility of damages awards is also an important deterrent to anticompetitive behaviour. Currently, the only relief available to the applicant is a cease and desist order of the Tribunal, or in some cases, an order for divestiture. But there is no right to sue for damages.

The right to sue for damages is a fundamental right accorded to plaintiffs in civil proceedings throughout the world. It is an injustice that applicants in Tribunal proceedings should be denied the same fundamental right as any other litigant to claim restitution for the losses they have sustained as a result of another person's anticompetitive conduct. The ostensible reason for the policy is that providing a damages remedy would lead to a rash of litigation, as has been the case in the United States and that this, in turn, would cause business to leave Canada, oppressed by the high cost of defending vexatious lawsuits.

But unless we have significant penalties, we have no teeth in these provisions. We simply litigate, and litigation can be a tool in itself to draw things out until the damage is done, until the competitor disappears from the landscape. Only with the threat of significant penalties with these sorts of provisions will we have true deterrents in our economy. [Robert Russell, Borden, Ladner & Gervais, 65:09:35]

The Committee is fully aware of the many differences that exist between the Canadian and U.S. approaches to antitrust enforcement, and we are of the view that the differences are so fundamental that no meaningful comparison can be drawn between the two. In addition to permitting treble damages to the successful plaintiff, the U.S. approach also contains other incentives to encourage litigation including, for example, civil jury trials and costs awards that overwhelmingly favour the plaintiff. For that reason, the Committee is firmly of the view that there is no merit to the argument that creating a right of damages in Tribunal proceedings would have an adverse impact on the business environment. In fact, quite the opposite could occur. Creating a fair system in which all persons and enterprises are able to protect their rights and economic interests would tend to attract investment, not drive it away. This conclusion is supported by the United States experience where, despite having the most litigious antitrust regime in the world, investment still flocks to the business environment of the United States ahead of any other in the world.

[A]dministrative penalties and damages to parties that are harmed. Without that, we don't have teeth in this legislation for important reviewable matters. If you put a company out of business today, all that will be said to you is, you shouldn't have done it. That's not a good enough deterrent. If you're going to abuse your dominant position in this country, you should be called to pay for damages to the party, costs for the proceedings, and penalties because the public interest has been affected. We need those teeth. [Robert Russell, Borden, Ladner & Gervais, 65:10:45]

Moreover, the argument is not borne out by the experience of ordinary civil courts in Canada. Our courts routinely assess and awards damages in civil cases, and there is absolutely nothing to suggest that the availability of the remedy has led to a rash of strategic litigation in those venues. For the same reason, there is nothing to support the position that permitting applicants to claim for damages before the Tribunal would result in a significant increase in litigation, particularly if the relief is limited to "single damages," i.e., the actual provable loss. The threat of strategic litigation would also be kept in check by the

Tribunal's new cost rules, as well as its power of summary dismissal and to refuse leave to commence an application.

As we note from the area of hard-core cartels, even a $10 million fine may not suffice. I know when I was at the Competition Bureau, when we were looking at a particular case, we calculated the overcharge to be hundreds of millions of dollars, so even a $10 million fine in that particular case, had it gone forward, would have been a mere fraction of the profits. If you're going to introduce an administrative monetary penalty for abusive dominance, I think you really want to give the Tribunal the greatest flexibility by allowing it to impose a penalty at its discretion. That will enable it to set the penalty at any level. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:55]

The Tribunal is composed of very experienced members of the judiciary and experts in economics, who certainly have the necessary expertise to assess damages. The Committee does not recommend under any circumstances the consideration of treble damages, such as are available to litigants in the United States, and which is said to have led to the growth of a massive antitrust litigation industry in that country.

Until claims for damages are permitted under the *Competition Act*, it is likely that the balance of litigation incentives in the Act will remain less than optimal. Some good cases likely will not be brought given no possibility of recovering damages. These would-be applicants will simply decide that the limited injunctive relief available from the Tribunal is just not worth the high cost of pursuing a case to hearing. Accordingly, from the perspective of the applicant, there is a good argument to be made for creating a right to sue for damages.

Historically, Canada's antitrust legislation has been principally concerned with the public interest in competition as opposed to the private interests of individual competitors. If you amended the legislation … to afford a litigant the right to damages, I think the implications would be quite profound … I think inevitably where you would end up is that the Tribunal would become a court like any other, only it would be a specialized court. So a lot of thought has to be given on whether it is in the public interest to migrate the legislation in that direction. [John Rook, Osler, Hoskin & Harcourt, 65:10:55]

Moreover, damages would provide excellent deterrence. The possibility of being liable for damages would certainly provide additional incentive for dominant firms to refrain from anticompetitive practices by raising the potential cost of embarking on such a course. Increasing compliance with the Act would, of course, also relieve the Canadian taxpayer of some of the expense of having the Bureau solely responsible for enforcing the Act. Currently, there is little disincentive to a dominant player from abusing its market power. The abusive firm knows that the worst that will happen is that, at the end of the proceeding, it will be ordered merely to cease and desist the anticompetitive behaviour, and perhaps to pay a portion of the applicant's legal costs. It will not be required to pay damages, no matter how much its victim or victims may have lost. Compare this, on the other hand, to the enormous profits that the abusive firm may realize while the case is before the Tribunal. The absence of damages creates a very strong incentive for the abusive firm to prolong the litigation; doing so will, of course, raise its legal costs somewhat, but it will not increase its exposure in the much larger area of damages. In the meantime, the victim of the conduct will continue to suffer losses (and will thus be under increasing pressure to settle the case), while the abusive firm will continue to realize its ill-gotten gains, without any concern of ultimately having to pay damages to its victim.

I think some real benefit can be derived from looking at other case management models where a judge is assigned not only to schedule, but to manage what issues are coming forward before theTribunal. We have, I believe, a very good example in the commercial list in Toronto....There are judges, typically six at a time, who are assigned to the list — three fairly permanent members, and three members who are rotated in every six months. It has a specific protocol in dealing with commercial litigation, and a very tight case management system, where a judge not only manages all of the pre-trial hearings, if you will, but also enforces that the parties go through methods of mediation, typically before they get to a trial. ... Effective case management by a judge *... is something that would, I believe, definitely assist our procedures in terms of the Tribunal.* [Robert Russell, Borden, Ladner & Gervais, 65:09:25]

With the adoption of Bill C-23, the Tribunal will now have the authority to award court costs to a successful litigant. This is also expected to have an impact on the prospective applicant's decision of whether to take a case to the Tribunal, although it cannot be said to be a strong incentive either way. The spectre of having to pay a successful defendant's cost would tend to deter an applicant not strongly convinced of the merits of his case, certainly as much as the prospect of recovering costs would tend to encourage it. Furthermore, at least some cases, it is anticipated, will not obtain the leave of the Tribunal required to bring an application under sections 75 and 77, which is another possible disincentive to commencing an application.

The Committee also found considerable support among witnesses for giving the Tribunal the authority to levy administrative monetary fines as a further deterrent to egregious anticompetitive conduct. Although the threat of damages is certainly an effective deterrent, fines would be a useful additional remedy in situations where: (1) an award of damages would not, in itself, be a sufficient deterrent; (2) the victims of the conduct could not be easily ascertained, for example, where the loss has been shared by a large number of consumers; or (3) where the losses of each is too minimal to make a damages award a practical remedy.

I think there is a need to review the whole scheme as to what we're trying to do … [I]n Bill C-23 there's now a penalty of $15 million in the airline situation. I think that's too hasty. I appreciate there are all sorts of political considerations, but … you need to look more generally at what principles you want enshrined in the act to deal with reviewable matters. … [I]t's not a question of what we can do to stop the big business. When you have these penalties in place, they will apply equally to smaller businesses. [Stanley Wong, Davis & Company, 65:10:15]

Administrative penalties, in order to have any effect, would have to be large enough to deter anticompetitive behaviour. In fact, to deter the conduct in the future, the penalty must be greater than the profit that the abusive firm might realize as a result of its anticompetitive conduct. For that reason, there should be no ceiling placed on the size of the potential fine that the Tribunal might levy. The size of the fine should be left to the discretion of the Tribunal, having regards to the profits realized by the abusive party and such other factors as it considers correct in the circumstances of the case.

When … we take a holistic approach and think about the institutional structures and the incentives that are put in place … that will go a long way towards dealing with some of these cost concerns. [Margaret Sanderson, Charles River Associates, 59:11:25]

Accordingly, the Act must provide the optimum mix of incentives to promote compliance with the Act and to encourage meritorious cases to come forward. The Committee was presented with two options:

1. That the Government amend the *Competition Act* to permit the Tribunal, in addition to the other remedies available to it in civil proceedings, to order the compensation to a party in the form of a damages award, and to levy administrative monetary penalties under section 79 as a deterrent to anticompetitive behaviour and the just and expeditious resolution of Tribunal proceedings.

Parliament should ask itself, how much of the public resources we have to allocate amongst many valuable objectives can we afford to put into this kind of adjudication? [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

2. To wait and see the impact of Bill C-23 reforms (i.e., private access, hearing of references) on the operation of the Tribunal and its procedures.

It is not clear whether the creation of the new right of private access, as well as the Bureau's new procedures to hear references and to summarily dismiss applications, will actually achieve the desired objective of encouraging positive litigation. The Committee is not convinced that these narrow reforms will, in themselves, strike the right balance. For this reason, the Committee recommends:

We just have to open up to the possibility of allowing private actions, possibly including damages or at least cost awards for some of these other offences. [Tom Ross, University of British Columbia, 59:12:45]

8. That the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79).

Jurisprudence — Bringing Cases

[W]e should be focused on … what are the right, economically sound designs of the law, and the jurisprudence should follow. [Neil Campbell, McMillan Binch 59:12:15]

There was a broad consensus among witnesses that simply not enough cases are being brought to the Tribunal. This is not to suggest that litigating disputes is to be encouraged for its own sake; however, bringing cases to the Tribunal will lead, over time, to the development of judicial interpretation that will ultimately serve to clarify the meaning of, as well as improve compliance with and enforcement of, the Act. The challenge for lawmakers is to create a system in which good cases (i.e., cases with merit) may be brought.

At the same time, we must be careful that we do not encourage frivolous, vexatious or strategic litigation.

Why would one bring an application to the Tribunal as a private litigant if you can convince the Commissioner to make an ex parte *application to stop your competitor from doing what it is doing in the marketplace? Why spend your money when you can spend the money of the public …?* [John Rook, Osler, Hoskin & Harcourt, 65:09:45]

The Committee is satisfied that the new Tribunal powers created by Bill C-23 are well designed to discourage frivolous litigation. However, whether the reforms will function to encourage good cases to come forward is far from clear.

Many disputes will undoubtedly be resolved by the Tribunal's new power to hear references.[12] At the same time, it is reasonable to anticipate that some cases will be dealt with summarily under the Tribunal's new powers of summary judgment. Cases obviously devoid of merit will be "stopped at the gate" by the Tribunal's right to deny leave to commence the application.

Parliament has surrounded this right of public access with a number of fences … and it remains to be seen whether it's practicable and will be used. … [I] don't see the incentives there particularly for a private litigant to proceed … [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee expects that the new right of private access to adjudicate disputes under sections 75 and 77, created by Bill C-23, will add to the Tribunal's caseload, as private individuals look to the Tribunal for protection from anticompetitive business practices. However, owing to the non-availability of any remedy in damages, the Committee does not anticipate the flood of litigation that some opponents of private access have predicted. Still it is anticipated — indeed, hoped — that stakeholders will use the legislation in good faith to assert their rights before the Tribunal and protect their civil rights and, more generally, to protect healthy competition.

We all benefit from having a reasoned decision. Not only will the complainant benefit, members of the public will benefit by understanding the way the Bureau is applying the law in a particular situation. You get an accountability benefit from seeing what the Bureau has done or has not done. [Neil Campbell, McMillan Binch 59:11:25]

On the subject of references, the Committee heard several criticisms of Bill C-23. That bill contemplates that the Commissioner alone, or both parties if they agree, may direct a reference to the Tribunal on a question of law, mixed law and fact, jurisdiction, practice or procedure. The Commissioner may, of his own accord, refer these matters (except for a question of mixed law and fact), but a responding party may not. The Committee does not find

12 The Tribunal will be able to hear references on questions of law, mixed law and fact, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 (*Deceptive Marketing Practices*) or Part VIII (*Matters Reviewable by the Tribunal*), whether or not an application has been made under those sections. Similarly, the Commissioner may, of his own accord, refer a question of law, jurisdiction, practice or procedure (but not of mixed law and fact) in relation to the application or interpretation of Part VII.1, VIII or IX (notifiable transactions, i.e., mergers).

any compelling policy justification for this apparent inequity and the Committee, therefore, recommends:

In private litigation, the parties have the freedom to spend as much money on their cases as they think their interests bear, so there's a natural competition in spending money on cases. Part of the resistance to the bureau bringing more cases has been the amount of money they consume. This is simply saying that the process becomes a kind of pearl without price. [Jack Quinn, Blake, Castles & Graydon, 59:12:30]

9. That the Government of Canada amend section 124.2 of the *Competition Act* to permit a party to a contested proceeding under Part VII.1 or VIII to refer to the Tribunal a question of law, jurisdiction, practice or procedure in relation to the application or interpretation of Part VII.1 or VIII.

Tribunal Resources

I think there is a general support for the idea that Tribunal proceedings should start and finish in six months, including a four-month period for adjudication and two months to write the decision. My sense is that the Tribunal itself is predisposed to pursue that and obviously requires the cooperation of the parties as well as sufficient resources. I understand one of the problems with delay in the past has been that there have been insufficient judicial resources. [Stanley Wong, Davis & Company, 65:09:25]

The Committee heard little evidence on the adequacy of the Tribunal's resources. However, some witnesses did point to a shortage of economist members in some cases, and this has reportedly resulted in occasional delays in cases proceeding in a timely fashion. We anticipate that the Tribunal's current budget may need to be increased in order to deal with cases brought by private parties after the adoption of Bill C-23. How many new cases will result remains to be seen. At the same time, it is possible that the power to grant summary judgment and to hear references may result in a greater number of cases being resolved short of a full-blown hearing, and this may result in some saving of resources.

I do not think just throwing more money there will solve the problem. If we kept the model we have today … you can have a situation such as the Superior Propane case where the Commissioner can lead ten economists as experts. … I think we have to change this process, or the quantity of resources that will have to be devoted to it … [W]hat the general taxpayer would view is a reasonable allocation, given competing and highly desirable goals for government policy. [Margaret Sanderson, Charles River Associates, 59:12:35]

In any case, the Committee is of the view that the Tribunal itself is in the best position to determine its resource requirements and that the current budgetary process provides the means to address this issue. For this reason, the Committee does not feel the necessity to comment on the adequacy of the Tribunal's current budget. The Committee intends to monitor the operation of the Tribunal as part of our oversight of the operation of Canada's competition law framework.

The *Competition Tribunal Act*

The Committee heard that subsection 12(1) of the Act, as it is written, does not reflect current Tribunal practice. That section states that questions of law shall be determined only by the judicial members, while questions of fact or mixed law and fact shall be determined by both judicial and lay members.

Distinguishing questions of law from questions of fact or mixed fact and law often presents difficulties, particularly in a statutory regime that is driven by market forces. The Tribunal, in its practice, does not preclude lay members from expressing opinions on questions of law. In one case, in fact, the appeal court affirmed the dissenting opinion of a lay member on an issue of the Tribunal's jurisdiction.

One area that in my judgment would add a lot of accountability, particularly in merger cases, is if a merger is before the Tribunal the reference power that exists in Bill C-23 should be amended to permit the respondent to bring an application to the Tribunal for a ruling on a summary point … If the respondent … had the power to go to the Tribunal and say, "this is wrong, this is outside the mandate of the Commissioner in these circumstances, and you ought to do something about it", that would have a very healthy disciplinary effect on the exercise of discretion … [John Rook, Osler, Hoskin & Harcourt, 65:10:45]

The Committee believes that there is no compelling reason to maintain the artificial and somewhat unwieldy distinction between questions of fact and question of law or mixed fact and law in Tribunal proceedings. Accordingly, the Committee recommends:

10. That the Government of Canada amend section 12 of the *Competition Tribunal Act* to permit questions of law to be considered by all the members sitting in a proceeding.

Automatic Right of Appeal

Section 13 of the *Competition Tribunal Act* creates an automatic right of appeal[13] from any decision or order of the Tribunal, including interim (temporary) orders.[14] One exception exists to this automatic right of appeal: an appeal on a question of fact alone may only be brought with leave (permission) of the Court. This approach reflects a principle known as judicial deference. It is based on the notion that the Tribunal, with its specialized expertise and full hearing of the evidence, is in a better position than the appeal court to determine evidence-based findings of fact. But should the idea of deference extend to questions of law as well?

Judicial members have the exclusive right to decide on questions of law and then all other questions decided by the entire panel. … [I]t's a bit awkward for the Tribunal to operate in that way … in reality the Tribunal members probably look at everything together [Stanley Wong, Davis & Company, 65:09:15]

[13] To the Federal Court of Appeal.

[14] However, section 103.3 interim orders (created by Bill C-23) would not be reviewable.

Right now there is an automatic right of leave to appeal except on questions of fact. I know of no skillful lawyer who can't at least make a question of mixed fact and law to launch an appeal. This, I think, unnecessarily delays the adjudicative process, given that the purpose of the Tribunal is to be a specialized Tribunal. [Stanley Wong, Davis & Company, 65:09:15]

Judicial members of the Tribunal are judges of the Federal Court. It is evident to the Committee that, with such a depth of legal knowledge and experience, the Tribunal warrants a very high degree of deference on matters of law. Moreover, it has been clearly shown that lay members of the Tribunal can, and do, comment meaningfully on issues of law in Tribunal decisions. For this reason, the Committee believes that the principle of deference should extend to the Tribunal not only in questions of fact alone, but equally in questions of law of general application and laws specific to competition proceedings.

It is important to be clear that requiring a party to obtain leave to appeal does not deprive the party of its right to appeal. It simply requires that the appellant first convince the Court of Appeal that there is sufficient merit to the appeal to warrant a hearing. The Court of Appeal might, if it finds no merit in the appeal, summarily dismiss it without the necessity of going through a full appeal proceeding. In this way, many proceedings might be abbreviated without sacrificing principles of procedural fairness. Accordingly, the Committee recommends:

It is not good for the system to have a very prolonged period for adjudication of appeal and subsequent appeal because, certainly in the merger context, very few mergers will be held up. That is, mergers that were not completed would not wait. [Stanley Wong, Davis & Company, 65:09:15]

11. That the Government of Canada amend section 13 of the *Competition Tribunal Act* to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.

CHAPTER 4: CONSPIRACIES AND OTHER HORIZONTAL AGREEMENTS

The Organizational Continuum

Cooperation among competitors is a double-edged sword. On one hand, it may offer prospects of economic benefits; on the other hand, it may bear the costs of dulled competitive performance. The economic benefits develop from the synergistic effects when individuals and organizations with different competencies and resources are brought together. More specifically, such collaboration may: (1) result in new and less costly production processes; (2) facilitate the attainment of scale and scope economies; and/or (3) lead to a more efficient allocation of resources or improved product quality. A typical example in today's knowledge-based economy would be the combining of research, development and marketing resources of two or more firms to reduce the time needed — as well as risk exposure — to develop and bring new products to market. An additional social benefit would be the elimination or mitigation of duplicative work and facilities. Unfortunately, sometimes these benefits accrue, in part, to a market sharing or a coordinated pricing agreement needed to make such cooperation profitable. This may lead to, in varying measure, restricted supply, higher prices, less product selection and/or less-than-optimal product quality. Hence, an intricate weighing of economic factors is required to offer a definitive conclusion on the ultimate impact of such cooperation.

In many cases, a strategic alliance is just a contractual joint arrangement similar to a merger. It may be dictated by tax considerations rather than any particular overriding purpose in having a contractual arrangement. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

It's also reasonable to think about these arrangements between firms that fall short of mergers but are not hard-core cartel behaviour, like many strategic alliances and joint ventures. There's … [the] example of a joint venture to develop a vaccine. A lot of these arrangements are wonderfully efficient on the one hand, but pose some certain competition challenges on the other. They need a more sensitive, nuanced evaluation of the sort we give to mergers. [Tom Ross, University of British Columbia, 59:09:30]

At the outset, one should be aware that such cooperation could take several organizational forms. It can be purely contractual, purely combinational, or it can be located anywhere between these polar opposites. The Committee will, for simplicity, include the diverse set of business relationships on this organizational continuum under the term "strategic alliance."[15] This integration can be contrasted with that of a merger or acquisition of assets or capabilities.

There are many agreements that incidentally affect prices or incidentally affect customers but are not in essence price-fixing agreements. If you stick to prohibiting agreements to fix prices, i.e., agreements the object of which is to fix prices, as opposed to agreements that simply affect prices as an ancillary matter, you'll get much closer to truly hard-core criminal behaviour. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

Public concern over cooperation among competitors, when it is simply a veil for a cartel, begins to rise not only because it potentially redistributes income (from buyers to sellers) in a covert way that is tantamount to fraud, but it may also reduce economic efficiency as resources are misallocated in the economy. Indeed, such monopolization results in lower economic welfare and is, therefore, deemed to be a crime against society. However, a thorough competitive effects review would ensure that both types of cooperation, whether a merger or strategic alliance, receive similar treatment because neither can a priori be categorized as pro-competitive or anticompetitive.

Theoretically, a strategic alliance that is not what competition specialists call a "naked hard-core cartel" may be afforded criminal or civil treatment under Canada's *Competition Act*, even though it may be strictly pro-competitive and restrict competition only in an ancillary way. Law enforcement may proceed by way of a criminal trial under the conspiracy provision (section 45) or by way of a civil review under either joint dominance (section 79) or a merger (section 92). Uncertainty abounds on the possible course to be taken, but a strategic alliance would meet the public policy ideal of a "level playing field" with respect to that of a merger only if it received a section 92 through 96 review. Unfortunately, as many witnesses told the Committee, a strategic alliance may be inadvertently swept into section-45 treatment, where criminal law is not well suited to judge it. Specific court deficiencies in a section 45 case are:

It's somewhat odd that if two firms or competitors get together in a merger, they get a civil review where they get to talk about efficiencies, and there's a kind of cost-benefit evaluation of the proposal, yet if they do something less than a merger, they're subject only to criminal law, and people can go to jail and pay fines. [Tom Ross, University of British Columbia, 59:09:25]

- the absence of specialized expertise in the criminal courts;
- the tendency of structural considerations (market share or concentration) to dominate the very limited analysis;

15 In the past few decades, the business sector has preferred the strategic alliance, which usually takes the form of a joint venture, to that of a full-blown merger because this form involves fewer financial trappings associated with increasing integration. These horizontal agreements typically provide for formal supply arrangements, access to technologies and specialized expertise, distributional channels and customers (particularly in foreign markets where there are trade barriers), capital funding, risk sharing, and/or collaboration on research and development.

- the lack of consideration given efficiencies or innovation; and
- the limitation of sanctions to fines, in the absence of behavioural solutions.

A “chilling effect” on pro-competitive strategic alliances results, and the Committee intends to provide a solution to this design flaw. However, before doing so, the Committee will review and address the circumstances that have led to the over-inclusiveness and under-inclusiveness of the conspiracy provision.

I don’t think the strategic alliance bulletin provided the comfort the business community was looking for, because it was very evident that there is an overlapping potential application of not only the merger provisions but also the criminal provisions of section 45 … and even joint dominance provisions. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:20]

History of the Legal Treatment of Conspiracies

The prohibition against horizontal agreements (i.e., between competitors in the same product market) to fix prices, allocate markets and/or restrict the entry of competitors has been a central feature of Canada’s antitrust Act since 1889. However, for most of the original Act’s history, the prohibition was ineffective due to the presence of the word “unlawful” and the lack of a permanent investigative and enforcement body. Between the *Combines Investigation Act* of 1923 and the enactment of the *Competition Act* in 1986, the enforcement of the prohibition varied according to the legal interpretation given to the term “unduly” in the provision’s reference to “prevent or lessen competition unduly” when assessing the agreement’s economic effects. In this period, several unsuccessful attempts were made to rid the Act of this word in order to strengthen the prohibition. After the Supreme Court decisions in *Aetna Insurance* (1977) and *Atlantic Sugar* (1980), the Crown had to prove that the alleged conspirators both intended to enter into the agreement and intended to lessen competition “unduly.” The double intent proved hard to establish, as can be seen by the drop in the Crown’s success rate from 90% to 55%.[16]

We have not had great success with this provision. Particularly because of some of the burdens and the wording of the section, it’s made it much more difficult to use it against hard-core cartels … [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

However, the enactment of the *Competition Act* de facto reversed these court decisions. Section 45 of the *Competition Act* provides that “everyone who conspires, combines, agrees or arranges” to lessen or prevent competition “unduly” is guilty of a criminal offence and is

[T]he $150 million in fines recently collected is the coattail argument. We have collected $150 million in fines in Canada after other jurisdictions have enforced against those international cartels. We’ve done very well at getting guilty pleas on them, but I don’t consider that to be a success of our statute. [Robert Russell, Borden, Ladner & Gervais, 59:09:40]

16 William Stanbury, “The New Competition Act and Competition Tribunal Act: Not With A Bang, But A Whimper,” *Canadian Business Law Journal*, Vol. 12, 1986/87, p. 20.

liable to fines and/or imprisonment. This provision incorporates a defence for horizontal agreements between competitors for:

[W]hen we analysed the cases back in the early 1980s, … we found that the government lost as many if not more of the cases because they couldn't prove agreement. It wasn't that they couldn't prove undueness; they couldn't prove there was actually an agreement. That is the cornerstone of a conspiracy section. [Lawson Hunter, Stikeman Elliott, 59:09:25]

- the exchange of statistics, defining product standards, or the sizes or shapes of product containers and packaging;
- the exchange of credit information, research and development, placing restrictions on advertising, promotion or measures to protect the environment; and
- the adoption of the metric system of weights and measures.

There are also specific defences for export consortia and specialized agreements.

The Act's most significant changes, however, were introduced in subsections 45(2.1) and 45(2.2). These provisions permit the Court to infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence; and while it is necessary to prove that the parties intended to and did enter into the agreement, it is not necessary to prove that the agreement was intended to have the effect of lessening competition "unduly." Subsequent jurisprudence has been consistent with this interpretation.

The question of whether to strike unduly from section 45 rather than go to a two-track approach has been raised before. The simple response to why we wouldn't do it is because it would make the section too inclusive. It would trap many agreements, which are innocent. For example, agreements between a franchise and a franchisee might be captured by section 45 if it simply said that any agreement that restricts competition, supply, production and so on. … [R.W. McCrone, Competition Bureau, 64:09:15]

The Supreme Court further provided the more controversial interpretation on the meaning and implications of the word "unduly" when it handed down its decision in the *Nova Scotia Pharmaceutical Association* case, which is commonly referred to as the *PANS* case. The courts are now required to conduct a two-part test on price-fixing arrangements before condemning them as lessening competition "unduly." The first part would be a market power test, while the second would be a test to establish injurious behaviour to competition that would qualify as "undue." This legal framework in fact establishes a partial rule of reason because agreements are neither treated as per se illegal, even those that are patently "naked hard-core cartels" with no redeeming benefits to society, nor treated under a "rule of reason," whereby the economic advantages and disadvantages of the agreement would be weighed. A strategic alliance that restricts price competition only in an ancillary way would then be subject to less than a thorough review to determine its ultimate economic impact.

As it currently stands, the Crown must establish four elements beyond a reasonable doubt when bringing forth a section 45 case:

1. The existence of a conspiracy, combination, agreement or arrangement to which the accused is a party.
2. The conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly (i.e., it does not have to be implemented);
3. The accused had the subjective intent of the first two elements; and
4. The accused was aware, or ought to have been aware, that the effect of the agreement would prevent or lessen competition *unduly*.

A review of the enforceability of the law on conspiracies is revealing.

The Enforceability of Section 45

Competition law experts believe, almost unanimously, that section 45, as currently written, is hard to enforce in a contested trial setting, even when applied to a "naked hard-core cartel." They also believe the two-step "market structure-behaviour" tests provide too much room for litigating irrelevant economic matters in the case of a "naked hard-core cartel." Public enforcement costs are therefore excessive. Given that these views are so widely held, the Committee sees no reason for going to great lengths to validate them. The Committee will exclusively rely on Bureau data, analyses and conclusions.[17]

I participated in a special council for the Attorney General of Canada in the Nova Scotia pharmaceutical proceedings, where we tried to bring clarification in the submissions to the Supreme Court of Canada in the early 1990s to the meaning of "undueness" in order to give broader certainty to the public and to the Bureau. And my own view today is that despite all those good intentions, section 45 really does warrant priority consideration. The reasons are … [i]t is both under- and over-inclusive. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

[Canada is] the only jurisdiction in the world that requires the level of analysis in order to prove a conviction under section 45. Most jurisdictions, … Europe, the United States, Australia, New Zealand, South Africa, … have adopted a per se approach to hard-core cartel behaviour, while providing for a civil track approach … to deal with strategic alliances … [Robert Russell, Borden, Ladner & Gervais, 59:09:10]

It's recognized that our standard of undueness is a partial rule of reason, but it doesn't embrace any recognition of efficiencies. Efficiencies are one of the objectives of competition law, and are something that ought to be considered in determining whether or not some action or arrangement ought to be condemned. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

17 Harry Chandler and Robert Jackson, *Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act*, Competition Bureau, http://strategis.ic.gc.ca/SSG/ct01767e.html, May 2000. The Committee relies on the authors' assertion that none of the 51 cases constituted a pro-competitive strategic alliance.

[O]f the 22 contested cases, three were successful. Is every Department of Justice lawyer or those retained from the outside incompetent? No. The provision is a criminal standard. It requires, beyond a reasonable doubt, the proving of all the elements. That standard should be maintained. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

The Competition Bureau reports that 51 cases have been prosecuted under section 45 or its predecessor between 1980 and 2000. Almost 60% of these cases (29 of 51) resulted in a guilty plea. The conviction rate in contested trials was exceptionally low, somewhere between 10% and 15% (3 of 22). The Bureau estimates that slightly more than 35% of cases (6 of 17) were acquitted at trial or discharged at a preliminary hearing because of insufficient evidence of an agreement — the first element described above. Almost 65% of cases (11 of 17) were acquitted or discharged because of insufficient evidence of an undue lessening of competition (the second element) or of the parties' intent that the agreement would have that effect (the third and fourth elements). These data and analyses indicate that the burden of proof "beyond a reasonable doubt" is a formidable one, but the "undueness" element poses the greatest obstacle to a successful conviction under section 45.

[T]he Bureau contracted three independent studies [on the issue horizontal agreements amongst competitors]. … [T]hey all agree that hard-core cartel behaviour, such as price fixing, market sharing and output restrictions, should be a criminal offence without a competition test. [Gaston Jorré, Competition Bureau, 64:09:10]

The Two-Track Proposal: Criminal and Civil

At this point, the Committee must remind the reader that the object of competition policy is not about winning or losing litigated cases; it is about prescribing a framework for an efficient business sector that delivers products and services at competitive prices. We strongly believe that section 45 is meant to only apply to certain types of agreements, and the current law does not give fair warning of what type of agreement constitutes a serious indictable offence. Furthermore, although the Committee understands that writing law with so much precision as to preclude uncertainty is unattainable — watertight compartments are not possible — the law should not, at the same time, be written so loosely as to capture all horizontal agreements between competitors in achieving its objective.

There have certainly been prominent examples where the problem was evaluating the undueness of the lessening of competition. Clarifying this is the way to go, by breaking the law into two pieces — a criminal part without the word "undue" for naked price-fixing, hard-core cartels, and then a civil branch for the more complicated arrangements. [Tom Ross, University of British Columbia, 59:09:25]

As it currently stands, section 45 excessively relies on prosecutorial discretion, which can be exercised differently by different individuals, rather than on a law crafted to properly discriminate between the two forms of cooperation — an anticompetitive cartel arrangement and a competitively benign or pro-competitive strategic alliance. By the same token, the Committee does not think it is appropriate for criminal liability, which may involve fines and jail terms, to depend on a court's assessment of complex economic factors — such as the cross-price elasticity of demand, the height of barriers to entry in the industry, the extent of sunk costs, the strength of other competitors or potential competitors, market power, etc. — that a court is not well suited to judge.

I don't see any basis for treating one type of horizontal arrangement, such as a merger, analytically differently from another type … such as strategic alliance. … So outside what would be the new criminal track under a revised two-track approach to conspiracies … you would … have … the same efficiency provision … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Advocates for change have successfully persuaded this Committee to accept this view; in all respects, change is long overdue. The conspiracy provision of the *Competition Act* must be reformed to reflect modern business tendencies to form strategic alliances and joint ventures, circumstances in which the current Act is unnecessarily restrictive, while at the same time being under-restrictive in clearly anticompetitive cases. The Committee, therefore, recommends:

12. That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.

[Y]our interim report suggested if we go the two-track approach, the hard-core criminal per se provision might be limited to price-fixing and output restrictions. I would encourage you to expand that list to include market allocation — and by that I mean geographic market allocation and customer allocation — as well as certain types of group boycotts, such as group boycotts in support of price-fixing or keeping new entrants out of the market. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:45]

The Criminal Track

The necessary elements in a contested section 45 case must accurately reflect contemporary economic thinking on conspiracies; they should not require excessive labouring on irrelevant economic factors coincidental to the agreement or to the industry under scrutiny. We believe that a conspiracy should be a per se criminal offence and should be guided by the simple and pertinent facts of the case at hand. The Committee, therefore, recommends:

When we're going to go after hard-core cartel behaviour the standard should be met, but we shouldn't have to go into the economic effects. That's what every other regime in the world has done. Per se simply means if I engage in a price-fixing arrangement, you don't have to look to see whether it has an anti-competitive effect, with the huge cost of litigation that goes to that issue, because that is the main issue. [Robert Russell, Borden, Ladner & Gervais, 59:09:35]

I strongly favour reform of section 45, to narrow its criminal law focus to hard-core cartel behaviour activity, such as price fixing, customer and territorial allocations, and production curtailment. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

13. That the Government of Canada repeal the term “unduly” from the conspiracy provision (section 45) of the *Competition Act*.

A per se criminal offence without a provision for exceptions would cast a wide net — too wide a net. Horizontal agreements other than that of a cartel would be captured by a strict per se offence. Therefore, a provision for exceptions is necessary. Although recognizing that a long list may have to be drawn to sufficiently reduce the uncertainty surrounding such a specific prohibition, the Committee believes the best approach for an exception would be based, rather than a so-called laundry list of items, on guiding principles. These guiding principles would be premised on known characteristics of a pro-competitive horizontal agreement, such as the existence of economic factors, other than the restraint in question, incorporated into the agreement. Other economic factors would include efficiencies (whether technical or organizational) and innovation. The Committee, therefore, recommends:

[Y]ou need to be careful. The United States, as we all know, has a per se offence, but it is judge-interpreted. It is not statutorily defined. I think you also need to watch that the exemptions don’t overwhelm what you’re catching. [Lawson Hunter, Stikeman Elliott, 59:09:20]

14. That the Government of Canada amend the *Competition Act* by adding paragraphs to section 45 that would provide for exceptions based on factors such as: (1) the restraint is part of a broader agreement that is likely to generate efficiencies or foster innovation; and (2) the restraint is reasonably necessary to achieve these efficiencies or cultivate innovation. The onus of proof, based on the “beyond a reasonable doubt” standard, for such an exception would be placed on the proponents of the agreement.

The Committee further recognizes that the two-track approach of pursuing horizontal agreements between competitors provides considerable prosecutorial discretion — although less than provided under the current law. To limit this discretion, the Committee recommends:

[C]reating that sort of bifurcated approach puts an incredible amount of discretion and authority into the hands of the Commissioner. … If you think of a situation where there is a conspiracy that could go one way or the other … the Commissioner would have incredible authority to say, for instance, if you don’t do what I like, then I will throw you on the criminal side. [Lawson Hunter, Stikeman Elliott, 59:09:20]

15. That the Government of Canada amend the *Competition Act* to add a paragraph to section 45 that would prohibit any proceedings under subsection 45(1) against any person who is subject to an order sought under any of the relevant reviewable sections

of the *Competition Act* covering essentially the same conduct.

The Civil Track

In its *Interim Report*, the Committee suggested that the government consider modifying the abuse of dominant position provision (section 79) to allow for a civil review of horizontal agreements between competitors. This suggestion may have been premature. Although section 79 deals with joint dominance cases and could in some way be modified to accommodate horizontal agreements that fall under the joint dominance category, we believe that such modifications should not be made. The nature of these horizontal agreements is fundamentally different and incompatible with practices that would be considered potentially abusive behaviour. In other words, a proposed agreement between competitors that may restrict competition only in an ancillary way is an agreement between allies; it is not about an abuser-victim relationship. Consequently, modifications to section 79 to accommodate horizontal agreements that may or may not be anticompetitive may not be the most effective way of pursuing these agreements, and, at the same time, such an approach may risk a loss in effectiveness in pursuing abuse of dominance cases. Indeed, two instruments designed to target two different types of behaviour would be the prudent approach to take.

[I]t may be that two pharmaceutical companies need to collaborate in the development of the vaccine and need to fix the price for some short period of time to recoup the development costs. That sort of activity would be examined as a strategic alliance and may be exempt. [Robert Russell, Borden, Ladner & Gervais, 59:09:15]

It strikes me that it will be better if … we can look at these arrangements the same way we look at mergers, with the full panoply of economic analysis ... [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

The Committee is also reluctant to propose that these agreements be afforded a section 92 through 96 merger review. A horizontal agreement may not easily meet the definition given a merger under section 91 and there is no compelling reason dictating that we modify one to accommodate the other when unforeseen consequences may inadvertently arise. Nevertheless, a strategic alliance should be afforded a similar review to that of a merger. The Committee, therefore, recommends:

Our proposal was to focus on the question of whether the agreement was … in … substance price-fixing … or price-fixing element only ancillary to some larger agreement that itself would not be found in violation of section 45. If it were just ancillary to a larger agreement, then the whole agreement would go down the civil track and be reviewed, very much like a merger. [Tom Ross, University of British Columbia, 59:09:30]

16. That the Government of Canada amend the civilly reviewable section of the *Competition Act* to add a new strategic alliance section for the review of a horizontal agreement between competitors. Such a section should, as much as possible, afford the

same treatment as the merger review provisions (sections 92 through 96), and should authorize the Commissioner of Competition to apply to the Competition Tribunal with respect to such agreements that have or are likely to have the effect of "preventing or lessening competition substantially" in a market.

[In the] merger provisions of the Act, we have a considerable degree of turmoil now in understanding what the objective … is in terms of recognizing economic efficiency … it's rather premature to try to extend the notion of efficiency to other sections of the Act … until we know … what the view of Parliament is on the role of efficiency in competition law. [Roger Ware, Queen's University, 59:12:15]

The Committee intends that this new section only apply to horizontal agreements between competitors, whether suppliers or buyers, and not to vertical agreements, i.e., agreements between a seller and many buyers or between a buyer and many sellers. The Committee, therefore, recommends:

17. That the Government of Canada ensure that its newly proposed civilly reviewable section dealing with strategic alliances, as found in recommendation 16, apply to agreements between competing buyers and sellers, but not to vertical agreements such as those subject to review under sections 61 and 77 of the *Competition Act*.

In addition to the prospect of a fine or incarceration for committing a criminal offence under the Act, would-be offenders must also consider that (if they are convicted) they may also be ordered to pay monetary damages to any person suffering loss as a result of their criminal conduct. The Committee is aware that moving a practice from criminal treatment and subjecting it to civil review will remove the availability of damages awards under section 36 of the Act. This could have an adverse impact on deterrence and compliance, since it lowers the potential "cost" to the offender of engaging in the conduct. This would not be the case, of course, if the government amends the Act to permit the Tribunal to award damages (as set out in recommendation 8).

[O]utside what would be the new criminal track under a revised two-track approach to conspiracies … you would want to have basically the same efficiency provision … But the nature of that efficiency provision would have to be different from the one we have today in section 96, which never worked for almost 10 years … [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

At the same time, however, it does not appear to be the case that damages are commonly awarded as a result of a criminal conviction, and for that reason we do not wish to overstate their value as a deterrent. The Committee believes that, for the same reasons that it is inappropriate to treat certain pricing practices under criminal law, it is equally inappropriate to permit a remedy of damages to attach to such conduct. If we were to permit damages awards with respect to only a few select practices, but not to other civilly reviewable matters, inconsistency would result in the Act. This underscores the importance of extending the right to claim damages under all civil practices, including those for which transfer into the civil steam is recommended.

When you go down that road and look at that bifurcated model for section 45, … I would alert you to the fact that as the law is currently cast, all activity within the criminal part of the Act can be the basis for a claim for damages. To the extent you remove any part of that activity and put it into the civil part of the Act, it will no longer be subject to a possible claim for damages. It's something you might want to factor into your deliberations. [George Addy, Osler, Hoskin & Harcourt, 59:12:30]

Given the numerous changes we are recommending, the Competition Bureau's Strategic Alliance Bulletin will have to be thoroughly reworked and upgraded to the status of enforcement guidelines. The business community, in the absence of jurisprudence, will need ample guidance from the Commissioner on how the Bureau will treat horizontal agreements between competitors. The Committee, therefore, recommends:

18. That the Competition Bureau establish, publish and disseminate enforcement guidelines on conspiracies, strategic alliances and other horizontal agreements between competitors that are consistent with recommendations 12 through 17 that would amend the *Competition Act*.

Strategic Alliances and a Pre-Clearance Process

As stated above, the Committee accepts the general proposition that no conspiracy law can be written with perfect precision; a number of pro-competitive horizontal agreements will be inadvertently caught by any per se provision, no matter how carefully it is written. The above exception provides some measure of certainty for some contemplated pro-competitive horizontal agreements, yet more is needed to reduce the uncertainty and "chilling effect" that arises in some of the more controversial or borderline agreements. A systematic way of reducing or eliminating a horizontal agreement's prospective liability to criminal sanctions prior to being consummated is required. On this point, there have been two suggestions: a notification process and a pre-clearance process.

Others have suggested approaches based on whether the agreement itself is public. If it were a public agreement, it would get the civil review, whereas secretive agreements would be viewed as per se, illegal, and there are other approaches as well. [Tom Ross, University of British Columbia, 59:09:35]

The notification system would prohibit all secret or covert conspiracies to directly or indirectly fix prices, but would provide an exemption from subsection 45(1) to all overt horizontal agreements provided that their proponents notify the Bureau before the agreement takes effect. Major deviations from the original agreement would be subject to criminal prosecution. The notification of such an agreement would be optional; there would be no obligation to disclose the facts of any agreement. The Commissioner would also be entitled to request additional information in order to determine whether the agreement should be opposed or altered under a civil proceedings or, as others have coined it, the civil track.

The pre-clearance system would operate much like the advance ruling certificate for mergers pursuant to section 102 of the *Competition Act*. This would be a voluntary reporting system, with a limited cost-recovery fee assessed in return for providing an advance ruling. Under such a system, the Commissioner of Competition would be authorized to issue a clearance certificate if he is satisfied that the agreement, as proposed and implemented, does not substantially lessen competition or poses a threat under section 45 or under the newly proposed civil track. The certificate might or might not grant a time-limited exception from criminal liability and, like the notification system, major deviations from the original agreement would be subject to criminal prosecution.

[T]here have been a number of suggestions that the salvation for some trade-restraining agreements would be the public notification of those agreements that would enable the parties to them to be assured that they wouldn't be challenged. As a policy matter, I think it's undesirable to have agreements that are in contradiction to our general principles simply on the theory — a naive one, I think — that public disclosure of them will deter people from dealing with people who have entered into these kinds of restrictive arrangements. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:20]

The Committee is of the opinion that both systems have their advantages and disadvantages; however, for a number of reasons, we favour a pre-clearance system. Such a system provides more assurance that contrived or "dressed up" cartel agreements will not slip through the cracks. The Committee, therefore, recommends:

19. That the Government of Canada amend the *Competition Act* to allow for a voluntary pre-clearance system that would screen out competitively benign or pro-competitive horizontal agreements between competitors from criminal liability pursuant to subsection 45(1) of the Act. That the Competition Bureau levy a fee on application for a pre-clearance certificate that would be based on cost-recovery principles similar to that of a merger review. That a reasonable time limit upon application for a certificate be imposed on the Commissioner of Competition, failing

which the applicant is deemed to have been granted a certificate.

In the case where the Commissioner does not grant a pre-clearance certificate, the applicant should be given fair hearing before the Tribunal. The Committee, therefore, recommends:

The experience in other jurisdictions will evidence the fact that lawyers are very clever in the way they write up these arrangements, and describe them using obfuscation and confusing legal documents or burying the filings with the appropriate agency such that people really don't have a good understanding of what in fact is being disclosed. [Tim Kennish, Osler, Hoskin & Harcourt, 59:10:25]

20. That the Government of Canada amend the *Competition Act* to allow individuals who have been refused a pre-clearance certificate for a horizontal agreement between competitors by the Commissioner of Competition be given standing before the Competition Tribunal for a fair hearing on the proposed agreement. That such standing be granted only if the agreement remains proposed and has not been completed.

CHAPTER 5: THE ANTICOMPETITIVE PRICING PROVISIONS

Predatory Pricing

Predatory behaviour occurs when a firm temporarily lowers its prices or expands output or capacity in an attempt to deter new competitors from entering the market or to drive out or discipline competitors who are already there. In all three cases, the predator incurs temporary losses in the expectation of, at the very least, recouping them by raising prices later and from an increased market share. Prior to the 1980s, most economists regarded predation as extremely rare because the barriers to entry in most markets were thought to be low. Consequently, it was believed that the subsequent high prices required to recoup the losses suffered in the predatory period would not be sustainable in the face of new entrants. Moreover, predation would be very expensive; the “prey” would be aware that the period of lower prices would be costly for the predator and might hold on in the hope of eventual profits (in the case of efficient capital markets), or to see the predator attempt to buy it out. Only in the extremely rare event that the predator had greater and better access to external capital would a predatory campaign pay off; although even a takeover or merger would generally be a more successful way of monopolizing the market.

I also would like to commend the Committee for its initiative in taking on reforms … to sections 50, 61, and 75, which have needed attention for a long time. [Donald McFetridge, Carleton University, 59:10:00]

In section 50, where we have the vague wording “at prices unreasonably low”, we don’t have much jurisprudence … to give an interpretation of it. [Douglas West, University of Alberta, 59:10:40]

Recent economic research, however, challenges this long-held position on the grounds that predation may be a more frequent occurrence than previously thought. Some believe the practice, although still infrequent, is not rare.

Predatory pricing is a criminal offence under paragraph 50(1)(*c*) of the *Competition Act*. Several elements must be established before an offence is proven. The alleged predator must be engaged in a business and have adopted a policy of selling products at prices that are unreasonably low. Both the “policy” requirement and the “unreasonably low” price requirement have raised difficult

[W]ith predatory pricing … [E]very case in Canada has failed because cost isn’t properly defined. [Robert Russell, Borden, Ladner & Gervais, 59:10:35]

issues of interpretation. With respect to a policy, one of the following four requirements must be met:

1. It must have the effect or tendency of substantially lessening competition.
2. It must have the effect or tendency of eliminating a competitor.
3. It must be designed to substantially lessen competition.
4. It must be designed to eliminate a competitor.

[T]he Tribunal is dealing with the generic question about avoidable cost: what is avoidable cost, timing issues related to avoidable cost, when the cost became avoidable, and what revenues to consider as part of the test. [Douglas West, University of Alberta, 59:11:40]

The Committee was told that, as simple as the above definition seems, predatory pricing and behaviour are much more complicated to establish in practice. The firm's broad scope in pricing its services (in the case where its marginal cost can approach zero) makes it extremely difficult to distinguish predatory pricing from aggressive price competition. In the case of perishable goods, whose marginal cost is often as close to zero as you can get, selling below cost is a perfectly legitimate business practice.

Indeed, modern thinking even questions whether the hard-to-define marginal cost concept is the appropriate test of predatory pricing. The Committee was told to consider the case of Amazon.com; founded in 1995, the firm has yet to price above cost. Amazon.com is pricing less than its cost, but it is not engaged in predatory pricing. Through low prices, it is investing in a future market share as a new innovator. So there is a temporal aspect to pricing that may not be properly accounted for in the current cost test of predatory pricing.

[W]e create penalties, and the whole point of enforcement is to discourage people from doing bad things. … So a few successful cases on predatory pricing, no matter how long they take, might create the right kinds of incentives to get … the right enforcement stance on predatory pricing. We don't need regulatory powers from the Commissioner to do that. [Roger Ware, Queen's University, 59:12:15]

This example of below-cost pricing which is not predatory pricing was further extended to apply to simple goods such as a razor and razor blades or a number of other complementary products. Apparently, pricing razors below their accounting measures of cost makes good economic sense when it leads to greater sales of razor blades and ultimately greater profit. In this case, what should be compared to today's price is the following: today's average variable cost minus the present value of the firm's expected increased gross margin per unit in the future that is attributable to the low pricing policy. Needless to say, when the investigator has gathered this last bit of information, the "prey" will have given up the struggle. Clearly, economic theory, as a practical guide to enforcement of predatory pricing, leaves something to be desired.

The VanDuzer Report was sceptical of both the legal framework and its economic underpinnings:

> Designing rules to deal effectively with predation is the thorniest problem related to anticompetitive pricing practices. The effects can be devastating but are extremely difficult to distinguish from the effects of aggressive competition, even with the expenditure of substantial resources. One thing seems clear, the existing criminal provision, suffers from some serious defects as an instrument to provide relief in circumstances where predation exists.[18]

A consensus of competition law experts supports the VanDuzer Report's proposed solution:

> Dealing with predation under section 79 is one solution to these problems. As prescribed by economic analysis … section 79 imposes market power as a threshold for obtaining relief. The abuse provision offers the lower civil burden of proof which may be important given the inherently contestable nature of claims regarding predation.[19]

I [do] not favour the high-penalty deterrence process, because unlike a cartel situation, where it's inherently bad conduct, aggressive price competition is usually good. You're on a sounder path … where you look at moving into a more refined treatment of predation in the context of the abuse-of-dominance provisions in the Act, because it really is a species of that area of monopolization. [Neil Campbell, McMillan Binch, 59:12:15]

The VanDuzer Report suggests other advantages of shifting the prohibition under section 79:

> As well, it requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal could sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices.
>
> The abuse provision would also permit account to be taken of the particular conditions in the marketplace, including the factors discussed in relation to the new economy ... Where a market was characterized by high levels of

[18] J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 75.

[19] Ibid., p. 75.

> innovation, declining costs and network effects, low pricing which eliminated a competitor might nevertheless be found to be pro-competitive, where the pricing was part of a strategy to introduce a new and better technology and any dominance which resulted was unlikely to be sustained in the face of future innovation.[20]

However, the Commissioner of Competition, the Canadian Bar Association and a number of other stakeholders oppose this suggested change because they believe the criminal status best deters egregious anticompetitive conduct; they favour more enforcement resources, believing the double layer of protection (paragraph 50(1)(*c*) and section 79) against predatory pricing is more appropriate at this time.

[T]his notion of trying to make some changes to the predatory pricing provisions and to bring them over to the civil side … I think it's important to consider the possibility of creating a new section that deals with predatory pricing, but not necessarily under the existing wording of the abuse-of-dominance provision. [Douglas West, University of Alberta, 59:12:40]

The Committee has reservations about this last position, because there is simply insufficient case law to validate the deterrent effect of paragraph 50(1)(*c*). The Committee cannot just ignore the predatory pricing provision's inactive and ineffectual history, which includes only two contested cases (both of which are more than two decades old). Moreover, the Committee is unsure about a court being the right venue for the intricate economic analysis needed to discern between predatory and aggressive, pro-competitive pricing; the Competition Tribunal appears better able to judge this behaviour. In any event, a consensus has formed on the use of the abuse of dominant position provision as a vehicle for bringing a predatory pricing case before the legal authorities — a provision that requires that the alleged predator has "market power" and that the practice in question would "prevent or lessen competition substantially." For these reasons, the Committee recommends:

21. That the Government of Canada repeal paragraphs 50(1)(*b*) and 50(1)(*c*) of the *Competition Act* and amend the Act to include predatory pricing as an anticompetitive act within the abuse of dominant position provision (section 79).

[20] Ibid., p. 75.

Price Maintenance

Price maintenance is the practice whereby a firm attempts to either set or influence upward the minimum price at which another firm further down the manufacturer-wholesaler-retailer distribution chain can sell its product. Although resale price maintenance is not a pervasive practice throughout the business sector, it is one of the most common pricing restraints found in the marketplace. It may take place either vertically, for example between a wholesale supplier and a retailer that resells the supplier's products, or horizontally, for example between competitors who agree to impose resale price maintenance on those who resell their products.

In terms of vertical price maintenance, typically the example given would be ... Say, for example in the electronics industry, … You can sit down, you can go into a sound room, and you can listen to a whole bunch of different types of speakers. You can listen to a bunch of different types of CD players. You can get a real feel for the quality differences. But it costs … a lot of money to put that sound room in place. If somebody else could come along and free ride off that by locating down the street or a few blocks away, selling exactly the same products but at a substantially reduced price, … [the service providing store] wouldn't be able to continue to provide the consumer with the benefit of that. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

Since 1951, following the recommendations of the MacQuarrie Commission, price maintenance has been a criminal offence under section 61 of the Act. Thus, it is illegal for any person engaged in a business to try to "influence upward or discourage the reduction" of the price at which someone else engaged in a business sells the product by "any agreement, threat, promise or like means." In 1960, the law was amended to add the current defences to the related offence of refusing to supply a customer because of the customer's low pricing policy. These defences are listed in subsection 61(10) as:

- using products supplied as loss leaders (the "*Loss Leader Defence"*);
- using products supplied not for the purpose of selling them for a profit but to attract customers to buy a rival's products (the "*Bait and Switch Defence*");
- engaging in misleading advertising in respect of the products supplied; and
- not providing the level of service that purchasers of the products might reasonably expect (the "*Service Defence*").

So the pro-competitive aspect of it, of resale price maintenance is it provide dealers with a margin to invest in providing services, to expand the demand for the product. … when you expand the demand for the product, you increase aggregate wealth in the economy. So it's pro-competitive in that sense. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

On the other hand, requests, discussions, moral suasion, or suggestions to this end are considered to be much the same as setting a suggested list price and are permissible (subsection 61(3)). Similarly, under subsection 61(4), if the suggested price appears in an advertisement, it must be expressed in such a way that it is clear to any person who looks at the advertisement that the product may be sold at a lower price; otherwise the supplier will be found to have attempted to influence the price upward.

In any vertical relationship, let's say between a manufacturer and a distributor, suppose the manufacturer owned the distributor? Then they could decide whatever terms and conditions they wanted that product to be sold under, including price, the quality of the sales personnel, their qualifications. The manufacturer could determine everything down to the lighting in the store. And we wouldn't consider that to be anti-competitive. So why would we consider it to be anti-competitive if Sony tried to do some of those things at arm's length? [Roger Ware, Queen's University, 65:12:30]

The Committee is more easily convinced of the economic rationale for prohibiting horizontal price maintenance. Where suppliers agree among themselves to set the resale price of their products, price competition among downstream competitors is precluded. Where the resale price is the more visible of the two, the maintenance of that price may facilitate collusion among suppliers. By subtracting the retailer and wholesaler profit margins from the minimum fixed retail price, manufacturers in effect fix their own prices of the product. The Committee was also made aware that resale price maintenance could facilitate the work of a retailer cartel. History suggests that this had long been the case of pharmaceutical retailers whereby drug stores pressured manufacturers of the products they carried to impose resale price maintenance.

You take price maintenance. We have a very strict law here. There's no necessity for an agreement to be in place … The necessity for agreement in U.S. law allows the so called Colgate doctrine, which means: they can unilaterally sell, you won't sell my product for less than, you just can't have an agreement. … So price maintenance that would be unlawful in Canada occurs in the U.S. all the time. That's a cross-border legal issue that I have to deal with monthly … [because] the law is different here. [Robert Russell, Borden, Ladner & Gervais, 65:11:15]

Vertical price maintenance is less obviously an anticompetitive act. The classical example of such price maintenance is where a supplier requires someone to whom it sells, perhaps a retailer but also a wholesaler, to maintain prices at a particular level as a way of encouraging that retailer or wholesaler to engage in competition on something other than price. A higher retail margin thus encouraged the retailer to engage in providing a high level of service to clients or to ensure that the brand image associated with the product is maintained and not sullied in any way.

[P]rice maintenance provision which deals with these vertical pricing arrangements you're talking about is a very effective section for us. [R.W. McCrone, Competition Bureau, 64:09:40]

From the consumer's perspective, vertical price maintenance results in more services, which we would regard as good, but higher prices, which we would view as bad. The Committee was told that, on balance, the decision of how to market a product and how to design a distribution system should be left up to the manufacturer. Prohibiting resale price maintenance under the per se rule is effectively regulating the manufacturer's decisions on how best to maximize the sale of his products. By way of an analogy, we do not prohibit by law high levels of advertising even when such advertising raises prices; for the same reason we should not prohibit vertical price maintenance under a per se rule. So to the extent that there are efficiency justifications for price maintenance, the per se criminal prohibition in the Act is over-inclusive.

I just don't agree that criminal prohibition is warranted, especially where there is no requirement for demonstrating adverse effects on competition. They have to be presumed and … there are many potential circumstances in which there are pro-competitive benefits that come from it. In the vertical situation we're not talking about controlling the price of a product amongst all the competitors, we're talking about controlling perhaps the pricing and positioning of the product from one supplier which is going to be disciplined by other parties in the marketplace if in fact they're not dominant. [Tim Kennish, Osler, Hoskin & Harcourt, 65:12:35]

All witnesses, except Bureau officials, who commented on price maintenance had a recurring theme: vertical price maintenance should be decriminalized and horizontal price maintenance should be moved to the conspiracy provision. The Bureau, the lone dissenter, could only offer a higher success rate when prosecuting under a per se offence as its reason for departing from expert opinion. The Committee, however, must remind everyone that competition policy is not about winning and losing cases; it is about designing a framework whereby an efficient business sector can deliver products and services at competitive prices. Moreover, the Committee sees no social benefit in risking convictions of, and a "chilling effect" on, pro-competitive vertical price maintenance under the criminal section of the Act, when the civil section offers a more reasonable approach and a better result. In decriminalizing vertical price maintenance, competition experts suggested that shifting this act under the abuse of dominant position provision (section 79) would be the preferred route. In this way, the treatment of vertical price maintenance under the law will better conform to contemporary economic thinking.

[I]n the area of pricing practices … [y]ou've had the benefit of Professor VanDuzer's detailed report, which has examined the fact that some of those laws are economically no longer really very modern. [Neil Campbell, McMillan Binch, 59:11:25]

The Committee understands that a section 79 review has two advantages: the practice would receive a full hearing on its likely economic effects and would also be subject to a lower burden of proof (from "beyond a reasonable doubt" to "on the balance of probabilities"). Another difference, which could be an advantage or a disadvantage depending on one's perspective, is that section 79 will require an assessment of the market power of the individual firm engaging in price maintenance. According to the VanDuzer Report, the market power test is an advantage because economic factors can easily be identified for discerning anticompetitive from pro-competitive cases. Indeed, the VanDuzer Report suggests three economic indicators of anticompetitive vertical price maintenance:

I would encourage you … to look at the decriminalization of the pricing practices … those laws are out of date and out of sync with good economics. [Neil Campbell, McMillan Binch, 59:12:40]

1. The person implementing price maintenance (the "Supplier") has market power, which suggests that customers may have limited opportunities to switch suppliers.

2. The Supplier does not have an efficiency-based justification, such as the desire to increase service or prevent brand-impairing practices, which would include "loss leadering" or misleading advertising.

[There] is the need to reform the arcane criminal provisions in the Act — not just section 45, but many of the provisions relating to the pricing practices, including predatory pricing, price discrimination, and price maintenance. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:11:15]

3. The Supplier was induced to implement price maintenance in relation to one customer by another customer who competes with the first.[21]

At the same time, the VanDuzer Report is unsure if the section 79 market power test is appropriate for vertical price maintenance cases.

The Committee accepts all of the above reasoning. We believe that where the law can be modernized to better reflect conventional economic thinking, which in this case is able to properly distinguish between anticompetitive and pro-competitive incidences of vertical price maintenance, we should change the law. Given the recommended changes of section 79 (Chapter 6), reducing the bluntness of the Act in terms of vertical price maintenance should lessen the "chilling effect" on pro-competitive instances. The Committee, therefore, recommends:

22. That the Government of Canada repeal the price maintenance provision (section 61) of the *Competition Act*. In order to distinguish between those practices that are anticompetitive and those that are competitively benign or pro-competitive, that the Government of Canada amend the *Competition Act* so that: (1) price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provision (section 45); and (2) price maintenance agreements between a manufacturer and its distributors (i.e., vertical price maintenance) be reviewed under the abuse of dominant position provision (section 79).

When it comes to horizontal price maintenance, that ought to be dealt with under a new section 45. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

[21] Ibid., p. 44.

Price Discrimination

Price discrimination is a marketing practice whereby a supplier of goods or services charges different prices to different customers (whether other businesses or final consumers) and these price differentials do not accurately reflect differences in costs of serving the different customers. To be found discriminating on the basis of price, a firm has to meet the following conditions: (1) the firm must have market power to set prices (otherwise, consumers can choose to purchase from a competing supplier); (2) the firm must be able to identify classes of consumers with different price sensitivities; and (3) consumers have only a limited opportunity to resell to each other (otherwise, consumers would arbitrage these prices to the lower price offered).

If I were to come to you and say "I'll … come and pick the product up at your door, or I'll warehouse the product, or I'll perform some other function for you and save you money, if you give me a deal," it's arguable … whether you could give me a discount in recognition of that pro-competitive initiative. It may be that I'm just a better negotiator. That maybe I'm going to do something for you in a different market. Buy more goods on a different market from you if you give me a better discount. What [the criminal offence] does is it just chills the negotiation process ... It would be a criminal offence for you to give me a better discount. So the whole competitive process that one would normally see between supplier and customer is chilled. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:12:30]

Price discrimination is a criminal act that extends only to "sales" of "articles" under paragraph 50(1)(*a*) of the Act and to promotional allowances under section 51. These provisions were introduced in 1935 in response to concerns of unfairness to small business, particularly in the grocery subsector, with the emergence of large retail discount and chain stores and following the *Report of the Royal Commission on Price Spreads*. Because paragraph 50(1)(*a*) only applies to "sales" of "articles," leases and services are not covered. If the purchasers do not carry on business in the same market, such as the case where one is a final consumer and the other is a business, there is no offence. Volume or quantity discounts are exempted. There must be knowledge of each element of the offence. The supplier must have knowledge that the sale is discriminatory. Section 51 makes discrimination other than on the basis of price (i.e., differential access to promotional allowances) a criminal offence in some circumstances.

On price discrimination, we're really weak in Canada compared to the U.S. because in the U.S. you can discriminate in price on the basis of volume. So you can, as a store for example, buy a product for less if you buy 100 than if you buy two. It's completely arbitrary in our law. You can make a differentiation between one and two, or one and 5,000 — whatever you want — and set your price on that level. That's the law in Canada. You don't have to justify it on the basis of cost as a manufacturer. In the U.S. what you have to do is you can't discriminate unless you can justify it. [Robert Russell, Borden, Ladner & Gervais, 65:11:15]

Although price discrimination by definition means treating individuals or groups of consumers differently and may create an "unlevel playing field" when the product is an input into another product, it is not an inherently anticompetitive practice. It is often pro-competitive to charge different prices to different consumers when there are different costs attached to serving them (in the same way as volume and quantity discounts imply different costs and are not anticompetitive in and of themselves). Price discrimination may also result in additional sales, for example, to children and seniors who would not otherwise purchase the product. To the extent that the consumption of the good or service increases as a result, economic efficiency is being promoted.

Price discrimination is commonplace. For instance, a bank that offers students no-fee banking services in order to gain their loyalty later on in their lives is practising price discrimination. Many non-price techniques with similar aims to price discrimination could also be implemented to discriminate between consumers. Two classic examples are tied sales and multi-part pricing policies. The VanDuzer Report explains the tied selling technique:

There are questions as to whether the sections on predation and price discrimination, for example, should be decriminalized. People have been trying to address this for many years, and there are questions about the proper ambit of the abuse-of-dominance provision, among others. [Calvin Goldman, Davies, Ward & Beck, 59:10:50]

> At one time, IBM had a monopoly on certain types of tabulating equipment. Different customers valued IBM's equipment quite differently based on the amount that they used the equipment. However, instead of using price discrimination to get the maximum price that each customer was willing to pay, IBM forced customers to buy tabulating cards from the company, and by charging a price for tabulating cards in excess of their cost, IBM was able to discriminate among its customers according to the intensity of their use of the equipment. Block booking and commodity bundling are other examples of non-price requirements imposed by sellers that succeed in enforcing effective price discrimination.[22]

Examples of multi-part pricing techniques of executing price discrimination are: (1) cab fares that include a lump-sum fee upon engagement and charges per unit of distance and/or time; (2) newspaper, magazine, radio and television pricing with two revenue streams — one from advertisers and one from subscribers; (3) fairground entry fees and ride tolls; (4) cover charges at bars and night clubs that are in addition to prices for drinks; (5) automobile licence fees and automotive gasoline taxes; and (6) slotting fees or slotting allowances charged by retailers on top of the retail price mark-up.[23]

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22 Ibid., p. 6.

23 Most multi-part pricing policies are two-part, as they include only two sources of revenue.

The VanDuzer Report concludes that:

> There is no question that the current criminal price discrimination provision is not adequate to address anticompetitive price discrimination. The economic analysis … concludes that price discrimination is not anticompetitive in many circumstances. Whether there is any possibility that price discrimination will have an anticompetitive effect will depend on the facts of each case. The current provision does not require the discriminating supplier to have market power, a prerequisite to true discrimination, nor does it require any assessment of the effect of discrimination on competition. To this extent the provision is over-inclusive. At the same time, by failing to include discrimination in services and discrimination in forms of transactions other than sales, the provision excludes important areas of economic activity in the contemporary marketplace. In its present form, the criminal price discrimination provision is not an accurate tool for addressing anticompetitive behaviour and imposes excessive compliance and monitoring costs on business. Because price discrimination is a criminal offence, this chilling effect is exacerbated.[24]

[T]he best and most effective way to deal with predatory pricing, as well as geographic price discrimination and vertical price maintenance, is to repeal the current provisions and deal with this conduct under reinforced abuse-of-dominance provisions. By "reinforced" I mean you need to create an administrative penalty of the type you currently have in the deceptive marketing practices provisions of the Act. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

The VanDuzer Report makes a very compelling case for decriminalizing price discrimination cases, and a consensus among competition experts has followed. The Committee, therefore, recommends:

23. That the Government of Canada repeal the price discrimination provisions (paragraph 50(1)(*a*) and section 51) of the *Competition Act* and include these prohibitions under the abuse of dominant position provision (section 79). This prohibition should govern all types of products, including articles and services, and all types of transactions, not just sales.

24 J. Anthony VanDuzer and Gilles Paquet, op.cit., p. 72.

CHAPTER 6: ABUSE OF DOMINANCE

Substantive Elements

Sections 78 and 79 together form the so-called "abuse of dominance" provisions, constituting a key element of Part VIII of the *Competition Act* dealing with "reviewable practices." These sections were enacted in 1986 and replaced the previous criminal offence of being party to, or to the formation of, a monopoly.

Section 79 permits the Commissioner to apply for, and the Tribunal to make, an order prohibiting a person or persons from engaging in anticompetitive acts. Section 78 provides a list of some of these so-called "anticompetitive" acts for the purposes of invoking section 79; the list in section 78 is not exhaustive and so does not narrow the application of section 79 to only the practices specifically listed in section 78. In fact, the Tribunal has ventured outside this list on a number of occasions.

I think the Tribunal, when it has articulated the need for a market power test in the abuse-of-dominance provisions, has never gone further and told us what degree of market power you need. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Some of the anticompetitive acts contemplated in Part VIII may also be addressed, in the alternative, in criminal proceedings under section 45 or 61, or paragraph 50(1)(*c*) of the Act. The Act requires that either one approach or the other be adopted, but not both.

To get an order under section 79, the Commissioner must convince the Tribunal, on the "balance of probabilities" (the standard of proof in civil law), of three elements:

1. That one or more persons *substantially or completely controls,* throughout Canada or any area of Canada, a class or species of business.
2. That the person or persons have engaged in or are engaging in a *practice* of uncompetitive acts.
3. That the practice has had, is having, or is likely to have, the effect of *preventing* or *lessening competition substantially* in a market.

Where these three elements are present, the Tribunal may make a cease and desist order. In addition to ordering the cessation of the anticompetitive activity, the Tribunal may also, to the extent that it is reasonable and necessary to overcome the effects of the activity, make an order requiring any person to take certain action, including the divestiture of assets or shares. The order must be only for the purpose of restoring competition in the relevant market and may not be for the purpose of imposing punitive measures.

The phrase "substantial or complete control" in the first element is the same wording used in the criminal monopoly section that preceded the current abuse of dominance rules.[25] But what degree of control is "substantial"? The case law interpreting the predecessor criminal provision suggests that control must approach 100% of the relevant geographic and product market, but subsequent cases have refined this analysis considerably.

Predatory pricing can be captured under section 79…. And also we had a panel of experts who suggested that price discrimination could already be dealt with under section 79 of the civil provisions also. [R.W. McCrone, Competition Bureau, 64:09:40]

The Tribunal must, as the first step to determining whether abuse of dominance exists, define the "relevant market." Market definition has two aspects: the product market and the geographic market. Determining the relevant market for a product is a complicated undertaking, involving consideration of such factors as direct and indirect evidence of substitutability and functional interchangeability of products, trade views on what constitutes the same product, and the costs of switching from one product to another.

In addition to defining the relevant product market, the Tribunal must also define the relevant geographic market. It does so by reference to the boundaries within which competitors must be located if they are to compete with each other and where prices either tend toward uniformity or change in response to each other. The Tribunal has recognized that the relevant market (so defined) will have a significant impact on any conclusion regarding the effect of the dominant firm's behaviour on competition. In general, however, the more broadly the market is defined, the less likely it is that the firm will possess market power and that its behaviour will be found to substantially lessen competition.

25 In section 2 of the *Combines Investigation Act*.

Once the market is defined, the Tribunal will address whether there exists "substantial or complete control" over that market. The Tribunal has equated this rather ambiguous phrase to mean market power. "Market power" may be understood to be the case of a dominant player that has the ability to raise its prices (or reduce product quality) in a non-transitory way (the longer term, usually defined as two years) without suffering a loss in profit.

With respect to market power, high market share alone will not give rise to a presumption of dominance. In *Laidlaw*,[26] the Tribunal held that dominance would not be presumed where market share is below 50%. The Tribunal has yet to deal with a contested claim of dominance where the allegedly dominant firm has a market share of less than 85%. Interestingly, the 50% threshold enunciated in *Laidlaw* is higher than the 35% threshold set in the Bureau's *Merger Enforcement Guidelines* and the *Predatory Pricing Enforcement Guidelines*. More jurisprudence on this issue would be helpful.

[I]n terms of pricing provisions … The current provisions under the abuse of dominance might cover that kind of conduct, but it's a bit of a grey area because the firm that's entering the new market may not in fact be dominant in that market. The abuse-of-dominance provisions refer to a firm having substantial or complete control of a class or species of business. Now, you could try to sandwich the conduct under the abuse-of-dominance provision. It's not clear that this is what it was intended for … [Douglas West, University of Alberta, 59:12:40]

Barriers to the entry of new competition also constitute an important factor. In determining the existence of a barrier to entry, the Tribunal will examine factors such as sunk costs[27] and economies of scale, as well as technical and regulatory barriers. Sunk costs or economies of scale on their own are unlikely to be regarded as sufficient. The Tribunal must also consider the number of competitors, their relative market shares, and whether there is excess capacity in the market. Notwithstanding the guidance provided by the Tribunal in past cases, predicting when the Tribunal will find dominance will often be difficult.

The second element to be considered in section 79 is whether the practice has the effect of lessening competition substantially (this is more commonly referred to as an "SLC" test). Determining whether a practice will result, or has resulted, in an SLC is a difficult determination. What meaning is to be given to the term "substantial"? In *Nutrasweet*, approximately 90% of the market was controlled by the leading aspartame company. Although a

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26 Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992), 20 C.P.R. (3d) 289.

27 The costs that the new entrant will not recoup if he subsequently exits the market. Advertising is the most common example of a sunk cost.

high market share may suggest dominance, such a high level may not be necessary to prove dominance. The Committee anticipates that the meaning of the term will in time become clear through jurisprudence.

[Y]ou have the right … idea … with respect to modernizing and decriminalizing … the pricing provisions in the Act and moving them into … the abuse-of-dominance regime. This will provide a … coherent and single place in which you can think about those types of behaviour … where there is a competition concern as opposed to the many situations where there is not. [Neil Campbell, McMillan Binch, 59:11:25]

The final element that must be demonstrated under section 79 is a "practice of anticompetitive acts." Although "practice" was not defined in *Nutrasweet*, the Tribunal appears to have set the bar quite low, stating that a practice may exist "where there is more than an isolated act or acts." Moreover, a number of different isolated anticompetitive acts might constitute a practice when taken together.

Anticompetitive Pricing Practices: The Civil Approach

As discussed in the previous chapter, the Committee believes that the current approach of treating the practices in sections 50, 51 and 61 as criminal offences is inappropriate in the modern business environment. These provisions — owing to their possible efficiency-enhancing or pro-competitive effects — would be more effectively addressed as reviewable trade practices under Part VIII of the Act, and more specifically under the abuse of dominance rules. At the same time, as the VanDuzer Report and other commentators have suggested, there are certain conceptual difficulties in treating the pricing practices under section 79.

The first objection is that removing these practices from criminal treatment to civil review may undermine the deterrence value of treating them as criminal offences. However, the Committee believes that this same deterrence could be accomplished by empowering the Tribunal to levy monetary penalties under section 79. Furthermore, the criminal law treatment could remain in place for practices, such as hard-core cartel activity, that are without redeeming social value.

A remedy based on damages and fines seems to be a sensible deterrent. You can move that into the civil side without having the problems on the criminal side. [Jeffrey Church, University of Calgary, 59:10:55]

The second objection is not as simply understood. It requires the enunciation of a single legal test to unify under the abuse of dominant position provisions the different legal tests which the Crown, or the Commissioner as the case may be, must meet to succeed before the Court or Tribunal. In addition to the different legal tests existing under the criminal pricing sections and section 79, the different standard of proof in the criminal provisions (i.e., "beyond a reasonable doubt") must be addressed.

To obtain a conviction under paragraphs 50(1)(*b*) or 50(1)(*c*), the Crown is merely required to show that the policy has, or is designed to have, the effect of lessening competition *or* eliminating a competitor. Paragraph 50(1)(*a*) and sections 51 and 61 require only that the practice itself be proven (the per se approach) in order to secure a conviction, that is there is no need to show that a lessening of competition has occurred. In both cases, the Crown must prove the offence according to the criminal standard of proof, that is, "beyond a reasonable doubt." By removing or shifting those provisions from criminal prosecution to section 79, the Tribunal would consider the competitive effects or the efficiencies resulting from the practice, and would make its determination accordingly. The result, in the Committee's view, would be a better approach for dealing with these practices, one that is more consistent with sound economic analysis. However, if we are going to treat these practices as civil matters, it is necessary to enunciate the single test that will apply to any application brought under section 79.

[I]f you put a civil administrative penalty power into the abuse-of-dominance provisions, you would retain that deterrence effect of the law. And if you further amended the abuse-of-dominance provisions to eliminate the words "substantially or completely control", then the anti-competitive test would simply be substantial lessening of competition, which is the same test that you have right now in the predatory pricing provisions. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

The obstacles to creating a single test under section 79 to permit both criminal and civil practices to be addressed may, in fact, not be as significant in practice as the legislation suggests. With respect to paragraph 50(1)(*a*) and sections 51 and 61, the Committee has already stated that those practices should be subject to an SLC test. Moving them to section 79 would have this effect. For its part, the Bureau does not appear to have pursued conduct that does not prevent or lessen competition substantially; this suggests that such an amendment would be in line with current enforcement practice.

The thing that comes with criminal sanctions is the possibility of prison terms in some cases, so you wouldn't replace that on the civil side. Also, just the stigma of a criminal record has a deterrent effect that you wouldn't get on the civil side. I don't think, really, that fines on the criminal side and administrative penalties on the civil side are really comparable. One is clearly designed to penalize for criminal behaviour, and the other I think is more designed to encourage compliance with orders of the Tribunal. [R.W. McCrone, Competition Bureau, 64:10:30]

Furthermore, the Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* seem (the "Abuse Guidelines") to suggest that the Bureau does not consider there to be any significant difference between the thresholds. This inference is drawn from the same 35% single-firm "safe harbour" found in the criminal *Predatory Pricing Enforcement Guidelines* and the civil *Merger Enforcement Guidelines*. So this suggests that the amendment would only clarify the law and enhance its enforceability, without altering it in substance.

So the abuse-of-dominance provisions basically would have a similar anti-competitive threshold and similar deterrence power in the form of an administrative fine that the criminal provision today has, except you wouldn't have to deal with the criminal burden of proof. That's … the most effective way of dealing with not only predatory pricing but also price discrimination and the other pricing practices. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:12:25]

With respect to the "eliminating a competitor" test in paragraphs 50(1)(*b*) and 50(1)(*c*), the Committee believes that this offends the overriding spirit of the *Competition Act*, which is to preserve the process of competition and not competitors specifically. Moreover, the Bureau's *Predatory Pricing Enforcement Guideline*s and the Abuse Guidelines, make it quite clear that the focus of the Bureau's analysis is upon the likely impact of conduct on competition, not on individual competitors. Moving these practices to section 79 would make them subject to the SLC test and to the civil standard of proof. This would remove the chilling effect that currently results from treating these practices as criminal offences. Instead, the practices would be subject to a more appropriate treatment, i.e., one that takes into consideration possible efficiency gains.

For all these reasons, the Committee recommends:

24. That the Government of Canada amend the *Competition Act* by deleting paragraph 79(1)(*a*).

This amendment would bring the wording of section 79 into closer conformity with the concept of market power as it has evolved through judicial interpretation.

In fact, the Supreme Court of Canada told us we need a greater degree of market power because of the presence of those words "substantially or completely controlled." So if we get rid of those words, we simply have the general market power requirement we have with respect to all of the other provisions of the Act that have this substantial lessening of competition test, which is a lower anti-competitive threshold, and the same one that you currently have in the predatory pricing provision. So you wouldn't be losing anything by shifting over to the abuse-of-dominance provisions. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 59:13:00]

Finally, a word on guidelines. The Committee recognizes that the Bureau's current Abuse Guidelines may need to be revised and expanded in order to accommodate the expanded scope of section 79. Many issues may need to be addressed including, for example, a minimum market share for assessing market control, the best analytical framework for assessing when price discrimination and vertical price maintenance are anticompetitive acts, as well as appropriate approaches to dealing with so-called price predation in the civil context. The Committee, therefore, recommends:

25. That the Competition Bureau revise its *Enforcement Guidelines on the Abuse of Dominance Provisions* in order to be consistent with the addition of the anticompetitive pricing practices (paragraphs 50(1)(*a*) and 50(1)(*c*) and section 61) to section 79 of the *Competition Act*.

I think we have a very good abuse-of-dominance framework that applies to most industries ... The abuse guidelines that have just been issued are very well done. They're exceptional. The Bureau is to be commended for that perspective. [Jeffrey Church, University of Calgary, 59:10:15]

CHAPTER 7: MERGER REVIEW

Merger Review Process

The *Competition Act* provides for the civil review of mergers (sections 91 through 96) by the Competition Tribunal. On application by the Commissioner of Competition, the Tribunal may issue a prohibition or divestiture order with respect to a merger that is deemed to prevent or lessen competition substantially. However, before such orders are granted, varied or denied by the Tribunal, a well-established review process must take place. As a starting point, the Committee will provide a simple sketch of this merger review process, which will provide the necessary background to comment on the operations and enforcement of the merger provisions in the Act.

On the other issue, from an enforcement perspective, there's a lot of discussion in the business about how few cases there are and how much guidance is available to the public at large and the business and consumer legal communities about how decisions are made. This issue has been debated probably longer than private access, but I think it's time we institute some form of formal decision publication process. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

Section 91 of the *Competition Act* sets forth the definition of a "merger," which is deemed to occur when direct or indirect control over, or significant interest in, the whole or a part of a business of another person is acquired or established. The principal issue in this section is the interpretation of the words "significant interest," which is considered to occur when a person acquires or establishes the ability to materially influence the economic behaviour of the business of a second person (i.e., block Director resolutions or make executive decisions relating to pricing, purchasing, distribution, marketing or investment). In general, a direct or indirect holding of less than a 10% voting interest in another entity will not be considered a significant interest. However, a significant interest may be acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving incorporated or non-incorporated entities.

The EU has a process where, even though a transaction isn't challenged, a decision is released describing how the agency went through its review, what its findings were, and what it considered important or not important. I think that would serve as a very useful public information service for the Bureau to adopt. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

In general, a merger will be found to be likely to prevent or lessen competition substantially when the parties to the merger would more likely be in a position to exercise a materially greater degree of market power in a substantial part of a market for two years or more. Market power can be exercised unilaterally or interdependently with other competitors and its ascertainment will be determined according to the following Bureau screening processes:

The Bureau does publish, in each merger case, aspects of its decision. What people are saying is there's not enough core analysis necessarily there for us to judge the next case. The contest, however, is how much can you disclose of the confidential information that gives rise to the analysis? [Robert Russell, Borden, Ladner & Gervais, 59:12:05]

1. The Bureau will define the relevant markets, each of which consists of determining substitute products and services of rivals of the merging parties, both from a product and a geographic dimension. This will include all products and services that customers would likely turn to in response to a small but significant, non-transitory increase in prices or a reduction in quality and variety of the products or services offered by the merging parties (the "hypothetical monopolist" test of a 5% price increase for up to two years). The geographic dimension of the market would be determined similarly; therefore, it is likely that different products will have different geographic dimensions.

2. The Bureau will then calculate and analyze market share and concentration thresholds to distinguish markets that are unlikely to be anticompetitive. The markets that do not surpass the requisite thresholds (so-called "safe harbours") will be screened out. The unilateral exercise of market power threshold is 35% of the post-merger pro-forma market share of the merging parties (sales volume or production capacity). The interdependent exercise of market power threshold incorporates a 65% market share held by the four largest firms in a post-merger market and a 10% market share held by either of the merging parties.[28]

[W]hen you're sitting in the room negotiating the resolution, you also talk about what should be published, and it can interfere with some of the remedy. If you're having to divest of a core asset, if you put too much out there, it becomes a fire sale, which makes it more difficult to resolve. If you're going to give me a penny for my asset or $100 million for my asset, you're going to have a different negotiation coming up with a resolution. [Robert Russell, Borden, Ladner & Gervais, 59:12:10]

3. Given that the Act requires that the Tribunal shall not find that a proposed merger prevents or lessens competition substantially solely on the basis of evidence of concentration or market share, a complete competitive effects analysis will then be performed on those markets where the shares of the merging parties' sales or production surpassed the "safe harbour" thresholds. The Bureau will evaluate many relevant factors, as listed in section 93, such as: foreign competition, availability of acceptable substitutes, barriers to entry, absolute cost advantages, sunk or irrecoverable costs, the time it would take a potential competitor to become an effective competitor, effective

[28] There is no economic rationale for these thresholds over that of others. Simply put, an effective merger review process demands market share anchors, but why these thresholds were chosen over others has never been made clear.

remaining competition, the removal of a vigorous and effective competitor, change and innovation, business failure and exit, and other criteria.

4. The Act recognizes that changes in regulations, developments in new technologies, and the sweeping forces of globalization will have implications on the structure of industry. If the elements of the efficiency exception (section 96) are met (these are cost savings to the economy and are not merely purchasing power savings due to any enhanced ability to squeeze better prices out of a supplier, and that these efficiencies could not be attained if the merger did not proceed), where they would "offset" or are "greater than" the anticompetitive concerns, the Bureau would not pursue the merger any further. The onus of proof of this exception before the Tribunal is put on the merging parties.

[U]nder a total surplus approach, the Competition Tribunal would be prohibited from issuing an order in respect of an anti-competitive merger if it found that the overall effect of the merger on the economy likely would be positive. In other words, if the gain to producers resulting from the cost savings and other efficiency gains likely to be brought about by the merger were greater than the loss to society attributed to the anti-competitive effects, the Tribunal would not … issue an order in respect of the merger. In this very complicated analysis, wealth transfers from consumers to producers are treated as neutral, because they have no bearing on the aggregate level of wealth in the economy. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:11:55]

Merger Review Workload and Service Standards

Virtually every witness appearing before the Committee admitted that the Bureau has faced an unprecedented number of merger reviews over the past several years, which has, and continues to put, extraordinary pressure on its Mergers Branch staff. Table 7.1 provides the data to back up the first part of this claim. Excluding asset securitizations (which, since 1999, have been exempted from filing), merger filings have hovered about 340 per annum in the past four years, which is up more than 70% from the average of about 200 filings per year recorded in the first half of the 1990s. So the trend is definitely up over the past decade, but it is also up over the past five years, with 373 mergers being filed in 2000-2001, the highest ever.

I have submitted for consideration a one-month initial review followed by a four-month timeframe. If, after the first month, the Bureau does not go into a full-scale investigative mode, the merger is cleared. If they do go into that mode, then there is a fixed period … of four months … to complete the Bureau's investigation. [Calvin Goldman, Davies, Ward & Beck, 59:09:20]

I recommended earlier that in the area of merger review consideration be given to trying to define the time periods with statutory certainty so that business persons engaged in transactions, third parties interested in transactions and making submissions to the Bureau, … know there are fixed time periods, as opposed to the current service standard guidelines …This would promote certainty. [Calvin Goldman, Davies, Ward & Beck, 59:09:15]

Table 7.1
Number of Transactions (%) — 1995-2001

Business Line	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001
Pre-merger Notification Filing	57	58	84	109	92	73
Advance Ruling Certificate Request	117	181	219	174	209	255
Other Examinations	17	23	17	26	60	45
Sub-total	**191**	**262**	**320**	**309**	**361**	**373**
Securitization	36	52	72	52	64	0
Total	**227**	**314**	**392**	**361**	**425**	**373**

Source: Competition Bureau Merger Branch, *Merger Review Performance Report June 2001*, 2001.

Data submitted to the Committee provides evidence of the second part of the claim. The Mergers Branch at the Bureau averaged 38 full-time equivalent person-years in the early 1990s, but has gradually increased to 57 in 2000-2001. Therefore, the Bureau's Mergers Branch has grown by just less than 50% over the employment levels of the early 1990s, which is significantly below the merger filings growth rate of more than 85% in the same period.[29] Moreover, Table 7.2 indicates that the complexity of mergers that the Bureau has had to review is also increasing. Complex mergers and very complex mergers, which are increasingly resource intensive, have augmented their respective shares in the past four years by 4% each. Although non-complex mergers make up the vast majority of cases under review (between 80-90%), their share of total reviews undertaken by the Bureau has declined substantially in the past four years. This trend, the Bureau claims, is due largely to globalization and the inherent complexities associated with multi-jurisdictional cases.

It will be interesting, now that this merger wave is sort of down, to see how resources are reallocated. As a result of that, it is certainly true that the other areas of the organization, such as the civil reviewable practices areas and conspiracy, are not nearly as well funded relative to other international comparisons. [Margaret Sanderson, Charles River Associates, 59:11:20]

[29] Competition Bureau Merger Branch, *Merger Review Performance Report June 2001*, 2001.

Table 7.2
Number of Cases by Level of Complexity (%)
1997-2001

Complexity	1997-1998	1998-1999	1999-2000	2000-2001
Non-complex	68 (89%)	212 (77%)	232 (80%)	282 (81%)
Complex	8 (11%)	56 (20%)	49 (17%)	53 (15%)
Very Complex	0 (0%)	6 (2%)	8 (3%)	14 (4%)
Total	**76 (100%)**	**274 (100%)**	**289 (100%)**	**349 (100%)**

Source: Competition Bureau Mergers Branch, *Merger Review Performance Report June 2001*, 2001.

The revenue generated from fees related to merger review has been a significant but not a fully compensatory help to the Bureau's budget constraint. The Bureau estimates that revenues from pre-merger notification, advance ruling certificates and advisory opinions will be in excess of $8.4 million in 2000-2001, $7.5 million of which will be available to the Bureau. Any fees the Bureau receives in excess of $7.5 million will be credited to the government's Consolidated Revenue Fund. Given that the direct costs of merger review is estimated to be $9.5 million for 2000-2001, merger review revenues clearly fall short of cost recovery.

[T]he Bureau's workload over the past few years has greatly increased. Unfortunately, our resources have not kept pace ... In a recent survey involving five comparable competition authorities, our Bureau had the second-lowest level of funding on a per-capita basis. Our demands continue to grow, largely due to globalization and our increased mandate. Ten years ago, the great majority of cases examined by the Bureau were domestic in nature. Today, not only are there more cases, but a very large number of them have an international dimension. This is demonstrated by the increasing number of multi-jurisdictional mergers and international cartels. [Gaston Jorré, Competition Bureau, 64:09:10]

In 1997, along with fees for certain services, the Bureau established and committed itself to meet a series of service standards when reviewing mergers. These standards are: non-complex mergers, 14 days; complex mergers, 10 weeks; and very complex, 5 months. Although the Bureau has, in a given year, met these targets 100% of the time, its performance level has varied without trend since 1997. In fiscal year 2000-2001, the Bureau met the three targets 95.7%, 92.5% and 100% of the time, respectively. The average and median turnaround times for merger review have at all times been shorter than the established standard. However, in every year since 1997, a relatively small number of merger reviews has fallen well outside the target date. These poor performances appear to be isolated cases that are not the result of systemic failures, but are more likely owing to human error — errors probably committed on the part of Bureau staff and merging parties. This performance and the targeted standards, the Committee finds, are reasonable. Although there were complaints about the merger review process made to the Committee, stakeholders had not complained about this aspect.

The Committee believes that the routine merger review procedures of the Bureau are not the cause of selected protracted merger reviews of which people complain. These reviews bog down only when the Commissioner has unresolved issues with the merger (as proposed) and intense negotiation begins for restructuring the merger proposal or when seeking a consent order, or where a contested Tribunal proceeding is going to be launched. As a consequence, the Committee sees no benefit in enshrining strict deadlines for merger review in the Act, as some commentators have suggested. Indeed, the Committee sees more harm than good coming from such Act-imposed deadlines. Given an inviolable deadline, the Bureau would be forced to work more intensively on cases that are likely to run into difficulty and breach the deadline, sacrificing resources in other reviews and therefore delaying less problematic mergers. In effect, strict or Act-imposed deadlines will compress the time distribution of completed reviews, but only at the expense of higher average turnaround times.

From the Competition Bureau's perspective, it has limited resources … the Bureau is in fact fairly strapped when it comes to resources, so it has to make responsible decisions as to how it deploys those resources. It currently has case-screening criteria that would bias its decisions in favour of bringing cases that have a broader economic impact. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:10]

Merger Enforcement Record

The combination of an unexpected and uncontrollable merger review workload, growing at rates in excess of that of staffing, with that of quick turnaround times provided by the Bureau is a situation that lends itself to the perception that vigorous enforcement of the Act may have been sacrificed. The Committee will investigate.

Table 7.3 provides the Bureau's statistical record of merger enforcement under the *Competition Act*.[30] The Bureau's entire enforcement record over the 1986-2000 timeframe is included, but the data is broken down into three four-year periods to look for trends in the statistics while overcoming a small numbers problem from which the data suffers. What is clear from the statistical record is that the past four years has involved almost as many merger

[30] Data from fiscal year 2000-2001 does not include asset securitizations and is, therefore, not directly comparable.

examinations by the Bureau than that of the previous two four-year periods. Very little else can be discerned with such a high degree of confidence.

Table 7.3
Merger Enforcement Activity Under the *Competition Act* 1986-2000

Fiscal Years	1988-1992	1992-1996	1996-2000	1996-2000
Examinations Commenced	798	816	1,492	3,292
Examinations Concluded:				
As Posing No Threat Under the Act	736	776	1,443	3,094
With Monitoring	38	8	3	61
With Pre-closing Restructuring	1	-	3	6
With Post-closing Restructuring/Undertakings	6	-	10	19
With Consent Orders	3	-	5	8
Through Contested Proceedings	1	3	2	6
Abandoned by Parties as a Result of Director/Commissioner Concerns	6	12	4	27
Mergers Posing an Issue/ Examinations Concluded	6.9%	2.9%	1.8%	3.9%
Mergers Posing an Issue (Excluding Monitoring)/ Examinations Concluded	2.1%	1.9%	1.6%	2.0%
Merger Abandonment/ Mergers Posing a Threat	0.82%	1.55%	0.28%	0.87%

Source: Competition Bureau, *Annual Report of the Commissioner of Competition*, various years.

The Committee will begin its investigation by considering the perennial complaint that a contested case at the Tribunal is expensive and becoming more so. As such, one would think that the Bureau and the parties to a merger proposal would both shy away from contested proceedings and seek alternative solutions with greater frequency as the cost of a contested case rises. Although the Committee recognizes that there may be other explanations for a trend to fewer contested merger cases — particularly when we introduce qualitative information into the analysis — the data, while limited, tends to (indirectly) confirm this complaint. Four contested cases of 1,614 merger examinations were taken to the Tribunal for resolution in the two four-year periods starting in 1988 and ending in 1996. Given 1,492 merger investigations and similar vigorous enforcement, one would have expected four contested cases would have gone to the Tribunal in the 1996-2000 period; however, there were only two such cases. Therefore, the behaviours of the Commissioner and prospective merging parties suggest that contested Tribunal cases are becoming more expensive.

Virtually all the cases that have been brought in the 15-year period since the Tribunal was created and the merger provisions were decriminalized have involved mergers that had already been consummated. At that point the merging parties had every incentive to hunker down and fight. By contrast, business people invariably have no appetite whatsoever to become involved in contested proceedings where their transaction has not yet been consummated. [Paul Crampton, Davies, Ward, Phillips & Vineberg 65:09:55]

The vast majority of mergers pose no threat, or raises no issue, under the *Competition Act*. Donald G. McFetridge reports that about 1.6% of all publicly reported mergers (7.5% of those examined) between 1986 and 1994 raised an issue under the Act.[31] According to the data in Table 7.3, the number of issues raised in merger cases has further declined in the latter half of the 1990s. When one subtracts mergers in which monitoring was the chosen enforcement response by the Commissioner — because they were never later challenged or brought back under investigation — the number of mergers that raised an issue under the Act has average only 2% of examinations undertaken by the Bureau.

The Committee finds it rather curious that, except for contested proceedings, all enforcement responses fell out of favour with the Commissioner (then the Director) in the mid-1990s. However, except for monitoring, all other enforcement responses, such as pre- and post-closing restructuring/undertakings and consent orders, have come back into favour. Moreover, what the Committee finds disturbing is that the number of mergers abandoned by their proponents as a result of the position taken by the Commissioner has declined substantially over the late 1990s. For example, 18 merger proposals were abandoned by their proponents of 1,614 merger examinations undertaken by the Bureau in the two four-year periods starting in 1988 and ending in 1996. Given 1,492 merger investigations and similar vigorous enforcement by the Commissioner, one would have expected about the same number of abandonments, 18, in the 1996-2000 period; however, there were only 4 such abandonments; less than one-quarter of what would reasonably be expected.

[W]e can review any merger, no matter what the size. Where size comes in is whether you have to notify us. … And I guess … it's a trade-off … if the world were cost-free, it would be nice to look at every merger and have notification. But given the costs imposed, there has to be some level before you create a notification process, and that's why there is a threshold for notification. [Gaston Jorré, Competition Bureau, 64:09:30]

To the Committee the data suggest one of three explanations: (1) mergers have become less problematic from a competition perspective; (2) the business community at large has in the past five years come to realize that the Commissioner is a vigorous enforcer of his Act and has increasingly acquiesced to other restrictive undertakings

[31] Donald G. McFetridge, *Competition Policy Issues*, Research Paper Prepared for the Task Force on the Future of the Canadian Financial Services Sector, September 1998, p. 11.

imposed by him/her as a means of realizing their mergers; or (3) the business community has in the past five years come to realize that the Commissioner's budget is insufficient to vigorously enforce his Act and that he must acquiesce to the merging parties by seeking other non-vigorous merger enforcement methods than that of contesting them under a costly Tribunal proceedings.

It's not just the filing fee. When you notify, you have to retain counsel, you have to provide the information. You need a good adviser. [Gaston Jorré, Competition Bureau, 64:09:30]

Without qualitative information on these mergers, the Committee cannot draw definitive conclusions. However, the Committee fears that the third explanation is more likely correct and, at least in part, explains the fewer merger proposal abandonments. Somewhat paradoxically, the lack of information published on mergers that the Commissioner did not oppose as a means of protecting private and strategic market information from being made public may be providing more protection, in terms of accountability, to the Commissioner — a state of affairs that the competition law community has long complained about.

In any event, vigorous enforcement of the merger review provisions can be accomplished by providing the Bureau with adequate resources and allowing it to exercise greater selectivity in the review of mergers that are likely to pose a competition issue — recommendations that this Committee advocates.

[I]f parties to smaller transactions — mergers, for example — want to proceed with their transaction without notifying the Competition Bureau and try to fly below the radar screen, they have to take the risk that the Competition Bureau isn't going to find out about the transaction for three years, because if the Bureau does, it can bring an application to the Tribunal for up to three years and force divestiture. That's a huge risk, and business people typically do not want to assume that risk without comfort. So I find myself frequently, at any given time, having several matters on the go that involve transactions that are not above the notification thresholds, but the parties nevertheless want comfort from the Competition Bureau in the form of a no-action letter or an advance ruling certificate before they put their money on the table and proceed with the transaction. [Paul Crampton, Davies, Ward, Phillips & Vineberg, 65:10:10]

Review Thresholds

The claim that the Bureau receives insufficient funding for optimal enforcement of the Act, in particular mergers, is not new. In fact, the competition law community has made the Committee aware of this fact since it undertook its study of the *Competition Act* and its publishing of the *Interim Report*. The desire for a more complete evaluation that would consider other consequential impacts on enforcement has held the Committee from venturing beyond the call for more resources to be allocated to the Bureau. Given the concern raised in the preceding section, the Committee is now prepared to evaluate specific proposals to raise the merger review thresholds as a way of focusing scarce resources on the larger merger reviews and the enforcement of other aspects of the Act.

Since the adoption of the *Competition Act* in 1986, the parties to any significant merger — that is, a merger of a certain size as set out in the Act — are required to notify the Commissioner before closing the transaction. Although all proposed mergers may be reviewed by the Commissioner, only those mergers (i.e., asset or share acquisitions) involving more than $35 million in gross revenue from sales per annum in or from Canada, or involving more than $400 million in combined assets or sales (including affiliates) in Canada, must notify the Commissioner of the proposed transaction. The transactions threshold for amalgamations is $70 million. Both the gross sales and combined asset thresholds have remained unchanged since 1986.

One thing that would help … is the elevation of the thresholds to align them with the economic value of the threshold as it was when it first came in, in 1988. In 1988 a $35 million threshold on the transaction size was put in place. … In the meantime, the value of the dollar has eroded by more than a third, and if we were to make that adjustment today, I think it would release from the system, from the review, maybe 40% of the cases they now deal with, and would enable more people to be freed up to do other things. [Tim Kennish, Osler, Hoskin & Harcourt, 59:09:25]

Between 1986 and 2001, inflation of more than 40% (as measured by the consumer price index or CPI) has occurred. Consequently, the $35 million and $400 million thresholds have captured many more mergers than Parliament had intended when the Act was adopted. Indeed, the possible over-inclusiveness of mergers that must automatically undergo review may have been a constraint on optimal enforcement of the Act — the Bureau suggests that the gross-revenue-from-sales threshold of $35 million has been particularly binding. In other words, some resources currently devoted to merger review may be more effectively allocated to other activities, either to the review of larger mergers or to the enforcement of other provisions of the Act.

From an enforcement perspective, I would like to see increasing attention paid to other provisions of the Act, perhaps becoming a little less risk-averse from an enforcement perspective in dealing with mergers. We also heard this morning about the possibility of increasing thresholds. That might help too. [George Addy, Osler, Hoskin & Harcourt, 59:11:15]

The Bureau performed a special request for the Committee that indicates that approximately one in ten mergers examined by its Mergers Branch in the past year fell within the $35 to $50 million transactions range. This statistic, one in ten, suggests that raising the transactions threshold to $50 million would reduce the total number of merger filings by about 40 per year. Unfortunately, we were unable to find out how many of these one-in-ten mergers posed an issue under the Act. Nevertheless, given the deficiency in filing revenues to cover the direct costs of merger review and the Committee’s belief that there are more pressing needs for enforcement of other activities, we believe that it is best to raise the $35 million transactions threshold to $50 million. The Committee, therefore, recommends:

26. **That the Government of Canada amend section 110 of the *Competition Act* to require parties to any merger (i.e., asset or share acquisitions) involving gross revenues from sales of $50 million in or from Canada to notify the Commissioner of Competition of the transaction.**

There are two thresholds. There's the transaction size and there's the party size. And we think it would be appropriate to increase the transaction size threshold, which currently is $35 million. The party-size threshold, which is $400 million, is much higher and we see increasing the first, but not the latter, roughly in line with inflation for the period since the Act came in, which takes you to about $50 million. [Gaston Jorré, Competition Bureau, 64:09:30]

Furthermore, the Committee believes there is merit in formalizing such considerations and, therefore, recommends:

27. **That the Government of Canada amend the *Competition Act* to have a parliamentary review of the notification thresholds contained in sections 109 and 110 within five years and every five years thereafter to ensure optimal enforcement of the *Competition Act*.**

But in looking at it historically, in countries that have had strong competition laws, like the U.S., and countries that had very weak competition laws, like Japan, they found that they didn't end up with very productive and efficient economies when they didn't foster competition and make sure those efficiencies, that productivity and efficiency, were there. So when the cases are looked at, it's not just on the basis of the consumer or the small business alone, but the Canadian economy and what benefits consumers as a whole. [Robert Russell, Borden, Ladner & Gervais, 65:10:15]

Mergers and Efficiencies

Section 96 of the *Competition Act* sets Canada's competition legislation apart from those of other countries. This section states that: "The Tribunal shall not make an order if the merger brings about gains in efficiencies that are greater than, and will offset, the effects of any prevention or lessening of competition"; this has been interpreted by some as being consistent with what is known as the "total surplus standard."

The Act also goes to considerable lengths to explain both what should and should not be included as a gain in efficiency. For example, the Act states that "the gains in efficiency" to be considered are those that "would not likely be attained if an order were made in respect of the merger"; that is, they must be merger specific. This implies that if the efficiencies could be realized in a manner that generates less anticompetitive harm than that created by the merger, then the efficiencies would not be ascribed to the merger. For example, efficiencies that could occur through internal growth or unilateral rationalization would not be ascribed to the merger. Alternatively, there may exist other cooperative means of achieving the efficiencies, such as joint ventures or a restructured merger, which would create lesser anticompetitive effects. Additionally, the efficiencies must

The analysis of efficiencies in competition law in this country is in a state of disarray, to say the least. We've had 15 years or more of toing and froing on it, and still don't know if we have anything we can work with. So if you're going to go for the section 45 reform … [focus on] what constitutes the civil test. [Donald McFetridge, Carleton University, 59:10:05] be real and not just pecuniary; that is, the merger must bring about a real savings in resources and must not stem from greater bargaining or purchasing power that is essentially redistributive among members of society.

Canada is the only country known to have a competition legislation that requires the efficiencies likely to be produced by a merger to be weighed against the likely anticompetitive effects of the merger. This approach occupies the middle ground between the European Union approach, whereby the merging parties are invited to make claim to efficiencies that the Merger Task Force will consider (which introduces lobbying into the mix), and the U.S. approach, which requires efficiency gains to be so great that prices will not rise as a result of the proposed merger (the so-called "price standard"). In retrospect, this is not an unreasonable approach and, in fact, may be a strategically sound one given Canada's relatively smaller and open market economy.

Although this legislative defence is unique among the industrialized countries of the world, its 15-year history has not been very hospitable to merger proponents. The Commissioner has not even once found the efficiency gains to a merger proposal sufficient to offset any lessening of substantial competition. This behaviour contrasts sharply with the Commissioner's findings of efficiency gains on many occasions pertaining to exclusive dealing and tied selling cases. Furthermore, in this same 15-year period, the Tribunal has only once decided (*Superior Propane*) and twice commented on efficiency gains (*Imperial Oil* and *Hillsdown*). The elucidations, however, have been confusing to say the least. Just when the Tribunal has come to agree with the Bureau's guidelines on the treatment of efficiencies according to the "total surplus standard" (*Superior Propane*), the Bureau abandoned its guidelines. To further confuse the issue, the Federal Court weighed in and partially overturned the Tribunal's decision in favour of expanding the strictly quantitative analysis of the "total surplus standard" to include redistributional and other qualitative effects of the merger, while neither advocating the "consumer surplus standard" or the American "price standard" approach. This Court direction had the consequence of opening the door to the Commissioner, as well as to the lone dissenting Trial judge sitting on the *Superior Propane* case, to advocate the

Within the merger review guidelines there's a part … about efficiencies which was written many years ago before Superior Propane. We have, in effect, withdrawn it. We've said that they've now been superseded by the Court of Appeal on Superior Propane and at some point once the Superior Propane case is finished we're going to have to re-write them because clearly they're not, after this litigation, a reliable guide. [Gaston Jorré, Competition Bureau, 64:10:00]

[T]he efficiency defence on the merger guidelines. I think it would be an appropriate time for the committee to readdress section 96 and have a look at what it means, at how it should be applied, and provide, perhaps, some guidance from Parliament's perspective in terms of what the efficiency test is supposed to be *in a merger context.* [Jeffrey Church, University of Calgary, 59:10:20]

[W]hether the efficiencies outweigh and offset the anti-competitive effect and really, in principle, that includes everything. It includes all the anti-competitive effects and some of those are measured quantitatively but … [t]hen you have other factors which are more qualitative and you can't really measure. To give you a very simple example, how do you weigh the impact of loss of choice. If you go from having two people you can buy something from to just having one, you've clearly lost something, apart from price and it's not something you can really value but it's certainly something that has to be weighed in. [Gaston Jorré, Competition Bureau, 64, 10:00]

"consumer surplus standard."[32] Sensing that the latter standard would render section 96 virtually ineffective, the majority opinion of the Tribunal panel chose to supplement the "total surplus standard" with a calculation of what is described as the "adverse social effects" of the merger, i.e., the wealth redistributed from "poor" Canadian consumers to the shareholders of the merging parties.

In my view, the guidance given by that Federal Court of Appeal decision is not adequate to this task. … broadly speaking it says the Tribunal, in considering weight given to efficiencies, should apply a flexible approach, not restricted to … a total surplus approach … It takes account of diverse factors, such as the effects on small business, the possibility of creating monopolies, and perhaps income-distribution effects. [T]his Federal Court of Appeal decision is quite flawed in some respects. I also think it doesn't, whether flawed or not, give a good guide to the future conduct of competition policy. I also believe there's a danger that Canada could move from a position of being more supportive of efficiency claims in merger review than the United States … to a position where we could be less supportive of efficiency claims than the Americans.
[Roger Ware, Queen's University, 65:11:30]

The Tribunal's decision in *Superior Propane* may or may not be satisfactory; it is not clear if such precise calculations of the wealth redistributed from "poor" consumers to the shareholders of producers will be possible in future cases. Moreover, so many different interpretations of Parliament's intentions when it stated that the "*effects* of a merger that would prevent or lessen competition" must be weighed against the "gains in efficiency" suggest that more expert study is required.[33] Accordingly, the Committee recommends:

28. That the Government of Canada immediately establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the *Competition Act,* and that the report of the task force be submitted to a parliamentary committee for further study within six months of the tabling of this report.

32 The "consumer surplus standard" weighs the gains in efficiencies against the so-called "deadweight loss" arising from the merger, as does the "total surplus standard," as well as the wealth transferred from consumers to the shareholders of the merging companies. So the "consumer surplus standard" is a more restrictive test than is the "total surplus standard."

33 In *Superior Propane*, the Tribunal also heard testimony in favour of the "price standard," the "U.S.-modified price standard," and Professor Townley's" balancing weights approach."

CHAPTER 8: REFUSAL TO DEAL

The Committee listened with concern to the testimony of the Association Québécoise des Indépendants du Pétrole (AQUIP) as it described the experience of some of their members in the Quebec petroleum market. At the outset, it is important to understand the industry is unique in that it is comprised of a handful of large companies engaged in exploration, manufacturing, wholesaling and retailing. These vertically integrated companies compete at the retail level with many small independents. This unique market structure obliges independent retailers to negotiate directly with their competitors for the supply of their main product. The *Competition Act* must, therefore, consider this state of affairs, which is peculiar to the oil sector and ensure that all companies have access to supply without discrimination.

There were shortages, and they had to set an 80% quota. We are convinced that during the 80% cut, the major company retailers were still working at full capacity, without suffering from these cuts. At those times, we had to reduce our clients' inventories. We were fortunate that these were only brief periods of a week or two in the two cases I mentioned. In the first case, the problem was caused by cold weather on the St. Lawrence River. In the second case, it was the January 1997 ice storm in Quebec. I do not know if you are aware of this, but in January 1997, there was an ice storm and supplies had to be rationed. In both cases, our supply was reduced, but we are sure that the multinationals were still running their heating oil and gas station retail networks at full capacity. [Pierre Crevier, Association Québécoise des Indépendants du Pétrole 40:16:20]

The facts presented to the Committee at its Bill C-23 hearings, if true, suggest that AQUIP might have been the victim of an anticompetitive refusal to deal.[34] Of more immediate concern to the Committee, however, was the suggestion that section 75 would not apply to prohibit this manner of conduct. AQUIP suggested that a supplier could rely on the fact that "trade terms" (market conditions) were not "usual" and the section would not apply. The Tribunal would not be able to make an order, since it could only make an order for supply on "usual" trade terms.

> We put it to you that suppliers of petroleum products would only have to illustrate that they cannot supply products because of abnormal trade conditions to stall access to the Tribunal.[35]

The Committee has carefully considered this analysis of section 75 and, with all due respect, we cannot agree with the interpretation. Reading the section as a whole, it is clear that the section was enacted not to provide a defence to unscrupulous suppliers, but rather to enable a customer to get necessary supply on the same terms as a

[34] The Committee, of course, is not a court of law. Accordingly, we do not presume to offer any conclusions on questions of fact or the application of the Act in an individual case. These are matters for the Tribunal.

[35] AQUIP, Brief to the Committee.

supplier's other customers. Moreover, for reasons set out below, we would suggest that "rationing" imposed by the supplier in response to supply shortages would fall within the definition of "terms of trade" in subsection 75(3). For that reasons, section 75 would appear to apply to ensure that a customer can get supply on the same terms as other customers, even in limited supply market conditions.

The fundamental difficulty with the AQUIP analysis is that it appears to treat the ideas "trade terms" and "market conditions" as synonyms. But as subsection 75(3) makes clear, the two ideas are quite distinct. It is a *condition* of the *market* that petroleum is in short supply, or that demand is unusually high. The terms of trade are the conditions of the *transaction*. The "terms of trade" in a transaction (such as a supply contract) may change in response to changing market conditions, that is, prices may go up or the quantities that suppliers are able to deliver might have to be reduced. Trade terms may be affected by market conditions, which necessarily implies that they are distinct concepts. AQUIP suggests that a supplier could plead "unusual *market conditions*" as a defence to section 75. But if we accept this interpretation, we would have to accept that section 75 would be of no effect in abnormal market conditions. This conclusion leads us to think that the interpretation may be incorrect.

By contrast, the Committee's interpretation finds strong support in subsection 75(3). That subsection defines "trade terms" as "terms in respect of payment, unit of purchase and reasonable technical and servicing requirements." The effect of subsection 75(3) is twofold. First, it limits the trade terms that the supplier may *impose* on the transaction. This ensures that suppliers cannot impose "unusual" trade terms (for example, rationing) as a pretext to withhold supply. Secondly, the section ensures that the customer is able to *receive* supply on the same terms as the suppliers' other customers, without being subject to any "unusual trade terms." So if other customers are receiving 100% of their orders, then all customers would be so entitled. Imposing a 20% cut on one customer, while not doing so to others would clearly be imposing an "unusual" term of trade on that customer, as the term is contemplated in subsection 75(3). As a result, section 75 would apply and allow the Tribunal to order the resumption of supply on the same terms enjoyed by other customers.

AQUIP suggested that the phrase "usual trade terms" be deleted from section 75. This would presumably "untie the hands" of the Tribunal and give it flexibility to order supply on terms *other* than "usual" trade terms, i.e., order the supplier to accept a customer on *unusual* trade terms, e.g., pro rata shares of available supply. But again, the distinction betweens *market conditions* and *terms of trade* must be kept in mind. What AQUIP is really asking for is that the Tribunal order the supplier to continue to supply during *unusual market conditions* (e.g., supply shortages) but on the *same trade terms* (80% of usual supply using the previous example) as other customers, without discrimination.

Although the Committee does not concur that the phrase "usual trade terms" in section 75 undermines the effectiveness of the section, we do recognize that there exists another plausible interpretation of section 75, one that would lead us to the opposite conclusion, meaning that the section would *not* apply to prohibit discriminatory rationing of the type described by the AQUIP (the integrated producers supply its own retail outlets on terms more favourable than independent retailers).

Paragraph 75(1)(*d*) requires that, for the section to apply, the product must be in "ample supply." On a plain reading, this would suggest that the section is meant to apply only in market conditions where supply is "ample," that is at least sufficient to satisfy current demand. If this interpretation is correct, the section would not apply during periods of limited supply, and a supplier could choose to fill one customer's order in full, while refusing another customer wholly or in part, using *discriminatory* rationing as a means of disciplining a non-integrated independent retailer.

This second interpretation is also consistent with the wording of subsection 75(3). To an ordinary observer, the term "units of purchase" might describe the manner in which the product is packaged for sale and delivery, such as in *litre* units, or in *shipping container* units, etc. In fact, this interpretation might be more plausible than the other. Had Parliament, in drafting the legislation, wished to specify that "quantity" be included among the "terms of trade" set out in subsection 75(3), it could have drafted the legislation to that effect. Instead, Parliament used the phrase "units of purchase," a phrase that does not clearly mean the same thing as "quantity."

If this interpretation is correct, we would have to accept that section 75 was not meant to, and would not, apply in a market characterized by supply shortages. As such, an unscrupulous and dominant supplier could profit by the shortage to promote his own retail network and discipline independent retailers by selectively rationing their supply in a discriminatory manner. The current wording of the section might suggest that Parliament simply did not anticipate selective rationing being used in this way; or perhaps it was aware that such a practice might occur, but that it could be better addressed under the abuse of dominance provisions in section 79.

Rationing should not result in non-renewal of supply contracts on the pretext that the market situation is abnormal. On the contrary, we must ensure that abnormal market situations do not cause the elimination of efficient oil and gasoline businesses by depriving them of supply. We therefore propose that the words "on usual trade terms" be withdrawn from the bill. In this way, the new provisions would also be applicable in ordinary circumstances, where they could be particularly useful. [Pierre Crevier, Association Québécoise des Indépendants du Pétrole, 40:15:45]

The Committee is aware that the ambiguity could be resolved by simply deleting paragraph 75(1)(*d*). However, no witness raised this point and we have had no debate or analysis concerning the economic and legal implications of implementing such a change. For that reason, the Committee is reluctant to make such a recommendation. For the reasons we have set out, we believe that the more reasonable interpretation is that the section would apply in all market conditions, including markets characterized by supply shortages. Ultimately, however, the uncertainty can only be resolved in one of three ways: (1) a government amendment to clarify the application of the section; (2) the Tribunal's judicial interpretation in the context of an application on these, or similar facts; or (3) an interpretation guideline from the Bureau.

Clearly, the preferred option is to be proactive now to clarify the application of section 75. Moreover, it is neither fair nor just that we should ask the AQUIP, or anyone else for that matter, to bear the brunt of what might turn out to be protracted and expensive litigation simply in order to clarify the law, when such a clarification is clearly for the benefit of all. The Committee commends the AQUIP for bringing this important issue to our attention and recommends:

29. That the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

CONCLUSION

Canadian competition policy, as embodied in the *Competition Act* and as carried out by the Competition Bureau and the Competition Tribunal, is a modern framework for dealing with contemporary antitrust issues. The *Competition Act* generally reflects modern economic analysis, though minor modifications might be desirable. The Competition Bureau's enforcement guidelines can claim to be clear and transparent, though some fine-tuning would be helpful. The Bureau manages its current caseload well, though more resources would enable it to be a more vigilant enforcer. The Competition Tribunal has provided clear and thoughtful jurisprudence that properly embodies economic principles, though its procedures could be adjusted in order to expedite its workload and make room for more activity as a result of the granting of carefully thought out rights of private action. These were the views, and indeed the exact words, of the Committee expressed in its *Interim Report*. The Committee maintains these findings and, in this final report, has been more specific.

The Committee believes that Canada's business landscape would be served best by making conspiracies one of its highest priorities. The Committee recognizes that the Bureau has well-developed strategies and tactics already in place for detecting and pursuing both domestic and international conspiracies, but is hampered by an ineffective law — a law that is under-inclusive in its treatment of naked hard-core cartels and over-inclusive of pro-competitive strategic alliances. The Committee has, therefore, recommended that the *Competition Act* be modified to create a two-track conspiracy law, where cartels are pursued more vigorously under a stricter criminal track and strategic alliances are pursued more sensibly under a civil track through a new section. Under the existing criminal provision, the term "unduly" would be dropped to eliminate the need to litigate wasteful and irrelevant economic factors. At the same time, specific defences for efficiencies will be created, thereby reversing the onus of proof, to ensure the two tracks are kept separate. Additionally, a voluntary pre-clearance system for strategic alliances would be organized to provide guidance to the business sector seeking assurances that they will not be subject to criminal sanctions, and thus reduce any residual “chilling effect” the law creates.

In support of realigning the enforcement priorities away from smaller mergers and back towards conspiracies, as Parliament originally intended in 1986, the Committee has recommended that more resources be allocated to the Competition Bureau and that the merger transactions notification threshold be raised from $35 million to $50 million. The Committee further recommends amending the *Competition Act* to provide automatic parliamentary reassessments of all merger notification thresholds every five years. Furthermore, the Committee recommends extending a private right of action to include abuse of dominance and expanding relief to those who have been prejudiced by reviewable conduct under exclusive dealing, tied selling, market restriction, refusal to deal, and abuse of dominance to include awards of damages and fines in order to bolster private enforcement, as a complement to public enforcement, of the Act.

The Committee makes a number of recommendations to streamline Competition Tribunal processes for disposing of cases, most notably empowering it to assess and impose damage awards and monetary penalties on those found guilty of abuse of dominance. These unbounded penalties would provide a better balance of incentives to deter abusive conduct and hopefully reduce the caseloads of the Bureau and the Tribunal. They, along with the Tribunal’s forthcoming general power to issue interim cease and desist orders in an expeditious way, as would be granted under Bill C-23, would make the existing provisions that are specific to the airline industry redundant. The airline industry-specific provisions could then be abolished to permit the return of the *Competition Act* to its traditional status as a law of general application.

The Committee further recommends the deletion of the condition of “substantial or complete control” in the abuse of dominance section of the Act. This would bring the abuse of dominance provision closer to conformity with the concept of market power as it has evolved through judicial interpretation and other sections of the Act. This amendment, along with the Competition Tribunal’s new power to assess monetary penalties under abuse of dominance, would support the decriminalization of the anticompetitive pricing provisions — predatory pricing, vertical price maintenance, and price discrimination — as reflected in contemporary economic thinking. Criminal-like deterrence could be maintained when such behaviour constitutes an abuse of dominance, while reducing, if not eliminating, the chilling effect on pro-competitive applications of these pricing practices.

In regards to the process of merger review, the Committee recommends the establishment of an independent task force of experts for the study of the role efficiencies should play in all civilly reviewable sections of the *Competition Act*. In terms of refusal to deal, the Committee recommends that the Competition Bureau issue an interpretation guideline clarifying whether section 75 would apply to the circumstance where a supplier in a market characterized by supply shortages could selectively ration its available supply in such a manner as to discriminate against independent retailers.

In light of all of these recommended changes, the Competition Bureau must commit to rewriting its enforcement guidelines on strategic alliances, merger review and abuse of dominant position, not the least of which must be expanded to include predatory pricing, vertical price maintenance and price discrimination practices.

Finally, the Committee is convinced that these recommendations reflect the expert testimony it received; this testimony was thorough and comprehensive. A consensus was reached on most issues, allowing for specific and concrete recommendations to be made. Where a consensus was not immediately obtainable, further study was recommended. As such, we believe this report has the makings of a blueprint for a government White Paper on competition policy in Canada and the next round of amendments to the *Competition Act*.

APPENDIX A
WITNESSES

Associations and Individuals	Date	Meeting
As Individual	04/12/2001	59
George Addy, Lawyer, Osler, Hoskin & Harcourt		
A. Neil Campbell, Lawyer, McMillan Binch		
Jeffrey Church, Professor, University of Calgary		
Paul Crampton, Lawyer, Davies Ward Phillips & Vineberg		
Calvin Goldman, Lawyer, Davies, Ward & Beck		
Lawson Hunter, Lawyer, Stikeman Elliott		
Tim Kennish, Lawyer, Osler, Hoskin & Harcourt		
Donald McFetridge, Professor, Carleton University		
John Quinn, Lawyer, Blakes, Cassels & Graydon		
Thomas Ross, Professor, University of British Columbia		
Robert Russell, Lawyer, Borden Ladner Gervais		
Margaret Sanderson, Vice-President, Charles River Associates		
John Scott, President, Canadian Federation of Independent Grocers		
John Sotos, Lawyer, Sotos Associates		
Roger Ware, Professor, Queen's University		
Douglas West, Professor, University of Alberta		
Stanley Wong, Lawyer, Davis and Company		
Department of Industry	31/01/2002	64
Gaston Jorré, Acting Commissioner of Competition		
André Lafond, Deputy Commissioner of Competition, Civil Matters Branch		
R.W. McCrone, Assistant Deputy Commissioner of Competition, Criminal Matters		

Associations and Individuals	Date	Meeting
As Individual	05/02/2002	65
Paul Crampton, Lawyer, Davies Ward Phillips & Vineberg		
Tim Kennish, Lawyer, Osler, Hoskin & Harcourt		
John Rook, Lawyer, Osler, Hoskin & Harcourt		
Robert Russell, Lawyer, Borden Ladner Gervais		
Roger Ware, Professor, Queen's University		
Stanley Wong, Lawyer, Davis and Company		

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this report within one hundred and fifty (150) days.

A copy of the relevant Minutes of Proceedings of the Standing Committee on Industry, Science and Technology (*Meetings Nos. 59, 64 and 65 which includes this report*) is tabled.

Respectfully submitted,

Walt Lastewka, M.P.
St. Catharines

Chair

Supplementary Opinion — Canada's Competition Regime

Canadian Alliance Party
Charlie Penson
James Rajotte

Over the past two years, the Standing Committee on Industry, Science and Technology has studied the Competition Act extensively, including several private members bills, the VanDuzer report, the Committee's own interim report of June 2001, Bill C-23 and now a report from the Standing Committee. The Canadian Alliance commends the work of the members of the Standing Committee on this report and on their vigilance in studying the subject of competition policy in Canada.

Throughout these hearings, Canadian Alliance members of the Committee have consistently put forth the view that Canadian consumers and producers are best served not by a tribunal or by government interference in the marketplace, but by genuine, business-to-business competition. The focus of competition policy should not be to protect individual competitors, but should instead be to facilitate competition itself.

While the Canadian Alliance endorses the majority of this report, there are three areas where we disagree with the recommendations — specifically Chapters One, Three and Eight.

Chapter One: Competition Law cannot replace competition

Chapter One recommends that conspiracy-related crimes against competition (i.e. price fixing) should be one of the most important concerns for the Competition Bureau. It also supports the idea that there should be no special rules for specific industries within overarching framework law.

In the opinion of the Canadian Alliance, the underlying theme of market regulation contained in Chapter One is fundamentally flawed. The Liberal party's policy of tinkering with competition law and regulating the market place cannot replace the need for a healthy business environment.

The report acknowledges the monopoly-creating distortion of government policies, such as foreign ownership rules, which act as barriers to entry in the airline and retail book industries. Canada's small domestic market and large geography are usually used as justification for regulation, but the Canadian Alliance believes that these problems have been compounded by the Liberal government's approach to industrial policy. There are too many sectors in the Canadian economy that escape market forces — telecommunications, wheat marketing, and transportation being examples. It is far better to have a proper business and tax environment for many competitors than regulation for a few.

Direct government interference in these sectors has resulted in reduced competition. The Liberal's reaction is not to reduce regulations, but to compensate by amending the Competition Act. This approach compromises competition law and does not facilitate competition. For example, the government has amended the *Competition Act* to regulate the airline industry using cease and desist powers, monetary penalties and a consumer complaints referee. Yet, all these changes cannot discipline Air Canada like a competitive marketplace would. In addition, framework law such as the *Competition Act* is not the right place to regulate industry.

There is a belief that certain industries must be protected from foreign ownership or interference, but at what cost to the Canadian consumer? The National Energy Program made no sense for the Canadian oil industry and the Canadian Alliance suggests that mandated national ownership is not advantageous for other industries. Even if the situation could be corrected completely by the *Competition Act*, which is doubtful, it would certainly cost much more for the same result a market solution would produce.

In recent years, the Competition Commissioner has approved large-scale mergers in the airline or retail book industry, with caveats that certain assets be sold to other interests. In both cases, the deadlines passed with no prospective buyers coming forward due to government-imposed domestic-ownership rules. The end result in both industries has been a more concentrated monopoly and less choice for the Canadian consumer.

The Canadian Alliance therefore recommends:

The Liberal government and the Minister of Industry should designate business-to-business competition as one of its highest priorities by making a concerted effort to reduce regulation and government interference in the marketplace.

Chapter Three — Delays at the Competition Tribunal

Chapter Three attempts to deal with difficulties at the Competition Tribunal. The Canadian Alliance would like to call attention to undue delays in reaching a final decision. The abuse of dominance case that WestJet and now defunct Canada 3000 (CanJet) brought against Air Canada case is certainly an example where justice delayed is justice denied. This case will play a part in determining the future of the Canadian airline industry, and yet Air Canada has managed to secure two six-month adjournments. At present, the case is scheduled to resume in Fall 2002 — a full two years after the Air Canada seat sale at issue had taken place.

The Canadian Alliance is very concerned about these developments. Not only is Air Canada not being held accountable for its actions, but much needed clarity on competition rules has been put off again. Continuing ambiguity discourages new entrants into the market. Delays in the process mean that it is very difficult to entice investors to put money into new passenger air carriers.

The Canadian Alliance therefore recommends:

That the Competition Tribunal should increase its efforts to ensure cases brought before it are heard in a timely manner.

Chapter Eight — Vertical Integration in the Oil and Gas Retail Industries.

Chapter Eight is particularly troublesome because the experts convened in preparation for this report did not raise the relationship between vertically integrated corporations and their independent retailers. Indeed, this Chapter is essentially based on one association's point of view and from testimony delivered in October 2001 when the association appeared before the Committee's study of Bill C-23.

The inclusion of this issue in the Committee's report serves to highlight the Liberal government's predisposition to politicize competition law and policy.

It is the opinion of Canadian Alliance members of the Committee that the recommendation to clarify the Bureau's guidelines with respect to Section 75 is not constructive. There are times when scarcity methods of allocation are necessary and retailers should not be able to use private access to leverage their contracts. The Canadian Alliance believes that the Competition Act should not interfere with contract law and these types of complaints would be better dealt with under Section 79 (abuse of dominance).

NDP Dissenting Opinion
Bev Desjarlais, MP Churchill, NDP Industry Critic

Introduction

The Majority Report focuses exclusively on fine-tuning Canada's existing competition laws and makes recommendations to that effect. What the Committee has failed to recognize is that competition laws, while important, are not the be all and end all of competition policy.

Due to its narrow focus, the Majority Report does not consider the implications of other government policies on Canada's overall competitive framework. Tinkering with competition laws, as this Report recommends, will have little impact on competition in Canada without addressing the broader policies government policies that undermine competitive markets.

The Social Benefits of Competitive Markets

It is worth underlining that social democrats support the establishment of competitive markets as a fundamental social good unto itself. Our history in the twentieth century has proven, beyond any doubt, that competitive market economies deliver better, more prosperous, more comfortable and fulfilling lives for citizens than any of the anti-market alternatives. Competitive markets maximize our prosperity by encouraging entrepreneurship and efficiency and by widening consumer choice.

The Liberals and the other right-wing parties talk incessantly about the benefits of markets. Unfortunately, all this talk is merely a smokescreen for policies that distort markets and promote monopoly at the expense of competition.

Perfect Competition

It should go without saying that competition is the basis of a properly functioning market. Economists evaluate the competitiveness of a given market against an idealized model of perfect competition. Perfect competition requires: 1) that buyers and sellers have all the information they need to make informed choices; 2) that there are enough buyers and sellers to prevent any one actor from influencing the market; 3) homogeneous products; 4) that there are no barriers to market entry; and 5) perfect mobility of production factors.

Eliminating Distortion

In real life, markets never achieve the ideals of perfect competition. Any real life factor that interferes with one of the five assumptions of perfect competition is a market distortion. The fewer distortions there are in a given market, the more its outcomes benefit society. Conversely, when markets are distorted, the benefits of competition are reduced or negated. Thus, the object of our government's competition policy should be to eliminate and/or mitigate market distortions.

Regulation vs Distortion: How the Right Distorts Competition

The political right has built a false mythology about markets. This mythology holds that all government regulation is, by definition, a market distortion. It follows from this that removing regulations removes distortions and moves markets closer to perfect competition. The Liberal government uses this ideological approach to justify deregulating everything they possibly can.

The problem with this approach is that regulation is <u>not</u>, by definition, a market distortion. Sometimes it is, but most government regulations actually promote competition by <u>reducing</u> market distortions, thereby making markets <u>more</u> competitive. This is due to the fact that, in the real world, markets have built in distortions. Effective regulations eliminate or mitigate these distortions and make markets more competitive.

Real Life vs Ideology: The Repeated Failures of Deregulation

Without sufficient regulation to eliminate or mitigate distortions, many markets inevitably become, to a greater or lesser degree, anti-competitive, inefficient and harmful to consumer choice. The kinds of markets that are prone to these outcomes when deregulated are those that, structurally, are the furthest from the ideal of perfect competition. The more distortions a market has in its unregulated state, the more anti-competitive it is in the absence of corrective regulations.

In our experience with deregulation in North America, markets with severe barriers to entry and limited numbers of sellers have consistently been the most failure prone when deregulated. Examples of such industries include the airline industry, electricity and health care.

Canada's airline industry is a striking example of an industry in which government deregulation has increased market distortion, leading to a single-airline monopoly. This is because the airline industry is, structurally, so far from the ideal of perfect competition that, in the absence of regulations to correct its distortions, it rapidly trends toward the elimination of competition. It has enormous barriers to market entry and far too few sellers to prevent market manipulation. For consumers, the end result of deregulation has been the elimination of choice and higher air fares, the opposite of what the government promised when it deregulated the industry.

Outcomes have been similarly negative in the electricity and health care sectors. Jurisdictions that have deregulated electricity markets, such as California and Alberta, have experienced monopolistic price manipulation and, in the case of California, deliberate manipulation of energy supplies that led to blackouts.

America's supposedly free market health care system is, in fact, demonstrably less efficient than Canada's highly regulated system. The American system is also highly intrusive into personal medical decisions. Private insurance companies routinely second guess treatments and prevent Americans from switching doctors. Thus, Canada's highly regulated health care system delivers the benefits of competition, greater efficiency and choice, better than America's less regulated model.

When confronted with the real life failures of their mythology, the Liberal government and others on the political right respond with a convenient tautology. Any time deregulation fails, they simply claim that they did not deregulate enough and use this to justify further deregulation that further distorts the market. This refusal or inability to grasp when cold hard reality contradicts theory is classic ideological behaviour.

How Regulation Promotes Competition

All markets have built in distortions that reduce or negate the benefits of competition. Economists recognize that perfect competition is an unattainable ideal. Regulation promotes competition by eliminating or mitigating market distortions.

For an example of how regulation eliminates market distortion, look no further than your local supermarket. The government imposes very strict labelling regulations on most supermarket products to make sure consumers have information on nutritional factors and price per unit. Since consumer information is one of the requirements of perfect competition, these regulations eliminate a market distortion and help the market function more efficiently. The world is full of similar examples of regulations that expedite commerce, like government regulations of weights and measures and enforcement of standards and labelling on other products, like textiles and consumer durables.

Regulations can also mitigate market distortions to reduce their harmful effects on competition. Let us return to the example of the airline industry. No regulations can eliminate the barriers to market entry, such as the prohibitive start-up costs and the limitations of the supporting infrastructure like airports and air traffic control resources. However, more effective regulations to prevent the Air Canada monopoly from using its market power to systematically destroy all competition could at least mitigate the distortions inherent in this market.

New Democrats, New Vision for Competition

Canada's New Democrats propose a new approach to competition policy, beginning from the assertion that government has a positive role to play in promoting competition by eliminating and mitigating market distortions. This would mean a departure from the dominant mythology that government regulation is automatically distorting.

While New Democrats do not oppose the minor tinkering proposed by the Majority Report, we consider the report inadequate because it is constrained by its narrow focus. There is no discussion of, for example, the role that consumer rights play in competition policy. Well-informed consumers are a necessary part of a healthy competitive market, and one of the requirements for perfect competition, yet the Liberal government continues to ignore growing public demands for more information on the labels of consumer products.

New Democrats have been at the forefront of campaigns for mandatory labelling of genetically modified foods and changes to the Textile Labelling Act that would tell Canadian consumers whether or not the clothes they buy are produced with Third World child labour. By refusing to make this information available to consumers, the Liberal government is deliberately protecting the market distortions created by this lack of information. In so doing, they contradict their stated support for competitive markets and expose their real agenda — to protect companies with existing market power at the expense of new entrepreneurs and competitors who would offer the public a wider range of choices.

Labelling is just one example of an area where the Liberal government's ideologically driven antipathy to regulation results in less competition and choice. Another example is their headlong rush to deregulate industries, like the airline industry, which contain major structural distortions that require regulation to prevent natural monopolies from taking hold. The result of their "deregulate everything" approach is less competition, the rewarding of inefficiency, less choice and higher prices for consumers. The only winners are companies that already have market power, which are free to abuse their dominant market positions. The losers are consumers, smaller and newer businesses, entrepreneurs and society as whole, which loses out on the benefits of a dynamic and innovative economy.

When New Democrats challenge the Liberal government's ideological refusal to promote competition in the economy, the government typically responds with unfounded accusations that the NDP is an enemy of business and enterprise. Nothing could be further from the truth. We do not call for massive government intervention in the economy, but rather a balanced approach focused on promoting healthy competitive markets. Indeed, the real enemies of enterprise are the anti-competitive policies of the government that promote and protect inefficient monopolies, gouge consumers and squeeze the innovation out of our economy by blocking competition from newer, smaller and more dynamic businesses.

MINUTES OF PROCEEDINGS

Tuesday, April 9, 2002
(*Meeting No. 74*)

The Standing Committee on Industry, Science and Technology met *in camera* at 9:15 a.m. this day, in Room 308, West Block, the Chair, Walt Lastewka, presiding.

Members of the Committee present: Larry Bagnell, Stéphane Bergeron, Walt Lastewka, Serge Marcil, Dan McTeague, James Rajotte, Andy Savoy and Paddy Torsney.

Acting Member present: Cheryl Gallant for Charlie Penson.

In attendance: *From the Library of Parliament*: Dan Shaw and Geoffrey P. Kieley, Research Officers.

Pursuant to the Committee's mandate under Standing Order 108(2), the Committee resumed consideration of the Competition Law and Policy *(See Minutes of Proceedings, Tuesday, December 4th, 2001, Meeting No. 59)*.

It was agreed, — That pursuant to Standing Order 109, the Committee request that the Government table a comprehensive response to this report within one hundred fifty (150) days.

It was agreed, — That the Chair be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the Draft Report to the House.

It was agreed, — That the Draft Report (as amended) be concurred in.

Ordered, — That the Chair present the Report (as amended) to the House at the earliest possible opportunity.

It was agreed, — That in addition to the 550 copies printed by the House, an additional 1000 copies of the Report be printed in a tumble format.

It was agreed, — That a News Release be issued.

It was agreed, — That a News Conference be held upon presentation of the Report.

It was agreed, — That the Committee express its appreciation for the professionalism and excellent work of Daniel Shaw and Geoffrey Kieley, Research Officers, Library of Parliament and to Norm Radford, Clerk Committees Directorate.

At 11:00 a.m., the Committee adjourned to the call of the Chair.

Normand Radford
Clerk of the Committee

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Infineon Technologies AG and Infineon Technologies North America Corp. *Appellants*

v.

Option consommateurs and Claudette Cloutier *Respondents*

and

Canadian Federation of Independent Grocers *Intervener*

Indexed as: Infineon Technologies AG *v.* Option consommateurs

2013 SCC 59

File No.: 34617.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil procedure — Class actions — Jurisdiction of Quebec court — Application for authorization to institute class action in order to recover damages from international manufacturers that had conspired to inflate price of microchips — Whether Quebec courts have jurisdiction over dispute between international manufacturers and group consisting of direct and indirect purchasers located in Quebec given that alleged wrongdoing that forms basis of claim occurred outside Quebec — Civil Code of Québec, S.Q. 1991, c. 64, art. 3148(3).

Civil procedure — Class actions — Conditions for authorizing action — Direct and indirect purchasers — Application for authorization to institute class action in order to recover damages from international manufacturers that had conspired to inflate price of microchips — Proposed group consisting of direct and indirect purchasers who suffered losses by absorbing, in whole or in part, inflated portion of price — Whether common questions arise — Whether cause of action can be

Infineon Technologies AG et Infineon Technologies North America Corp. *Appelantes*

c.

Option consommateurs et Claudette Cloutier *Intimées*

et

Fédération canadienne des épiciers indépendants *Intervenante*

Répertorié : Infineon Technologies AG *c.* Option consommateurs

2013 CSC 59

N° du greffe : 34617.

2012 : 17 octobre; 2013 : 31 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Procédure civile — Recours collectifs — Compétence du tribunal québécois — Demande d'autorisation d'exercer un recours collectif pour recouvrer des dommages-intérêts de fabricants internationaux qui ont comploté en vue de gonfler le prix de micropuces — Les tribunaux québécois ont-ils compétence sur un litige opposant des fabricants internationaux et un groupe d'acheteurs directs et indirects se trouvant au Québec, alors que l'acte fautif allégué à l'origine de la demande a été commis à l'extérieur du Québec? — Code civil du Québec, L.Q. 1991, ch. 64, art. 3148(3).

Procédure civile — Recours collectifs — Conditions d'autorisation du recours — Acheteurs directs et indirects — Demande d'autorisation d'exercer un recours collectif pour recouvrer des dommages-intérêts de fabricants internationaux qui ont comploté en vue de gonfler le prix de micropuces — Groupe proposé formé des acheteurs directs et indirects qui ont subi des pertes en absorbant, en tout ou en partie, la portion gonflée du prix — Existe-t-il des questions communes? — Une *rooted in passing on of artificially inflated prices resulting from anti-competitive practices — Whether it is sufficient to prove aggregate loss at authorization stage — Whether representative and designated member are qualified to adequately represent members of proposed group — Whether class action should be authorized — Code of Civil Procedure, R.S.Q., c. C-25, arts. 1003, 1048.*

The appellant companies are manufacturers of DRAM, which is a microchip that allows information to be electronically stored and rapidly retrieved. DRAM is commonly used in a wide range of electronic devices. The appellants sell DRAM through a number of distribution channels to original equipment manufacturers ("OEMs"), such as Dell Inc. OEMs insert the chips into various electronic products they manufacture, which are in turn sold either to intermediaries in the distribution chain or directly to final consumers. The appellants have acknowledged their participation in an international conspiracy to suppress and eliminate competition by fixing the prices of DRAM to be sold to OEMs. They were heavily fined both in the United States and in Europe for their respective roles in the conspiracy.

Option consommateurs applied to the Superior Court for authorization to institute a class action against the appellants in order to recover damages in this regard on behalf of the members of the affected class. The group comprises direct and indirect purchasers who suffered losses by absorbing, in whole or in part, the inflated portion of the price of DRAM sold in Quebec. Its claim is based upon allegations that the appellants failed to discharge statutory obligations under the *Competition Act* and that their conduct amounted to a fault giving rise to civil liability under the *Civil Code of Québec* ("*C.C.Q.*"). In its motion for authorization of the class action, Option consommateurs designated C as a member of the group. C is a resident of Montréal who purchased a personal computer containing DRAM on Dell's website with her credit card. The motion judge held that the Superior Court did not have territorial jurisdiction to hear the class action. In any event, he would have dismissed the motion for authorization on the merits, because he was of the view that the requirements of arts. 1003(*b*), 1003(*d*) and 1048 of the *Code of Civil Procedure* ("*C.C.P.*") were not satisfied. On appeal, the Court of Appeal set that decision aside and granted the motion for authorization to institute the class action.

cause d'action peut-elle prendre sa source dans le transfert de hausses artificielles de prix causées par un comportement anticoncurrentiel? — Suffit-il de démontrer une perte globale à l'étape de l'autorisation? — La représentante et le membre désigné ont-ils qualité pour représenter adéquatement les membres du groupe? — Y a-t-il lieu d'autoriser le recours collectif? — Code de procédure civile, L.R.Q., ch. C-25, art. 1003, 1048.

Les appelantes sont des sociétés qui fabriquent la DRAM, une micropuce qui permet de stocker électroniquement l'information et de la récupérer rapidement. La DRAM est couramment utilisée dans une grande variété d'appareils électroniques. Les appelantes vendent la DRAM par l'intermédiaire d'un certain nombre de canaux de distribution à des fabricants d'équipement d'origine (« FEO »), comme Dell Inc. Les FEO incorporent les puces dans divers produits électroniques qu'ils fabriquent, qui sont ensuite vendus soit à des intermédiaires au sein du canal de distribution, soit directement aux consommateurs finaux. Les appelantes ont reconnu leur participation à un complot international en vue de supprimer et d'éliminer la concurrence en fixant les prix de la DRAM devant être vendue à des FEO. Elles ont été condamnées aux États-Unis et en Europe à de lourdes amendes pour leur rôle respectif dans le complot.

Option consommateurs a présenté une requête devant la Cour supérieure afin d'obtenir l'autorisation d'exercer un recours collectif contre les appelantes pour recouvrer des dommages-intérêts au nom des membres du groupe touché. Le groupe est formé des acheteurs directs et indirects qui ont subi des pertes en absorbant, en tout ou en partie, la portion gonflée du prix de la DRAM vendue au Québec. Sa demande repose sur des allégations selon lesquelles les appelantes n'ont pas rempli les obligations que leur imposait la *Loi sur la concurrence* et que leur conduite équivalait à une faute entraînant la responsabilité civile sous le régime du *Code civil du Québec* (« *C.c.Q.* »). Dans sa requête pour autorisation d'exercer un recours collectif, Option consommateurs a désigné C à titre de membre du groupe. C, une résidente de Montréal, avait acheté un ordinateur personnel équipé de DRAM par l'entremise du site Web de Dell et l'avait payé par carte de crédit. Le juge saisi de la requête a conclu que la Cour supérieure n'avait pas compétence territoriale pour entendre le recours collectif. Quoi qu'il en soit, il aurait rejeté la requête pour autorisation sur le fond, estimant que les exigences des al. 1003*b*) et 1003*d*) et de l'art. 1048 du *Code de procédure civile* (« *C.p.c.* ») n'avaient pas été respectées. La Cour d'appel a infirmé cette décision et accueilli la requête en autorisation d'exercer le recours collectif.

Held: The appeal should be dismissed.

On the basis of the facts as alleged, the Quebec courts have jurisdiction to decide whether the class action should be authorized under art. 1003 of the *C.C.P.* Article 3148(3) of the *C.C.Q.* confers jurisdiction on a Quebec authority in a personal action of a patrimonial nature where "a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec". Damage suffered in Quebec is an independent connecting factor: the damage does not need to be tied to the locus of the injury or of the fault. Also, the plain language of art. 3148(3) does not preclude economic damage from serving as a connecting factor, nor is the recovery of a purely economic loss prohibited in Quebec civil law.

In the instant case, the economic damage was allegedly suffered by C — not merely recorded — in Quebec. More specifically, the damage was allegedly suffered as a result of the contract between Dell and C. Although the contract is not in fact the source of the cause of action in this case, which is extracontractual in nature, it is a juridical fact that establishes where the alleged economic damage occurred: the conclusion of the contract is the event that fixes the "*situs*" of the material damage suffered in Quebec. As a result, the contract is relevant, regardless of the fact that none of the appellants were parties to it, to the determination of whether the Quebec courts have jurisdiction in this case. C's pecuniary loss flowed directly from her contract with Dell, which is deemed under Quebec's *Consumer Protection Act* to have been made in Quebec. The resulting economic damage did not merely have a remote effect on C's patrimony in Quebec; rather, she suffered it in Quebec upon entering into the contract in that province, and this brought her claim within the scope of art. 3148(3) of the *C.C.Q.*

At the stage of authorization of a class action, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in art. 1003 of the *C.C.P.*, bearing in mind that the threshold provided for in that article is a low one. The authorization process does not amount to a trial on the merits. Although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law. In this case, the motion for authorization alleges sufficient facts to demonstrate the elements required under art. 1003 of the *C.C.P.*

Arrêt : Le pourvoi est rejeté.

En raison des faits allégués, les tribunaux québécois ont compétence pour décider si le recours collectif devrait être autorisé sur le fondement de l'art. 1003 *C.p.c.* Le paragraphe 3148(3) *C.c.Q.* confère compétence aux autorités québécoises dans les actions personnelles à caractère patrimonial lorsqu'« [u]ne faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée ». Le préjudice subi au Québec constitue un facteur de rattachement indépendant : il n'est pas nécessaire que le préjudice soit lié à l'endroit où le fait dommageable a été subi ou la faute commise. De plus, le libellé clair du par. 3148(3) n'empêche pas le préjudice économique de servir de facteur de rattachement, et le droit civil québécois n'interdit pas non plus l'indemnisation de la perte purement économique.

En l'espèce, le préjudice économique aurait été subi par C — et non simplement comptabilisé — au Québec. Plus précisément, il découlerait du contrat intervenu entre elle et Dell. Bien que ce contrat ne soit pas, en fait, à l'origine de la cause d'action dans la présente affaire, qui est de nature extracontractuelle, il constitue un fait juridique établissant le lieu où le préjudice économique allégué s'est produit : la conclusion du contrat représente l'événement qui fixe le *situs* du préjudice matériel subi au Québec. En conséquence, le contrat s'avère pertinent pour décider si les tribunaux québécois ont compétence en l'espèce, sans égard au fait qu'aucune des appelantes n'y était partie. La perte financière de C découlait directement de son contrat intervenu avec Dell, qui est réputé, aux termes de la *Loi sur la protection du consommateur* du Québec, avoir été conclu dans cette province. Le préjudice économique causé par ce contrat n'a pas simplement entraîné un effet à distance sur le patrimoine de C au Québec, mais il a été subi au Québec lors de la conclusion du contrat dans cette province, d'où l'application du par. 3148(3) *C.c.Q.* à la demande de cette dernière.

À l'étape de l'autorisation d'un recours collectif, le tribunal exerce un rôle de filtrage. Il doit simplement s'assurer que le requérant a réussi à satisfaire aux critères de l'art. 1003 *C.p.c.*, sans oublier le seuil d'application peu élevé que prévoit cette disposition. La procédure d'autorisation ne constitue pas un procès sur le fond. Même si la demande peut, en fait, être ultimement rejetée, le recours devrait être autorisé à suivre son cours si le requérant présente une cause défendable eu égard aux faits et au droit applicable. En l'espèce, la requête en autorisation allègue des faits suffisants pour démontrer les éléments requis à l'art. 1003 *C.p.c.*

Option consommateurs has met the requirement that there be sufficient common questions for the purposes of art. 1003(*a*). There are no differences between the members of the proposed group at the authorization stage that adversely affect the unity of the group. All the members, regardless of their individual circumstances, have a common interest both in proving the existence of a price-fixing conspiracy and in maximizing the amount of the resulting unlawful overcharge. Any disparity between the direct purchasers' relationships with the appellants and those of the indirect purchasers does not alter the fact that they have a collective interest in the questions of fault and liability. Any conflicts of interests can be addressed at trial.

With respect to the requirement of art. 1003(*b*) of the *C.C.P.* that "the facts alleged seem to justify the conclusions sought", Option consommateurs has made out an arguable case in support of its claim of the appellants' extracontractual liability. It has discharged its burden with respect to the demonstration of fault, injury and causation. The allegations set out in the motion for authorization are sufficient to support an inference of fault, given the relatively low standard to be met at the authorization stage. Although the allegations and supporting documentation do not explicitly establish the commission of wrongful behaviour in Quebec, they certainly do point to the international nature of the conspiracy to fix the price of DRAM and to the suffering of damage outside the United States. It is not unreasonable to infer that anti-competitive practices in the United States that have an impact on large multinational corporations and on a DRAM market that is international in scope might — indeed are likely to — affect consumers in Quebec. Further, Option consommateurs does not need to prove liability under s. 45 of the *Competition Act* at this stage of the proceedings, given the nature of the claim and the evidence that has already been adduced. Its claim of undue economic impact under s. 45 is relevant only to the extent that a violation of the statutory scheme can give rise to extracontractual liability under art. 1457 of the *C.C.Q.*

Option consommateurs has also discharged the burden of demonstrating that C and the other members of the proposed group suffered an injury as a result of the appellants' anti-competitive conduct. The passing on of price increases can ground a class action where the members of the group include direct purchasers. The policy considerations that militate against the defence

Option consommateurs a satisfait à la condition de la suffisance des questions communes établie à l'al. 1003*a*). Aucune différence entre les membres du groupe proposé à l'étape de l'autorisation ne porte atteinte à l'unité du groupe. Tous les membres, sans égard à leur situation personnelle, possèdent en commun l'intérêt tant de prouver l'existence d'un complot de fixation des prix que de maximiser le montant des pertes résultant de la surfacturation illégale. Les différences entre les relations des acheteurs directs avec les appelantes et celles des acheteurs indirects ne modifient en rien leur intérêt collectif à l'égard des questions de faute et de responsabilité. Toute question relative aux conflits d'intérêts peut être traitée au procès même.

En ce qui concerne l'exigence de l'al. 1003*b*) *C.p.c.* que « les faits allégués paraissent justifier les conclusions recherchées », Option consommateurs a présenté une cause défendable à l'appui de sa prétention invoquant la responsabilité extracontractuelle des appelantes. Elle s'est acquittée du fardeau relatif à la démonstration de la faute, du préjudice et du lien de causalité. Les allégations formulées dans la requête en autorisation sont suffisantes pour inférer une faute, compte tenu de la norme relativement peu exigeante s'appliquant à l'étape de l'autorisation. Bien que les allégations et la documentation à l'appui n'établissent pas explicitement l'existence d'un comportement fautif au Québec, elles mettent certainement en lumière le caractère international du complot de fixation du prix de la DRAM et le fait que le préjudice a été subi aussi à l'extérieur des États-Unis. Il n'est pas déraisonnable de conclure que des pratiques anticoncurrentielles aux États-Unis entraînant des répercussions sur de grandes entreprises multinationales et le marché de la DRAM, de portée internationale, pourraient peut-être, voire probablement, toucher les consommateurs québécois. Par ailleurs, Option consommateurs n'est pas tenue de prouver la responsabilité en vertu de l'art. 45 de la *Loi sur la concurrence* à la présente étape du recours, en raison de la nature de la demande et de la preuve déjà présentée. Son argument fondé sur les répercussions économiques indues, reposant sur l'art. 45, ne demeure pertinent que dans la mesure où un manquement au régime législatif peut entraîner une responsabilité extracontractuelle aux termes de l'art. 1457 *C.c.Q.*

Option consommateurs s'est aussi acquittée du fardeau de démontrer que C et les autres membres du groupe proposé ont subi un préjudice par suite du comportement anticoncurrentiel des appelantes. Le transfert des hausses de prix peut fonder un recours collectif dont les membres du groupe comprennent des acheteurs directs. Les considérations de politique juridique qui of passing on at common law should favour, in the civil law of Quebec, compensation for a loss that has been passed on to a plaintiff. In the instant case, there is no risk of double recovery, since the direct and indirect purchasers would be combined in a single group that would make a single collective claim of an aggregate loss. It is not necessary at the authorization stage to prove that each member of the group suffered a loss. As well, the evidentiary standard for demonstrating passing through is no different than the one for demonstrating an aggregate loss. The applicant must establish an arguable case that losses were passed on. Given this low threshold, the applicant is neither expected nor required to adduce expert testimony and advance a sophisticated methodology. At this early stage, the aggregate loss alleged by Option consommateurs and supported by the exhibits is enough to meet the burden of an arguable case. If at trial Option consommateurs is unable to demonstrate how the loss was passed on to the indirect purchasers and how it is to be calculated, the action might fail at that stage.

To establish causation under art. 1457 of the *C.C.Q.*, the damage must be shown to be a direct consequence of the injurious act, but the plaintiff need not be the immediate victim of that act in order to recover. At the authorization stage, the applicant needs only to present an arguable case that the loss was a direct result of the alleged misconduct. In this case, although the indirect purchasers may be indirect victims, the injury they allegedly suffered was a direct result of the appellants' anti-competitive conduct.

Finally, regarding the requirement of adequate representation, it would be contrary to the spirit of art. 1003(*d*) of the *C.C.P.* to deny authorization for the proposed group of purchasers of DRAM on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs and C are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts that would reveal a conflict with other members. Further, the class members clearly share a common interest in establishing the aggregate loss and in maximizing the amount of this loss. Much like art. 1003, art. 1048 of the *C.C.P.* is intended to be a flexible gatekeeper. Where a legal person applies to represent a class, art. 1048 directs that its mission be

militent contre le moyen de défense fondé sur le transfert de la perte en common law devraient favoriser, en droit civil québécois, l'indemnisation de la perte transférée à un demandeur. Dans la présente affaire, il n'existe aucun risque de double indemnisation puisque les acheteurs directs et indirects seraient réunis dans un même groupe qui présenterait une seule et même réclamation collective visant une perte globale. À l'étape de l'autorisation, il n'est pas nécessaire de prouver que chaque membre du groupe a subi une perte. En outre, la norme de preuve applicable pour démontrer le transfert de la perte ne diffère pas de celle qui s'applique pour démontrer la perte globale. Le requérant doit en effet établir qu'il est possible de soutenir que des pertes ont été transférées. Compte tenu de ce seuil peu élevé, il ne faut pas s'attendre à ce que le requérant présente des témoignages d'expert et propose une méthodologie sophistiquée, ni l'exiger de sa part. À cette étape initiale, la perte globale alléguée par Option consommateurs et appuyée par les pièces suffit à cette dernière pour s'acquitter du fardeau de présenter une cause défendable. Au procès, si Option consommateurs n'est pas en mesure de démontrer comment la perte a été transférée aux acheteurs indirects ni comment elle doit être calculée, le recours collectif pourrait être rejeté à cette étape.

Pour établir le lien de causalité prévu à l'art. 1457 *C.c.Q.*, il faut démontrer que le préjudice constitue une suite directe du fait dommageable, mais, pour pouvoir obtenir réparation, le demandeur ne doit pas forcément être la victime immédiate du fait en question. À l'étape de l'autorisation, le requérant n'a qu'à démontrer qu'il est possible de soutenir que la perte était le résultat direct de l'inconduite reprochée. En l'espèce, bien que les acheteurs indirects puissent être des victimes par ricochet, le préjudice qu'ils allèguent avoir subi représentait le résultat direct du comportement anticoncurrentiel des appelantes.

Enfin, pour ce qui est de l'exigence d'une représentation adéquate, il serait contraire à l'esprit de l'al. 1003*d*) *C.p.c.* de refuser l'autorisation au groupe proposé d'acheteurs de DRAM sur le fondement d'un éventuel conflit d'intérêts entre les membres du groupe. Le dossier n'indique pas qu'Option consommateurs et C ont intenté le recours et le mènent d'une manière malhonnête ou qu'elles ont omis de divulguer des faits importants qui révéleraient un conflit avec d'autres membres. En outre, les membres du groupe partagent manifestement l'intérêt commun d'établir la perte globale du groupe et d'en maximiser le montant. À l'instar de l'art. 1003, l'art. 1048 *C.p.c.* joue le rôle d'un gardien conciliant. Lorsqu'une personne morale demande à représenter le groupe, l'art. 1048 exige qu'elle remplisse connected not with the interests of all members of the class, but merely with those of one of the members. Since C is a member of Option consommateurs and of the proposed group, art. 1048 does not prohibit Option consommateurs from representing the interests of the members in this case.

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un mandat qui soit lié, non pas à l'intérêt de tous les membres du groupe, mais simplement à celui de l'un de ses membres. Puisque C est membre d'Option consommateurs et du groupe proposé, l'art. 1048 n'interdit pas à Option consommateurs de représenter en l'espèce les intérêts des membres.

Jurisprudence

Distinction d'avec les arrêts : *Harmegnies c. Toyota Canada inc.*, 2008 QCCA 380 (CanLII); *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214; **arrêt approuvé :** *Hubert c. Merck & Co. Inc.*, 2007 QCCS 3291 (CanLII); **arrêts mentionnés :** *Quebecor Printing Memphis Inc. c. Regenair Inc.*, [2001] R.J.Q. 966; *Banque de Montréal c. Hydro Aluminum Wells Inc.*, 2004 CanLII 12052; *Thompson c. Masson*, [1993] R.J.Q. 69; *Royal Bank of Canada c. Capital Factors Inc.*, [2004] Q.J. No. 11841 (QL); *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205; *Sterling Combustion inc. c. Roco Industrie inc.*, 2005 QCCA 662 (CanLII); *Option Consommateurs c. British Airways PLC*, 2010 QCCS 140 (CanLII); *Marcotte c. Longueuil (Ville)*, 2009 CSC 43, [2009] 3 R.C.S. 65; *Nault c. Canadian Consumer Co. Ltd.*, [1981] 1 R.C.S. 553; *Comité régional des usagers des transports en commun de Québec c. Commission des transports de la Communauté urbaine de Québec*, [1981] 1 R.C.S. 424; *Comité d'environnement de La Baie Inc. c. Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655; *Château c. Placements Germarich Inc.*, [1990] R.D.J. 625; *Tremaine c. A.H. Robins Canada Inc.*, [1990] R.D.J. 500; *Nadon c. Ville d'Anjou*, [1994] R.J.Q. 1823; *Pharmascience Inc. c. Option Consommateurs*, 2005 QCCA 437, [2005] R.J.Q. 1367; *Martin c. Société Telus Communications*, 2010 QCCA 2376 (CanLII); *Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347; *Berdah c. Nolisair International Inc.*, [1991] R.D.J. 417; *Breslaw c. Montréal (Ville)*, 2009 CSC 44, [2009] 3 R.C.S. 131; *Option Consommateurs c. Novopharm Ltd.*, 2008 QCCA 949, [2008] R.J.Q. 1350; *Collectif de défense des droits de la Montérégie (CDDM) c. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826 (CanLII); *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534; *Guilbert c. Vacances sans Frontière Ltée*, [1991] R.D.J. 513; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477; *Sun-Rype Products Ltd. c. Archer Daniels Midland Company*, 2013 CSC 58, [2013] 3 R.C.S. 545; *Hanover Shoe, Inc. c. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Colombie-Britannique c. Canadian Forest*

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Products Ltd., 2004 CSC 38, [2004] 2 R.C.S. 74; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Illinois Brick Co. c. Illinois*, 431 U.S. 720 (1977); *Regroupement des citoyens contre la pollution c. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; *Croteau c. Air Transat A.T. inc.*, 2007 QCCA 737, [2007] R.J.Q. 1175; *Bouchard c. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Black c. Place Bonaventure inc.* (2004), 41 C.C.P.B. 181; *Comité syndical national de retraite Bâtirente inc. c. Société financière Manuvie*, 2011 QCCS 3446 (CanLII); *Bourgoin c. Bell Canada inc.*, 2007 QCCS 6087 (CanLII); *Rosso c. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61; *Sun-Rype Products Ltd. c. Archer Daniels Midland Company*, 2010 BCSC 922 (CanLII); *Association des résidents riverains de la Lièvre inc. c. Canada (Procureur général)*, 2006 QCCS 5661 (CanLII).

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POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Forget, Pelletier et Kasirer), 2011 QCCA 2116, [2011] Q.J. No. 16769 (QL), 2011 CarswellQue 12645, SOQUIJ AZ-50805798, qui a infirmé une décision du juge Mongeau, 2008

2781, [2008] R.J.Q. 1694, [2008] J.Q. nº 5796 (QL), 2008 CarswellQue 5729, SOQUIJ AZ-50498459. Appeal dismissed.

Yves Martineau, for the appellants.

Daniel Belleau, *Maxime Nasr* and *Violette Leblanc*, for the respondent Option consommateurs.

No one appeared for the respondent Claudette Cloutier.

David Sterns and *Jean-Marc Leclerc*, for the intervener.

The judgment of the Court was delivered by

LEBEL AND WAGNER JJ. —

I. Introduction

[1] At issue in this appeal is whether a proposed class action based on allegations that the appellants conspired to inflate the price of a broadly used product, the dynamic random-access memory chip ("DRAM"), and caused damage to consumers should be authorized under the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"). The Quebec Superior Court said no. The Court of Appeal disagreed and said yes. For the reasons that follow, we agree with the Court of Appeal and would dismiss the appeal.

II. Background

[2] The appellant[1] companies are manufacturers of DRAM, which is a microchip that allows information to be electronically stored and rapidly retrieved. DRAM is commonly used in a wide range

1 Micron Technology, Inc., Hynix Semiconductor Inc., Samsung Electronics Co., and Samsung Semiconductor Inc., which were originally parties to this case, have discontinued their appeals. The Court has been advised of settlements agreed to by some of them. We have taken this into account in our conclusion.

QCCS 2781, [2008] R.J.Q. 1694, [2008] J.Q. nº 5796 (QL), 2008 CarswellQue 5729, SOQUIJ AZ-50498459. Pourvoi rejeté.

Yves Martineau, pour les appelantes.

Daniel Belleau, *Maxime Nasr* et *Violette Leblanc*, pour l'intimée Option consommateurs.

Personne n'a comparu pour l'intimée Claudette Cloutier.

David Sterns et *Jean-Marc Leclerc*, pour l'intervenante.

Version française du jugement de la Cour rendu par

LES JUGES LEBEL ET WAGNER —

I. Introduction

[1] Dans le présent pourvoi, il s'agit de décider s'il y a lieu d'autoriser sous le régime du *Code de procédure civile* du Québec, L.R.Q., ch. C-25 (« *C.p.c.* »), un recours collectif projeté, fondé sur des allégations selon lesquelles les appelantes auraient comploté en vue de gonfler le prix d'un produit largement utilisé, soit une puce de mémoire vive dynamique (« DRAM »), et ainsi causé un préjudice aux consommateurs. La Cour supérieure du Québec a d'abord répondu par la négative, mais la Cour d'appel, ne partageant pas cet avis, a conclu par l'affirmative. Pour les motifs qui suivent, nous sommes d'accord avec la Cour d'appel et rejetons donc le pourvoi.

II. Contexte

[2] Les appelantes[1] sont des sociétés qui fabriquent la DRAM, une micropuce qui permet de stocker électroniquement l'information et de la récupérer rapidement. La DRAM est couramment utilisée

1 Micron Technology, Inc., Hynix Semiconductor Inc., Samsung Electronics Co. et Samsung Semiconductor Inc., initialement parties au présent appel, se sont désistées. La Cour a été informée des règlements intervenus dans certains cas, et elle en a tenu compte dans ses conclusions.

of electronic devices such as personal computers, GPS equipment, cellular telephones and digital cameras.

[3] The appellants sell DRAM through a number of complex distribution channels to original equipment manufacturers ("OEMs"), such as Dell Inc. and the Hewlett-Packard Company. OEMs insert the chips into various electronic products they manufacture, which are in turn sold either to intermediaries in the distribution chain or directly to final consumers.

[4] For our purposes, individuals or companies that acquired DRAM directly from the appellants are referred to as "direct purchasers". The term "indirect purchaser" is used to refer to individuals and companies that acquired DRAM, or products containing DRAM, either from a direct purchaser or from another indirect purchaser at a different level in the distribution chain.

[5] The appellants have acknowledged their participation in an international price-fixing conspiracy in the multi-billion dollar DRAM market during the relevant period, from 1999 to 2002. They and their co-conspirators, with the exception of Micron Technology, Inc., pleaded guilty in 2004, in the United States District Court for the Northern District of California, to the following charges:

> . . . participating in a conspiracy in the United States and elsewhere to suppress and eliminate competition by fixing the prices of Dynamic Random Access Memory ("DRAM") to be sold to certain original equipment manufacturers of personal computers and servers ("OEMs") from on or about July 1, 1999, to on or about June 15, 2002, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. [A.R., vol. II, at p. 130]

[6] The OEMs affected by the impugned sales were Dell Inc., Compaq Computer Corporation, Hewlett-Packard Company, Apple Computer Inc., International Business Machines Corporation and Gateway Inc.

dans une grande variété d'appareils électroniques, tels les ordinateurs personnels, les dispositifs GPS, les téléphones cellulaires et les appareils photonumériques.

[3] Les appelantes vendent la DRAM par l'intermédiaire d'un certain nombre de canaux de distribution complexes à des fabricants d'équipement d'origine (« FEO »), comme Dell Inc. et Hewlett-Packard Company. Les FEO incorporent les puces dans divers produits électroniques qu'ils fabriquent, qui sont ensuite vendus soit à des intermédiaires au sein du canal de distribution, soit directement aux consommateurs finaux.

[4] Aux fins du présent pourvoi, les particuliers ou les sociétés ayant acquis de la DRAM directement des appelantes sont appelés « acheteurs directs ». Le terme « acheteur indirect » renvoie aux particuliers et aux sociétés qui ont acquis de la DRAM ou des produits équipés de DRAM, soit d'un acheteur direct, soit d'un autre acheteur indirect se trouvant à un autre niveau au sein du canal de distribution.

[5] Les appelantes ont reconnu leur participation à un complot international pour la fixation des prix sur le marché de la DRAM, s'élevant à plusieurs milliards de dollars, durant la période en cause entre 1999 et 2002. Les appelantes et les autres parties au complot, à l'exception de Micron Technology, Inc., ont plaidé coupable en 2004 aux accusations suivantes devant la Cour de district des États-Unis du district nord de la Californie :

> [TRADUCTION] . . . avoir participé à un complot aux États-Unis et ailleurs en vue de supprimer et d'éliminer la concurrence en fixant les prix de la mémoire vive dynamique (« DRAM ») devant être vendue à certains fabricants d'équipement d'origine d'ordinateurs personnels et de serveurs (« FEO ») du 1er juillet 1999 au 15 juin 2002, ou vers ces dates, en contravention de la Sherman Antitrust Act, 15 U.S.C. § 1. [d.a., vol. II, p. 130]

[6] Les FEO touchés par les ventes en cause étaient Dell Inc., Compaq Computer Corporation, Hewlett-Packard Company, Apple Computer Inc., International Business Machines Corporation et Gateway Inc.

[7] All the conspirators were heavily fined for their respective roles in the price-fixing conspiracy except for Micron Technology, which was granted clemency because it had co-operated with the authorities. However, Micron Technology also acknowledged that the U.S. Department of Justice investigation had revealed that its employees had been involved in price-fixing in the DRAM market.

[8] In 2010, the appellants also acknowledged their participation in a cartel to fix the prices of DRAM in Europe. They paid a fine in a settlement of proceedings that had been undertaken against them there.

[9] The respondent Option consommateurs alleges that this price-fixing conspiracy artificially inflated the prices of DRAM and products containing DRAM sold in Quebec between April 1999 and July 2002. Its claim is based upon allegations that the appellants failed to discharge statutory obligations under the *Competition Act*, R.S.C. 1985, c. C-34, and that their conduct amounted to a fault giving rise to civil liability under the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*").

[10] Option consommateurs claims that, as a result of the alleged price inflation, both the direct and the indirect purchasers suffered damage in that they overpaid on purchases of DRAM or products containing DRAM.

[11] Option consommateurs applied to the Superior Court for authorization to institute a class action against the appellants in order to recover damages in this regard on behalf of the members of the affected class. The group comprises direct and indirect purchasers who suffered losses by absorbing, in whole or in part, the inflated portion of the price of DRAM sold in Quebec. The group was described as follows in the respondent's motion:

[7] Les parties au complot ont toutes été condamnées à de lourdes amendes pour leur rôle respectif dans le complot pour la fixation des prix, sauf Micron Technology, qui a bénéficié de la clémence des autorités pour avoir collaboré avec ces dernières. Toutefois, Micron Technology a également reconnu que l'enquête menée par le ministère de la Justice des É.-U. avait révélé l'implication de ses employés dans la fixation des prix sur le marché de la DRAM.

[8] En 2010, les appelantes ont aussi reconnu leur participation à un cartel pour fixer le prix de la DRAM en Europe. Elles ont par la suite payé une amende dans le cadre du règlement des poursuites qui y avaient été intentées contre elles.

[9] Pour sa part, Option consommateurs, intimée en l'espèce, allègue que ce complot pour la fixation du prix a gonflé artificiellement les prix de la DRAM et des produits équipés de DRAM vendus au Québec entre avril 1999 et juillet 2002. Sa demande repose sur des allégations selon lesquelles les appelantes n'ont pas rempli les obligations que leur imposait la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, et que leur conduite équivalait à une faute entraînant la responsabilité civile sous le régime du *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* »).

[10] En raison du gonflement du prix allégué, Option consommateurs prétend que tant les acheteurs directs qu'indirects ont subi un préjudice résultant des paiements en trop qu'ils ont effectués lors des achats de DRAM ou de produits équipés de DRAM.

[11] Option consommateurs a présenté une requête devant la Cour supérieure afin d'obtenir l'autorisation d'exercer un recours collectif contre les appelantes pour recouvrer des dommages-intérêts au nom des membres du groupe touché. Le groupe est formé des acheteurs directs et indirects qui ont subi des pertes en absorbant, en tout ou en partie, la portion gonflée du prix de la DRAM vendue au Québec. La requête de l'intimée décrit ainsi le groupe :

[TRANSLATION] Any person who purchased, in Quebec, dynamic random-access memory (DRAM) and/or one or more products containing dynamic random-access memory (DRAM) . . . between April 1, 1999 and June 30, 2002, inclusively.

However, a legal person established for a private interest, a partnership or an association may be a member of the group, but only if at all times since October 5, 2003, not more than fifty (50) persons bound to it by contract of employment were under its direction or control, and if it is dealing at arm's length with the applicant. [A.R., vol. II, at p. 57]

[12] The class action applies to all devices containing DRAM, including computers, servers, printers, hard drives, cellular telephones, digital cameras and MP3 players.

[13] In its motion for authorization of the class action, Option consommateurs designated the respondent Claudette Cloutier as a member of the group pursuant to art. 1048(*a*) of the *C.C.P.* Ms. Cloutier is a resident of Montréal who purchased a personal computer containing DRAM from Dell Computer Corporation ("Dell") on October 9, 2001. She accessed Dell's website and made the purchase by credit card from her home in Montréal.

[14] The standard-form terms for the online purchase indicated that the sale was deemed to have occurred in Ontario and was subject to Ontario law. The invoice indicated that Dell's address for payment was in Toronto, Ontario.

[15] The appellants have their head offices in other countries. Neither of them has a place of business in the province of Quebec.

III. Judicial History

A. *Quebec Superior Court (Mongeau J.), 2008 QCCS 2781, [2008] R.J.Q. 1694*

[16] The motion judge of the authorization proceeding held that the Superior Court did not have territorial jurisdiction to hear the class action,

Toute personne qui a acheté au Québec de la mémoire vive dynamique (DRAM) et/ou un ou des produits équipés de mémoire vive dynamique (DRAM) (. . .) entre le premier avril 1999 et le 30 juin 2002 inclusivement.

Toutefois, une personne morale de droit privé, une société ou une association n'est membre du groupe que si, en tout temps depuis le 5 octobre 2003 elle comptait sous sa direction ou sous son contrôle au plus cinquante (50) personnes liées à elle par contrat de travail, et qu'elle n'est pas liée avec la requérante. [d.a., vol. II, p. 57]

[12] Le recours collectif s'applique à tous les appareils équipés de DRAM, notamment aux ordinateurs, aux serveurs, aux imprimantes, aux disques durs, aux téléphones cellulaires, aux appareils photonumériques et aux lecteurs MP3.

[13] Dans sa requête pour autorisation d'exercer un recours collectif, Option consommateurs a désigné Claudette Cloutier, intimée en l'espèce, à titre de membre du groupe conformément à l'al. 1048*a*) *C.p.c*. Celle-ci, une résidente de Montréal, avait acheté un ordinateur personnel équipé de DRAM auprès de Dell Computer Corporation (« Dell ») le 9 octobre 2001. Pour ce faire, elle avait consulté le site Web de Dell et effectué l'achat par carte de crédit à partir de son domicile situé à Montréal.

[14] D'après le libellé des clauses types régissant cet achat en ligne, la vente était réputée avoir été effectuée en Ontario et était assujettie aux lois de cette province. En outre, la facture précisait que l'adresse de Dell aux fins du paiement était à Toronto, en Ontario.

[15] Les sièges sociaux des appelantes se trouvent tous à l'étranger. Aucune ne dispose d'un établissement dans la province de Québec.

III. Historique judiciaire

A. *Cour supérieure du Québec (le juge Mongeau), 2008 QCCS 2781, [2008] R.J.Q. 1694*

[16] Le juge saisi de la requête en autorisation a conclu que la Cour supérieure n'avait pas compétence territoriale pour entendre le recours

because no damage had been suffered in Quebec. Having found that there was no contract between Ms. Cloutier and the appellants, that the fault had been committed in the U.S. and that the appellants did not have a place of business in Quebec, he concluded that a real and substantial connection with Quebec that would be sufficient to ground jurisdiction did not exist.

[17] The motion judge adopted the reasons of the Quebec Court of Appeal in *Quebecor Printing Memphis Inc. v. Regenair Inc.*, [2001] R.J.Q. 966, and in *Banque de Montréal v. Hydro Aluminum Wells Inc.*, 2004 CanLII 12052, in holding that the concept of damage under art. 3148(3) of the *C.C.Q.* cannot be stretched to the point that the fact that the person who suffered damage is domiciled in Quebec would suffice to confer jurisdiction on the Quebec courts.

[18] The judge then considered how he would have ruled on the merits of the motion had he held that the Superior Court had jurisdiction. In his opinion, Option consommateurs and Ms. Cloutier had not shown that they met all the conditions set out in art. 1003 of the *C.C.P.* for authorizing a class action.

[19] Although the judge conceded that the motion adequately established the existence of questions of law or fact common to the group for the purposes of art. 1003(*a*) of the *C.C.P.*, he held that the motion failed on art. 1003(*b*) because the facts alleged did not support the conclusions being sought. More specifically, he found insufficient evidence that the appellants had breached s. 36 of the *Competition Act* or that an injurious act, damage and a causal connection had been shown for the purposes of s. 45 of the *Competition Act*. In any event, the judge found that the action was barred by the limitation period provided for in s. 36 of the *Competition Act*.

[20] The motion judge also held that the requirements of arts. 1003(*d*) and 1048 of the *C.C.P.* were not satisfied. In his view, the interests of Option consommateurs and Ms. Cloutier conflicted

collectif, puisqu'aucun préjudice n'avait été subi au Québec. Après avoir statué qu'aucun contrat ne liait M^me^ Cloutier et les appelantes, que la faute avait été commise aux É.-U. et que les appelantes ne disposaient d'aucun établissement au Québec, il a conclu qu'il n'existait pas de lien réel et substantiel avec le Québec suffisant pour établir la compétence du tribunal.

[17] Le juge saisi de la requête a fait siens les motifs de la Cour d'appel du Québec dans *Quebecor Printing Memphis Inc. c. Regenair Inc.*, [2001] R.J.Q. 966, et *Banque de Montréal c. Hydro Aluminum Wells Inc.*, 2004 CanLII 12052. Selon lui, la notion de préjudice visée au par. 3148(3) *C.c.Q.* ne pouvait être élargie au point de donner compétence aux tribunaux québécois du fait que la victime du préjudice était domiciliée au Québec.

[18] Le juge a ensuite examiné la façon dont il aurait statué sur le fond de la requête s'il avait conclu à la compétence de la Cour supérieure. À son avis, Option consommateurs et M^me^ Cloutier n'avaient pas démontré qu'elles répondaient à toutes les conditions énoncées à l'art. 1003 *C.p.c.* en vue de l'autorisation du recours collectif.

[19] Bien qu'il ait reconnu que la requête démontrait de façon adéquate l'existence de questions de droit ou de fait communes au groupe pour l'application de l'al. 1003*a*) *C.p.c.*, le juge a conclu qu'il n'avait pas été satisfait à la condition prévue à l'al. 1003*b*) puisque les faits allégués ne justifiaient pas les conclusions recherchées. Plus particulièrement, il a jugé la preuve insuffisante pour établir la violation par les appelantes de l'art. 36 de la *Loi sur la concurrence* ou la démonstration, pour l'application de l'art. 45 de cette même loi, d'un fait dommageable, d'un préjudice et d'un lien de causalité. Quoi qu'il en soit, il a conclu à la prescription de l'action en conformité avec l'art. 36 de cette loi.

[20] En outre, le juge saisi de la requête a affirmé que les exigences de l'al. 1003*d*) et de l'art. 1048 *C.p.c.* n'avaient pas été respectées. À son avis, les intérêts d'Option consommateurs et

with those of the non-consumer members of the proposed group.

[21] The motion judge accordingly dismissed the motion for authorization to institute a class action. Option consommateurs appealed to the Court of Appeal.

B. *Quebec Court of Appeal (Forget, Pelletier and Kasirer JJ.A.), 2011 QCCA 2115, 2011 QCCA 2116 (CanLII)*

[22] The Court of Appeal rendered two concurrent judgments. In one, it granted in part a motion of Option consommateurs to introduce new evidence in the appeal. More specifically, this decision authorized the filing of evidence that the appellants had participated in anti-competitive practices in Europe and had agreed to pay fines in a settlement with the competent European authorities.

[23] In the other judgment, the Court of Appeal overturned the Superior Court's judgment and authorized the class action. Kasirer J.A., who wrote the Court of Appeal's reasons, noted that the claims of the direct and indirect purchaser group members were not rooted in distinct contractual or extracontractual sources. Rather, he pointed out, the class action was grounded on an allegation of a precontractual fault of conspiring to artificially inflate the price of DRAM through a price-fixing scheme, which gave rise to extracontractual liability under art. 1457 of the *C.C.Q.*

[24] On the jurisdiction issue, Kasirer J.A. found that the Quebec courts had jurisdiction over the claim pursuant to art. 3148(3) of the *C.C.Q.* Under that provision, Quebec courts have jurisdiction in personal actions of a patrimonial nature where "a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in

de M[me] Cloutier entraient en conflit avec ceux des membres du groupe proposé qui n'étaient pas des consommateurs.

[21] En conséquence, le juge saisi de la requête a rejeté la requête en autorisation d'exercer un recours collectif. Option consommateurs a alors interjeté appel devant la Cour d'appel.

B. *Cour d'appel du Québec (les juges Forget, Pelletier et Kasirer), 2011 QCCA 2115, 2011 QCCA 2116 (CanLII)*

[22] La Cour d'appel a rendu deux jugements simultanément. Dans le premier, elle a accueilli en partie la requête d'Option consommateurs en vue de présenter de nouveaux éléments de preuve en appel. Cette décision autorisait, plus particulièrement, le dépôt d'éléments de preuve attestant la participation des appelantes à des pratiques anticoncurrentielles en Europe ainsi que leur décision d'accepter de payer des amendes dans le cadre d'un règlement conclu avec les autorités européennes compétentes.

[23] Dans le second, la Cour d'appel a infirmé le jugement de la Cour supérieure et autorisé l'exercice du recours collectif. Le juge Kasirer, auteur des motifs de la Cour d'appel, a fait observer que les demandes formulées par les membres du groupe des acheteurs directs et indirects ne reposaient pas sur des sources contractuelles ou extracontractuelles distinctes. Il a précisé que le recours collectif s'appuyait plutôt sur une allégation de faute précontractuelle, qui consistait dans un complot pour gonfler artificiellement le prix de la DRAM au moyen d'un stratagème de fixation des prix, qui engagerait la responsabilité extracontractuelle sous le régime de l'art. 1457 *C.c.Q.*

[24] À propos de la question de la compétence, le juge Kasirer a conclu qu'en application du par. 3148(3) *C.c.Q.*, les tribunaux québécois avaient compétence pour statuer sur la demande. Cette disposition reconnaît en effet leur compétence à l'égard des actions personnelles à caractère patrimonial lorsqu'« [u]ne faute a été commise

Québec or one of the obligations arising from a contract was to be performed in Québec". The fact that a Quebec resident's patrimony is located in that province is not sufficient to ground jurisdiction.

au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée ». Le fait que le patrimoine d'un résident du Québec se trouve dans cette province ne suffit pas pour fonder la compétence.

[25] Kasirer J.A. held that the damage was connected with a contract that had been concluded in Quebec. Under ss. 20 and 21 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, a remote-parties contract is deemed to be concluded at the consumer's address if the parties are not in one another's presence at the time of the offer or of acceptance, and the offer was not solicited by the consumer.

[25] Selon le juge Kasirer, le préjudice était lié à un contrat conclu au Québec. Suivant les anciens art. 20 et 21 de la *Loi sur la protection du consommateur*, L.R.Q., ch. P-40.1, un contrat à distance est réputé conclu à l'adresse du consommateur si les parties ne sont pas en présence l'une de l'autre au moment de l'offre ou de l'acceptation, et que l'offre n'a pas été sollicitée par le consommateur.

[26] Kasirer J.A. found that these criteria were met and that a remote-parties contract had in fact been formed between Ms. Cloutier and Dell. Accordingly, the jurisdiction of the Quebec courts did not rest merely on the existence of a Quebec patrimony, since the loss was suffered in Quebec as the result of a material event that occurred in Quebec. This was enough to ground jurisdiction pursuant to art. 3148(3) of the *C.C.Q.*

[26] Le juge Kasirer a statué qu'il avait été satisfait à ces conditions et qu'un contrat à distance avait effectivement été formé entre M[me] Cloutier et Dell. En conséquence, la compétence des tribunaux québécois ne reposait pas uniquement sur l'existence d'un patrimoine québécois puisque la perte avait été subie au Québec par suite d'un événement matériel survenu au Québec. Cela suffisait à donner compétence aux tribunaux québécois en application du par. 3148(3) *C.c.Q.*

[27] Having recognized the jurisdiction of the Quebec courts, Kasirer J.A. turned to the requirements for authorization of a class action set out in art. 1003 of the *C.C.P.* He held that the motion satisfied each of the criteria.

[27] Après avoir reconnu la compétence des tribunaux du Québec, le juge Kasirer s'est penché sur les conditions d'autorisation du recours collectif énoncées à l'art. 1003 *C.p.c.* et a conclu que la requête respectait chacune de celles-ci.

[28] On art. 1003(*a*) of the *C.C.P.*, Kasirer J.A. agreed with the Superior Court's finding that there were sufficient common questions of law or fact.

[28] S'agissant de l'al. 1003*a*) *C.p.c.*, le juge Kasirer a accepté la conclusion de la Cour supérieure selon laquelle il existait suffisamment de questions de droit ou de fait communes.

[29] On art. 1003(*b*), he found that the allegations of the motion for authorization adequately established fault, the harm suffered, and causation.

[29] Relativement à l'al. 1003*b*), il a décidé que les allégations formulées dans la requête en autorisation établissaient de façon adéquate la faute, le préjudice subi et le lien de causalité.

[30] In Kasirer J.A.'s opinion, the allegations of violations of s. 45 of the *Competition Act*, which gave rise to extracontractual liability under art. 1457 of the *C.C.Q.*, were sufficient. Kasirer J.A. held that Option consommateurs was "far from having

[30] Selon le juge Kasirer, les allégations de violation de l'art. 45 de la *Loi sur la concurrence*, ayant entraîné la responsabilité extracontractuelle en vertu de l'art. 1457 *C.c.Q.*, suffisaient. Il a conclu qu'Option consommateurs était [TRADUCTION] « loin

established its case on the merits" (para. 84), but that the evidence of plea agreements in the United States sufficed to discharge the low evidentiary burden Option consommateurs faced at this stage in respect of its allegations of undue restraint of trade. In his view, the lack of extraterritorial reach of s. 45 of the *Competition Act* was not a bar to the class action. It would not affect an action in civil liability under art. 1457 of the *C.C.Q.*, the provision on which the claim was based (paras. 86-88).

d'avoir établi sa preuve sur le fond » (par. 84), mais que la preuve des ententes sur le plaidoyer aux États-Unis suffisait pour répondre au fardeau de la preuve peu exigeant reposant sur Option consommateurs à cette étape relativement à ses allégations de restriction indue du commerce. D'après le juge, l'absence de portée extraterritoriale de l'art. 45 de la *Loi sur la concurrence* ne constituait pas un obstacle au recours collectif. Ce facteur demeurait sans incidence sur une action en responsabilité civile fondée sur l'art. 1457 *C.c.Q.* (par. 86-88).

[31] Kasirer J.A. held that the alleged aggregate loss suffered by the different members of the group constituted a sufficient *prima facie* demonstration of the loss for the purposes of art. 1003(*b*) of the *C.C.P.* In drawing this conclusion, he found that the losses of the direct purchasers and those of the indirect purchasers need not be distinguished at this stage. This issue would be properly resolved if and when the class action succeeded on its merits.

[31] Le juge Kasirer a précisé que la perte globale alléguée, subie par les différents membres du groupe, constituait une démonstration *prima facie* suffisante de la perte pour l'application de l'al. 1003*b*) *C.p.c.* Pour justifier cette conclusion, il a souligné qu'il n'était pas nécessaire, à la présente étape, d'effectuer une distinction entre les pertes des acheteurs directs et celles des acheteurs indirects. Cette question serait plutôt dûment tranchée lorsque, le cas échéant, le recours collectif serait accueilli sur le fond.

[32] Kasirer J.A. also found that at this stage, Option consommateurs could ground its cause of action on the passing on of inflated prices through the various layers of the distribution chain without there being a risk of double recovery, since the group comprised both the direct and the indirect purchasers of DRAM. Mindful of policy concerns in the area of consumer protection, Kasirer J.A. stated that precluding an action where price increases have been passed on could lead to the unjust enrichment of direct purchasers should indirect purchasers fail to take legal action against perpetrators of price-fixing conspiracies.

[32] À l'étape de l'autorisation, le juge Kasirer a également reconnu qu'Option consommateurs pouvait fonder sa cause d'action sur le transfert de prix gonflés par l'intermédiaire des différents niveaux au sein du canal de distribution sans risque d'une double indemnisation puisque le groupe se composait tant des acheteurs directs qu'indirects de DRAM. Conscient des considérations d'intérêt public présentes en matière de protection du consommateur, le juge Kasirer a précisé que le fait d'empêcher l'introduction d'une action portant sur le transfert de la majoration du prix favoriserait l'enrichissement injustifié des acheteurs directs dans les cas où les acheteurs indirects n'intenteraient pas d'action en justice à l'encontre des auteurs des complots pour fixer les prix.

[33] Significantly, Kasirer J.A. held that it is not necessary to advance a sophisticated methodology of proof of loss at this preliminary stage of the class action. It would be wrong to impose an overly onerous evidentiary burden and prevent Option consommateurs from having its case heard on its merits.

[33] Fait important, le juge Kasirer a affirmé qu'il n'est pas nécessaire, à cette étape préliminaire du recours collectif, de proposer une méthodologie sophistiquée en vue de prouver la perte. On aurait tort, en effet, d'imposer un fardeau de preuve trop onéreux à Option consommateurs et d'empêcher l'audition au fond de sa cause.

[34] Kasirer J.A. found that the allegations relating to causation were sufficient to satisfy the requirements of the authorization stage, given the nature of the claim and the structure of the proposed group. Proving that the price-fixing conspiracy had led to increased prices for DRAM and products containing DRAM was a task to be undertaken at the trial itself.

[35] Kasirer J.A. then found that the requirements of art. 1003(*d*) were satisfied and that Ms. Cloutier could carry on as the designated member of the proposed group. He held that Ms. Cloutier had standing to represent the group on the basis of her online purchase of a computer containing DRAM. What was relevant was not the type of device she had purchased, but the fact that it contained DRAM that had been purchased at an inflated price.

[36] Finally, Kasirer J.A. found that neither Ms. Cloutier nor Option consommateurs was in a conflict of interests with the direct purchasers at this stage, since all members of the group had a common objective of maximizing the total damages award.

[37] The Court of Appeal accordingly allowed the appeal, granted the motion for authorization to institute the class action and let that action proceed to trial.

IV. Issues

[38] There are two primary issues before the Court. The first is whether a Quebec court has jurisdiction under art. 3148 of the *C.C.Q.* to authorize a class action in the circumstances of this case. If it does, the second issue is whether Option consommateurs meets the threshold requirement for authorization under art. 1003 of the *C.C.P.*

V. Analysis

[39] Before we delve into the substantive legal issues, the standard of review must be addressed.

[34] Le juge Kasirer a aussi conclu que les allégations relatives au lien de causalité suffisaient pour satisfaire aux exigences applicables à l'étape de l'autorisation, compte tenu de la nature de la demande et de la structure du groupe proposé. Il s'agira de prouver au procès que le complot pour fixer les prix avait eu pour effet de gonfler les prix de la DRAM et des produits équipés de DRAM.

[35] Le juge Kasirer a ensuite statué qu'il était satisfait aux exigences de l'al. 1003*d*) et que M[me] Cloutier pouvait continuer d'agir à titre de membre désignée du groupe proposé. À son avis, celle-ci avait qualité pour représenter le groupe en raison de son achat en ligne d'un ordinateur équipé de DRAM. Le facteur important n'était pas le type d'appareil acheté, mais bien le fait qu'il était équipé de DRAM achetée à un prix gonflé.

[36] Enfin, le juge Kasirer a conclu que ni M[me] Cloutier ni Option consommateurs n'étaient en conflit d'intérêts avec les acheteurs directs à la présente étape. En effet, tous les membres du groupe partageaient un objectif commun de maximiser le montant total des dommages-intérêts susceptibles d'être accordés.

[37] En conséquence, la Cour d'appel du Québec a accueilli l'appel, ainsi que la requête en autorisation d'exercer le recours collectif, et permis l'audition de celui-ci.

IV. Questions en litige

[38] Notre Cour est saisie de deux questions principales. La première consiste à savoir si, dans les circonstances de la présente affaire, les tribunaux québécois ont compétence en vertu de l'art. 3148 *C.c.Q.* pour autoriser l'exercice du recours collectif. Dans l'hypothèse d'une réponse affirmative, il faudra trancher la seconde question, à savoir si Option consommateurs satisfait aux critères d'autorisation prévus par l'art. 1003 *C.p.c.*

V. Analyse

[39] Avant d'examiner les questions de droit substantiel, nous devons nous pencher sur le problème

The appellants submit that the Court of Appeal erred in overturning the motion judge's decision and finding that Option consommateurs met the threshold requirement for authorization under art. 1003 of the *C.C.P.*

[40] Contrary to the appellants' arguments, the Court of Appeal did not need to find that the motion judge had made a "palpable and overriding error" or that his reasons were "patently wrong" in order to intervene. As will be seen in the reasons that follow, the motion judge misapprehended the law as it relates to key components of the art. 1003 analysis: namely, the passing on of price increases as the basis for a cause of action, the demonstration of an aggregate loss at the authorization stage, the evidentiary and legal threshold requirements for authorization, and the need to satisfy the criteria for a successful action under ss. 36 and 45 of the *Competition Act*. These errors enabled the Court of Appeal to apply the appropriate legal standards to the motion judge's findings of fact and to draw the correct legal conclusions from them.

A. *Jurisdiction*

[41] The first issue is whether the Quebec courts have jurisdiction over this dispute between international DRAM manufacturers and a group consisting of direct and indirect purchasers located in Quebec, given that the alleged wrongdoing that forms the basis of the claim — a conspiracy to reduce competition and inflate the price of DRAM — occurred outside Quebec. The appellants are challenging the jurisdiction of the province's courts to hear the claim at the earliest stage, that of the motion for authorization of the class action.

[42] According to a well-established jurisprudence of the Quebec courts, challenges to Quebec's jurisdiction can properly be made and dealt with at the outset of a proceeding for authorization of a class action. The judgment rendered at this stage will determine, on the basis of the allegations, whether

de la norme de contrôle applicable. En effet, les appelantes prétendent que la Cour d'appel a commis une erreur en infirmant la décision du juge saisi de la requête et en concluant qu'Option consommateurs répondait aux critères d'autorisation prévus par l'art. 1003 *C.p.c.*

[40] Contrairement aux prétentions des appelantes, la Cour d'appel pouvait intervenir sans devoir conclure que le juge saisi de la requête avait commis une « erreur manifeste et dominante » ou que ses motifs étaient « manifestement erronés ». Comme nous le verrons dans les motifs qui suivent, le juge saisi de la requête a mal interprété la loi au sujet des composantes principales de l'analyse fondée sur l'art. 1003, à savoir le transfert des hausses de prix comme fondement de la cause d'action, la démonstration d'une perte globale à l'étape de l'autorisation, les exigences relatives au seuil de preuve et au seuil légal applicables à l'autorisation et la nécessité de satisfaire aux critères permettant d'accueillir une action aux termes des art. 36 et 45 de la *Loi sur la concurrence*. Ces erreurs ont permis à la Cour d'appel d'appliquer les normes juridiques appropriées aux conclusions de fait du juge saisi de la requête et d'en dégager les conclusions de droit correctes.

A. *Compétence*

[41] La première question qui se pose consiste à déterminer si les tribunaux québécois ont compétence sur ce litige opposant des fabricants internationaux de DRAM et un groupe d'acheteurs directs et indirects se trouvant au Québec, alors que l'acte fautif allégué à l'origine de la demande — un complot en vue de restreindre la concurrence et de gonfler le prix de la DRAM — a été commis à l'extérieur du Québec. Les appelantes contestent la compétence des tribunaux de la province pour instruire la demande à la première étape, c'est-à-dire celle de l'autorisation du recours collectif.

[42] Suivant une jurisprudence bien établie des tribunaux québécois, toute contestation de la compétence des tribunaux du Québec peut être soulevée et examinée à juste titre dès le début d'une instance en autorisation d'un recours collectif. Le jugement rendu à cette étape déterminera,

the matter appears to be properly before the court (see *Thompson v. Masson*, [1993] R.J.Q. 69 (C.A.)). However, this does not mean that a judgment dismissing a jurisdictional challenge at the authorization stage ends the debate over the territorial jurisdiction of the Quebec courts. This issue could be raised again later, because the judgment rendered at this stage is only an interlocutory decision (art. 1010 of the *C.C.P.*). The court may subsequently reconsider the issue in light of all the evidence, and decline jurisdiction, at the trial on the merits (*Thompson*, at p. 73).

[43] On the basis of the facts as alleged, we conclude that the Quebec courts have jurisdiction over this matter under art. 3148 of the *C.C.Q.* Article 3148 defines the scope of the jurisdiction of the Quebec courts under private international law by providing for certain connecting factors in respect of the jurisdiction of Quebec authorities. More specifically, art. 3148(3) confers jurisdiction on a Quebec authority in a personal action of a patrimonial nature where "a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec".

[44] As we mentioned above, Option consommateurs argues that every member of the group on behalf of which it intends to act has suffered economic damage as a result of the manufacturers' unlawful price-fixing scheme for DRAM. Ms. Cloutier, the designated member of the group, is domiciled in Quebec. When she purchased a computer from Dell over the Internet from her home in Montréal, she entered into a contract of sale that required her to pay more than she should have for the computer on account of the alleged conspiracy. Option consommateurs argues that the contract is deemed to have been entered into in Quebec under the *Consumer Protection Act* and that Ms. Cloutier accordingly suffered damage in Quebec. The appellants counter that economic damage alone is not sufficient to ground jurisdiction and, moreover, that the contract was not entered into in Quebec.

sur le fondement des allégations, s'il appert que le tribunal est dûment saisi de la question (voir *Thompson c. Masson*, [1993] R.J.Q. 69 (C.A.)). Toutefois, cela ne signifie pas qu'un jugement rejetant la contestation de la compétence à l'étape de l'autorisation mettra fin au débat sur la compétence territoriale des tribunaux québécois. En effet, cette question pourrait être soulevée de nouveau plus tard, car le jugement rendu à cette étape ne constitue qu'une décision interlocutoire (art. 1010 *C.p.c.*). Le tribunal peut subséquemment réexaminer la question à la lumière de l'ensemble de la preuve, et décliner compétence lors du procès au fond (*Thompson*, p. 73).

[43] En raison des faits allégués, nous concluons que les tribunaux québécois ont compétence sur cette question aux termes de l'art. 3148 *C.c.Q.* Cet article définit l'étendue de la compétence des tribunaux québécois sous le régime du droit international privé, en établissant certains facteurs de rattachement relatifs à cette compétence. Plus précisément, le par. 3148(3) confère compétence aux autorités québécoises dans les actions personnelles à caractère patrimonial lorsqu'« [u]ne faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée ».

[44] Comme nous l'avons déjà mentionné, Option consommateurs prétend que chacun des membres du groupe pour le compte desquels elle entend agir a subi un préjudice économique découlant du stratagème illégal de fixation du prix de la DRAM par les fabricants. M[me] Cloutier, membre du groupe désignée, est domiciliée au Québec. Lorsqu'elle a acheté un ordinateur auprès de Dell par Internet depuis son domicile montréalais, elle a conclu un contrat de vente qui l'obligeait à verser un prix plus élevé que ce qu'elle aurait dû payer en raison du complot allégué. Option consommateurs soutient que le contrat est réputé conclu au Québec en vertu de la *Loi sur la protection du consommateur* et que, partant, M[me] Cloutier a subi un préjudice au Québec. Les appelantes rétorquent que le préjudice économique n'est pas suffisant, à lui seul, pour donner compétence aux tribunaux québécois et, en outre, que le contrat n'a pas été conclu au Québec.

[45] Damage suffered in Quebec is an independent factor under art. 3148(3): the damage does not need to be tied to the locus of the injury or of the fault, unlike in the case of art. 3168, to give one example. Any one of the four individual factors listed in art. 3148(3) would constitute a sufficient connection with the province to ground jurisdiction (see *Royal Bank of Canada v. Capital Factors Inc.*, [2004] Q.J. No. 11841 (QL) (C.A.), at para. 2; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 56). In terms of the type of damage covered by art. 3148(3), there is no principled reason to exclude purely economic damage from its scope. The plain language of art. 3148(3) does not preclude economic damage from serving as a connecting factor, nor is the recovery of a purely economic loss prohibited in Quebec civil law (see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at pp. 116-18). It is clear from the Quebec jurisprudence that economic damage can serve as a connecting factor under art. 3148(3) (see, e.g., *Sterling Combustion inc. v. Roco Industrie inc.*, 2005 QCCA 662 (CanLII); *Option Consommateurs v. British Airways PLC*, 2010 QCCS 140 (CanLII)).

[46] *Quebecor Printing*, a case the appellants rely on, should not be read so broadly as to systematically exclude a purely economic loss as a type of damage to which art. 3148(3) applies. Rather, that case indicates that where financial damage is merely *recorded* in Quebec, that fact is not sufficient to ground jurisdiction under art. 3148(3). To satisfy the requirement of art. 3148(3), the damage must be *suffered* in Quebec. As Kasirer J.A. explained in the judgment of the Court of Appeal in the case at bar, there is a distinction between damage that is substantially suffered in Quebec and damage that is simply recorded in Quebec on the basis of the location of the plaintiff's patrimony:

[*Préjudice*] is to be distinguished from the "*dommage*/damage" that is the subjective consequence of the injury relevant to the measure of reparation needed to make good the loss. As a result, in specifying "damage was

[45] Le préjudice subi au Québec constitue un facteur indépendant prévu au par. 3148(3) : il n'est pas nécessaire que le préjudice soit lié à l'endroit où le fait dommageable a été subi ou la faute commise, contrairement par exemple à l'art. 3168. Chacun des quatre facteurs mentionnés au par. 3148(3) créerait un lien suffisant avec la province pour fonder la compétence (voir *Royal Bank of Canada c. Capital Factors Inc.*, [2004] Q.J. No. 11841 (QL) (C.A.), par. 2; *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205, par. 56). S'agissant du type de préjudice visé par le par. 3148(3), il n'existe aucune raison de principe justifiant d'exclure le préjudice purement économique de l'application de la disposition. Le libellé clair du par. 3148(3) n'empêche pas le préjudice économique de servir de facteur de rattachement, et le droit civil québécois n'interdit pas non plus l'indemnisation de la perte purement économique (voir C. Emanuelli, *Droit international privé québécois* (3e éd. 2011), p. 116-118). Il ressort clairement de la jurisprudence québécoise que le préjudice économique peut servir de facteur de rattachement en vertu du par. 3148(3) (voir, p. ex., *Sterling Combustion inc. c. Roco Industrie inc.*, 2005 QCCA 662 (CanLII); *Option Consommateurs c. British Airways PLC*, 2010 QCCS 140 (CanLII)).

[46] L'affaire *Quebecor Printing*, sur laquelle s'appuient les appelantes, ne devrait pas recevoir une interprétation si large qu'elle exclurait systématiquement la perte purement économique des formes de préjudice auxquelles s'applique le par. 3148(3). Cet arrêt indique plutôt que le fait de simplement *comptabiliser* au Québec le préjudice financier ne suffit pas pour fonder la compétence en vertu du par. 3148(3). Pour remplir l'exigence du par. 3148(3), le préjudice doit être *subi* au Québec. Comme l'explique le juge Kasirer dans la décision de la Cour d'appel dans la présente affaire, il importe de distinguer le préjudice subi pour l'essentiel au Québec de celui qui est simplement comptabilisé au Québec, sur le fondement du lieu où se trouve le patrimoine du demandeur :

[TRADUCTION] Il faut établir une distinction entre [le préjudice] et le « dommage », qui représente la conséquence subjective du préjudice se rapportant à la mesure de réparation nécessaire pour compenser la perte. Par suffered in Québec/*un préjudice y a été subi*" as the relevant connecting factor, article 3148(3) seeks to identify the substantive *situs* of the "bodily, moral or material injury which is the immediate and direct consequence of the debtor's default" (article 1607 C.C.Q.) and not the *situs* of the patrimony in which the consequence of that injury is recorded. [para. 65]

[47] This application of the *C.C.Q.* is not, as the appellants assert, a novel, or undue, extension of Quebec's jurisdiction. Rather, it is based on the language of art. 3148(3) and on the jurisprudence. As this Court stated in *Spar Aerospace*, at para. 58, "[t]here is abundant support for the proposition that art. 3148 sets out a broad basis for jurisdiction."

[48] In the instant case, the economic damage was allegedly suffered by Ms. Cloutier — not merely recorded — in Quebec. More specifically, the damage was allegedly suffered as a result of the contract between Dell and Ms. Cloutier. Although the contract is not in fact the source of the cause of action in this case, which is extracontractual in nature, it is a juridical fact that establishes where the alleged economic damage occurred: the conclusion of the contract is the event that fixes the "*situs*" of the material damage suffered in Quebec. As a result, the contract is relevant, regardless of the fact that none of the appellants were parties to it, to the determination of whether the Quebec courts have jurisdiction in this case. As we will explain below, Ms. Cloutier's pecuniary loss flowed directly from her contract with Dell, which is deemed under Quebec's *Consumer Protection Act* to have been made in Quebec. The resulting economic damage did not merely have a remote effect on Ms. Cloutier's patrimony in Quebec; rather, she suffered it in Quebec upon entering into the contract in that province, and this brought her claim within the scope of art. 3148(3).

[49] The contract between Ms. Cloutier and Dell for the sale of a computer is a "remote-parties contract" within the meaning of the former ss. 20 and 21 of the *Consumer Protection Act* (repealed S.Q. 2006,

conséquent, en précisant qu'« un préjudice y a été subi » comme facteur de rattachement pertinent, le paragraphe 3148(3) vise à identifier le *situs* réel du « préjudice, qu'il soit corporel, moral ou matériel, que lui cause le défaut du débiteur et qui en est une suite immédiate et directe » (article 1607 C.c.Q.), et non le *situs* du patrimoine dans lequel la conséquence de ce préjudice est comptabilisée. [par. 65]

[47] Cette application du *C.c.Q.* ne constitue pas, comme l'affirment les appelantes, un élargissement nouveau ou injustifié de la compétence des tribunaux du Québec. Au contraire, elle s'appuie sur le libellé du par. 3148(3) et sur la jurisprudence. Comme l'a affirmé notre Cour au par. 58 de l'arrêt *Spar Aerospace*, « [e]st amplement étayée la thèse selon laquelle l'art. 3148 prévoit une large assise juridictionnelle. »

[48] En l'espèce, le préjudice économique aurait été subi par M^me^ Cloutier — et non simplement comptabilisé — au Québec. Plus précisément, M^me^ Cloutier aurait encouru ce préjudice par suite du contrat intervenu entre elle et Dell. Bien que ce contrat ne soit pas, en fait, à l'origine de la cause d'action dans la présente affaire, qui est de nature extracontractuelle, il constitue un fait juridique établissant le lieu où le préjudice économique allégué s'est produit : la conclusion du contrat représente l'événement qui fixe le « *situs* » du préjudice matériel subi au Québec. Par conséquent, le contrat s'avère pertinent pour décider si les tribunaux québécois ont compétence en l'espèce, sans égard au fait qu'aucune des appelantes n'y était partie. Comme nous l'expliquerons plus loin, la perte financière de M^me^ Cloutier découlait directement de son contrat intervenu avec Dell, qui était réputé, selon la *Loi sur la protection du consommateur*, avoir été conclu au Québec. Le préjudice économique causé par ce contrat n'a pas simplement entraîné un effet à distance sur le patrimoine de M^me^ Cloutier au Québec, mais il a été subi au Québec lors de la conclusion du contrat dans cette province, d'où l'application du par. 3148(3) à la demande de cette dernière.

[49] Le contrat conclu entre M^me^ Cloutier et Dell pour la vente d'un ordinateur constitue un « contrat à distance » au sens des anciens art. 20 et 21 de la *Loi sur la protection du consommateur* (abrogés L.Q.

c. 56, s. 3; now called a "distance contract" in ss. 54.1 and 54.2). These provisions read as follows at the time Ms. Cloutier and Dell entered into their contract:

20. A remote-parties contract is a contract entered into between a merchant and a consumer who are in the presence of one another neither at the time of the offer, which is addressed to one or more consumers, nor at the time of acceptance, provided that the offer has not been solicited by a particular consumer.

21. The remote-parties contract is deemed to be entered into at the address of the consumer.

[50] On the facts as alleged, the offer was not solicited by Ms. Cloutier when she visited Dell's website and purchased the computer online. Although it will be up to the trial judge to consider the specifics of Dell's website and the details of the interaction between Ms. Cloutier and Dell, nothing currently on the record indicates that anything other than an ordinary online purchase occurred.

[51] A standard online sales page typically includes a merchant's "offer to contract . . . which contains all the essential elements of the proposed contract" (art. 1388 of the *C.C.Q.*; see also arts. 1385 to 1387). As N. L'Heureux and M. Lacoursière write in *Droit de la consommation* (6th ed. 2011), at p. 146, [TRANSLATION] "[t]he online offer thus contains the traditional elements of the offer to contract: to be binding on the consumer, it must therefore be firm and unequivocal".

[52] There is little apparent difference between an Internet transaction such as the one between Dell and Ms. Cloutier and the type of transaction that occurs when a consumer walks into a traditional neighbourhood store, sees an item for sale on a shelf and purchases that item from the merchant. Of course, the Internet transaction is conducted remotely, or virtually, and the "store" is not "in the neighbourhood" in a concrete sense. Nevertheless, given the global reach of the Internet, the online store is, in a way, even closer than a neighbourhood store, as the consumer does not need to leave home to shop.

2006, ch. 56, art. 3; maintenant « contrat conclu à distance », art. 54.1 et 54.2). Ces articles se lisaient comme suit au moment de la conclusion du contrat entre M[me] Cloutier et Dell :

20. Un contrat à distance est un contrat conclu entre un commerçant et un consommateur qui ne sont en présence l'un de l'autre ni lors de l'offre, qui s'adresse à un ou plusieurs consommateurs, ni lors de l'acceptation, à la condition que l'offre n'ait pas été sollicitée par un consommateur déterminé.

21. Le contrat à distance est réputé conclu à l'adresse du consommateur.

[50] Au vu des faits allégués, l'offre n'a pas été sollicitée par M[me] Cloutier lorsqu'elle a consulté le site Web de Dell et acheté l'ordinateur en ligne. Certes, il appartiendra au juge du procès d'examiner les caractéristiques du site Web de Dell et le détail de l'interaction entre M[me] Cloutier et Dell, mais, actuellement, le dossier n'indique pas autre chose qu'un achat en ligne ordinaire.

[51] Une page type de vente en ligne comprend habituellement « une offre de contracter [du commerçant] qui comporte tous les éléments essentiels du contrat envisagé » (art. 1388 *C.c.Q.*; voir aussi les art. 1385 à 1387). Comme l'écrivent N. L'Heureux et M. Lacoursière dans *Droit de la consommation* (6[e] éd. 2011), p. 146 : « Les éléments traditionnels de l'offre de contracter se retrouvent donc dans l'offre en ligne : l'offre doit donc être ferme et non équivoque pour lier le consommateur . . . »

[52] Il existe peu de différences apparentes entre une transaction par Internet comme celle qui est intervenue entre Dell et M[me] Cloutier et le genre de transaction qu'effectue un consommateur qui entre dans un magasin de quartier traditionnel, voit un article offert en vente sur une tablette et l'achète du commerçant. Bien sûr, la transaction par Internet s'effectue à distance ou virtuellement, et le « magasin » ne se trouve pas « dans le quartier » au sens concret du terme. Cependant, la portée mondiale d'Internet rapproche le magasin en ligne et il devient encore plus proche du consommateur qu'un magasin de quartier, puisque le consommateur peut conclure ses achats sans devoir quitter son domicile.

[53] The Superior Court came to a similar conclusion in *British Airways*, holding that ss. 20 and 21 of the *Consumer Protection Act* applied to a contract entered into over the Internet by a consumer who sent an email request to purchase airline tickets on a merchant's website. The court wrote the following, at paras. 57 and 59:

> [TRANSLATION] Indeed, it would be possible to say that the server, when products are advertised on it, proceeds systematically, and in every case, to make an offer.
>
> . . .
>
> Likewise, if information in a catalogue constitutes an offer by the merchant and a sale by catalogue constitutes a sale at a distance within the meaning of the C.P.A. [*Consumer Protection Act*], can it be said that the C.P.A. does not apply to a sale over the Internet?

[54] On the facts of the instant case as alleged, an offer to contract appears to have been made by Dell on its online sales page, as opposed to being solicited by Ms. Cloutier, which means that ss. 20 and 21 of the *Consumer Protection Act* apply. By virtue of s. 20, Ms. Cloutier's contract with Dell is a remote-parties contract, and s. 21 provides that a remote-parties contract is deemed to be entered into at the consumer's address. This contract was accordingly entered into in Quebec.

[55] The appellants argue that such an interpretation of online sale transactions would inappropriately subject all transaction sites from around the world to the jurisdiction of the Quebec courts. However, a merchant's online sales page would have to contain all the essential elements of contract formation for the *Consumer Protection Act* to apply. Moreover, merchants who post their online sales pages on the Internet and do not block access to their websites are aware that people from various jurisdictions may visit their sites and consent to their offers. Consumers purchase many large, expensive items online nowadays. Why should they fall outside the scope of the legislation when they shop online in their homes as opposed to driving to a store or picking up the telephone to make a purchase? To interpret the *Consumer Protection Act*

[53] La Cour supérieure a décidé en ce sens dans l'affaire *British Airways*, lorsqu'elle a décidé que les art. 20 et 21 de la *Loi sur la protection du consommateur* s'appliquaient à un contrat conclu sur Internet par un consommateur qui avait transmis par courriel une demande d'achat de billets d'avion sur le site Web d'un commerçant. La Cour s'est exprimée comme suit aux par. 57 et 59 :

> En effet, il est possible de soutenir que le serveur, lorsqu'il annonce des produits, procède systématiquement et dans tous les cas à une offre.
>
> . . .
>
> De même, si les informations contenues dans un catalogue constituent une offre du commerçant et la vente par catalogue une vente à distance au sens de la [*Loi sur la protection du consommateur*], peut-on exclure que la vente par Internet y soit assujettie?

[54] Devant les faits allégués en l'espèce, l'offre de contracter semble avoir été soumise par Dell sur sa page de vente en ligne, sans avoir été sollicitée par M[me] Cloutier, d'où l'application des art. 20 et 21 de la *Loi sur la protection du consommateur*. Suivant l'art. 20, le contrat conclu entre M[me] Cloutier et Dell constitue alors un contrat à distance. Aux termes de l'art. 21, ce contrat à distance est réputé conclu à l'adresse du consommateur. En conséquence, le contrat a été conclu au Québec.

[55] Les appelantes prétendent que pareille interprétation des ventes en ligne assujettirait indûment tous les sites transactionnels dans le monde à la compétence des tribunaux québécois. Toutefois, pour que la *Loi sur la protection du consommateur* s'applique, la page de vente en ligne du commerçant doit comporter tous les éléments essentiels à la formation d'un contrat. De plus, les commerçants qui affichent leurs pages de vente en ligne sur Internet et qui ne bloquent pas l'accès à leur site Web savent que des personnes de divers pays peuvent visiter leur site et consentir à leurs offres. D'ailleurs, de nos jours, les consommateurs achètent beaucoup de gros articles dispendieux en ligne. Pourquoi ne bénéficieraient-ils pas de l'application de la loi lorsqu'ils font leurs achats en ligne depuis leur domicile, sans se rendre en

too narrowly would be incompatible with the legislature's protective intent and with contemporary commercial realities.

[56] In sum, we find that Ms. Cloutier, a Quebec resident, suffered economic damage in Quebec as a result of a contract entered into in that province. The principles of comity, order and fairness that underlie private international law require that jurisdiction be properly assumed. Under Quebec law, if any one of the four factors listed in art. 3148(3) of the *C.C.Q.* is proven, a sufficient connection to the province is established (see *Spar Aerospace*, at paras. 55-56). The Quebec courts therefore have jurisdiction under art. 3148(3) to decide whether the class action in the case at bar should be authorized under art. 1003 of the *C.C.P.*

B. *Authorization of a Class Action Under Article 1003 of the C.C.P.*

[57] The question at this stage of the analysis is simply whether Option consommateurs meets both the evidentiary and the legal threshold requirements for authorization of a class action under art. 1003 of the *C.C.P.* Article 1003 reads as follows:

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(*a*) the recourses of the members raise identical, similar or related questions of law or fact;

(*b*) the facts alleged seem to justify the conclusions sought;

(*c*) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(*d*) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[58] When undertaking an analysis with respect to the authorization of a class action, it is essential

voiture à un magasin ou sans téléphoner pour faire un achat? Une interprétation trop restrictive de la *Loi sur la protection du consommateur* serait incompatible avec la volonté de protection du législateur et la réalité commerciale contemporaine.

[56] En résumé, nous estimons que M[me] Cloutier, une résidente du Québec, a subi un préjudice économique au Québec en raison de la conclusion d'un contrat dans cette province. Certes les principes de courtoisie, d'ordre et d'équité qui sous-tendent le droit international privé exigent que la compétence du forum soit correctement attribuée. Toutefois, suivant le droit québécois, la preuve de l'un ou l'autre des quatre facteurs énumérés au par. 3148(3) *C.c.Q.* permet d'établir un lien suffisant avec la province (voir *Spar Aerospace*, par. 55-56). En conséquence, les tribunaux québécois ont compétence aux termes du par. 3148(3) pour décider si le recours collectif en l'espèce devrait être autorisé sur le fondement de l'art. 1003 *C.p.c.*

B. *Autorisation du recours collectif selon les critères de l'art. 1003 C.p.c.*

[57] La question qui se pose à la présente étape de l'analyse consiste simplement à déterminer si Option consommateurs a satisfait aux exigences tant du seuil de preuve que du seuil légal en vue de l'autorisation du recours collectif selon les critères de l'art. 1003 *C.p.c.* Cet article se lit comme suit :

1003. Le tribunal autorise l'exercice du recours collectif et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que :

a) les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;

b) les faits allégués paraissent justifier les conclusions recherchées;

c) la composition du groupe rend difficile ou peu pratique l'application des articles 59 ou 67; et que

d) le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

[58] Au moment d'entreprendre l'analyse relative à l'autorisation du recours collectif, il est essentiel

not to conflate or confound the authorization process with the trial of an authorized action on its merits. Each of these stages serves a different purpose, and any review must be conducted accordingly.

[59] At the authorization stage, the court plays the role of a filter. It need only satisfy itself that the applicant has succeeded in meeting the criteria set out in art. 1003 of the *C.C.P.*, bearing in mind that the threshold provided for in that article is a low one. The authorizing court's decision is procedural in nature, as it must decide whether the class action may proceed.

[60] As this Court pointed out in *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 22, the requirements for authorization of a class action have on a consistent basis been interpreted and applied broadly both by it and by the Quebec Court of Appeal. As was noted in that case, the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation (see also *Nault v. Canadian Consumer Co. Ltd.*, [1981] 1 S.C.R. 553; *Comité régional des usagers des transports en commun de Québec v. Quebec Urban Community Transit Commission*, [1981] 1 S.C.R. 424; *Comité d'environnement de La Baie Inc. v. Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A.); *Château v. Placements Germarich Inc.*, [1990] R.D.J. 625 (C.A.); *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.)). The Court of Appeal astutely summarized this as follows in *Nadon v. Ville d'Anjou*, [1994] R.J.Q. 1823, at pp. 1827-28:

> [TRANSLATION] . . . the courts have generally held that the conditions of article 1003 must be interpreted broadly, that they leave a court little discretion when they are met, and that the court is not to rule on the legal merits of the conclusions in light of the alleged facts.

[61] At this stage, the court's role is merely to filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of art. 1003. The objective is not to impose

de ne pas combiner ni confondre la procédure d'autorisation avec l'instruction d'un recours dont l'exercice a été autorisé. Chacune de ces étapes répond à un objectif différent, et l'analyse effectuée doit en tenir compte.

[59] À l'étape de l'autorisation, le tribunal exerce un rôle de filtrage. Il doit simplement s'assurer que le requérant a satisfait aux critères de l'art. 1003 *C.p.c.*, sans oublier le seuil de preuve peu élevé prescrit par cette disposition. La décision du tribunal saisi de la requête en autorisation est de nature procédurale puisqu'il doit décider si le recours collectif peut être autorisé à aller de l'avant.

[60] Comme elle l'a souligné dans *Marcotte c. Longueuil (Ville)*, 2009 CSC 43, [2009] 3 R.C.S. 65, par. 22, notre Cour ainsi que la Cour d'appel du Québec ont toujours favorisé une interprétation et une application larges des conditions d'autorisation du recours collectif. Ainsi que l'a indiqué notre Cour dans cet arrêt, la jurisprudence a clairement voulu faciliter l'exercice des recours collectifs comme moyen d'atteindre le double objectif de la dissuasion et de l'indemnisation des victimes (voir également *Nault c. Canadian Consumer Co. Ltd.*, [1981] 1 R.C.S. 553; *Comité régional des usagers des transports en commun de Québec c. Commission des transports de la Communauté urbaine de Québec*, [1981] 1 R.C.S. 424; *Comité d'environnement de La Baie Inc. c. Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655 (C.A.); *Château c. Placements Germarich Inc.*, [1990] R.D.J. 625 (C.A.); *Tremaine c. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.)). La Cour d'appel l'a habilement résumé dans l'arrêt *Nadon c. Ville d'Anjou*, [1994] R.J.Q. 1823, p. 1827-1828 :

> . . . la jurisprudence a généralement établi que les conditions de l'article 1003 doivent être interprétées de façon non restrictive et qu'elles laissent peu de discrétion au tribunal lorsqu'elles sont remplies, sans pour autant que le tribunal ait à se prononcer sur le bien-fondé en droit des conclusions en regard des faits allégués.

[61] À la présente étape, le tribunal, dans sa fonction de filtrage, écarte simplement les demandes frivoles et autorise celles qui satisfont aux exigences relatives au seuil de preuve et au seuil légal

an onerous burden on the applicant, but merely to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims. The Court of Appeal described the threshold requirement as follows: "*le fardeau en est un de démonstration et non de preuve*" or, in English, [TRANSLATION] "the burden is one of demonstration and not of proof" (*Pharmascience Inc. v. Option Consommateurs*, 2005 QCCA 437 (CanLII), at para. 25; see also *Martin v. Telus Communications Co.*, 2010 QCCA 2376 (CanLII), at para. 32).

[62] More specifically, in the context of the application of art. 1003(*b*), this Court and the Court of Appeal have used varying vocabulary, both in English and in French, to describe and characterize the filtering function of a court hearing a motion for authorization to institute a class action. In 1981, Chouinard J. wrote that, at the authorization stage, the issue is "whether . . . the allegations support the conclusions *prima facie* or disclose a colour of right" (*Comité régional des usagers*, at p. 426). In his opinion, the court is "to reject entirely any frivolous or manifestly improper action, and authorize only those in which the facts alleged disclose a good colour of right" (p. 429).

[63] In a later case, Gonthier J. explained that an applicant at the authorization stage must establish "a good colour of right", "a *prima facie* right" or, in French, "*une apparence sérieuse de droit*", "*un droit prima facie*" (*Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at paras 9-11). He pointed out that the Court of Appeal had been using the same expressions, requiring that the applicant establish a [TRANSLATION] "good colour of right" or "*prima facie* right" (*Berdah v. Nolisair International Inc.*, [1991] R.D.J. 417 (C.A.), at pp. 420-21, *per* Brossard J.A.), or a "serious colour of right" (*Comité d'environnement de La Baie*, at p. 661, *per* Rothman J.A.).

[64] A few years ago, in *Marcotte*, the majority and the dissent agreed that the applicant had to meet a threshold test of a "*prima facie* case", of a

prévus à l'art. 1003. Le but de cet examen n'est pas d'imposer un lourd fardeau au requérant, mais simplement de s'assurer que des parties ne soient pas inutilement assujetties à des litiges dans lesquels elles doivent se défendre contre des demandes insoutenables. La Cour d'appel a décrit l'exigence relative au seuil comme suit : « le fardeau en est un de démonstration et non de preuve » ou, en anglais, [TRADUCTION] « *the burden is one of demonstration and not of proof* » (*Pharmascience Inc. c. Option Consommateurs*, 2005 QCCA 437, [2005] R.J.Q. 1367, par. 25; voir également *Martin c. Société Telus Communications*, 2010 QCCA 2376 (CanLII), par. 32).

[62] Plus particulièrement, dans le contexte de l'application de l'al. 1003*b*), notre Cour et la Cour d'appel ont utilisé divers termes, tant en français qu'en anglais, pour décrire et qualifier la fonction de filtrage exercée par le tribunal saisi d'une requête en autorisation d'un recours collectif. En 1981, le juge Chouinard écrivait qu'à l'étape de l'autorisation, la question est de déterminer si « les allégués justifient les conclusions *prima facie* ou dévoilent une apparence de droit » (*Comité régional des usagers*, p. 426). À son avis, le tribunal « écarte d'emblée tout recours frivole ou manifestement mal fondé et n'autorise que ceux où les faits allégués dévoilent une apparence sérieuse de droit » (p. 429).

[63] Dans une décision ultérieure, le juge Gonthier a expliqué que le requérant, à l'étape de l'autorisation, doit établir « une apparence sérieuse de droit », « un droit *prima facie* » ou, en anglais, « *a good colour of right*, [. . .] *a prima facie right* » (*Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347, par. 9-11). Il a en outre souligné que la Cour d'appel utilisait sensiblement les mêmes expressions, exigeant que le requérant établisse un « droit d'action qui paraisse sérieux » ou un « droit *prima facie* » (*Berdah c. Nolisair International Inc.*, [1991] R.D.J. 417 (C.A.), p. 420-421, le juge Brossard) ou « une apparence sérieuse de droit » (*Comité d'environnement de La Baie*, p. 661, le juge Rothman).

[64] Dans un arrêt prononcé quelques années auparavant, dans l'affaire *Marcotte*, les juges majoritaires et dissidents s'entendaient pour reconnaître

"good colour of right" or, in French, of an "*apparence de droit sérieuse*", of a "*preuve à première vue*" (para. 23, *per* LeBel J., and paras. 90 and 94, *per* Deschamps J.; see also *Breslaw v. Montreal (City)*, 2009 SCC 44, [2009] 3 S.C.R. 131, at para. 27; *Option Consommateurs v. Novopharm Ltd.*, 2008 QCCA 949, [2008] R.J.Q. 1350, at paras. 8 and 23).

[65] As can be seen, the vocabulary may change from one case to another. But some well-established principles for the interpretation and application of art. 1003 of the *C.C.P.* can be drawn from the jurisprudence of this Court and of the Court of Appeal. First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "*apparence sérieuse de droit*", or a "*prima facie* case" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.

[66] A review of legislative intent also confirms this low threshold. It is clear from successive amendments to the *C.C.P.* that Quebec's legislature intended to facilitate class actions. For example, art. 1002 of the *C.C.P.* formerly required that the applicant file affidavit evidence in support of the motion for authorization, which meant that he or she had to submit to examination as a deponent at the authorization stage under art. 93. The fact that the requirement of filing an affidavit was eliminated and examinations were strictly limited at the authorization stage in the latest reform of the class action provisions (S.Q. 2002, c. 7, s. 150) sends a strong signal that it would be unreasonable to require an applicant to establish anything more than an arguable case.

[67] At the authorization stage, the facts alleged in the applicant's motion are assumed to be true. The applicant's burden at this stage is to establish an arguable case, although the factual allegations

que le requérant devait satisfaire au critère préliminaire de la « preuve à première vue » ou d'une « apparence de droit sérieuse » ou, en anglais, « *a good colour of right* », « *a prima facie case* » (par. 23, le juge LeBel, et par. 90 et 94, la juge Deschamps; voir également *Breslaw c. Montréal (Ville)*, 2009 CSC 44, [2009] 3 R.C.S. 131, par. 27; *Option Consommateurs c. Novopharm Ltd.*, 2008 QCCA 949, [2008] R.J.Q. 1350, par. 8 et 23).

[65] Comme nous pouvons le constater, la terminologie peut varier d'une décision à l'autre. Mais certains principes bien établis d'interprétation et d'application de l'art. 1003 *C.p.c.* se dégagent de la jurisprudence de notre Cour et de la Cour d'appel. D'abord, comme nous l'avons déjà dit, la procédure d'autorisation ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage. Le requérant n'est pas tenu de démontrer que sa demande sera probablement accueillie. De plus, son obligation de démontrer une « apparence sérieuse de droit », « *a good colour of right* » ou « *a prima facie case* » signifie que même si la demande peut, en fait, être ultimement rejetée, le recours devrait être autorisé à suivre son cours si le requérant présente une cause défendable eu égard aux faits et au droit applicable.

[66] Un examen de l'intention du législateur confirme également l'existence de ce seuil peu élevé. Des modifications successives au *C.p.c.* témoignent clairement de l'intention de la législature du Québec de faciliter l'exercice des recours collectifs. Par exemple, l'art. 1002 *C.p.c.* exigeait auparavant que le requérant dépose une preuve par affidavit à l'appui de la requête en autorisation, ce qui le soumettait ainsi, comme affiant, à un interrogatoire à l'étape de l'autorisation aux termes de l'art. 93. L'abolition de l'exigence de l'affidavit et les restrictions sévères apportées aux interrogatoires à l'étape de l'autorisation dans la dernière réforme de ces dispositions relatives au recours collectif (L.Q. 2002, ch. 7, art. 150) envoient le message clair qu'il serait déraisonnable d'exiger d'un requérant qu'il établisse plus qu'une cause défendable.

[67] À l'étape de l'autorisation, les faits allégués dans la requête du requérant sont tenus pour avérés. Le fardeau imposé au requérant à cette étape consiste à établir une cause défendable, quoique les

cannot be [TRANSLATION] "vague, general [or] imprecise" (see *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380 (CanLII), at para. 44).

[68] Any review of the merits of the case should properly be left for the trial, at which time the appropriate procedures can be followed to adduce evidence and weigh it on the standard of the balance of probabilities.

[69] The appellants' position is that Option consommateurs' motion for authorization fails to allege sufficient facts to demonstrate the elements required under art. 1003(*a*), (*b*) and (*d*) of the *C.C.P.* This position is untenable on the facts before this Court, as our analysis will show. In our opinion, all the criteria of art. 1003 are met.

(1) Article 1003(*a*) — Common Questions

[70] Article 1003(*a*) of the *C.C.P.* requires that "the recourses of the members raise identical, similar or related questions of law or fact".

[71] According to the appellants, the only question common to the members of the proposed group is whether the appellants committed a fault. They argue that, given the range of products containing DRAM, the large number of distribution chains and their complexity, the inherent differences between the direct and indirect purchasers, and the nature of the aggregate claim, it would be impossible for the trial judge to establish an injury or a causal connection on a group-wide basis.

[72] This perspective is flawed. There is no requirement of a fundamental identity of the individual claims of the proposed group's members. At the authorization stage, the threshold requirement for common questions is low. As the Court of Appeal noted in *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826 (CanLII), at para. 22, even a single identical, similar or related question of law would be sufficient to meet the common questions requirement set out in art. 1003(*a*), provided that it

allégations de fait ne puissent être « vague[s], générale[s] [ou] imprécise[s] » (voir *Harmegnies c. Toyota Canada inc.*, 2008 QCCA 380 (CanLII), par. 44).

[68] Tout examen du fond du litige devrait être laissé à bon droit au juge du procès où la procédure appropriée pourra être suivie pour présenter la preuve et l'apprécier selon la norme de la prépondérance des probabilités.

[69] De l'avis des appelantes, la requête en autorisation du recours collectif d'Option consommateurs n'allègue pas de faits suffisants pour démontrer les éléments requis aux al. 1003*a*), *b*) et *d*) *C.p.c.* Cette thèse est indéfendable à l'examen des faits dont nous disposons, comme le démontrera notre analyse. À notre sens, il est satisfait à tous les critères énoncés à l'art. 1003.

(1) Alinéa 1003*a*) — Questions communes

[70] L'alinéa 1003*a*) *C.p.c.* exige que « les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes ».

[71] Selon les appelantes, la seule question commune aux membres du groupe proposé consiste à décider si les appelantes ont commis une faute. En raison de la variété des produits équipés de DRAM, du grand nombre de canaux de distribution et de leur complexité, des différences inhérentes entre les acheteurs directs et indirects et de la nature de la réclamation globale, elles plaident qu'il serait impossible pour le juge du procès d'établir le préjudice ou le lien de causalité pour l'ensemble du groupe.

[72] Cette thèse comporte des lacunes. Il n'est pas nécessaire, en effet, que les demandes individuelles des membres du groupe proposé soient fondamentalement identiques les unes aux autres. Le seuil nécessaire pour établir l'existence des questions communes à l'étape de l'autorisation est peu élevé. Comme l'a souligné la Cour d'appel dans l'arrêt *Collectif de défense des droits de la Montérégie (CDDM) c. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826 (CanLII), par. 22, même la présence d'une seule question de droit identique, similaire ou

is significant enough to affect the outcome of the class action.

[73] There is no requirement that each member of a group be in an identical or even a similar position in relation to the defendant or to the injury suffered. Such a requirement would be incompatible with the concern for judicial economy which the class action serves by avoiding duplicated or parallel proceedings (see *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 27). The Court of Appeal summarized this as follows in *Guilbert v. Vacances sans Frontière Ltée*, [1991] R.D.J. 513:

> [TRANSLATION] The fact that the situations of all members of the group are not perfectly identical does not mean that the group does not exist or is not uniform. To be excessively rigorous in defining the group would ren der the action useless . . . in situations in which claims are often modest, there are many claimants and dealing with cases on an individual basis would be difficult. [p. 517]

[74] In applying these principles to the case at bar, the motion judge and the Court of Appeal correctly held that there are no differences between the members of the proposed group at the authorization stage that adversely affect the unity of the group as regards the common questions requirement. All the members, regardless of their individual circumstances, have a common interest both in proving the existence of a price-fixing conspiracy and in maximizing the amount of the resulting unlawful overcharge. Any disparity between the direct purchasers' relationships with the appellants and those of the indirect purchasers does not alter the fact that they have a collective interest in these questions of fault and liability. Any conflicts of interests can be addressed at trial.

[75] We agree with the motion judge's finding that [TRANSLATION] "[t]he existence of the cartel, the alleged 'fraud', civil liability, the effect of the cartel on the prices charged, the overall loss and costs are obviously similar or related common questions" (para. 149). Mongeau J. also correctly highlighted

connexe serait suffisante pour satisfaire à l'exigence de la question commune prévue à l'al. 1003*a*), pourvu que son importance soit susceptible d'influencer le sort du recours collectif.

[73] Il n'est pas nécessaire non plus que chaque membre du groupe adopte un point de vue identique ni même similaire relativement au défendeur ou au préjudice subi. Pareille exigence serait incompatible avec le souci de l'économie des ressources judiciaires auquel les recours collectifs répondent en permettant d'éviter les instances dédoublées ou parallèles (voir *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, par. 27). La Cour d'appel a résumé ce principe dans l'arrêt *Guilbert c. Vacances sans Frontière Ltée*, [1991] R.D.J. 513 :

> Le fait que tous les membres du groupe ne sont pas dans des situations parfaitement identiques, ne prive pas celui-ci de son existence ou de sa cohérence. Une rigueur excessive dans la définition du groupe priverait le recours de toute utilité [. . .] dans des situations où les réclamations sont souvent modestes, les réclamants nombreux et le traitement individuel des dossiers difficile. [p. 517]

[74] En appliquant ces principes à l'espèce, le juge saisi de la requête et la Cour d'appel ont conclu à juste titre qu'aucune différence entre les membres du groupe proposé à l'étape de l'autorisation ne portait atteinte à l'unité du groupe nécessaire à l'égard de l'exigence relative à l'existence de questions communes. Tous les membres, sans égard à leur situation personnelle, possèdent en commun l'intérêt tant de prouver l'existence d'un complot pour la fixation des prix que de maximiser le montant des pertes résultant de la surfacturation illégale. Les différences entre les relations des acheteurs directs avec les appelantes et celles des acheteurs indirects ne modifient en rien leur intérêt collectif à l'égard de ces questions de faute et de responsabilité. Toute question relative aux conflits d'intérêts peut être traitée au procès même.

[75] Nous souscrivons à la conclusion du juge saisi de la requête que « [l]'existence du cartel, la "fraude" alléguée, la responsabilité civile, la conséquence du cartel sur les prix demandés, le dommage global et les frais sont de toute évidence des questions communes similaires ou connexes » (par. 149).

the procedural benefits that would flow from the authorization of the class action, which would make it possible "to avoid duplication of fact-finding or legal analysis" (para. 147). The respondent has met the requirement that there be sufficient common questions. We will now turn to the second requirement, that the alleged facts seem to justify the conclusions sought.

De plus, le juge Mongeau a souligné à juste titre les avantages, sur le plan procédural, qui découleraient de l'autorisation du recours collectif, qui permettrait « d'éviter la répétition de l'appréciation des faits ou de l'analyse juridique » (par. 147). L'intimée a satisfait à la condition de la suffisance des questions communes. Nous nous pencherons maintenant sur la deuxième condition, qui requiert que les faits allégués paraissent justifier les conclusions recherchées.

(2) Article 1003(*b*) — Sufficiency of the Alleged Facts

(2) Alinéa 1003*b*) — La suffisance des faits allégués

[76] Article 1003(*b*) of the *C.C.P.* requires that "the facts alleged seem to justify the conclusions sought".

[76] L'alinéa 1003*b*) *C.p.c.* exige que « les faits allégués paraissent justifier les conclusions recherchées ».

[77] The class action proposed by Option consommateurs is rooted in the alleged extracontractual liability of the appellants under art. 1457 of the *C.C.Q.* Article 1457 reads as follows:

> **1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> . . .

[77] Le recours collectif projeté par Option consommateurs se fonde sur la responsabilité extracontractuelle qui incomberait aux appelantes suivant l'art. 1457 *C.c.Q.* Cet article est rédigé comme suit :

> **1457.** Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
>
> Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
>
> . . .

[78] Under this general provision governing delictual and quasi-delictual liability in Quebec law, Option consommateurs must establish the elements of civil liability. These elements are (i) that the appellants committed a fault; (ii) that Ms. Cloutier and the other members of the group suffered an injury; and (iii) that a causal connection exists between the fault and the injury.

[78] Suivant cette disposition générale régissant la responsabilité délictuelle et quasi délictuelle en droit québécois, Option consommateurs doit établir les éléments de la responsabilité civile, soit (i) que les appelantes ont commis une faute; (ii) que M^{me} Cloutier et les autres membres du groupe ont subi un préjudice et (iii) qu'un lien de causalité existe entre la faute et le préjudice.

[79] In his decision on the motion for authorization, the motion judge found that the alleged facts were not sufficient to establish these three elements. That decision was overturned on appeal. We agree with the Court of Appeal that Option

[79] Dans sa décision rendue sur la requête en autorisation, le juge a conclu que les faits allégués ne permettaient pas d'établir ces trois éléments. Cette décision a toutefois été infirmée en appel. Nous convenons avec la Cour d'appel qu'Option

consommateurs had met the threshold requirement for art. 1003(*b*) of the *C.C.P.* by making out an arguable case in support of its claim of the appellants' extracontractual liability. Let us consider the three elements required by art. 1457 of the *C.C.Q.*

(a) *Fault*

[80] The first requirement to meet in order to successfully establish extracontractual liability in Quebec under art. 1457 of the *C.C.Q.* is that of fault. For the purposes of the authorization of a class action under art. 1003 of the *C.C.P.*, the applicant must allege facts that are sufficient to ground an arguable case that a fault has been committed. To make this determination, the allegations of Option consommateurs must be fully and well understood.

[81] In para. 2.5 of the motion, the respondent made a general allegation of a breach of the *Competition Act*:

> [TRANSLATION] The Respondents generally failed to discharge their obligations, both legal and statutory, and in particular their obligations with respect to competition under the *Competition Act* (R.S.C. (1985), c. C-34); [A.R., vol. II, at p. 58]

[82] In para. 2.6 of the motion, the respondent specified that the provisions that had allegedly been violated were ss. 36 and 45 of the *Competition Act*. Under s. 36, any person may bring a civil action with respect to any loss suffered as the result of the commission of any of the criminal offences provided for in s. 45, which prohibits any agreement to unduly prevent or lessen competition.

[83] Although Option consommateurs has since then abandoned its claim under s. 36, the allegation set out in para. 2.7 remains. In it, the respondent alleged that [TRANSLATION] "the Respondents also failed to discharge their general obligations under the *Civil Code of Québec* and, more specifically, those related to their obligation to act in good faith". As Kasirer J.A. correctly pointed out in his reasons, at para. 78, even though the claim is no

consommateurs a respecté les conditions d'autorisation prévues à l'al. 1003*b*) *C.p.c.* en présentant une cause défendable à l'appui de sa prétention invoquant la responsabilité extracontractuelle des appelantes. Nous allons maintenant examiner les trois éléments prescrits par l'art. 1457 *C.c.Q.*

a) *La faute*

[80] La première exigence à laquelle il faut répondre pour établir la responsabilité extracontractuelle au Québec suivant l'art. 1457 *C.c.Q.* est celle de la faute. Aux fins de l'autorisation d'un recours collectif en application de l'art. 1003 *C.p.c.*, le requérant doit alléguer des faits suffisants pour démontrer qu'il est possible de soutenir qu'une faute a été commise. Il importe, pour décider de cette question, de parfaitement bien comprendre les allégations d'Option consommateurs.

[81] Au paragraphe 2.5 de la requête, l'intimée présente, dans les termes suivants, une allégation générale de violation de la *Loi sur la concurrence* :

> De façon générale, les Intimées ont manqué à leurs obligations tant légales que statutaires et notamment à leurs obligations relatives à la concurrence prévues à la *Loi sur la concurrence* (L.R.C. (1985), c. C-34); [d.a., vol. II, p. 58]

[82] Au paragraphe 2.6 de la requête, l'intimée précise que les art. 36 et 45 de la *Loi sur la concurrence* constituent les dispositions qui auraient été violées. Aux termes de l'art. 36, toute personne peut intenter une action civile pour toute perte subie par suite de la commission de l'une ou l'autre des infractions criminelles prévues à l'art. 45, lequel interdit tout accord visant à empêcher ou à réduire indûment la concurrence.

[83] Bien qu'Option consommateurs se soit depuis désistée de sa demande fondée sur l'art. 36, l'allégation énoncée au par. 2.7 demeure. Dans ce paragraphe, l'intimée allègue que « les Intimées ont également manqué à leurs obligations générales prévues au *Code civil du Québec* et plus spécifiquement à celles ayant trait à leur obligation d'agir de bonne foi ». Comme le juge Kasirer le signale à juste titre au par. 78 de ses motifs, bien que la demande

longer rooted in the alleged commission of an offence under s. 45 of the *Competition Act*, a violation of that section remains relevant insofar as it might support the claim of extracontractual liability under art. 1457 of the *C.C.Q.*

ne repose plus sur la perpétration alléguée d'une infraction prévue à l'art. 45 de la *Loi sur la concurrence*, la violation de cet article demeure pertinente dans la mesure où elle pourrait étayer la demande fondée sur la responsabilité extracontractuelle selon l'art. 1457 *C.c.Q.*

[84] In para. 2.7.1 of the motion, the respondent provided greater detail about the alleged civil faults relied upon in support of authorization of the class action in Quebec by referring to the criminal proceedings undertaken against the appellants in the United States. While not explicitly advancing any meaningful connection between the U.S. proceedings and a civil action in Quebec, the respondent filed 13 exhibits comprising various articles and documents that attested to the appellants' involvement in a price-fixing conspiracy in the United States. Kasirer J.A. succinctly summarized these exhibits, at para. 79:

> They include press releases from the Antitrust Division of the U.S. Department of Justice in which it is announced that named respondents agreed to plead guilty to participating in an "international conspiracy" to fix prices in the DRAM market and to pay fines; "informations" which set forth the charges brought against certain of the respondents in United States District Court; and "plea agreements" in which certain of the respondents agreed to plead guilty to charges of "participating in a conspiracy in the United States and elsewhere". The exhibits contain no specific reference to Quebec.

[84] Au paragraphe 2.7.1 de la requête, l'intimée précise les fautes civiles alléguées sur lesquelles elle s'est appuyée dans sa procédure d'autorisation du recours collectif au Québec, en faisant référence aux poursuites criminelles intentées contre les appelantes aux États-Unis. Sans avancer explicitement de lien significatif entre les poursuites aux États-Unis et une action civile au Québec, l'intimée a déposé 13 pièces comportant divers articles et documents attestant la participation des appelantes à un complot pour la fixation des prix aux États-Unis. Le juge Kasirer a présenté un bref résumé de ces pièces au par. 79 :

> [TRADUCTION] Elles comprennent des communiqués de presse provenant de l'Antitrust Division du ministère de la Justice des É.-U. dans lesquels on annonce que les intimées désignées ont convenu de plaider coupable à des accusations de participation à un « complot international » en vue de fixer les prix sur le marché de la DRAM, et de payer des amendes; des « renseignements » qui décrivent les accusations portées contre certaines intimées devant la Cour de district des États-Unis; et des « ententes sur le plaidoyer » par lesquelles certaines intimées ont convenu de plaider coupable à des accusations d'avoir « participé à un complot aux États-Unis et ailleurs ». Les pièces ne contiennent aucune référence spécifique au Québec.

[85] It is noteworthy that, as we mentioned above, the respondent applied to the Court of Appeal for — and was granted — leave to adduce additional evidence in the form of a European Commission press release dated May 19, 2010 that outlined a settlement with 10 producers of DRAM, including the appellants in this case, for violations of European antitrust laws and for anti-competitive conduct in the European DRAM market.

[85] Il convient de souligner, comme nous l'avons déjà noté, que l'intimée a demandé et reçu l'autorisation de la Cour d'appel de présenter un nouvel élément de preuve, soit un communiqué de presse de la Commission européenne, daté du 19 mai 2010. Dans cette annonce, cette dernière exposait les grandes lignes d'un règlement intervenu avec 10 fabricants de DRAM, y compris les appelantes en l'espèce, à propos de violations de législation européenne antitrust et d'un comportement anticoncurrentiel sur le marché européen de la DRAM.

[86] In paras. 2.14, 2.15 and 2.15.1 of the motion, the respondent went on to allege specific losses

[86] Aux paragraphes 2.14, 2.15 et 2.15.1 de sa requête, l'intimée allègue ensuite des pertes

suffered by Ms. Cloutier and the other members of the group:

[TRANSLATION]

2.14 The Cartel had the effect of unduly restricting competition, artificially inflating the price of DRAM sold in Quebec and, in so doing, artificially inflating the sale prices of products containing DRAM sold in Quebec;

2.15 As a result, throughout the period of the Cartel, purchasers of DRAM sold in Quebec paid an artificially inflated price;

2.15.1 The same is true of subsequent purchasers of DRAM and/or products containing DRAM sold in Quebec to whom the original purchasers allegedly passed on the artificially inflated portion of the price of DRAM in whole or in part; [A.R., vol. II, at p. 69]

[87] The appellants argue that these allegations fail to meet the requirement that the respondent demonstrate fault, since the evidence proffered in support of the claim is restricted to events and outcomes that occurred in the United States and Europe. They submit that proof of an offence committed outside Canada does not give rise to a right of civil action under the *Competition Act* absent a "real and substantial" connection with Canada. Accordingly, they argue, the exhibits show only that guilty pleas were entered in relation to agreements to fix the price of DRAM in the United States, which had an impact on the prices of products sold in the United States and Europe. Absent a "real and substantial" connection with Canada, the appellants maintain that fault cannot be demonstrated under ss. 36 and 45 of the *Competition Act*.

[88] The appellants further submit that the alleged facts do not demonstrate liability under s. 45 of the *Competition Act*, since violations of the *Sherman Act* in the United States are not equivalent to undue restraint of competition under Canadian law. They cite *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, for the proposition that Canadian law requires an analysis of market structure and market share, and this in turn requires

précises subies par M[me] Cloutier et les autres membres du groupe :

2.14 Le Cartel a eu pour effet de restreindre indûment la concurrence, de gonfler artificiellement le prix de la DRAM vendue au Québec et par le fait même de gonfler artificiellement le prix de vente des produits équipés de DRAM vendus au Québec;

2.15 Ainsi, tout au cours de la période qu'a duré le Cartel, les acheteurs de DRAM vendue au Québec ont payé un prix artificiellement gonflé;

2.15.1 Il en va de même des acheteurs subséquents de DRAM et/ou de produits équipés de DRAM vendus au Québec à qui les premiers acheteurs auraient, en tout ou en partie, refilé la portion artificiellement gonflée du prix de la DRAM; [d.a., vol. II, p. 69]

[87] Pour leur part, les appelantes soutiennent que ces allégations ne satisfont pas à l'exigence imposée à l'intimée de démontrer la faute puisque la preuve présentée se limite à des événements et à des conséquences d'origines américaine et européenne. Elles prétendent que la preuve d'une infraction commise à l'extérieur du Canada ne donne pas ouverture au droit d'intenter une action civile en vertu de la *Loi sur la concurrence* en l'absence de lien « réel et substantiel » avec le Canada. En conséquence, les pièces démontrent seulement, à leur avis, que des plaidoyers de culpabilité ont été inscrits relativement aux ententes de fixation du prix de la DRAM aux États-Unis, qui ont entraîné des répercussions sur les prix des produits vendus aux États-Unis et en Europe. Les appelantes plaident donc que, sans lien « réel et substantiel » avec le Canada, la faute ne peut être démontrée aux termes des art. 36 et 45 de la *Loi sur la concurrence*.

[88] Les appelantes prétendent également que les faits allégués n'établissent pas la responsabilité aux termes de l'art. 45 de la *Loi sur la concurrence* puisque les manquements à la *Sherman Act* aux États-Unis ne constituent pas une restriction indue de la concurrence en droit canadien. Elles citent à cet égard l'arrêt *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, pour affirmer que le droit canadien exige une analyse de la structure du marché

evidence of commercial power capable of having a palpable impact on the market in question. They add that, without sufficient allegations and proof of market power and of the impact of a price-fixing conspiracy reaching into Canada, the "undue" economic effect required under the *Competition Act* was not established.

[89] The appellants' position is wrong, and the Court of Appeal was right to reject these arguments. In our view, the respondent's allegations are sufficient to support an inference of fault, given the relatively low standard to be met at the authorization stage. It must be borne in mind that the applicable standard is that of showing an arguable case, not the more onerous one of proof on a balance of probabilities.

[90] The exhibits on which the respondent relies demonstrate that the appellants participated in a price-fixing conspiracy. Admittedly, the criminal charges and plea agreements were rooted in events in the United States that had no explicitly demonstrated connection with Quebec. But this does not attenuate the apparent international nature and impact of the appellants' anti-competitive conduct.

[91] As Kasirer J.A. pointed out, at para. 84, "the cartel was sufficiently powerful to shake the American market and to affect major manufacturers such as Dell, IBM and Apple". And the impact of the anti-competitive price-fixing scheme was also felt in Europe, as can be seen from the guilty pleas entered and settlements reached under European antitrust laws. The European evidence is integral to the respondent's case in that it reveals the international ramifications of the cartel's actions.

[92] Although the respondent's allegations and supporting documentation do not explicitly establish the commission of wrongful behaviour in Quebec, they certainly do point to the international nature of the conspiracy to fix the price of DRAM

et des parts de ce dernier, puis la preuve d'une puissance commerciale capable d'engendrer des effets manifestes sur le marché en question. Elles ajoutent que, sans allégations ni preuve suffisantes de la puissance commerciale et des effets du complot pour la fixation du prix atteignant le Canada, les répercussions économiques « indues », exigées par la *Loi sur la concurrence*, n'ont pas été établies.

[89] La thèse des appelantes est inexacte et la Cour d'appel a eu raison de la rejeter. À notre avis, les allégations de l'intimée sont suffisantes pour inférer une faute, compte tenu de la norme relativement peu exigeante s'appliquant à l'étape de l'autorisation. Il faut garder à l'esprit que la norme applicable est celle de la démonstration d'une cause défendable, et non celle de la présentation d'une preuve selon la prépondérance des probabilités, plus exigeante.

[90] Les pièces sur lesquelles s'est appuyée l'intimée établissent que les appelantes ont participé à un complot de fixation des prix. Certes, les accusations criminelles et les ententes sur le plaidoyer reposaient sur des événements survenus aux États-Unis, sans lien explicitement démontré avec le Québec. Mais cette situation ne diminue en rien le caractère et les effets internationaux apparents du comportement anticoncurrentiel des appelantes.

[91] Comme l'a souligné le juge Kasirer au par. 84, [TRADUCTION] « le cartel était suffisamment puissant pour ébranler le marché américain et toucher des fabricants majeurs comme Dell, IBM et Apple ». Les effets du stratagème anticoncurrentiel de fixation de prix se sont également fait sentir en Europe, comme l'attestent les aveux de culpabilité inscrits et les règlements intervenus sous le régime de la législation européenne antitrust. La preuve européenne fait partie intégrante de la cause de l'intimée, puisqu'elle révèle les ramifications internationales des agissements du cartel.

[92] Bien que les allégations de l'intimée et la documentation à l'appui n'établissent pas explicitement l'existence d'un comportement fautif au Québec, elles mettent certainement en lumière le caractère international du complot de fixation du

and to the suffering of damage outside the United States. Indeed, the respondent's motion alleges that the effects of the conspiracy — which, according to the information issued by the U.S. Department of Justice (quoted in para. 2.10 of the motion (A.R., vol. II, at p. 61)), took place "in the United States and elsewhere" — were felt in Quebec. It is not unreasonable to infer that anti-competitive practices in the United States that have an impact on large multinational corporations and on a DRAM market that is international in scope might — indeed are likely to — affect consumers in Quebec.

[93] Failure to specifically allege a market structure that would make an "undue" economic impact possible does not adversely affect the claim at the authorization stage. The appellants correctly stress that this Court has held that a detailed analysis of market structure is needed in order to prove conduct restricting competition under the *Competition Act*. A defendant that lacks sufficient market power cannot be found to unduly affect competition or market pricing (see *Nova Scotia Pharmaceutical Society*, at pp. 652-55).

[94] However, the appellants' argument disregards the nature of a proceeding for authorization of a class action. The respondent does not need to present absolute proof of the allegation, nor do they even need to prove it on a balance of probabilities. At this stage, all it needs to do is demonstrate an arguable case by means of allegations and supporting evidence. The bare allegation of undue economic impact set out in para. 2.14 of the motion for authorization, combined with the exhibits demonstrating the impact of conduct in the United States on prices of DRAM in the international market, gives rise to an inference of an impact on the Canadian market that satisfies this low threshold requirement. Although it is unclear whether the respondent will eventually be able to meet the standard of proof on a balance of probabilities at

prix de la DRAM et le fait que le préjudice a été subi aussi à l'extérieur des États-Unis. En effet, la requête de l'intimée allègue que les répercussions du complot — lequel, selon les renseignements rendus publics par le ministère de la Justice des É.-U. (cités au par. 2.10 de la requête (d.a., vol. II, p. 61)), a été ourdi aux « États-Unis et ailleurs » — ont été ressenties au Québec. Il n'est donc pas déraisonnable de conclure que des pratiques anticoncurrentielles aux États-Unis, entraînant des répercussions sur de grandes entreprises multinationales et le marché de la DRAM, de portée internationale, pourraient peut-être, voire probablement, toucher les consommateurs québécois.

[93] Le défaut d'alléguer précisément une structure de marché capable de plausibles répercussions économiques « indues » ne porte pas atteinte à la recevabilité de la demande à l'étape de l'autorisation. Les appelantes soulignent à bon droit que notre Cour a conclu à la nécessité d'effectuer une analyse détaillée de la structure du marché pour prouver qu'il y a bien eu un comportement restreignant la concurrence en violation de la *Loi sur la concurrence*. Il est d'ailleurs reconnu qu'un défendeur dépourvu d'une puissance commerciale suffisante ne peut porter atteinte indûment à la concurrence ou à la fixation des prix du marché (voir *Nova Scotia Pharmaceutical Society*, p. 652-655).

[94] Toutefois, l'argumentation des appelantes ne tient pas compte de la nature de la procédure d'autorisation du recours collectif. L'intimée n'est pas tenue, en effet, de présenter une preuve absolue de l'allégation, ni même d'établir celle-ci selon la prépondérance des probabilités. À la présente étape, il suffit qu'elle démontre que sa cause est défendable au moyen d'allégations et d'éléments de preuve en appui. La simple allégation de répercussions économiques indues, énoncée au par. 2.14 de la requête en autorisation, ainsi que les pièces démontrant les effets d'un comportement aux États-Unis sur les prix de la DRAM sur le marché international, permettent de conclure à l'existence de répercussions sur le marché canadien satisfaisant à l'exigence de ce seuil de preuve peu élevé. Bien qu'on ne sache pas exactement si l'intimée sera

trial, we cannot deny it the opportunity to do so given the possibility of fault to which the exhibits attest.

[95] Further, the respondent does not need to prove liability under s. 45 of the *Competition Act* at this stage of the proceedings, given the nature of the claim and the evidence that has already been adduced. As we mentioned above, its action is rooted in art. 1457 of the *C.C.Q.*, not s. 45 of the *Competition Act*. Since the respondent abandoned its right to bring a civil action under the *Competition Act*, its claim of undue economic impact under s. 45 remains relevant only to the extent that a violation of the statutory scheme can give rise to extra-contractual liability under art. 1457 of the *C.C.Q.*

[96] The appellants are correct in asserting that compliance with statutory duties can inform questions with respect to civil law duties. However, compliance with statutory obligations is not always determinative of the issue of civil fault. As Kasirer J.A. rightly stated at para. 88 of his reasons, "[c]are must be taken . . . not to conflate the notion of civil fault and the violation of a statutory norm, whether in a commercial setting or elsewhere." He correctly pointed out that just because a failure to discharge a statutory obligation leads to a demonstration of fault in all but the most exceptional cases, it does not follow that a civil fault is absolved where there is no such failure. As J.-L. Baudouin and P. Deslauriers state in *La responsabilité civile* (7th ed. 2007), vol. I, at No. 1-188:

> [TRANSLATION] In principle, a failure to discharge a specific obligation imposed by a statute or a regulation, especially if it is intentional or serious, constitutes a civil fault, since it amounts to the breach of a mandatory standard of conduct established by the legislature. Nevertheless, adhering to such a standard does not in itself exempt one from liability.

éventuellement en mesure de répondre lors du procès à la norme de preuve selon la prépondérance des probabilités, nous ne pouvons lui refuser cette possibilité puisque les pièces au dossier révèlent qu'une faute a peut-être été commise.

[95] Par ailleurs, l'intimée n'est pas tenue de prouver la responsabilité en vertu de l'art. 45 de la *Loi sur la concurrence* à la présente étape du recours, en raison de la nature de la demande et de la preuve déjà présentée. Comme nous l'avons déjà précisé, son recours s'appuie sur l'art. 1457 *C.c.Q.*, et non sur l'art. 45 de la *Loi sur la concurrence*. Puisqu'elle a renoncé à son droit d'intenter une action civile sous le régime de la *Loi sur la concurrence*, son argument fondé sur les répercussions économiques indues en vertu de l'art. 45 ne demeure pertinent que dans la mesure où un manquement au régime législatif peut entraîner une responsabilité extracontractuelle aux termes de l'art. 1457 *C.c.Q.*

[96] Les appelantes affirment à bon droit que le respect des obligations imposées par la loi peut régler le sort des questions relatives aux obligations de droit civil. Toutefois, le respect de ces obligations ne constitue pas toujours un facteur déterminant pour trancher la question de la faute civile. Comme l'affirme à juste titre le juge Kasirer au par. 88 de ses motifs, [TRADUCTION] « [i]l faut faire attention [. . .] de ne pas confondre la notion de faute civile et la violation d'une norme fixée par la loi, que ce soit ou non dans un contexte commercial. » Il souligne avec raison que le simple fait qu'un manquement à une obligation d'origine législative mène à la démonstration d'une faute dans tous les cas, sauf les plus exceptionnels, n'emporte pas nécessairement le pardon de la faute civile en l'absence d'une telle violation. Les auteurs J.-L. Baudouin et P. Deslauriers s'expriment d'ailleurs comme suit, sur ce sujet, dans *La responsabilité civile* (7e éd. 2007), vol. I, no 1-188 :

> La transgression d'une obligation spécifique imposée par la loi ou le règlement, surtout si elle est intentionnelle ou lourde, constitue en principe une faute civile, puisqu'il y a alors violation d'une norme de conduite impérativement fixée par le législateur. Par contre, le simple respect de celle-ci ne dégage pas, pour autant, de la responsabilité.

[97] They go on to state the following, at No. 1-189:

> [TRANSLATION] . . . the mere fact that in a given case the defendant adhered to statutory or regulatory standards does not automatically rule out the possibility that he or she will nevertheless be held liable on the basis of the general law. Statutory provisions therefore do not have the effect of limiting the general obligation of good conduct in one's relations with others, and this means that it is not necessary to prove the violation of a statutory or legal rule for another person to be held liable.

[98] Applying this principle, we cannot accept that the appellants are exempt from civil liability because their liability has not been proven under s. 45 of the *Competition Act*. The Court must consider the liability of the appellants under the broad standards of art. 1457 of the *C.C.Q.*, not the narrower standards of s. 45 of the *Competition Act*, a penal provision.

[99] Perhaps more importantly, to accept the appellants' argument on this point would be to import the standard of proof applicable to a trial into this preliminary stage of an authorization proceeding and permit a logical absurdity to win the day. As we mentioned above, the respondent does not need to satisfy the criteria of s. 45 of the *Competition Act* on a balance of probabilities, and a criminal standard of proof is even less appropriate. It would be fallacious to conclude that the respondent's failure to meet the trial standard in advance leads to the conclusion that the appellants did not contravene the *Competition Act*. An absence of definitive proof of a violation does not constitute absolute proof of compliance. Accordingly, we need not determine at this stage, that of authorization, whether the appellants actually breached s. 45.

[100] In our opinion, the respondent has presented an arguable case that the appellants committed a civil fault. We will now turn to the analysis of the injury allegedly suffered under art. 1003(*b*) of the *C.C.P.*

[97] Au n° 1-189, ils poursuivent en ces termes :

> . . . le simple fait qu'à propos d'un incident le défendeur ait respecté les normes législatives ou réglementaires n'exclut pas automatiquement la possibilité que sa responsabilité puisse malgré tout être retenue en vertu du régime de droit commun. Les dispositions réglementaires n'ont donc pas pour effet de limiter l'obligation générale de se bien comporter à l'égard d'autrui et, en contrepartie, il n'est pas nécessaire de démontrer la violation d'une règle statutaire ou légale pour engager la responsabilité d'autrui.

[98] En appliquant ce principe, nous ne saurions accepter que les appelantes soient dégagées de toute responsabilité civile parce que leur responsabilité n'a pas été prouvée sous le régime de l'art. 45 de la *Loi sur la concurrence*. La Cour doit examiner leur responsabilité sur le fondement des normes générales prévues par l'art. 1457 *C.c.Q.*, et non des normes plus strictes de l'art. 45 de la *Loi sur la concurrence*, une disposition pénale.

[99] L'effet le plus grave de l'acceptation de l'argument des appelantes à ce sujet se retrouve dans l'introduction de la norme de preuve applicable au procès à cette étape préliminaire de l'autorisation, et de faire triompher un raisonnement absurde. Comme nous l'avons déjà rappelé, l'intimée n'est pas tenue de satisfaire aux critères prévus à l'art. 45 de la *Loi sur la concurrence* selon la prépondérance des probabilités, et encore moins selon une norme applicable en matière criminelle. Il serait fallacieux d'induire que le défaut de l'intimée de répondre d'avance à la norme applicable au procès permettrait la conclusion que les appelantes n'ont pas contrevenu à la *Loi sur la concurrence*. L'absence d'une preuve définitive d'un manquement à cette loi ne constitue pas une preuve absolue de conformité. Aussi n'est-il pas nécessaire de déterminer à la présente étape, soit celle de l'autorisation, si les appelantes ont effectivement contrevenu à l'art. 45.

[100] À notre avis, l'intimée a établi qu'il est possible de soutenir que les appelantes ont commis une faute civile. Nous procéderons maintenant à l'analyse du préjudice qui aurait été subi au sens de l'al. 1003*b*) *C.p.c.*

(b) *Injury Suffered*

[101] In order to justify the conclusions of civil liability sought by Option consommateurs, the motion for authorization must demonstrate an arguable case that Ms. Cloutier and the other members of the proposed group suffered a loss as a result of the appellants' anti-competitive conduct.

[102] We have already outlined paras. 2.14, 2.15 and 2.15.1 of the respondent's motion, which are reproduced above. The allegations of the motion asserted that the cartel artificially inflated the prices paid by Quebec purchasers for DRAM and for products containing DRAM as a result. In paras. 2.16 and 2.17, the respondent provided further information on the injury allegedly suffered:

[TRANSLATION]

2.16 As a result of the foregoing, each and every one of the members of the group suffered injury in that they assumed, in whole or in part, the artificially inflated portion of the price of DRAM;

2.17 When all is said and done, the injury collectively suffered by the Designated Person and the other members of the group is equal to the artificially inflated portion of the sales price of DRAM sold in Quebec and/or contained in products sold in Quebec; [A.R., vol. II, at p. 69]

[103] Essentially, the respondent is claiming that the loss suffered by the direct purchasers was equivalent to the amount by which the price of DRAM was artificially inflated. It argues that the indirect purchasers' losses were equal to the price increase passed on either by direct purchasers or by other indirect purchasers higher up in the distribution chain. The subgroup of indirect purchasers includes the designated member, Ms. Cloutier, who, the respondent alleges, suffered a loss in paying the inflated price passed on to her by Dell, from whom she purchased her computer. Thus, the respondent claims that each member of the proposed group suffered an injury by paying all or a portion of the amount by which the price of DRAM

b) *Le préjudice subi*

[101] Pour justifier les conclusions de responsabilité civile recherchées par Option consommateurs, la requête en autorisation doit démontrer qu'il est possible de soutenir que M^me^ Cloutier et les autres membres du groupe proposé ont subi une perte en raison du comportement anticoncurrentiel des appelantes.

[102] Nous avons déjà cité les par. 2.14, 2.15 et 2.15.1 de la requête de l'intimée. Selon ces allégations, le cartel a gonflé artificiellement les prix payés par les acheteurs du Québec pour la DRAM et les produits équipés de DRAM. Aux paragraphes 2.16 et 2.17, l'intimée donne des renseignements supplémentaires sur le préjudice qui aurait été subi :

2.16 En conséquence de ce qui précède, tous et chacun des membres du groupe ont subi des dommages en ce qu'ils ont assumé, en tout ou en partie, la portion artificiellement gonflée du prix de la DRAM;

2.17 En bout de piste, les dommages subis collectivement par la Personne désignée et les autres membres du groupe sont égaux à la portion artificiellement gonflée des prix de vente de la DRAM vendue au Québec et/ou équipant des produits vendus au Québec; [d.a., vol. II, p. 69]

[103] Pour l'essentiel, l'intimée prétend que la perte subie par les acheteurs directs équivalait à la partie artificiellement gonflée du prix de la DRAM. Elle argumente également que les pertes des acheteurs indirects équivalaient à la hausse du prix transférée, soit par les acheteurs directs, soit par d'autres acheteurs indirects placés à un niveau supérieur dans la structure de distribution. Le sous-groupe des acheteurs indirects comprend la membre désignée, M^me^ Cloutier, qui, selon les allégations de l'intimée, a subi une perte en payant le prix gonflé lui ayant été transféré par Dell, qui lui a vendu son ordinateur. En conséquence, l'intimée prétend que chaque membre du groupe proposé a subi un préjudice en payant, en tout ou en partie, une portion de

or of products containing DRAM sold in Quebec was artificially inflated.

[104] By setting out a single claim that the whole of the impugned price increase was absorbed collectively by the members of the proposed group, para. 2.17 points to the aggregate nature of the alleged injury. The respondent seeks to prove a single loss amount for both the direct and the indirect purchasers without distinguishing between these subgroups or between individuals within each of these subgroups as regards the nature or the degree of the loss they have suffered. The respondent would wait until a subsequent stage of the proceedings to divide this aggregate loss amount amongst the members of the proposed group on a yet-to-be-determined basis that would reflect each individual's loss.

[105] These allegations by the respondent raise two distinct issues with regard to the demonstration of injury. *First*, since the respondent has included the indirect purchasers in the proposed group, the question arises as to whether a cause of action can be rooted in the passing on of artificially inflated prices resulting from anti-competitive practices. *Second*, the Court must determine whether the respondent has discharged the burden of demonstrating that each member of the group suffered an injury in light of the complexity of the distribution channels. This second issue requires the Court to inquire into whether it is sufficient to prove an aggregate loss at this stage of the proceedings. The Court must also consider the nature of the respondent's evidentiary burden with regard to any methodology advanced to prove the effects of the alleged misconduct. In other words, to what extent must the respondent prove at the authorization stage that the direct purchasers suffered and retained a portion of the loss and that a portion of the loss was passed on to the indirect purchasers?

[106] In our opinion, passing on can result in a finding of a compensable injury in an action for extracontractual damages. We are also of the view that the respondent has discharged its evidentiary burden in respect of the loss resulting from the

la partie artificiellement gonflée du prix de la DRAM ou de produits équipés de DRAM vendus au Québec.

[104] En énonçant une seule demande selon laquelle la totalité de la hausse de prix contestée a été absorbée collectivement par les membres du groupe proposé, le par. 2.17 met en lumière la nature globale du préjudice allégué. L'intimée cherche à prouver un montant unique de perte tant pour les acheteurs directs que pour les acheteurs indirects sans faire de distinction entre ces sous-groupes ou entre des membres de ces sous-groupes à l'égard de la nature ou l'étendue de la perte qu'ils ont subie. L'intimée attendra à une étape ultérieure de l'instance pour répartir le montant de cette perte globale entre les membres du groupe proposé, selon une méthodologie qui reste à déterminer, afin de refléter la perte de chacun des membres.

[105] À la suite de ces allégations de l'intimée, deux questions distinctes se posent quant à la preuve du préjudice. *Premièrement*, l'inclusion par l'intimée des acheteurs indirects dans le groupe proposé soulève la question de savoir si le transfert des prix artificiellement gonflés résultant de pratiques anticoncurrentielles peut fonder une cause d'action. *Deuxièmement*, la Cour doit déterminer si l'intimée s'est acquittée du fardeau de démontrer que chaque membre du groupe proposé a subi un préjudice, vu la complexité des canaux de distribution. Cette seconde question exige que la Cour se demande si la preuve d'une perte globale suffit à la présente étape de l'instance. Elle doit aussi examiner la nature du fardeau de la preuve imposé à l'intimée au sujet des méthodologies proposées pour prouver les effets du comportement délictueux qu'elles allèguent. Autrement dit, dans quelle mesure l'intimée doit-elle prouver à l'étape de l'autorisation que les acheteurs directs ont subi et absorbé une portion de la perte, et qu'une partie de la perte a été transférée aux acheteurs indirects?

[106] Selon nous, le transfert peut mener à une conclusion de préjudice indemnisable dans le cadre d'une action en dommages-intérêts extracontractuels. Nous estimons également que l'intimée s'est acquittée de son fardeau de preuve à l'égard de la perte résultant

alleged passing on of the price increases caused by the appellants' anti-competitive conduct.

(i) Passing On as the Basis of a Cause of Action

[107] The question whether the passing on of price increases can ground a class action where the members of the group include direct purchasers is a threshold question. If the answer is no, the action cannot be authorized and the respondent's motion must fail.

[108] The appellants submit that the indirect purchasers cannot recover the losses that allegedly resulted from the passing on of overcharges by the direct and subsequent indirect purchasers, since those losses were not a direct consequence of the appellants' actions, and that the indirect purchasers accordingly lack standing. In support of this position, the appellants rely on a number of decisions from both Canada and the United States, and they raise the same arguments with regard to passing on as the respondents in the cases of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, which were heard together with this appeal.

[109] The root of this argument is the proposition that passing on cannot be raised as a defence. The United States Supreme Court explicitly accepted this proposition in the seminal decision of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in which it rejected the passing-on defence. The appellants contend that this same principle applies in Canadian law, citing *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, and *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, in which this Court criticized the theory of passing on when raised as a defence, stressing the policy consideration of ensuring that the twin goals of deterrence and victim compensation are not eroded.

du transfert allégué des hausses de prix causées par le comportement anticoncurrentiel des appelantes.

(i) Le transfert comme fondement de la cause d'action

[107] La question de déterminer si le transfert des hausses de prix peut fonder un recours collectif dont les membres du groupe comprennent des acheteurs directs conserve un caractère préliminaire. En cas de réponse négative, le recours ne peut être autorisé, et la requête de l'intimée doit être rejetée.

[108] Pour leur part, les appelantes soutiennent que les acheteurs indirects ne peuvent recouvrer les pertes résultant du transfert par les acheteurs directs et les acheteurs indirects subséquents des montants surfacturés, puisque ces pertes ne constitueraient pas une conséquence directe de la conduite des appelantes. En conséquence, les acheteurs indirects n'ont pas qualité pour agir. À l'appui de cette thèse, elles se fondent sur plusieurs décisions canadiennes ou américaines et soulèvent les mêmes arguments à l'égard du transfert de la perte que les intimées dans les affaires *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, et *Sun-Rype Products Ltd. c. Archer Daniels Midland Company*, 2013 CSC 58, [2013] 3 R.C.S. 545, dont notre Cour a entendu les appels en même temps.

[109] L'essentiel de cet argument repose sur le principe selon lequel le transfert de la perte ne peut être soulevé comme moyen de défense. La Cour suprême des États-Unis l'a explicitement reconnu dans l'arrêt clé *Hanover Shoe, Inc. c. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), dans lequel elle a rejeté le moyen de défense fondé sur le transfert de la perte. Les appelantes soutiennent que ce même principe s'applique en droit canadien, citant en appui les arrêts *Colombie-Britannique c. Canadian Forest Products Ltd.*, 2004 CSC 38, [2004] 2 R.C.S. 74, et *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3. Dans ces deux arrêts, notre Cour a critiqué la théorie du transfert de la perte comme moyen de défense, soulignant les principes de politique juridique relatifs à la sauvegarde du double objectif de la dissuasion des actes fautifs et de l'indemnisation de la victime.

[110] The appellants argue that if the defence of passing on is not accepted in Canadian law, the corollary is that passing on should not be accepted as the basis for a cause of action. They rely in support of this position on the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which that court explicitly rejected passing on as the basis for a cause of action, citing concerns of an excessively onerous burden of proof for plaintiffs and a risk of multiple liability for defendant manufacturers against which direct and indirect purchasers pursue separate claims.

[110] Les appelantes prétendent que si le moyen de défense fondé sur le transfert de la perte est rejeté en droit canadien, cela signifie que ce transfert ne devrait pas être autorisé comme fondement de la cause d'action. Au soutien de leur thèse, elles s'appuient sur la décision de la Cour suprême des États-Unis dans l'affaire *Illinois Brick Co. c. Illinois*, 431 U.S. 720 (1977). En effet, cet arrêt a explicitement rejeté le transfert de la perte comme fondement de la cause d'action, en exprimant la crainte que le fardeau de preuve imposé aux demandeurs ne soit beaucoup trop lourd et qu'il existe un risque de responsabilité multiple des fabricants-défendeurs que les acheteurs directs et indirects pourraient poursuivre séparément.

[111] We do not agree with the appellants. The policy considerations that militate against the defence of passing on at common law should favour, in the civil law of Quebec, compensation for a loss that has been passed on to a plaintiff. In reaching this conclusion, we must point out that the rejection of passing on as a defence does not preclude passing on as a factual occurrence. The defence has been rejected not because passing on does not exist, but primarily for policy reasons. In the instant case, acceptance of the passing-on defence would adversely affect the *Competition Act*'s objectives of deterrence and compensation. It might enable wrongdoers to keep ill-gotten gains if they could successfully demonstrate that artificial price increases had not been absorbed by direct purchasers and if indirect purchasers were unable or unwilling to mount their own action.

[111] Nous ne sommes pas d'accord avec les appelantes. Les considérations de politique juridique qui militent contre le moyen de défense fondé sur le transfert de la perte en common law devraient favoriser, en droit civil québécois, l'indemnisation de la perte transférée à un demandeur. Pour tirer cette conclusion, nous devons souligner que le rejet du transfert de la perte comme moyen de défense n'empêche pas le transfert dans les faits. Le moyen de défense est rejeté, non pas parce que le transfert n'existe pas, mais plutôt, principalement, pour des considérations de politique juridique. En l'espèce, l'acceptation du moyen de défense fondé sur le transfert de la perte nuirait à la réalisation des objectifs de dissuasion et d'indemnisation visés par la *Loi sur la concurrence*. Une telle acceptation risquerait de permettre aux auteurs d'un préjudice de conserver des gains mal acquis dans les cas où ils arriveraient à démontrer que les hausses de prix artificielles n'ont pas été absorbées par les acheteurs directs et où les acheteurs indirects ne seraient pas en mesure d'intenter leur propre action ou disposés à le faire.

[112] Courts were also concerned that acceptance of the passing-on defence would unduly increase the evidentiary burden of direct purchaser plaintiffs by requiring that they prove not only that they had suffered a loss, but also that they would not be benefiting from a windfall after having passed that loss on. This concern is particularly relevant since, as Professor Waddams points out in

[112] Les tribunaux craignaient également que l'acceptation du moyen de défense fondé sur le transfert de la perte alourdisse indûment le fardeau de la preuve imposé aux acheteurs directs demandeurs, en exigeant qu'ils prouvent non seulement avoir subi une perte, mais aussi qu'ils ne réaliseront pas un bénéfice exceptionnel après avoir transféré cette perte. Cette préoccupation est particulièrement

The Law of Damages (5th ed. 2012), at p. 15-38, direct purchasers can suffer losses even where anti-competitive price increases are passed on, since, owing to market dynamics, higher prices can have an impact on sales volumes and profitability. In order to preserve a direct purchaser's cause of action, it is necessary to crystallize the loss by holding that the action against the defendants vests in the direct purchaser at the time of the purchase.

légitime car, comme le souligne le professeur S. M. Waddams dans *The Law of Damages* (5e éd. 2012), p. 15-38, les acheteurs directs peuvent subir des pertes même lorsque les hausses de prix anticoncurrentielles sont transférées puisque, en raison de la dynamique de marché, des prix plus élevés sont susceptibles d'influer sur le volume des ventes et la rentabilité. Pour préserver la cause d'action d'un acheteur direct, il devient nécessaire de concrétiser la perte en concluant que l'action contre les défendeurs appartient à l'acheteur direct au moment de l'achat.

[113] By contrast, to reject the possibility, in the Quebec law of civil liability, of claiming compensation for a loss that has been passed on would be inconsistent with the twin objectives — deterrence and compensation — of extracontractual liability. To allow for recovery of such a loss would be compatible with those objectives.

[113] Au contraire, le rejet de la possibilité, en droit québécois de la responsabilité civile, de demander réparation pour une perte transférée serait incompatible avec le double objectif de dissuasion et d'indemnisation du régime de la responsabilité extracontractuelle. De plus, la reconnaissance de la possibilité de recouvrer une telle perte respecterait ces objectifs.

[114] The risk of double recovery for a single loss should be assessed in light of the facts and circumstances specific to each case, as opposed to being dealt with in the abstract by means of a blanket application of inflexible rules. Every case will raise distinct evidentiary issues, and these issues are appropriately addressed on a case-by-case basis.

[114] Le risque d'une double indemnisation d'une même perte devrait être évalué selon les faits et les circonstances spécifiques de chaque cas, en évitant de le traiter de façon abstraite par l'application générale de règles inflexibles. Chaque situation soulèvera des questions de preuve distinctes qui seront mieux évaluées au cas par cas.

[115] In the instant case, there is no risk of double recovery, since the direct and indirect purchasers would be combined in a single group that would make a single collective claim of an aggregate loss. This case does not involve separate claims, so there is quite simply no risk of multiple liability for a single loss.

[115] Dans la présente affaire, il n'existe aucun risque de double indemnisation puisque les acheteurs directs et indirects seraient réunis dans un même groupe qui présenterait une seule et même réclamation collective visant une perte globale. Comme la présente affaire ne concerne pas des réclamations distinctes, il n'existe tout simplement aucun risque de responsabilité multiple à l'égard de la même perte.

[116] The appellants submit that a notional risk of double recovery results from the application of art. 999 of the *C.C.P.*, which precludes legal persons with more than 50 employees from participating as members in a class action, thereby opening up the possibility of double recovery should a larger corporation bring a separate action. However, this risk is exactly as described: notional. There is no evidence before the Court that a separate action has

[116] Les appelantes prétendent qu'un risque théorique de double indemnisation découle de l'application de l'art. 999 *C.p.c.* En effet, cette disposition interdit aux personnes morales de plus de 50 employés de participer à titre de membres du recours collectif. En conséquence, une plus grande entreprise pourrait intenter une action distincte, ce qui créerait une possibilité de double indemnisation. Toutefois, le risque reste exactement comme il

been filed. In light of the flexible approach we have outlined above, a potentially valid action should not be barred on the basis of a theoretical concern that has not in fact materialized.

est décrit : théorique. D'ailleurs, la Cour ne dispose d'aucun élément de preuve attestant l'introduction d'une action distincte. Suivant l'approche plus flexible dont nous avons fait état précédemment, un recours potentiellement valide ne devrait pas être déclaré irrecevable sur la base d'une préoccupation théorique qui ne s'est pas, de fait, matérialisée.

[117] In summary, therefore, passing on can serve as a sword under the civil law of Quebec even though it cannot serve as a shield. Accordingly, what remains for the respondent is to meet the threshold requirement for the demonstration of passing on that applies at the authorization stage.

[117] Bref, le transfert de la perte peut servir d'épée en droit civil québécois et ce, même s'il ne peut servir de bouclier. En conséquence, l'intimée n'a plus qu'à satisfaire au critère préliminaire de la preuve du transfert applicable à l'étape de l'autorisation.

(ii) Evidentiary Burden With Respect to Injury

(ii) Le fardeau de la preuve relatif au préjudice

[118] The appellants argue that the allegations made in the respondent's motion are not sufficiently detailed and specific to discharge the burden of demonstrating that the loss was passed on to the indirect purchasers. Their position is that if the artificially inflated prices cannot be shown to have reached the indirect purchasers, those purchasers can have suffered no loss and for that reason cannot form part of the class. They claim that the respondent relies entirely on "speculative and unspecified allegations" and that the class action should accordingly not be authorized.

[118] Les appelantes soutiennent également que les allégations formulées par l'intimée dans sa requête ne sont pas suffisamment détaillées et précises pour lui permettre de s'acquitter du fardeau de démontrer le transfert de la perte aux acheteurs indirects. Selon leur thèse, si on ne peut établir que les prix artificiellement gonflés ont effectivement été transmis aux acheteurs indirects, il se peut que ceux-ci n'aient subi aucune perte et ne puissent, par voie de conséquence, faire partie du groupe. Elles plaident aussi que l'intimée s'appuie entièrement sur des [TRADUCTION] « allégations hypothétiques et non spécifiques » et que le recours collectif ne devrait donc pas être autorisé.

[119] In support of their position, the appellants cite *Toyota* and *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859. In the latter case, the Court of Appeal stated, at para. 32, that [TRANSLATION] "the allegations of fact set out in a motion for authorization to institute a class action must be sufficiently specific and precise to support *prima facie* the right the applicant wishes to assert".

[119] À l'appui de leur thèse, les appelantes invoquent les affaires *Toyota* et *Regroupement des citoyens contre la pollution c. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859. Dans la seconde, la Cour d'appel a exposé, au par. 32, que « les allégations factuelles énoncées dans une requête en autorisation d'exercer un recours collectif doivent être particulières et précises au point de soutenir *prima facie* le droit que le requérant tente de faire valoir ».

[120] These assertions raise two challenges which the respondent must overcome in order for the class action to be authorized. *First*, it must satisfy the courts that the claim of an aggregate loss is sufficient to meet the requirements of art. 1003(*b*)

[120] Selon ces prétentions, elles créent deux obstacles dans la demande d'autorisation du recours collectif. *Premièrement*, l'intimée doit convaincre les tribunaux que l'allégation de préjudice global suffit pour répondre aux exigences de l'al. 1003*b*)

of the *C.C.P.* at this preliminary stage. *Second*, it must present a sufficient arguable case that the artificial price increases passed through the complex distribution channels and were absorbed, at least in part, by the indirect purchasers. Both these issues are intertwined with questions related to the evidentiary threshold requirement to be met at this stage.

1. *Aggregate Loss*

[121] As we mentioned above, the appellants argue that the respondent's allegations that the indirect purchasers suffered a loss are vague and imprecise. More specifically, they submit that the motion does not clearly state what injury the indirect purchasers suffered, how the alleged injury can be identified and quantified, or how misconduct in other jurisdictions can cause an injury in Quebec. The appellants add that the allegations set out in the motion are couched in language that is so vague as to be of no help in determining whether any injury was in fact suffered. They assert, citing *Toyota*, that allegations of loss which are [TRANSLATION] "vague, general and imprecise" are not sufficient.

[122] Furthermore, the appellants submit that the respondent, by alleging an aggregate loss, has failed to discharge the burden of showing *prima facie* that all members of the group had suffered an injury. They again cite *Toyota* for this proposition, and more specifically the following comment made by the Court of Appeal in that case, at para. 54:

> [TRANSLATION] It is in effect essential to demonstrate the collective nature of the injury suffered, and a class action is not appropriate if it would give rise, at the hearing on the merits, to a multitude of small trials and if a major aspect of the dispute does not lend itself to collective determination because of a multiplicity of subjective factors.

[123] The appellants also cite *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, for the proposition that an aggregate loss is not sufficient to meet the requirement

C.p.c. à cette étape préliminaire. *Deuxièmement*, elle doit démontrer, de manière suffisante et sur le fondement d'une cause défendable, que les hausses artificielles du prix ont été répercutées à travers la chaîne de distribution complexe et ensuite été absorbées, du moins en partie, par les acheteurs indirects. Ces deux questions sont étroitement liées à l'exigence relative au seuil de preuve à laquelle il faut répondre à la présente étape.

1. *La perte globale*

[121] Comme nous l'avons souligné précédemment, les appelantes insistent sur le caractère vague et imprécis des allégations de l'intimée selon lesquelles les acheteurs indirects ont subi une perte. Les appelantes prétendent notamment que la requête n'indique pas clairement la nature du préjudice subi par les acheteurs indirects, ni comment il peut être identifié et quantifié, ou encore, de quelle manière l'inconduite survenue dans d'autres ressorts peut causer un préjudice au Québec. Elles ajoutent que le libellé des allégations formulées dans la requête est tellement vague qu'il ne permet pas de déterminer si un préjudice a réellement été subi. Citant l'arrêt *Toyota*, elles affirment que les allégations de perte, étant « vague[s], générale[s] et imprécise[s] », ne sont pas suffisantes.

[122] En outre, les appelantes plaident que l'intimée, en alléguant une perte globale, ne s'est pas acquittée du fardeau d'établir *prima facie* que tous les membres du groupe avaient subi un préjudice. Elles s'appuient parfois sur l'arrêt *Toyota*, et plus précisément sur les commentaires suivants formulés par la Cour d'appel au par. 54 :

> Il est, en effet, essentiel de démontrer le caractère collectif du dommage subi et le recours collectif n'est pas approprié lorsqu'il donnerait naissance, lors de l'audition au fond, à une multitude de petits procès et qu'un aspect important de la contestation engagée ne se prête pas à une détermination collective en raison d'une multiplication de facteurs subjectifs.

[123] Les appelantes renvoient également à l'arrêt *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214, pour affirmer que la présence d'une perte globale ne satisfait pas

for authorization and that each member of the proposed group must be proven to have sustained a loss for the claim to succeed. In that case, Deschamps J. stated, at para. 53:

> As I mentioned above, for a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group . . . . [Emphasis added.]

[124] We do not accept the appellants' arguments. In our opinion, the respondent has met the low evidentiary threshold requirement for demonstrating an injury at this preliminary stage of the proceedings.

[125] At the risk of being repetitive, we wish to stress that the evidentiary burden applicants must discharge at the authorization stage is that of establishing an arguable case. This means that the respondent must show that the members of the group suffered an injury. While it is true that a judge hearing a motion for authorization is responsible for weeding out frivolous cases, a class action alleging an aggregate loss is not, *per se*, frivolous. No provision of the *C.C.P.* bars such claims, which meet the twin objectives of deterrence and compensation that animate the class action system. Moreover, the *C.C.P.* itself provides for collective recovery (arts. 1031 to 1033). If both indirect and direct purchasers have in fact suffered losses, it would run counter to the legislative intent with respect to the class action not to allow the case to proceed to trial, where the merits can be appropriately weighed.

[126] At this preliminary stage, allowing the demonstration of an aggregate loss will provide flexibility for the proceedings without requiring applicants to establish each member's individual loss, which would be an overly onerous burden. How the loss might be allocated and compensated for can be left to the review of the merits of the case and to the stage of execution of an eventual judgment. Moreover, we cannot accept any argument that this would open the door to frivolous actions. If an aggregate loss can be demonstrated, the question

à l'exigence applicable à la procédure d'autorisation et qu'il faut prouver que chaque membre du groupe proposé a subi une perte pour que la demande soit accueillie. Dans ce pourvoi, la juge Deschamps a affirmé ce qui suit au par. 53 :

> Comme je l'ai mentionné précédemment, pour que son action soit accueillie, le demandeur doit établir les éléments faute, préjudice et lien de causalité à l'endroit de chacun des membres du groupe . . . [Nous soulignons.]

[124] Nous ne souscrivons pas aux arguments des appelantes. À notre avis, l'intimée s'est bien acquittée de l'exigence relative au seuil de preuve peu élevé de démontrer le préjudice à cette étape préliminaire de l'instance.

[125] Au risque de nous répéter, nous estimons que le fardeau de preuve dont doivent s'acquitter les requérants à l'étape de l'autorisation consiste à établir une cause défendable. Cela signifie que l'intimée doit démontrer que les membres du groupe ont subi un préjudice. Bien qu'il soit vrai que le juge saisi de la requête en autorisation se trouve investi du rôle d'écarter les causes frivoles, un recours collectif dans lequel on invoque une perte globale n'est pas, en soi, frivole. Aucune disposition du *C.p.c.* n'interdit pareilles demandes, qui respectent le double objectif de dissuasion et d'indemnisation inspirant le régime de recours collectif. En outre, le *C.p.c.* même prévoit le recouvrement collectif (art. 1031 à 1033). Si tant les acheteurs indirects que directs ont effectivement subi des pertes, il serait contraire à l'objectif législatif en matière de recours collectifs de ne pas autoriser l'instruction de l'affaire qui permettra de dûment apprécier son bien-fondé.

[126] À cette étape préliminaire, le fait de permettre la démonstration d'une perte globale apportera une certaine flexibilité à l'instance sans obliger les requérants à établir la perte individuelle subie par chaque membre du groupe, ce qui imposerait un fardeau trop onéreux. Le problème de la méthode selon laquelle les pertes pourraient être réparties et indemnisées peut être tranché lors de l'audition au fond, puis à l'étape de l'exécution d'un éventuel jugement. Au surplus, nous ne pouvons pas non plus accepter l'argument laissant entendre que cette

how that loss is to be divided among the members of the proposed group does not change the fact that a loss was indeed suffered. As a result, the demonstration of an aggregate loss is sufficient to meet the requirements of art. 1003(*b*) of the *C.C.P.* at the authorization stage, provided that the evidentiary threshold requirement is met.

[127] The threshold requirement for art. 1003 is that the applicants present an arguable case that an injury was suffered. Although more than bare allegations are required, this threshold falls comfortably below the civil standard of proof on a balance of probabilities.

[128] This evidentiary burden is less demanding than the one that applies in other parts of Canada. As evidenced by this Court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, indirect purchasers in other Canadian jurisdictions would, to obtain certification of a class proceeding, have to show that their claim has a sufficient basis in fact. An applicant in one of those jurisdictions would be required to produce expert testimony and advance a methodology capable of demonstrating an aggregate loss that would apply to both direct and indirect purchasers. However, presentation of expert evidence is not the norm at the authorization stage in Quebec. A requirement that applicants adduce such evidence and advance a sophisticated methodology capable of demonstrating an aggregate loss and how that loss was passed on through complex distribution channels would be more onerous than the threshold requirement for art. 1003.

[129] With regard to the appellants' reliance on *Toyota* for the proposition that an aggregate loss is not sufficient at the authorization stage, we agree with Kasirer J.A. that the appellants have given an overly broad reading to that case. The reasons of Baudouin J.A. in *Toyota* do nothing to persuade us that the burden should be more onerous at the authorization stage than the one we have outlined

approche pourrait ouvrir la porte à des recours frivoles. Si la perte globale peut être démontrée, la manière dont cette perte doit être divisée entre les membres du groupe proposé ne change rien au fait qu'une perte a effectivement été subie. En conséquence, à l'étape de l'autorisation, la preuve d'une perte globale suffit pour répondre aux exigences de l'al. 1003*b*) *C.p.c.* pour autant que l'exigence relative au seuil de preuve soit respectée.

[127] Une telle exigence impose aussi aux requérants de démontrer qu'il est possible de soutenir qu'un préjudice a été subi. Bien que les requérants ne puissent se contenter de formuler de simples allégations, ce seuil est beaucoup moins exigeant que la norme de preuve applicable en droit civil, soit celle de la prépondérance des probabilités.

[128] Ce fardeau de preuve est aussi moins exigeant que celui qui s'applique ailleurs au Canada. En effet, comme l'atteste la décision de notre Cour dans *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, pour obtenir l'autorisation d'exercer un recours collectif dans d'autres ressorts canadiens, les acheteurs indirects doivent démontrer que leur demande repose sur un fondement factuel suffisant. Les requérants de ces ressorts doivent présenter des témoignages d'experts et proposer une méthodologie susceptible de prouver une perte globale touchant les acheteurs tant directs qu'indirects. Or, la présentation de ce type de témoignage d'expert ne constitue pas la norme à l'étape de l'autorisation au Québec. Le seuil d'application de l'art. 1003 serait outrepassé si les requérants étaient tenus de présenter une telle preuve et de proposer une méthodologie sophistiquée pouvant démontrer une perte globale et la façon dont celle-ci a traversé des canaux de distribution complexes.

[129] Nous partageons le point de vue du juge Kasirer selon lequel les appelantes ont donné une interprétation trop large à l'arrêt *Toyota*, lorsqu'elles prétendent s'appuyer sur cet arrêt pour plaider que la preuve d'une perte globale ne suffit pas à l'étape de l'autorisation. Les motifs énoncés par le juge Baudouin dans *Toyota* ne nous persuadent aucunement que le fardeau des requérants devrait

above. In fact, Baudouin J.A. reiterated this point himself in *Toyota*, at paras 43-44. Rather than laying down sweeping principles that would apply to the case at bar, *Toyota* was based on unique circumstances that are easily distinguished from those of this case. In comments with which we agree, Kasirer J.A. aptly summarized the relevant distinctions from that case as follows, at para. 99:

It was the very particular character of the price-maintenance scheme, which put an end to price negotiation by new car buyers, that explained why the motion for a class action failed in that case. For able negotiators contending with the price-maintenance scheme in *Toyota*, the fixed price created a loss. But for poor negotiators in the same class, the fixed price resulted in a gain. There was accordingly no way of knowing, based on the allegations made, whether losses outweighed gains and, importantly, how the foregone opportunity to negotiate was to be quantified as a loss. Contrary to *Toyota*, it cannot be said in the present case that the allegations create an uncertainty as to whether there is an aggregate loss to direct and indirect buyers of DRAM. The allegations are precise in that respect. This is not a case that runs the risk, at trial, of disintegrating into the multiple trials Baudouin, J.A. warned against in *Toyota*. Indeed the motions judge himself recognized at paragraph 153 of the judgment *a quo*.

[130] We will now turn to the appellants' assertion that an injury must be made out for each member of the proposed group, a proposition for which they cite *Malhab*. Much like the appellants' argument with respect to *Toyota*, this argument is based on an overly broad interpretation of the principles laid down in *Malhab*. Although *Malhab* did address the issue of proof of injury for each individual member of the group, it did so in the context of a trial on the merits. The plaintiffs in *Malhab* therefore faced a much stricter burden of demonstrating an injury across the group. In the

être plus onéreux à l'étape de l'autorisation que celui que nous avons décrit précédemment. En fait, le juge Baudouin a lui-même repris cette idée aux par. 43-44 de l'arrêt *Toyota*. Loin d'exposer des principes très généraux qui s'appliqueraient à la présente affaire, l'affaire *Toyota* se rattachait plutôt à des circonstances uniques se distinguant nettement de celles du présent pourvoi. Formulant des propos auxquels nous souscrivons, le juge Kasirer résume avec justesse, au par. 99 de ses motifs, les distinctions pertinentes qu'il convient d'établir entre *Toyota* et la présente affaire :

[TRADUCTION] C'est la nature très particulière du régime de maintien des prix, lequel a mis fin à la négociation des prix par les acheteurs de nouvelles voitures, qui expliquait pourquoi la requête en autorisation d'un recours collectif a été rejetée dans cette affaire. Pour les négociateurs chevronnés qui étaient confrontés au régime de maintien des prix chez *Toyota*, les prix fixés ont créé une perte. Mais pour les négociateurs inexpérimentés du même groupe, le prix fixé a engendré un gain. Par conséquent, il n'y avait aucun moyen de savoir, sur le fondement des allégations formulées, si les pertes étaient plus importantes que les gains et, surtout, comment la privation de la possibilité de négocier allait être quantifiée en tant que perte. Contrairement à *Toyota*, on ne saurait affirmer en l'espèce que les allégations créent une incertitude quant à savoir si les acheteurs directs et indirects de DRAM ont subi une perte globale. Les allégations sont précises à cet égard. Il ne s'agit pas d'un cas qui risque, au procès, de se fragmenter en une multitude de petits procès contre lesquels le juge Baudouin avait fait une mise en garde dans *Toyota*. En effet, le juge saisi des requêtes l'a lui-même reconnu au paragraphe 153 du jugement *a quo*.

[130] Penchons-nous maintenant sur l'affirmation des appelantes, qui invoquent à cet égard l'arrêt *Malhab*, selon lequel le préjudice doit être établi pour chaque membre du groupe proposé. Tout comme leur argument relatif à l'arrêt *Toyota*, cet autre argument s'appuie sur une interprétation trop large des principes exposés dans l'affaire *Malhab*. Bien que cet arrêt traite effectivement de la question de la preuve du préjudice subi par chaque membre du groupe, il le fait dans le contexte d'un procès. Dans cette affaire, les demandeurs faisaient ainsi face au fardeau beaucoup plus lourd de démontrer

instant case, which is at the authorization stage, the respondent is merely required to establish an arguable case of an injury suffered. It is therefore not necessary at this preliminary stage to prove that each member of the group suffered a loss. As we indicated above, the demonstration of an aggregate loss may be enough at the authorization stage.

le préjudice subi par tout le groupe. Dans le présent pourvoi, qui se trouve à l'étape de l'autorisation, l'intimée est simplement tenue d'établir qu'il est possible de soutenir qu'un préjudice a été subi. Aussi n'est-il pas nécessaire, à cette étape préliminaire, de prouver que chaque membre du groupe a subi une perte. Comme nous l'avons déjà mentionné, il peut suffire de prouver, à l'étape de l'autorisation, une perte globale.

[131] Even if the difference between the stages of the proceedings is disregarded, the requirements with respect to an aggregate injury that were established in *Malhab* were adopted in a context distinct from that of the case at bar. In that case, the Court had to determine whether an entire ethnic group had suffered an injury from defamatory comments made in the media. The tort of defamation is unique in that it balances freedom of expression against the protection of reputation. Establishing damage to reputation on a collective basis would require an extraordinary set of circumstances. As Deschamps J. explained, at para. 66, "the imputing of a single characteristic to all members of a group that is highly heterogeneous, has no specific organization or has flexible, broadly defined admission criteria would make an allegation of personal injury implausible". On the other hand, claims of losses resulting from artificially inflated prices do not require an examination of the characteristics of individual members aside from their having purchased a particular product and paid an inflated price. Questions about visibility in the community, historical stigmatization, the type and tone of defamatory comments, societal perceptions, and the impact of a myriad of other traits of the group on the alleged injury are irrelevant to the demonstration of losses in a case involving an anti-competitive price-fixing scheme.

[131] Même si on fait abstraction du fait que les deux recours ne se trouvent pas à la même étape, les exigences relatives au préjudice global, établies par l'arrêt *Malhab*, ont été adoptées dans un contexte distinct de celui de la présente affaire. Dans *Malhab*, la Cour devait déterminer si un groupe ethnique en entier avait subi un préjudice en raison de propos diffamatoires tenus dans les médias. Le délit de la diffamation est unique en ce qu'il maintient l'équilibre entre la liberté d'expression et la protection de la réputation. Prouver une atteinte à la réputation sur une base collective exigerait la présence d'un ensemble extraordinaire de circonstances. Comme l'explique la juge Deschamps au par. 66, « l'imputation d'une caractéristique unique à tous les membres d'un groupe très hétérogène, sans organisation précise ou appliquant des critères d'admission souples et définis largement rend peu plausible une allégation de préjudice personnel ». Par ailleurs, les demandes fondées sur des pertes découlant de prix artificiellement gonflés ne requièrent pas l'examen des caractéristiques de chacun des membres, hormis la question de savoir si ceux-ci ont acheté un produit en particulier et payé un prix gonflé. Les problèmes concernant la visibilité dans la communauté, la stigmatisation historique, le genre et le ton des propos diffamatoires, les perceptions de la société et les effets d'une myriade d'autres traits du groupe sur le préjudice allégué ne jouent aucun rôle dans la démonstration des pertes dans une affaire relative à un stratagème de fixation de prix anticoncurrentiels.

[132] These marked differences limit a court's ability to draw inferences about injuries suffered on an individual basis. As Deschamps J. explained, "the plaintiff must prove an injury shared by all

[132] Ces différences marquées limitent la capacité des tribunaux à tirer des conclusions concernant les préjudices subis sur une base individuelle. Comme l'explique la juge Deschamps, « le demandeur doit

members of the group so the court can infer that personal injury was sustained by each member" (*Malhab*, at para. 54).

[133] On the nature of the specific allegations in the instant case, we agree with the Court of Appeal's conclusion that the respondent has presented an arguable case of loss that is sufficient to meet the requirements of art. 1003(*b*) of the *C.C.P.* As we mentioned above, the respondent alleged the following in its motion for authorization: (a) a price-fixing conspiracy had artificially inflated the price of DRAM sold in Quebec (para. 2.14); (b) direct and indirect purchasers of DRAM had collectively overpaid as a result of this anti-competitive conspiracy (paras. 2.15 and 2.15.1); (c) all members of the group had assumed the inflated portion of the price, either in whole or in part (para. 2.16); and finally (d) the collective injury suffered by the entire group was equivalent to the total overpayment by the direct and indirect purchasers (para. 2.17).

[134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants' alleged anti-competitive conduct is sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.

[135] Accordingly, we agree with Kasirer J.A.'s conclusion that on the facts of this case, the aggregate loss alleged by the respondent is sufficient

établir un préjudice que partagent tous les membres du groupe et qui permet au tribunal d'inférer un préjudice personnel chez chacun des membres » (*Malhab*, par. 54).

[133] En examinant la nature des allégations spécifiques en l'espèce, nous souscrivons à la conclusion de la Cour d'appel selon laquelle l'intimée a fait valoir qu'il était possible de soutenir l'existence d'une perte suffisante pour répondre aux exigences de l'al. 1003*b*) *C.p.c.* Comme nous l'avons déjà noté, l'intimée a allégué ce qui suit dans la requête en autorisation : a) le complot de fixation des prix a gonflé artificiellement les prix de la DRAM vendue au Québec (par. 2.14); b) les acheteurs directs et indirects de DRAM ont collectivement payé trop cher par suite de ce complot anticoncurrentiel (par. 2.15 et 2.15.1); c) tous les membres du groupe ont absorbé la portion gonflée du prix, en tout ou en partie (par. 2.16); et enfin, d) le préjudice collectif subi par l'ensemble du groupe correspondait au paiement excédentaire total effectué par les acheteurs directs et indirects (par. 2.17).

[134] À elles seules, ces simples allégations seraient insuffisantes pour satisfaire à la condition préliminaire d'établir une cause défendable. Bien que cette condition soit relativement peu exigeante, de simples affirmations sont insuffisantes sans quelque forme d'assise factuelle. Comme nous l'avons déjà souligné, les allégations de fait formulées par un requérant sont présumées vraies. Mais elles doivent tout de même être accompagnées d'une certaine preuve afin d'établir une cause défendable. Or, l'intimée a présenté une preuve, aussi limitée qu'elle puisse être, à l'appui de ses affirmations. Ainsi, les pièces attestent l'existence d'un complot visant la fixation des prix et de ses effets internationaux, qui ont été ressentis aux États-Unis et en Europe. À l'étape de l'autorisation, ces répercussions internationales apparentes du comportement anticoncurrentiel allégué des appelantes suffisent pour inférer que les membres du groupe auraient subi le préjudice allégué.

[135] En conséquence, nous sommes d'accord avec la conclusion du juge Kasirer selon laquelle au vu des faits de l'espèce, la perte globale alléguée

in Quebec law to demonstrate an injury in accordance with the evidentiary standard applicable at the authorization stage. The arduous task of actually proving this loss for each member of the group is one that would be more appropriately undertaken at trial.

2. *Passing On*

[136] At the authorization stage, the evidentiary standard for demonstrating passing through is no different than the one for demonstrating an aggregate loss. The applicant must establish an arguable case that losses were passed on.

[137] Given this low threshold, the applicant is neither expected nor required to adduce expert testimony and advance a sophisticated methodology. Indeed, at this stage, the applicant need not even propose a possible methodology for the trial. But the representative of the class will need to be able to prove that losses were passed on to the indirect purchasers in order to succeed at trial. The Court of Appeal set these principles out succinctly in *Pharmascience*, at para. 52:

> Although the legal argument described in the proceedings is easily stated, there is still a marked want of proof behind the allegations in the motion for authorization. At this stage, however, the apparent complexity of the case is irrelevant under Quebec's *Act respecting the class action*. It does not fall to the judge hearing the motion for authorization to assess the risks and pitfalls faced by the applicant. Indeed, even if the judge did find that some of the claims were without merit, she would not be authorized to immediately exclude them from the debate because the motion for partial dismissal has been struck out of the *Code of Civil Procedure*.

[138] At this early stage, the aggregate loss alleged by the respondent and supported by the exhibits referred to above is enough to meet the burden of an arguable case. As Kasirer J.A. noted,

par l'intimée suffit en droit québécois pour démontrer le préjudice conformément à la norme de preuve applicable à l'étape de l'autorisation. Quant à la difficile tâche de prouver effectivement cette perte pour chacun des membres du groupe, c'est davantage dans le cadre du procès qu'il convient de l'entreprendre.

2. *Le transfert des pertes*

[136] À l'étape de l'autorisation, la norme de preuve à satisfaire pour démontrer le transfert de la perte ne diffère pas de celle qui s'applique pour démontrer la perte globale. Le requérant doit en effet établir qu'il est possible de soutenir que des pertes ont été transférées.

[137] Compte tenu de ce seuil peu élevé, il ne faut pas s'attendre, à l'étape de l'autorisation du recours, à ce que le requérant présente des témoignages d'expert et propose une méthodologie sophistiquée, ni l'exiger de sa part. De fait, à la présente étape, le requérant n'est même pas tenu de proposer une méthodologie envisageable pour le procès. Pour que, dans la présente affaire, la demande soit accueillie à l'issue du procès, la représentante du groupe devra être en mesure de prouver le transfert des pertes aux acheteurs indirects. La Cour d'appel décrit brièvement ces principes dans *Pharmascience*, au par. 52 :

> Bien que ce syllogisme juridique, décrit à la procédure, puisse être énoncé aisément, il se profile néanmoins derrière ces allégations de la requête en autorisation d'évidentes difficultés de preuve. Toutefois, cette complexité, à tout le moins apparente de l'affaire, est, à ce stade, sans pertinence dans le cadre de la *Loi sur le recours collectif* au Québec. En effet, il n'appartient pas au juge saisi de la demande d'autorisation d'évaluer les risques et les écueils qui guettent le requérant. Plus encore, même si la juge constatait que certaines réclamations n'avaient aucun fondement, elle ne serait pas autorisée à les exclure immédiatement du débat. Cela découle de la suppression de la requête en irrecevabilité partielle au *Code de procédure civile*.

[138] À cette étape initiale, la perte globale alléguée par l'intimée et appuyée par les pièces évoquées précédemment suffit à cette dernière pour s'acquitter du fardeau de présenter une cause

the "challenge will be a substantial one at trial but it would be inappropriate, once damage is alleged, to say that the class action should not proceed past the authorization stage because the challenge is too great" (para. 117). If at trial the respondent is unable to demonstrate how the loss was passed on to the indirect purchasers and how it is to be calculated, the action might fail at that stage.

[139] Subject to these reservations, we agree that the respondent has met the threshold requirements of art. 1003 of the *C.C.P.* in respect of the alleged injury. We will now turn to the problem of the causal connection between the fault and the injury.

(c) *Causation*

[140] To establish causation under art. 1457 of the *C.C.Q.*, it is necessary to show that the injury suffered was an immediate and direct consequence of the fault. As stated in art. 1607 of the *C.C.Q.*:

1607. The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor's default.

[141] The appellants argue that any losses suffered by indirect purchasers fail to meet this requirement of directness, because the alleged injury is a "*dommage par ricochet*" ([TRANSLATION] "indirect damage"). They assert that each direct purchaser and each upstream indirect purchaser made the decision to pass on some, all or none of the overcharge that allegedly stemmed from the appellants' anti-competitive conduct. According to the appellants, this choice to pass on or absorb a price increase is enough to break the chain of causation, since they did not retain control over the price of DRAM throughout the distribution chain. They submit that the indirect purchasers cannot be said to have suffered damage directly, since the actions of other parties determined the price paid for DRAM by end users.

défendable. Comme le souligne le juge Kasirer, le [TRADUCTION] « défi sera majeur au procès, mais il serait malvenu, une fois que le préjudice est allégué, d'affirmer que le recours collectif ne devrait pas suivre son cours après l'étape de l'autorisation parce que le défi est trop grand » (par. 117). Au procès, si l'intimée n'est pas en mesure de démontrer comment la perte a été transférée aux acheteurs indirects ni comment elle doit être calculée, le recours collectif pourrait être rejeté.

[139] Sous ces réserves, nous convenons que l'intimée a satisfait aux conditions préliminaires de l'art. 1003 *C.p.c.* à l'égard du préjudice allégué. Nous devons maintenant nous pencher sur le problème du lien de causalité entre la faute et le préjudice.

c) *Le lien de causalité*

[140] Pour établir le lien de causalité prévu à l'art. 1457 *C.c.Q.*, il faut démontrer que le préjudice subi constituait une suite immédiate et directe de la faute. L'article 1607 *C.c.Q.* se lit comme suit :

1607. Le créancier a droit à des dommages-intérêts en réparation du préjudice, qu'il soit corporel, moral ou matériel, que lui cause le défaut du débiteur et qui en est une suite immédiate et directe.

[141] Les appelantes prétendent que toute perte subie par les acheteurs indirects ne répond pas à cette exigence du caractère direct puisque les préjudices allégués constituent des « dommages par ricochet ». Elles affirment ainsi que chaque acheteur direct et chaque acheteur indirect en amont a pris la décision de transférer en tout ou en partie — ou même encore de ne pas transférer — les montants surfacturés qui découleraient du comportement anticoncurrentiel des appelantes. Selon les appelantes, ce choix de transférer ou d'absorber une hausse du prix suffit pour rompre le lien de causalité, puisqu'elles n'ont pas conservé le contrôle du prix de la DRAM dans l'ensemble de la chaîne de distribution. Les appelantes allèguent en outre qu'on ne peut affirmer que les acheteurs indirects ont subi un préjudice direct car les agissements d'autres parties ont déterminé le prix que les utilisateurs finaux ont payé pour la DRAM.

[142] While the appellants correctly state that Quebec civil law does not permit compensation for indirect damage, they fail to make an important distinction between indirect damage and the "*victime par ricochet*" ([TRANSLATION] "indirect victim"). The indirect victim is someone who suffers an autonomous injury after the commission of a fault, where the damage suffered was the logical, direct and immediate result of the fault. This is contrasted with indirect damage where the damage itself is indirect, because its source is not the immediate fault. Baudouin and Deslauriers comment on the application of this distinction, at No. 1-327:

> [TRANSLATION] In our opinion, the debate should focus not, as has been the case, in a formalistic and artificial manner on whether a broad or a narrow interpretation should be given to the word *another*, but on the real issue, that of the causal connection. The courts must therefore determine, in each case, independently of the claimant's personality, whether the *injury* being claimed is a direct consequence of the fault, rather than trying to determine whether the *applicant* is the *immediate victim*.

[143] This distinction was ably explained by a Superior Court judge in *Hubert v. Merck & Co. Inc.*, 2007 QCCS 3291 (CanLII), a judgment on a motion in an authorization proceeding that involved indirect victims, at paras 12-13:

> [TRANSLATION] At law, an indirect victim can have a cause of action against the person who caused the injury if he or she can prove that the person in question committed a fault.
>
> The indirect victim's injury, although distinct from that of the direct victim, is an immediate and direct result of that fault.

[144] We agree with this reasoning and accept the distinction between an indirect victim and indirect damage. Thus, the damage must be shown to be a direct consequence of the injurious act, but the plaintiff need not be the immediate victim of that act in order to recover. But at the authorization stage, the applicant needs only to present an arguable case that the loss was a direct result of the

[142] Bien que les appelantes affirment à bon droit que le droit civil québécois ne permet pas l'indemnisation des dommages par ricochet, elles omettent une distinction importante entre le « dommage par ricochet » et la « victime par ricochet ». La « victime par ricochet » est une victime indirecte qui subit un préjudice autonome après la perpétration d'une faute, lorsque le préjudice subi représente le résultat logique, direct et immédiat de la faute. Cette notion diffère du dommage par ricochet, où le préjudice même est indirect parce que son origine n'est pas la faute immédiate. Les auteurs Baudouin et Deslauriers formulent d'ailleurs les commentaires suivants sur l'application de cette distinction, au nº 1-327 :

> Le débat, à notre avis, ne doit pas se situer d'une façon formaliste et artificielle, comme ce fut le cas, autour d'une interprétation large ou restrictive à donner au mot *autrui*, mais autour du véritable problème qui est celui de la relation causale. Les tribunaux doivent donc évaluer, dans chaque cas particulier, si le *dommage* réclamé est une conséquence directe de la faute, indépendamment de la personnalité du réclamant, et non pas chercher à décider si le *demandeur* est bien la *victime immédiate*.

[143] Aux paragraphes 12 et 13 de l'arrêt *Hubert c. Merck & Co. Inc.*, 2007 QCCS 3291 (CanLII), un jugement sur une requête présentée dans le cadre d'une procédure d'autorisation concernant des « victimes par ricochet », un juge de la Cour supérieure a expliqué éloquemment cette distinction :

> En droit, les victimes par ricochet peuvent jouir d'une cause d'action contre l'auteur du préjudice, si elles établissent que cette personne a commis une faute.
>
> Le préjudice de la victime par ricochet, bien que distinct du préjudice de la personne blessée, est une suite immédiate et directe de la faute commise par l'auteur.

[144] Nous souscrivons à ce raisonnement, en reconnaissant la distinction qui existe entre la victime par ricochet et le dommage par ricochet. En conséquence, il faut démontrer que le préjudice constitue une suite directe du fait dommageable, mais, pour pouvoir obtenir réparation, le demandeur ne doit pas forcément être la victime immédiate du fait en question. Ainsi, à l'étape de l'autorisation, le

alleged misconduct. In the instant case, it would be wrong at this stage to find that only the direct purchasers suffered a direct injury. Although the indirect purchasers may be indirect victims, the injury they allegedly suffered was a direct result of the appellants' anti-competitive conduct.

[145] In light of this distinction, we agree with the Court of Appeal that the appellants' argument based on art. 1607 of the *C.C.Q.* must fail and that the demonstration of causation is sufficient to meet the requirements of the authorization stage. Whether causality — a direct link between the fault and the injury — can be proved on a balance of probabilities is a question best addressed at trial.

(d) *Article 1003(b) — Conclusion*

[146] In our opinion, the respondent has discharged its burden with respect to the demonstration of fault, injury and causation at the authorization stage. We will now turn to arts. 1003(*d*) and 1048 of the *C.C.P.* to determine whether Ms. Cloutier and Option consommateurs are in a position to adequately represent the members of the proposed group.

(3) Articles 1003(*d*) and 1048 — Adequate Representation of the Group's Members

[147] The appellants make two arguments as to why Ms. Cloutier does not meet the requirements for representing the members of the proposed group under art. 1003(*d*) of the *C.C.P.* First, they submit that Ms. Cloutier cannot represent a group whose members purchased DRAM or products containing DRAM in Quebec, because she purchased her computer in Ontario. As we mentioned above in discussing the issue of jurisdiction, however, Ms. Cloutier's computer is deemed under the *Consumer Protection Act* to have been purchased in Montréal under a remote-parties contract.

requérant doit seulement démontrer qu'il est possible de soutenir que la perte était le résultat direct de l'inconduite reprochée. En l'espèce, il serait erroné à la présente étape de la procédure de conclure que seuls les acheteurs directs ont subi un préjudice direct. Bien que les acheteurs indirects puissent être des victimes par ricochet, le préjudice qu'ils allèguent avoir subi représentait le résultat direct du comportement anticoncurrentiel des appelantes.

[145] Compte tenu de cette distinction, nous sommes d'accord avec les conclusions de la Cour d'appel selon lesquelles l'argument des appelantes fondé sur l'art. 1607 *C.c.Q.* doit être rejeté et que la preuve du lien de causalité est suffisante pour satisfaire aux exigences de l'étape de l'autorisation. Par ailleurs, il sera préférable de trancher lors du procès au fond la question de déterminer si le lien de causalité — le lien direct entre la faute et le préjudice — peut être prouvé selon la prépondérance des probabilités.

d) *Conclusion sur l'al. 1003b)*

[146] À notre avis, l'intimée s'est acquittée du fardeau relatif à la démonstration de la faute, du préjudice et du lien de causalité à l'étape de l'autorisation. Nous examinerons maintenant l'al. 1003*d*) et l'art. 1048 *C.p.c.* pour déterminer si M^{me} Cloutier et Option consommateurs sont en mesure de représenter de façon adéquate les membres du groupe proposé.

(3) Alinéa 1003*d*) et art. 1048 — La représentation adéquate des membres du groupe

[147] Les appelantes avancent deux arguments pour démontrer que M^{me} Cloutier ne satisfait pas aux exigences de l'al. 1003*d*) *C.p.c.* pour représenter les membres du groupe proposé. Premièrement, elles prétendent que M^{me} Cloutier, ayant acheté son ordinateur en Ontario, ne peut représenter un groupe dont les membres ont acheté de la DRAM ou des produits équipés de DRAM au Québec. Or, comme nous l'avons mentionné en examinant la question de la compétence, l'ordinateur de M^{me} Cloutier est réputé, selon la *Loi sur la protection du consommateur*, avoir été acheté à Montréal dans le cadre d'un contrat à distance.

[148] Second, the appellants argue that there is an inherent conflict of interests between Ms. Cloutier, as an indirect purchaser, and the direct purchasers. More specifically, the appellants assert that the direct and indirect purchasers have opposing interests in that each of these subgroups will argue that its members absorbed the full amount of the overcharge resulting from the price-fixing conspiracy. This argument has no valid basis.

[148] Deuxièmement, les appelantes plaident l'existence d'un conflit d'intérêts inhérent entre M^{me} Cloutier, à titre d'acheteuse indirecte, et les acheteurs directs. Plus précisément, elles affirment que les acheteurs directs et indirects ont des intérêts opposés en ce sens que chacun de ces sous-groupes prétendra que ses membres ont absorbé la totalité de la surfacturation découlant du complot de fixation des prix. Cet argument ne convainc pas.

[149] Article 1003(*d*) of the *C.C.P.* provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [TRANSLATION] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(*d*), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.

[149] Selon l'alinéa 1003*d*) *C.p.c.*, « le membre auquel il entend attribuer le statut de représentant [doit être] en mesure d'assurer une représentation adéquate des membres ». Dans *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond avance que la représentation adéquate impose l'examen de trois facteurs : « . . . l'intérêt à poursuivre [. . .], la compétence [. . .] et l'absence de conflit avec les membres du groupe . . . » (p. 419). Pour déterminer s'il est satisfait à ces critères pour l'application de l'al. 1003*d*), la cour devrait les interpréter de façon libérale. Aucun représentant proposé ne devrait être exclu, à moins que ses intérêts ou sa compétence ne soient tels qu'il serait impossible que l'affaire survive équitablement.

[150] Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorization. As Lafond states, at p. 423, [TRANSLATION] "[i]n the event of a conflict, denying authorization is in our opinion an overly radical step that would harm the absent members, especially given that the judge sitting at the stage of the motion for authorization has the power to ascribe the status of representative to a member other than the applicant or the proposed member." Given that the purpose of the authorization stage is merely to screen out frivolous claims, it follows that the purpose of art. 1003(*d*) cannot be to deny authorization if there is only a possibility of conflict. This position is supported by the case law, as authorization appears to have been denied under art. 1003(*d*) on the basis of a conflict of interests only where prospective representative plaintiffs had failed to disclose material facts or were undertaking the legal proceedings purely for personal gain.

[150] Même lorsqu'un conflit d'intérêts peut être démontré, le tribunal devrait hésiter à prendre la mesure draconienne de refuser l'autorisation. D'après Lafond à la p. 423, « [e]n cas de conflit, le refus de l'autorisation nous apparaît une mesure trop radicale qui porterait préjudice aux membres absents, d'autant plus que le juge siégeant au stade de la requête pour autorisation a le pouvoir d'attribuer le statut de représentant à un autre membre que le requérant lui-même ou le membre proposé. » Puisque l'étape de l'autorisation vise uniquement à écarter les demandes frivoles, il s'ensuit que l'al. 1003*d*) ne peut avoir pour conséquence de refuser l'autorisation en présence d'une simple possibilité de conflit. Ce point de vue est d'ailleurs étayé par la jurisprudence qui semble refuser l'autorisation en vertu de l'al. 1003*d*) pour cause de conflit d'intérêts seulement lorsque les représentants demandeurs omettent de divulguer des faits importants ou intentent le recours dans le seul but d'obtenir des gains personnels. (Voir *Croteau c. Air*

(See *Croteau v. Air Transat A.T. inc.*, 2007 QCCA 737, [2007] R.J.Q. 1175; *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Black v. Place Bonaventure inc.* (2004), 41 C.C.P.B. 181 (Que. C.A.); *Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446 (CanLII); *Bourgoin v. Bell Canada inc.*, 2007 QCCS 6087 (CanLII); and *Rosso v. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61.)

[151] It would accordingly be contrary to the spirit of art. 1003(*d*) of the *C.C.P.* to deny authorization for the proposed group of purchasers of DRAM on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs and Ms. Cloutier are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts that would reveal a conflict with other members. Further, the class members clearly share a common interest in establishing the aggregate loss and in maximizing the amount of this loss. As the British Columbia Supreme Court astutely pointed out in its decision at trial in *Sun-Rype*, "[t]he only parties at this time that have an interest in having the direct and indirect purchasers in a conflict of interest are the defendants" (2010 BCSC 922 (CanLII), at para. 194).

[152] The appellants also submit, on the basis of art. 1048 of the *C.C.P.*, that Option consommateurs should not be permitted to represent both the direct and the indirect purchasers, because its mandate of advocating for consumers runs counter to the interests of the direct purchasers. Article 1048 reads as follows:

1048. A legal person established for a private interest, partnership or association defined in the second paragraph of article 999 may apply for the status of representative if

(*a*) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and

Transat A.T. inc., 2007 QCCA 737, [2007] R.J.Q. 1175; *Bouchard c. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Black c. Place Bonaventure inc.* (2004), 41 C.C.P.B. 181 (C.A. Qué.); *Comité syndical national de retraite Bâtirente inc. c. Société financière Manuvie*, 2011 QCCS 3446 (CanLII); *Bourgoin c. Bell Canada inc.*, 2007 QCCS 6087 (CanLII); et *Rosso c. Autorité des marchés financiers*, 2006 QCCS 5271, [2007] R.J.Q. 61.)

[151] En conséquence, il serait contraire à l'esprit de l'al. 1003*d*) *C.p.c.* de refuser l'autorisation au groupe proposé d'acheteurs de DRAM sur le fondement d'un éventuel conflit d'intérêts entre les membres du groupe. D'ailleurs, le dossier n'indique pas qu'Option consommateurs et M[me] Cloutier ont intenté le recours et le mènent d'une manière malhonnête ou qu'elles ont omis de divulguer des faits importants qui révéleraient un conflit avec d'autres membres. En outre, les membres du groupe partagent manifestement l'intérêt commun d'établir la perte globale du groupe et d'en maximiser le montant. Comme l'a judicieusement affirmé la Cour suprême de la Colombie-Britannique dans l'affaire *Sun-Rype*, décision de première instance, [TRADUCTION] « [l]es défenderesses sont les seules parties à ce moment-ci qui ont un intérêt à ce que les acheteurs directs et indirects soient en conflit d'intérêts » (2010 BCSC 922 (CanLII), par. 194).

[152] Les appelantes argumentent également, en se fondant sur l'art. 1048 *C.p.c.*, qu'Option consommateurs ne devrait pas être autorisée à représenter à la fois les acheteurs directs et les acheteurs indirects puisque son mandat de défenseur des consommateurs va à l'encontre des intérêts des acheteurs directs. Cet article 1048 est rédigé comme suit :

1048. Une personne morale de droit privé, une société ou une association visée au deuxième alinéa de l'article 999 peut demander le statut de représentant si :

a) un de ses membres qu'elle désigne est membre du groupe pour le compte duquel elle entend exercer un recours collectif; et (*b*) the interest of that member is linked to the objects for which the legal person or association has been constituted.

. . .

[153] We see no reason to prevent Option consommateurs from continuing to represent the interests of both the direct and the indirect purchasers at this stage of the litigation. Much like art. 1003, art. 1048 is intended to be a flexible gatekeeper. As the Superior Court pointed out in *Association des résidents riverains de la Lièvre inc. v. Canada (Procureur général)*, 2006 QCCS 5661 (CanLII), at paras. 180-81, the purpose of art. 1048 is to enable a legal person with no direct interest in an action to be granted the status of representative. And as Kasirer J.A. correctly pointed out in his reasons in the case at bar, at para. 133, "[t]he Code does not direct that the legal person who applies to represent the class have a mission connected to all the members of the class, but merely to the interest of one of its members." Since Ms. Cloutier is a member of Option consommateurs and of the proposed group, art. 1048 does not prohibit Option consommateurs from representing the interests of the members in this case.

[154] In summary, we see no conflict between the direct and indirect purchasers at this stage of the proceedings that would bar either Ms. Cloutier or Option consommateurs from representing the interests of the class. It would be more appropriate to deal with any actual conflict between the direct and indirect purchasers at subsequent stages of the proceedings, once any aggregate loss has been established.

VI. Disposition

[155] For these reasons, we would dismiss the appeal. Costs should be awarded in this Court against the appellants Infineon Technologies AG and Infineon Technologies North America Corp. The motion to strike part of the factum of the intervener Canadian Federation of Independent Grocers is dismissed.

b) l'intérêt de ce membre est relié aux objets pour lesquels la personne morale ou l'association a été constituée.

. . .

[153] Nous ne voyons aucune raison d'empêcher Option consommateurs de continuer à représenter les intérêts tant des acheteurs directs que des acheteurs indirects à cette étape du litige. À l'instar de l'art. 1003, l'art. 1048 joue le rôle d'un gardien conciliant. Comme le souligne la Cour supérieure dans sa décision *Association des résidents riverains de la Lièvre inc. c. Canada (Procureur général)*, 2006 QCCS 5661 (CanLII), par. 180-181, l'art. 1048 cherche à habiliter une personne morale sans intérêt direct dans le recours collectif à se voir attribuer le statut de représentant. En outre, comme le mentionne à juste titre le juge Kasirer au par. 133 de ses motifs dans la présente affaire, [TRADUCTION] « [l]e Code n'exige pas que la personne morale qui demande à représenter le groupe remplisse un mandat qui soit lié à tous les membres du groupe, mais simplement un mandat dans l'intérêt de l'un de ses membres. » Puisque M^{me} Cloutier est membre d'Option consommateurs et du groupe proposé, l'art. 1048 n'interdit pas à Option consommateurs de représenter en l'espèce les intérêts des membres.

[154] Bref, il n'existe aucun conflit entre les acheteurs directs et indirects à la présente étape du recours qui empêcherait M^{me} Cloutier ou Option consommateurs de représenter les intérêts du groupe. Il serait préférable de trancher toute question de conflit réel entre les acheteurs directs et les acheteurs indirects aux étapes ultérieures du recours, une fois établie, le cas échéant, la perte globale.

VI. Dispositif

[155] Pour ces motifs, nous sommes d'avis de rejeter le pourvoi. Les appelantes Infineon Technologies AG et Infineon Technologies North America Corp. sont condamnées aux dépens en cette Cour. La requête en radiation d'une partie du mémoire de la Fédération canadienne des épiciers indépendants, intervenante en l'espèce, est rejetée.

Appeal dismissed with costs.

Solicitors for the appellants: Stikeman Elliott, Montréal.

Solicitors for the respondent Option consommateurs: Belleau Lapointe, Montréal.

Solicitors for the intervener: Sotos, Toronto.

Pourvoi rejeté avec dépens.

Procureurs des appelantes : Stikeman Elliott, Montréal.

Procureurs de l'intimée Option consommateurs : Belleau Lapointe, Montréal.

Procureurs de l'intervenante : Sotos, Toronto.

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Competition Tribunal Tribunal de la concurrence

Reference: *Coretti v Bureau de la Sécurité Privée and Garda World Security Corporation*, 2019 Comp Trib 4
File No: CT-2019-001
Registry Document No: 11

IN THE MATTER OF an application by Luigi Coretti for an Order granting leave, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34, as amended [Act], to make an application under subsection 77(3) of the Act;

BETWEEN:

Luigi Coretti
(applicant)

and

Bureau de la Sécurité Privée, Garda World Security Corporation, Garda World International Corporation, Garda Canada Security Corporation, The Garda Security Group, Société en Commandite Transport de Valeurs Garda, Garda Alarm Services Corporation
(respondents)

Decided on the basis of the written record.
Before Judicial Member: J. Gagné
Date of Reasons for Order and Order: July 31, 2019

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE

I. BACKGROUND

[1] Mr. Luigi Coretti is seeking leave from the Tribunal, pursuant to section 103.1 of the *Competition Act*, RSC 1985, c C-34, as amended, to file an application under subsection 77(3) of the Act against the Bureau de la Sécurité Privée (**"Bureau"**), on one hand, and Garda World Security Corporation, Garda World International Corporation, Garda Canada Security Corporation, The Garda Security Group Inc., Société en Commandite Transport de Valeurs Garda, and Garda Alarm Services Corporation (collectively **"Garda"**), on the other hand.

[2] Mr. Coretti essentially states that the Bureau and Garda have acted in concert to restrict the private security services market in the Province of Quebec, by forcing customers to do business exclusively with Garda.

[3] He states that Garda caused him to lose his assets and personal security services business, the Bureau canadien d'investigation et ajustements – BCIA, by initiating a malicious prosecution against it. In fact, he states that current or former employees of Garda were also officers and directors of the Caisse des policiers et policières de Montréal, a creditor in his business' bankruptcy which also made allegations of fraud against him. Finally, he states that by using a multitude of entities, Garda gained control of the Bureau "by acting as independent persons and appearing to represent the majority of market actors".

[4] With respect to the Bureau, a self-regulatory body that governs the private security services industry in Quebec, Mr. Coretti argues that it illegally refused to grant him the licence that he requires to provide private security services in Quebec. He held such a licence from 1985 to 2010, but the Bureau refused to grant him a new one in 2017 after the charges of fraud against him were stayed in 2016, on the basis that his training and qualifications were outdated. He has challenged that decision before the Tribunal administratif du Québec and the Quebec Superior Court. Both of these proceedings are pending.

II. ISSUES

[5] In his application for leave, Mr. Coretti raises the following issues:

A. ***Is the applicant directly and substantially affected by the conduct of the respondents?***

B. ***Is the applicant directly and substantially prevented from entering the Québec market for protection of financial assets (namely armoured cars, transportation, security) by a market restriction?***

C. ***If the above is affirmative, is the market restriction caused by the respondents?***

[6] However, the main issue raised by this application is rather:

Does Mr. Coretti's application meet the test for leave?

III. ANALYSIS

[7] In *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339, Justice Marshall Rothstein adopted the leave test that has generally been cited since. He stated the following:

> [16] In *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Comp. Trib.), Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:
>
>> Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.
>
> I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).
>
> [17] The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a *bona fide* belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.

[8] Justice Rothstein also underlined the importance of the affidavit filed in support of an application for leave:

> [20] […] Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application […]. That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1) [in the instant case, it would be the elements of the reviewable trade practice of market restriction set out in subsection 77(3)]. It is that affidavit which the Tribunal will consider in determining a leave application

under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

[9] Applying the above leave test to the case before me, I must be satisfied that there is sufficient credible evidence to give rise to a *bona fide* belief (1) that the applicant may have been directly and substantially affected in his business by the alleged practice, and (2) that the practice in question could be subject to an order under subsection 77(3) of the Act.

[10] In my view, Mr. Coretti's failure to meet this second element of the test is dispositive of his leave application.

[11] Under subsection 77(3) of the Act, three elements must be met before the tribunal can issue an order: (1) there is a "market restriction"; (2) that market restriction is engaged in by a major supplier of a product or is widespread in relation to a product, and (3) that market restriction is likely to substantially lessen competition in relation to the product (because it is widespread or engaged in by a major supplier).

[12] Mr. Coretti brings no evidence supporting a *bona fide* belief that there has been a market restriction. A "market restriction" is defined in subsection 77(1) of the Act as "any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market".

[13] Yet, Mr. Coretti's affidavit filed in support of the application is silent as to the alleged requirement or penalty exacted. He states that the respondents "have restricted the market by forcing customers to buy only from it and by effectively destroying competitors". He essentially asserts that he cannot supply security services unless he joins Garda. However, there is no explanation in his application as to how the definition of a market restriction is met and I fail to see how any reasonable inference can be drawn from his affidavit or application to conclude that there is a *bona fide* belief that the practice in question could be the subject of an order under subsection 77(3).

[14] This finding, in and of itself, is sufficient to dismiss the present application for leave.

[15] However, with respect to the Bureau, I would add that section 17 of the *Interpretation Act*, RSC 1985, c I-21 states that no enactment of Parliament is binding on Her Majesty except as mentioned or referred to in that enactment. Section 17 of the *Interpretation Act* not only applies to the Crown in right of Canada, but also to the Crown in right of a province and extends to agents of the Crown.

[16] Section 2.1 of the Act provides that the statute is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation solely in respect of commercial activities engaged in by that agent in competition with other persons.

[17] In my view, the Act is not binding on the Bureau because the alleged conduct at issue (the issuance of a licence under the Quebec *Private Security Act*, CQLR c S-3.5) does not constitute a commercial activity engaged in by the Bureau in competition with other persons. The fact that individuals linked to potential competitors of Mr. Coretti sit on the Bureau's board of directors, in accordance with legislative requirements (subsection 44(2) of the *Private Security Act*), does not transform the issuance of licences into a commercial activity for the purposes of section 2.1 of the Act.

[18] The Bureau enjoys Crown immunity in accordance with section 17 of the *Interpretation Act*, and the application for leave against the Bureau is also dismissed on that basis.

IV. CONCLUSION

[19] The evidence contained in Mr. Coretti's affidavit falls far short of meeting the test for leave and his application is therefore dismissed.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[20] The application for leave is dismissed;

[21] Costs in the amount of $1,000 each are granted to the respondents.

DATED at Ottawa, this 31st day of July 2019.

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

(s) Jocelyne Gagné

COUNSEL OF RECORD:

For the applicant:

Luigi Coretti

Felipe Morales

For the respondents:

Bureau de la Sécurité Privée

Stéphane Gauthier
Élise Veillette

Garda World Security Corporation
Garda World International Corporation
Garda Canada Security Corporation
The Garda Security Group
Société en Commandite Transport de Valeurs Garda and
Garda Alarm Services Corporation

Gabriel Séguin

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Pioneer Corporation,
Pioneer North America, Inc.,
Pioneer Electronics (USA) Inc.,
Pioneer High Fidelity Taiwan Co., Ltd.
and Pioneer Electronics of Canada Inc.
Appellants

v.

Neil Godfrey *Respondent*

\- and -

Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., Samsung Electronics America, Inc., Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., BENQ Corporation, BENQ America Corporation and BENQ Canada Corp. *Appellants*

v.

Neil Godfrey *Respondent*

and

Option consommateurs,
Consumers Council of Canada,
Canadian Chamber of Commerce and
Consumers' Association of Canada
Interveners

INDEXED AS: PIONEER CORP. *v.* GODFREY

2019 SCC 42

Pioneer Corporation,
Pioneer North America, Inc.,
Pioneer Electronics (USA) Inc.,
Pioneer High Fidelity Taiwan Co., Ltd.
et Pioneer Électronique du Canada, inc.
Appelantes

c.

Neil Godfrey *Intimé*

\- et -

Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba du Canada Limitée, Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., Samsung Electronics America, Inc., Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., BENQ Corporation, BENQ America Corporation et BENQ Canada Corp. *Appelantes*

c.

Neil Godfrey *Intimé*

et

Option consommateurs,
Consumers Council of Canada,
Chambre de commerce du Canada et
Association des consommateurs du Canada
Intervenants

RÉPERTORIÉ : PIONEER CORP. *c.* GODFREY

2019 CSC 42

File Nos.: 37809, 37810.

2018: December 11; 2019: September 20.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Class actions — Certification — Plaintiff alleging that defendants conspired to fix prices of optical disc drives and related products — Plaintiff's action certified as class proceeding — Class membership including direct purchasers, indirect purchasers and umbrella purchasers — Whether umbrella purchasers have cause of action under Competition Act — Whether Competition Act bars plaintiff from bringing common law or equitable claims — Whether plaintiff's proposed questions relating to loss suffered by class members meet standard for certification as common issues — Competition Act, R.S.C. 1985, c. C-34, s. 36(1) — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

Limitation of actions — Competition Act setting out limitation period of two years from day on which conduct was engaged in — Action brought against some defendants more than two years after alleged conduct occurred — Whether action against those defendants barred by statutory limitation period — Whether discoverability rule or doctrine of fraudulent concealment applies to extend statutory limitation period — Competition Act, R.S.C. 1985, c. C-34, s. 36(4).

The proposed representative plaintiff applied for certification of a class proceeding under the British Columbia *Class Proceedings Act*. The plaintiff alleges that the defendants, who manufacture Optical Disc Drives ("ODDs") and ODD products, conspired to fix prices of ODDs and ODD products between 2004 and 2010 ("class period"). He advances various causes of action based on that alleged conduct. They include a cause of action under s. 36(1)(a) of the *Competition Act*, which allows for the recovery of damages or loss that resulted from conduct contrary to Part VI of the *Competition Act*, as well as common law and equitable claims. The plaintiff seeks to bring the proposed class proceeding on behalf of all British Columbia residents who purchased an ODD or an ODD product during

Nos du greffe : 37809, 37810.

2018 : 11 décembre; 2019 : 20 septembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Recours collectifs — Autorisation — Allégation du demandeur que les défenderesses ont comploté pour fixer les prix de lecteurs de disques optiques et de produits connexes — Action du demandeur autorisée en tant que recours collectif — Groupe composé d'acheteurs directs, d'acheteurs indirects et d'acheteurs sous parapluie — Les acheteurs sous parapluie ont-ils une cause d'action au titre de la Loi sur la concurrence? — La Loi sur la concurrence empêche-t-elle le demandeur d'intenter des recours de common law ou d'equity? — Les questions proposées par le demandeur qui ont trait à la perte subie par les membres du groupe satisfont-elles à la norme d'autorisation de questions en tant que questions communes? — Loi sur la concurrence, L.R.C. 1985, c. C-34, art. 36(1) — Class Proceedings Act, R.S.B.C. 1996, c. 50, art. 4(1).

Prescription — Loi sur la concurrence établissant un délai de prescription de deux ans à compter de la date du comportement en question — Action intentée contre certaines défenderesses plus de deux ans après le comportement reproché — Le délai de prescription prévu par la loi fait-il obstacle à l'action intentée contre ces défenderesses? — La règle de la possibilité de découvrir ou la doctrine de la dissimulation frauduleuse s'applique-t-elle de manière à prolonger le délai de prescription établi par la loi? — Loi sur la concurrence, L.R.C. 1985, c. C-34, art. 36(4).

Le représentant proposé des demandeurs a demandé l'autorisation d'un recours collectif en vertu de la *Class Proceedings Act* de la Colombie-Britannique. Le demandeur allègue que les défenderesses, qui fabriquent des lecteurs de disques optiques (« LDO ») et des produits munis de LDO, ont comploté pour fixer les prix des LDO et des produits munis de LDO entre 2004 et 2010 (« période visée par le recours collectif »). Il avance diverses causes d'action fondées sur ce comportement reproché, notamment une cause d'action au titre de l'al. 36(1)a) de la *Loi sur la concurrence*, qui permet l'indemnisation d'une perte ou des dommages qui découlent d'un comportement allant à l'encontre de la partie VI de cette loi, ainsi que l'exercice de recours de common law et d'equity. Le the class period. The proposed class consists of direct purchasers, indirect purchasers, and umbrella purchasers, that is, purchasers whose ODD or ODD product was manufactured and supplied by a non-defendant. Although the action against most of the defendants was filed within two years of the end of the class period, the action against a subset of the defendants ("Pioneer defendants") was filed more than two years after the end of the class period.

demandeur cherche à intenter le recours collectif projeté au nom de tous les résidents de la Colombie-Britannique qui ont acheté un LDO ou un produit muni de LDO durant la période visée par le recours collectif. Le groupe projeté est composé des acheteurs directs, des acheteurs indirects et des acheteurs sous parapluie, c'est-à-dire les acheteurs dont les LDO ou produits munis de LDO ont été fabriqués et fournis par une personne qui n'est pas une défenderesse. Bien que l'action contre la plupart des défenderesses ait été déposée moins de deux ans après la fin de la période visée par le recours collectif, l'action contre un sous-groupe des défenderesses (« défenderesses Pioneer ») a été déposée plus de deux ans après la fin de cette période.

The certification judge certified the action as a class proceeding, subject to certain exceptions and conditions. He was not satisfied that it was plain and obvious that the action against the Pioneer defendants was barred by the two-year limitation period set out in s. 36(4) of the *Competition Act*. He also held that the umbrella purchasers had a cause of action against the defendants under s. 36(1)(a) of the *Competition Act*, that a breach of the *Competition Act* could represent the unlawfulness element of the various causes of action advanced by the plaintiff, thereby affirming the availability of those common law and equitable actions, and that the plaintiff's proposed questions in relation to loss suffered by the class were certifiable as common questions. The Court of Appeal dismissed the appeals brought by the defendants.

Le juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions. Il n'était pas convaincu que l'action intentée contre les défenderesses Pioneer était évidemment et manifestement prescrite en raison de l'écoulement du délai de prescription de deux ans prévu au par. 36(4) de la *Loi sur la concurrence*. Il a également conclu que les acheteurs sous parapluie avaient une cause d'action fondée sur l'al. 36(1)a) de la *Loi sur la concurrence* contre les défenderesses, qu'une infraction à la *Loi sur la concurrence* pouvait constituer l'élément d'illégalité des diverses causes d'action avancées par le demandeur, confirmant ainsi qu'il est possible de se prévaloir de ces recours de common law et d'equity, et que les questions proposées par le demandeur relativement à la perte subie par le groupe pouvaient être autorisées en tant que questions communes. La Cour d'appel a rejeté les appels formés par les défenderesses.

Held (Côté J. dissenting in part): The appeals should be dismissed.

Arrêt (la juge Côté est dissidente en partie) : Les pourvois sont rejetés.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.: It is not plain and obvious that the plaintiff's claim against the Pioneer defendants will fail on the basis that it was commenced after the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act* because the discoverability rule applies to extend the limitation period. As for the inclusion of umbrella purchasers, the pleadings against all the defendants disclose a cause of action for them under s. 36(1)(a) of the *Competition Act*, thereby satisfying the conditions under s. 4(1)(a) of the *Class Proceedings Act* for certification. Also, as s. 36(1) of the *Competition Act* does not bar common law or equitable claims, it is not plain and obvious that the plaintiff's other claims cannot succeed. Furthermore, the certification judge identified the correct standard to certify commonality of loss as a common issue

Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe et Martin : Il n'est pas évident et manifeste que la demande du demandeur contre les défenderesses Pioneer doit être rejetée au motif qu'elle a été introduite après le délai de prescription de deux ans prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence* parce que la règle de la possibilité de découvrir s'applique de façon à prolonger le délai de prescription. Quant à l'inclusion des acheteurs sous parapluie, les actes de procédure contre toutes les défenderesses révèlent une cause d'action dont ils sont les titulaires en vertu de l'al. 36(1)a) de la *Loi sur la concurrence*, répondant ainsi aux conditions d'autorisation prévues à l'al. 4(1)a) de la *Class Proceedings Act*. En outre, puisque le par. 36(1) de la *Loi sur la concurrence* ne fait pas obstacle aux recours de common law ou d'equity, il n'est pas évident et and there is no basis to interfere with his certification of these loss-related questions.

manifeste que les autres recours exercés par le demandeur ne peuvent être accueillis. Qui plus est, le juge saisi de la demande d'autorisation a arrêté la norme applicable à l'autorisation, en tant que question commune, de la question de la communauté de la perte et il n'y a aucune raison de modifier sa décision d'autoriser ces questions relatives à la perte.

Where a limitation period is subject to the rule of discoverability, a cause of action will not accrue for the purposes of the running of the limitation period until the material facts on which the cause of action is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. The discoverability rule is not a universally applicable rule of limitations, but a rule of construction to aid in the interpretation of statutory limitation periods. It can therefore be displaced by clear legislative language. In determining whether discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from "the accrual of the cause of action", discoverability applies if it is evident that the operation of a limitation period is conditioned upon accrual of a cause of action or knowledge of an injury. Discoverability will apply where the event triggering the limitation period is an element of the cause of action because, in such cases, the legislature has shown its intention that the limitation period be linked to the cause of action's accrual.

Quand un délai de prescription est assujetti à la règle de la possibilité de découvrir, une cause d'action ne prendra naissance, pour les besoins de l'écoulement du délai de prescription, qu'au moment où les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable. La règle de la possibilité de découvrir n'est pas une règle de prescription d'application universelle; c'est plutôt une règle d'interprétation visant à faciliter l'interprétation des délais de prescription fixés par la loi. Elle peut donc être écartée par un texte législatif clair. Pour décider si la règle de la possibilité de découvrir s'applique, le fond, non la forme, doit prévaloir : même si la loi ne précise pas que le délai de prescription commence à courir à compter de « la naissance de la cause d'action », la règle de la possibilité de découvrir s'applique s'il est évident que le point de départ du délai de prescription dépend de la naissance de la cause d'action ou de la connaissance d'un préjudice. La règle de la possibilité de découvrir s'applique lorsque l'événement marquant le point de départ du délai de prescription est un élément de la cause d'action car, en pareil cas, la législature a manifesté son intention que le délai de prescription soit lié à la naissance de la cause d'action.

The discoverability rule applies to extend the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act*, such that it begins to run only when the material facts on which the cause of action granted by s. 36(1)(a) of the *Competition Act* is based are discovered or ought to have been discovered by the exercise of reasonable diligence. The event triggering this particular limitation period is the occurrence of an element of the underlying cause of action — specifically, conduct contrary to Part VI of the *Competition Act*. Consideration of the rationales for limitation periods affirms the application of the discoverability rule to this provision.

La règle de la possibilité de découvrir s'applique de façon à prolonger le délai de prescription de deux ans établi au sous-al. 36(4)a)(i) de la *Loi sur la concurrence* de sorte que ce délai ne commence à courir qu'au moment où les faits importants sur lesquels repose la cause d'action reconnue par l'al. 36(1)a) de la *Loi sur la concurrence* sont découverts ou auraient dû l'être par diligence raisonnable. Le fait déclencheur de ce délai de prescription est la survenance d'un élément de la cause d'action sous-jacente — plus précisément, le comportement qui va à l'encontre de la partie VI de la *Loi sur la concurrence*. L'examen des justifications qui sous-tendent les délais de prescription confirme que la règle de la possibilité de découvrir s'applique à cette disposition.

Furthermore, it is not plain and obvious that the doctrine of fraudulent concealment could not delay the running of the limitation period. Fraudulent concealment is a form of equitable fraud that arises so as to delay the running of a limitation period when it would be, for any

De plus, il n'est pas évident et manifeste que la doctrine de la dissimulation frauduleuse ne pouvait retarder le point de départ du délai de prescription. La dissimulation frauduleuse est une forme de fraude d'equity dont la présence permet de retarder le point de départ d'un délai reason, unconscionable for the defendant to rely on the advantage gained by having concealed the existence of a cause of action. The inquiry is not into the relationship within which the conduct occurred, but into the unconscionability of the conduct itself. Its application is therefore not conditioned upon a special relationship between the parties.

Umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act*. Under the theory of umbrella pricing, the entire market for the subject product is affected because anti-competitive cartel activity causes non-cartel manufacturers to also raise their prices. The text of s. 36(1)(a), which provides a cause of action to "[a]ny person who has suffered loss or damage as a result of" conduct contrary to s. 45 of the *Competition Act*, supports the view that umbrella purchasers have a cause of action thereunder. Parliament's use of the words "[a]ny person" empowers any claimant who can demonstrate that loss or damage was incurred as a result of a defendant's conduct to bring a claim. Also, interpreting s. 36(1)(a) so as to permit umbrella purchaser actions furthers the purpose of the *Competition Act* set out in s. 1.1, which is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices". This interpretation also furthers two other objectives of the *Competition Act*: it furthers the objective of deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour, and it furthers the objective of compensation because it affords umbrella purchasers recourse to recover from loss arising from what is assumed to have been anti-competitive conduct. Moreover, departmental and parliamentary statements fortify the view that Parliament intended that the cause of action in s. 36(1)(a) be broadly available to anyone who suffers a loss from anti-competitive behaviour.

Recognizing that umbrella purchasers have a cause of action under s. 36(1)(a) does not risk exposing defendants to indeterminate liability. Firstly, liability of defendants is limited by the class period, and by the specific products whose prices are alleged to have been fixed. Also, in order for cartel members to profit from a conspiracy, the entire market price has to increase — the umbrella effect is therefore an intended consequence of the anti-competitive behaviour. Intended results are not indeterminate, but rather

de prescription lorsqu'il serait abusif pour le défendeur de profiter de l'avantage obtenu en dissimulant l'existence d'une cause d'action. L'examen ne porte pas sur la relation dans le cadre de laquelle le comportement a eu lieu, mais sur le caractère abusif du comportement lui-même. Son application ne tient donc pas à l'existence d'une relation spéciale entre les parties.

Les acheteurs sous parapluie ont une cause d'action fondée sur l'al. 36(1)a) de la *Loi sur la concurrence*. Selon la théorie de l'effet parapluie sur les prix, c'est l'ensemble du marché du produit en cause qui est touché parce que les activités anticoncurrentielles du cartel provoquent également une hausse des prix chez les fabricants ne faisant pas partie du cartel. Le texte de l'al. 36(1)a), qui accorde un droit d'action à « [t]oute personne qui a subi une perte ou des dommages par suite » d'un comportement allant à l'encontre de l'art. 45 de la *Loi sur la concurrence*, étaye le point de vue selon lequel, sous son régime, les acheteurs sous parapluie ont une cause d'action. L'emploi, par le législateur, de l'expression « [t]oute personne » habilite à intenter un recours tout demandeur capable de démontrer que la perte ou les dommages ont été subis par suite du comportement d'une défenderesse. De plus, interpréter l'al. 36(1)a) de façon à autoriser les actions des acheteurs sous parapluie favorise l'atteinte de l'objet de la *Loi sur la concurrence* décrit à l'art. 1.1, qui est de « préserver et de favoriser la concurrence au Canada » dans le but d'assurer aux consommateurs « des prix compétitifs et un choix dans les produits ». Cette interprétation favorise également l'atteinte de deux autres objectifs de la *Loi sur la concurrence* : elle favorise l'atteinte de l'objectif de dissuasion, en ce que le risque de responsabilité auquel s'exposent ceux qui se livrent à des comportements anticoncurrentiels augmente et elle favorise l'atteinte de l'objectif d'indemnisation, parce que les acheteurs sous parapluie ont ainsi la possibilité de recouvrer les pertes découlant de ce qui est présumé être un comportement anticoncurrentiel. Qui plus est, certaines déclarations ministérielles et parlementaires renforcent l'opinion que le législateur entendait que la cause d'action prévue à l'al. 36(1)a) soit largement accessible pour quiconque subit une perte par suite d'un comportement anticoncurrentiel.

La reconnaissance d'une cause d'action fondée sur l'al. 36(1)a) aux acheteurs sous parapluie ne risque pas d'exposer les défenderesses à une responsabilité indéterminée. Premièrement, la responsabilité des défenderesses est limitée par la période visée par le recours collectif et par les produits dont les prix auraient été fixés. De plus, pour que les membres du cartel puissent tirer profit du complot, les prix du marché global doivent augmenter. L'effet parapluie est ainsi une conséquence voulue du pre-determined. Secondly, as s. 36(1)(a) limits recovery to only those purchasers who can show that they suffered a loss or damage "as a result of" a defendant's conspiratorial conduct, recovery is limited to claimants with a loss that is not too remote from the conduct and umbrella purchasers will have to demonstrate that they suffered such loss or damage. Thirdly, the elements of the wrongful conduct outlined in the text of s. 45(1) in force at the relevant time limit the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct.

Section 36(1) of the *Competition Act* does not bar common law or equitable claims, such as claims in civil conspiracy. Prior to the enactment of the cause of action contained in what is now s. 36(1) of the *Competition Act*, a breach of s. 45(1) of the *Competition Act* was, as it still is, able to satisfy the "unlawful means" element of the tort of civil conspiracy. The enactment of the statutory cause of action in s. 36(1) of the *Competition Act* did not oust common law and equitable actions by its express terms or by necessary implication. Section 36(1) is not duplicative of the tort of civil conspiracy, it does not provide a new and superior remedy, nor does it represent a comprehensive and exclusive code regarding claims for anti-competitive conspiratorial conduct. In addition, s. 62 of the *Competition Act* contemplates the subsistence of common law and equitable rights of action. It is therefore not plain and obvious that the plaintiff is precluded from bringing common law and equitable causes of action alongside his s. 36(1)(a) claim.

In order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish that loss reached the requisite purchaser level. It is not necessary that it establish that each and every class member suffered a loss nor must it be able to identify those class members who suffered no loss so as to distinguish them from those who did. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, the Court directed that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more claimants at the purchaser level. For indirect purchasers, this would involve demonstrating that the direct purchasers

comportement anticoncurrentiel. Des résultats voulus ne sont pas indéterminés, mais bien déterminés à l'avance. Deuxièmement, comme l'al. 36(1)a) limite le recours en indemnisation aux seuls acheteurs qui peuvent démontrer qu'ils ont subi une perte ou des dommages « par suite » du complot d'une défenderesse, seuls les demandeurs ayant subi une perte qui n'est pas trop éloignée du comportement peuvent donc être indemnisés et les acheteurs sous parapluie devront démontrer qu'ils ont subi une telle perte ou de tels dommages. Troisièmement, les éléments du comportement répréhensible décrits dans le libellé du par. 45(1) qui était en vigueur durant la période en question limitent l'étendue de la responsabilité à ceux qui, au minimum, ont eu l'intention expresse de convenir d'un comportement anticoncurrentiel.

Le paragraphe 36(1) de la *Loi sur la concurrence* ne fait pas obstacle aux recours de common law ou d'equity, tels qu'une action pour complot civil. Avant l'adoption de la disposition conférant une cause d'action qui se trouve dans ce qui est devenu le par. 36(1) de la *Loi sur la concurrence*, une infraction au par. 45(1) de cette loi pouvait, et peut encore, satisfaire à l'élément « moyens illégaux » du délit de complot civil. L'adoption de la disposition du par. 36(1) de la *Loi sur la concurrence* conférant une cause d'action n'a pas écarté les recours de common law et d'equity de façon expresse ou par déduction nécessaire. Le paragraphe 36(1) ne fait pas double emploi avec le délit de complot civil, il ne prévoit pas de nouvelle façon supérieure de remédier à un manquement et il n'est pas non plus un code complet et exclusif régissant les actions pour comportement ou complot anticoncurrentiel. De plus, l'art. 62 de la *Loi sur la concurrence* prévoit le maintien des droits d'action en common law et en equity. Il n'est donc pas évident et manifeste que le demandeur ne peut exercer des recours de common law et d'equity en même temps qu'une action fondée sur l'al. 36(1)a).

Pour que les questions relatives à la perte soient autorisées en tant que questions communes, la méthode de l'expert du demandeur n'a qu'à être suffisamment fiable ou acceptable pour établir que l'acheteur du niveau requis a subi une perte. Il n'est pas nécessaire que cette méthode établisse que chaque membre du groupe a subi une perte. Il n'est pas non plus nécessaire qu'elle permette d'identifier les membres du groupe qui n'ont subi aucune perte de manière à les distinguer de ceux qui en ont subi une. Dans *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, la Cour a prescrit que, pour autoriser les questions liées à la perte en tant que questions communes dans un recours collectif pour fixation du prix, le tribunal doit être convaincu que le demandeur a présenté une méthode valable pour établir que passed on the overcharge. Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon the defendants and will result in common success. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level, because a common issues trial will either determine liability or terminate the litigation, with either scenario advancing the litigation toward resolution.

la perte a été transférée à un ou à plusieurs demandeurs du niveau de l'acheteur. Dans le cas des acheteurs indirects, cela implique de démontrer que les acheteurs directs ont refilé la majoration. Qui plus est, démontrer que la perte a été transférée aux acheteurs indirects satisfait au critère d'autorisation d'une question commune, puisqu'une telle démonstration permettra de faire progresser substantiellement l'instance, qu'elle est essentielle pour imposer une responsabilité aux défenderesses et qu'elle débouche sur un succès commun. Démontrer que la perte a été transférée aux acheteurs du niveau requis fera progresser les réclamations de tous les acheteurs de ce niveau, car l'audition des questions communes déterminera la responsabilité ou mettra fin au litige; les deux scénarios contribuent au règlement du litige.

Aggregate damages under s. 29(1)(b) of the *Class Proceedings Act* are purely remedial, and available only after all other common issues have been determined, including liability. Irrespective, then, of whether aggregate damages are certified as a common issue, it is for the trial judge to determine, following the common issues trial, whether the statutory criteria are met such that the aggregate damages provisions can be applied to award damages. Aggregate damages provisions cannot be used to establish liability. In order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has actually suffered a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Whether a plaintiff's expert's methodology is sufficient for the purposes of establishing a defendant's liability to all class members will depend on the findings of the trial judge.

Les dommages-intérêts globaux au sens de l'al. 29(1)b) de la *Class Proceedings Act* ont un objectif purement réparateur et ne peuvent être octroyés qu'après le règlement de toutes les autres questions communes, y compris la responsabilité. Peu importe, donc, si les dommages-intérêts globaux sont autorisés en tant que question commune, il revient au juge du procès de décider, au terme de l'audition des questions communes, si les critères établis par la loi sont respectés de sorte que les dispositions sur les dommages-intérêts globaux peuvent s'appliquer pour octroyer ceux-ci. Les dispositions sur les dommages-intérêts globaux ne peuvent servir à établir la responsabilité. Pour que les membres du groupe participent à l'octroi des dommages-intérêts, le juge du procès doit être convaincu que chacun d'eux a réellement subi une perte lorsque la preuve de la perte est essentielle à une conclusion de responsabilité (comme c'est le cas de la responsabilité fondée sur l'art. 36 de la *Loi sur la concurrence*). La réponse à la question de savoir si la méthode de l'expert du demandeur suffit pour établir la responsabilité d'un défendeur envers tous les membres du groupe dépend des conclusions du juge du procès.

Per Côté J. (dissenting in part): Both appeals should be allowed in part. The Pioneer defendants have not demonstrated that the plaintiff's claim for recovery under s. 36(1) of the *Competition Act* is time-barred by the limitation period in s. 36(4)(a)(i). While the discoverability rule does not apply to toll the limitation period, it is not plain and obvious that the fraudulent concealment doctrine has no application in this case. There is agreement with the majority, though for different reasons, that the existence of the statutory cause of action in s. 36(1) of the *Competition Act* does not preclude the plaintiff from advancing claims at common law or in equity based on the same conduct prohibited by Part VI. However, there is disagreement that the umbrella purchasers have a claim against the

La juge Côté (dissidente en partie) : Il y a lieu d'accueillir les deux pourvois en partie. Les défenderesses Pioneer n'ont pas démontré que le recours en indemnisation intenté par le demandeur au titre du par. 36(1) de la *Loi sur la concurrence* est prescrit en raison du délai de prescription prévu au sous-al. 36(4)a)(i). Bien que la règle de la possibilité de découvrir ne s'applique pas de manière à repousser le point de départ du délai de prescription, il n'est pas évident et manifeste que la doctrine de la dissimulation frauduleuse ne trouve pas application en l'espèce. Il est convenu avec les juges majoritaires — bien que pour des motifs différents — que l'existence de la cause d'action prévue au par. 36(1) de la *Loi sur la concurrence* n'empêche pas le demandeur d'intenter des recours en defendants under s. 36(1) of the *Competition Act*. There is also disagreement that the certification judge identified the correct standard for certifying loss as a common issue pursuant to s. 4(1)(c) of the *Class Proceedings Act* and therefore that the plaintiff's methodology met the correct standard in the present case.

The discoverability rule does not apply to toll the limitation period in s. 36(4)(a)(i) of the *Competition Act* that is applicable to the plaintiff's claim for recovery under s. 36(1) of that statute. Discoverability is a judge-made rule of statutory interpretation that assists in determining whether the event triggering the commencement of a limitation period depends upon the state of the plaintiff's knowledge. This rule applies only where a legislature provides that the limitation period runs from the accrual of the cause of action (or wording to that effect) or from the occurrence of some event that is related to the state of the plaintiff's knowledge. Conversely, where a legislature provides that a limitation period is triggered by an event that occurs without regard to the plaintiff's state of mind, courts cannot apply the discoverability rule to postpone the commencement of the limitation period until such time as the plaintiff discovered that the event had taken place.

Statutory language referring to the occurrence of an element of the cause of action cannot be equated with language referring to the accrual or arising of the cause of action in its entirety such that the discoverability rule automatically applies in the former case. This would expand the scope of the discoverability rule in a manner that is neither consistent with precedent nor justifiable in principle and would create an arbitrary distinction between triggering events that are related to the cause of action and those that are not, even though both may occur independently of the plaintiff's state of mind. A preferable approach is instead one that considers each statutory limitation clause on its own terms, recognizing that a triggering event that relates to a cause of action can, but need not, be dependent on the plaintiff's state of mind.

The limitation period in s. 36(4)(a)(i) commences on the day on which the conduct contrary to Part VI of the

common law ou en equity qui visent le même comportement interdit par la partie VI. Toutefois, il y a désaccord pour dire que les acheteurs sous parapluie ont un recours contre les défenderesses en vertu du par. 36(1) de la *Loi sur la concurrence*. Il y a également désaccord sur le fait que le juge saisi de la demande d'autorisation a appliqué la bonne norme pour autoriser la question de la perte en tant que question commune en vertu de l'al. 4(1)(c) de la *Class Proceedings Act* et, donc, que la méthode du demandeur a satisfait à la bonne norme en l'espèce.

La règle de la possibilité de découvrir ne s'applique pas de façon à repousser le point de départ du délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence* qui s'applique au recours en indemnisation intenté par le demandeur au titre du par. 36(1) de cette loi. La règle de la possibilité de découvrir est une règle prétorienne d'interprétation statutaire qui aide à déterminer si l'événement qui marque le point de départ du délai de prescription dépend de la connaissance qu'en avait le demandeur. Cette règle s'applique uniquement dans les affaires où le législateur précise que le délai de prescription commence à courir au moment où la cause d'action prend naissance (ou toute autre formulation allant dans le même sens) ou au moment où survient un événement qui a un rapport avec la connaissance du demandeur. À l'inverse, lorsqu'une législature prévoit que le point de départ d'un délai de prescription est marqué par un événement qui survient indépendamment de l'état d'esprit du demandeur, les tribunaux ne peuvent appliquer la règle de la possibilité de découvrir pour reporter le point de départ du délai de prescription jusqu'à ce que le demandeur découvre la survenance de l'événement.

Les mots d'une disposition législative qui font mention de la survenance d'un élément de la cause d'action ne sauraient être assimilés à des mots qui désignent la naissance de la cause d'action dans son ensemble de telle sorte que la règle de la possibilité de découvrir s'applique automatiquement dans le premier cas. Cela étendrait la portée de la règle de la possibilité de découvrir d'une manière qui n'est ni conforme à la jurisprudence ni justifiable en principe et créerait une distinction arbitraire entre les faits déclencheurs ayant un rapport avec la cause d'action et ceux qui n'en ont pas, même si les deux peuvent se produire indépendamment de l'état d'esprit du demandeur. Il vaut mieux plutôt examiner chaque disposition statutaire de prescription selon ses propres termes, en tenant compte qu'un fait déclencheur ayant un rapport avec une cause d'action peut, mais ne doit pas nécessairement, dépendre de la connaissance du demandeur.

Le délai de prescription prévu au sous-al. 36(4)a)(i) commence à courir à la date à laquelle le comportement allant

Competition Act actually takes place and not the day on which a potential claimant discovers that it took place. There is simply no link between the triggering event and the plaintiff's state of mind. The provision does not contain wording to the same effect as accrual of the s. 36 cause of action. Applying discoverability would make the limitation period chosen by Parliament virtually meaningless and create uncertainty around the likelihood and timing of significant litigation.

à l'encontre de la partie VI de la *Loi sur la concurrence* se produit, et non à la date où le demandeur éventuel découvre que le comportement en question s'est produit. Il n'existe tout simplement aucun lien entre ce fait déclencheur et l'état d'esprit du demandeur. La disposition en cause ne contient pas des mots dans le sens de naissance de la cause d'action fondée sur l'art. 36. Si la règle de la possibilité de découvrir s'appliquait, le délai de prescription choisi par le Parlement perdrait pratiquement tout son sens et laisserait planer l'incertitude quant à la probabilité d'engager de nombreuses poursuites et au moment de les engager.

A special relationship between the parties — one that is based on trust and confidence — is not always a prerequisite or a necessary element for the operation of the doctrine of fraudulent concealment. This doctrine operates to prevent a limitation clause from being used as an instrument of injustice in circumstances where a defendant conceals the facts giving rise to a potential cause of action from a plaintiff. In such circumstances, equity suspends the running of the limitation clock until the injured party can reasonably discover the cause of action. Fraud in equity is broader than it is at common law and what constitutes unconscionable conduct will vary from case to case and depend in part on the connection between the parties. Based on this understanding of the fraudulent concealment doctrine, it is not plain and obvious that equity can intervene to toll the applicable limitation period only in cases where there exists a special relationship; it may be that it can also intervene in cases — at least in the commercial context, as here — where the plaintiff can demonstrate something commensurate with or tantamount to a special relationship. However, simply establishing the existence of the conspiracy will not suffice for the fraudulent concealment doctrine to toll the applicable limitation period.

L'existence d'une relation spéciale — fondée sur la confiance — entre les parties ne constitue pas toujours une condition préalable ou un élément nécessaire à l'application de la doctrine de la dissimulation frauduleuse. Cette doctrine vise à empêcher que le délai de prescription serve à créer une injustice, lorsque le défendeur cache au demandeur les faits à l'origine d'une cause d'action potentielle. En pareille situation, l'equity permet de suspendre l'écoulement du délai de prescription jusqu'à ce que la partie lésée puisse raisonnablement découvrir l'existence de la cause d'action. Le terme « fraude » comporte un sens plus large en equity qu'en common law et ce en quoi consiste une conduite abusive varie d'une affaire à l'autre et dépend en partie du lien qui unit les parties. Vu cette conception de la dissimulation frauduleuse, il n'est pas évident et manifeste que l'equity peut intervenir pour repousser le point de départ du délai de prescription uniquement dans les cas où il existe une relation spéciale; il se peut qu'elle puisse aussi intervenir dans les cas — du moins en matière commerciale, comme dans le cas présent — où le demandeur peut démontrer quelque chose correspondant ou d'équivalent à une relation spéciale. Cependant, le simple fait d'établir l'existence du complot ne suffit pas pour que la doctrine de la dissimulation frauduleuse repousse le point de départ du délai de prescription applicable.

It is plain and obvious that the claims by umbrella purchasers — those class members who purchased from a non-defendant a product that was not manufactured or supplied by a defendant — under s. 36(1)(a) of the *Competition Act* cannot succeed. While on its face, s. 36(1) appears to be worded broadly enough to capture umbrella purchaser claims, so long as they can prove that they suffered loss or damage as a result of the conduct specified in para. (a) or (b) of subs. (1), this statutory provision must be interpreted in a manner that is consistent with the principles of indeterminacy and remoteness that limit the extent of liability at common law. Indeterminacy is a policy consideration that negates the imposition of a duty of care in negligence where it would expose the defendant to liability in an indeterminate amount for an indeterminate

Il est évident et manifeste que les acheteurs sous parapluie — les membres du groupe qui ont acheté, d'une personne qui n'est pas une défenderesse, un produit qui n'a pas été fabriqué ou fourni par une défenderesse — ne peuvent avoir gain de cause contre les défenderesses dans leur recours fondé sur l'al. 36(1)a) de la *Loi sur la concurrence*. Bien qu'à première vue, le libellé du par. 36(1) semble suffisamment général pour englober les réclamations des acheteurs sous parapluie, pourvu qu'ils puissent établir qu'ils ont subi une perte ou des dommages par suite des comportements énumérés aux al. a) et b) du par. (1), il faut interpréter cette disposition conformément aux principes de l'indétermination et du caractère éloigné qui limitent l'étendue de la responsabilité en common law. L'indétermination correspond à une considération time to an indeterminate class and remoteness limits the scope of liability in negligence where the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable. Although these principles relate primarily to liability in negligence, they can inform the analysis of claims under s. 36 for pure economic loss. Section 36(1) should not be interpreted in a manner that would permit claimants to recover from defendants for any losses that in some way flowed from the alleged price-fixing conspiracy as it would expose defendants to liability that is potentially limitless in scope for loss and damage that are too remote from any price-fixing that occurred. Consistent with the principles underlying indeterminacy and remoteness, the cause of action in s. 36(1) should be read as limiting the scope of liability of defendants to loss and damage flowing from their own pricing decisions, not those of third parties. Any overcharges the umbrella purchasers may have incurred in the present case were the direct result of pricing decisions made by non-defendant manufacturers and suppliers of ODDs, regardless of whether those choices were influenced by broader market trends. The defendants have control over their own business decisions but not over those of third parties. For this reason, it would be unfair to hold the defendants liable to the umbrella purchasers where they had no control over such liability.

It is not plain and obvious that s. 36(1) bars a plaintiff from alleging common law and equitable causes of action in respect of conduct that breaches the prohibitions in Part VI of the *Competition Act*. The coexistence of statutory and common law or equitable claims arising from conduct contrary to Part VI of the *Competition Act* is contemplated by s. 62 of that statute. The inclusion of s. 62 in the statutory framework suggests that Parliament did not intend the provisions of the *Competition Act* to intrude upon the provinces' jurisdiction over civil rights and liberties. That s. 62 applies only to Part VI of the *Competition Act* is not consequential as the cause of action created by s. 36(1)(a) is expressly tied to conduct that would constitute an offence under that part. When the words of s. 62 are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object

de politique générale qui vient écarter l'imposition d'une obligation de diligence en droit de la négligence lorsque le défendeur serait exposé à une responsabilité pour un montant indéterminé, pour un temps indéterminé et envers une catégorie indéterminée, et le caractère éloigné a pour effet de limiter l'étendue de la responsabilité pour négligence si le préjudice a trop peu de lien avec l'acte fautif pour que le défendeur puisse raisonnablement être tenu responsable. Bien que ces principes se rapportent principalement à la responsabilité pour négligence, ils peuvent guider l'analyse des réclamations fondées sur l'art. 36 pour des pertes purement économiques. Le paragraphe 36(1) ne devrait pas être interprété d'une manière qui permettrait aux demandeurs de se faire indemniser par les défenderesses pour toute perte découlant d'une façon ou d'une autre du complot allégué de fixation des prix parce que cela aurait pour effet d'exposer les défenderesses à une responsabilité potentiellement illimitée, ainsi qu'à une responsabilité à l'égard de pertes et de dommages qui sont trop éloignés de toute fixation des prix. Conformément aux principes sous-tendant l'indétermination et le caractère éloigné, il y a lieu de considérer que la cause d'action prévue au par. 36(1) limite l'étendue de la responsabilité des défendeurs aux pertes et aux dommages découlant de leurs propres décisions, et non de celles prises par des tiers. Toute majoration que les acheteurs sous parapluie auraient pu absorber en l'espèce était en fin de compte la conséquence directe des choix en matière de prix effectués par ces fabricants et fournisseurs de LDO autres que les défenderesses, que ces choix aient ou non été influencés par des tendances générales du marché. Les défenderesses exercent un contrôle sur leur propres décisions d'affaires, mais non sur celles des autres fabricants et fournisseurs. Pour ce motif, il serait injuste de tenir les défenderesses responsables envers les acheteurs sous parapluie alors qu'elles n'avaient aucun contrôle sur cette responsabilité.

Il n'est pas évident et manifeste que le par. 36(1) empêche le demandeur d'exercer des recours de common law et d'equity à l'égard d'un comportement qui enfreint les prohibitions prévues à la partie VI de la *Loi sur la concurrence*. La coexistence des recours fondés sur la loi et des recours fondés sur la common law ou l'equity qui découlent d'un comportement allant à l'encontre de la partie VI de la *Loi sur la concurrence* est prévue à l'art. 62 de cette loi. L'inclusion de l'art. 62 dans le cadre législatif donne à penser que le Parlement ne voulait pas que les dispositions de la *Loi sur la concurrence* portent atteinte à la compétence des provinces sur les droits et libertés civils. Le fait que l'art. 62 s'applique seulement à la partie VI de la *Loi sur la concurrence* est sans conséquence parce que la cause d'action créée par l'al. 36(1)a) est expressément liée au comportement qui constituerait of the act and the intention of Parliament, this provision has the effect of preserving all civil rights of action that a claimant may have in respect of anti-competitive conduct contemplated under Part VI of that Act. Section 62 would be meaningless if s. 36(1) were interpreted as exhaustive in respect of civil claims for such conduct.

For questions to be certified as common issues under s. 4(1)(c) of the *Class Proceedings Act*, the representative plaintiff must show there is some basis in fact for the commonality requirement — that is, that the questions be capable of resolution on a class-wide basis. What the "some basis in fact" standard requires in any given case depends on what it is that the proposed questions ask; different questions will impose different requirements. In class actions where loss is an essential element of liability, loss-related questions can be certified as common issues only if the representative plaintiff's expert methodology will be able to actually identify which class members suffered a loss at trial.

In the present case, in order for loss-related questions to be certified as common issues among indirect purchasers pursuant to s. 4(1)(c) of the *Class Proceedings Act*, the representative plaintiff's proposed methodology must be capable of establishing at trial that at least some identifiable indirect purchasers actually suffered a loss. The plaintiff has not met the required standard in the present case because his methodology is only capable of establishing at trial that loss was occasioned somewhere at the indirect purchaser level of the distribution chain. Such a methodology will not enable the common issues trial judge to determine which class members actually suffered a loss — an essential element of the causes of action pleaded, and necessary for the purpose of making determinations as to liability. The proposed loss-related questions will therefore not be capable of resolution on a class-wide or common basis. What is required of the plaintiff in this case is a methodology capable of answering the loss-related questions on an individualized basis, either by showing that all of the indirect purchasers suffered a loss or at least by identifying those who did and separating them from those who did not.

une infraction sous le régime de cette partie. Lorsqu'on lit les termes de l'art. 62 dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du Parlement, cette disposition a pour effet de préserver tous les droits d'action au civil que peut exercer le demandeur relativement à un comportement anticoncurrentiel envisagé à la partie VI de cette loi. L'article 62 serait vide de sens si le par. 36(1) était interprété comme une disposition exhaustive en ce qui concerne les recours civils relatifs à ce type de comportement.

Pour qu'une question soit autorisée en tant que question commune conformément à l'al. 4(1)(c) de la *Class Proceedings Act*, le représentant des demandeurs doit établir l'existence d'un certain fondement factuel pour respecter l'exigence de la question commune, c'est-à-dire que la question doit pouvoir faire l'objet d'une résolution à l'échelle du groupe. Dans un cas donné, la norme fondée sur l'existence d'« un certain fondement factuel » dépend de la teneur des questions proposées; des exigences différentes seront imposées selon les questions soulevées. Dans des recours collectifs où la perte constitue un élément essentiel pour établir la responsabilité, les questions de perte ne peuvent être autorisées en tant que questions communes que si la méthode de l'expert du représentant des demandeurs permet d'identifier au procès les membres du groupe qui ont subi une perte.

En l'espèce, pour que les questions liées à la perte soient autorisées en tant que questions communes aux acheteurs indirects en application de l'al. 4(1)(c) de la *Class Proceedings Act*, la méthode que propose le représentant des demandeurs doit permettre d'établir au procès qu'au moins un certain nombre d'acheteurs indirects identifiables ont effectivement subi une perte. Le demandeur n'a pas satisfait à la norme applicable en l'espèce parce que sa méthode permet seulement d'établir au procès qu'une perte a été subie quelque part au niveau de l'acheteur indirect dans la chaîne de distribution. Cette méthode ne permettra pas au juge appelé à statuer sur les questions communes de déterminer quels membres du groupe ont réellement subi une perte — un élément essentiel des causes d'action plaidées et nécessaires à la prise de décisions sur la responsabilité. Les questions de perte proposées par le demandeur ne pourront donc pas être résolues à l'échelle du groupe ou en commun. Il incombe au demandeur en l'espèce de proposer une méthode permettant de répondre aux questions liées à la perte de façon individuelle : en démontrant que tous les acheteurs indirects ont subi une perte ou, à tout le moins, en identifiant ceux qui ont subi une perte et en les distinguant de ceux qui n'en ont pas subi.

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APPEALS from a judgment of the British Columbia Court of Appeal (Newbury, Groberman and Savage JJ.A.), 2017 BCCA 302, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448, [2017] B.C.J. No. 1618 (QL), 2017 CarswellBC 2245 (WL Can.), affirming a decision of Masuhara J., 2016 BCSC 844, [2016] B.C.J. No. 979 (QL), 2016 CarswellBC 1313 (WL Can.). Appeals dismissed, Côté J. dissenting in part.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Groberman et Savage), 2017 BCCA 302, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448, [2017] B.C.J. No. 1618 (QL), 2017 CarswellBC 2245 (WL Can.), qui a confirmé une décision du juge Masuhara, 2016 BCSC 844, [2016] B.C.J. No. 979 (QL), 2016 CarswellBC 1313 (WL Can.). Pourvois rejetés, la juge Côté est dissidente en partie.

W. Michael G. Osborne, *Brigeeta Richdale* and *Jessica Lewis*, for the appellants Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc.

W. Michael G. Osborne, *Brigeeta Richdale* et *Jessica Lewis*, pour les appelantes Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. et Pioneer Électronique du Canada, inc.

Laura F. Cooper and *Vera Toppings*, for the appellants Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd. and Toshiba America Information Systems, Inc.

Laura F. Cooper et *Vera Toppings*, pour les appelantes Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba du Canada Limitée et Toshiba America Information Systems, Inc.

Robert E. Kwinter and *Evangelia (Litsa) Kriaris*, for the appellants Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc. and Samsung Electronics America, Inc.

Robert E. Kwinter et *Evangelia (Litsa) Kriaris*, pour les appelantes Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc. et Samsung Electronics America, Inc.

Neil Campbell, *Joan Young* and *Samantha Gordon*, for the appellants Koninklijke Philips Electronics

Neil Campbell, *Joan Young* et *Samantha Gordon*, pour les appelantes Koninklijke Philips Electronics

N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc. and Philips Electronics Ltd.

John F. Rook, *Q.C.*, *Christiaan A. Jordaan* and *Emrys Davis*, for the appellants Panasonic Corporation, Panasonic Corporation of North America and Panasonic Canada Inc.

Stephen Fitterman, for the appellants BENQ Corporation, BENQ America Corporation and BENQ Canada Corp.

Reidar M. Mogerman, *Linda J. Visser*, *David G. A. Jones*, *Charles M. Wright*, *Katie I. Duke* and *Bridget M. R. Moran*, for the respondent.

Maxime Nasr and *Violette Leblanc*, for the intervener Option consommateurs.

Jonathan J. Foreman and *Jean-Marc Metrailler*, for the intervener the Consumers Council of Canada.

Sandra A. Forbes and *Adam Fanaki*, for the intervener the Canadian Chamber of Commerce.

Jean-Marc Leclerc and *Mohsen Seddigh*, for the intervener the Consumers' Association of Canada.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

Brown J. —

I. Introduction

[1] The proposed representative plaintiff, Neil Godfrey, applied for certification of a class proceeding under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The defendants manufacture Optical Disc Drives ("ODDs" — a memory storage device that uses laser light or electromagnetic waves near the light spectrum to read and/or record data on optical discs), and ODD products (products that contain ODDs). Godfrey alleges that

N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc. et Philips Electronics Ltd.

John F. Rook, *c.r.*, *Christiaan A. Jordaan* et *Emrys Davis*, pour les appelantes Panasonic Corporation, Panasonic Corporation of North America et Panasonic Canada Inc.

Stephen Fitterman, pour les appelantes BENQ Corporation, BENQ America Corporation et BENQ Canada Corp.

Reidar M. Mogerman, *Linda J. Visser*, *David G. A. Jones*, *Charles M. Wright*, *Katie I. Duke* et *Bridget M. R. Moran*, pour l'intimé.

Maxime Nasr et *Violette Leblanc*, pour l'intervenante Option consommateurs.

Jonathan J. Foreman et *Jean-Marc Metrailler*, pour l'intervenant Consumers Council of Canada.

Sandra A. Forbes et *Adam Fanaki*, pour l'intervenante la Chambre de commerce du Canada.

Jean-Marc Leclerc et *Mohsen Seddigh*, pour l'intervenante l'Association des consommateurs du Canada.

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe et Martin rendu par

Le juge Brown —

I. Introduction

[1] Le représentant proposé des demandeurs, Neil Godfrey, a demandé l'autorisation d'un recours collectif en vertu de la *Class Proceedings Act*, R.S.B.C. 1996, c. 50, de la Colombie-Britannique. Les défenderesses fabriquent des lecteurs de disques optiques (« LDO » — un dispositif de stockage de la mémoire qui utilise la lumière laser ou les ondes électromagnétiques près du spectre optique pour lire ou enregistrer des données sur un disque optique), et des

the defendants conspired to fix prices of ODDs and ODD products.

[2] The certification judge granted Godfrey's application. Two sets of defendants — one led by Pioneer Corporation, and the other by Toshiba Corporation — each appealed from that decision, unsuccessfully, to the British Columbia Court of Appeal. At stake in these appeals is, principally, whether it is plain and obvious that the claim under s. 36(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34, of so-called "umbrella purchasers" who bought ODDs or ODD products manufactured and supplied by someone *other than* the defendants, but who allege that the defendants' price-fixing conduct raised the market price of the product, cannot succeed. This depends on whether these umbrella purchasers have a cause of action under s. 36(1)(a). For the reasons that follow, I agree with the courts below that they do, and it therefore follows that it is not plain and obvious that their claim cannot succeed.

[3] These appeals also present an occasion to clarify the operation of the statutory limitation period for claims under s. 36(1)(a) of the *Competition Act*, to affirm the availability of common law and equitable actions in respect of claims also brought under s. 36(1)(a) of the *Competition Act*, and to reiterate the standard required to certify loss-related questions as common issues in class proceedings.

[4] As I will explain below, my disposition of all these matters would lead me to dismiss the appeals.

II. Background

[5] Godfrey applied for certification of a class proceeding against 42 defendants (collectively, "Toshiba"),

produits munis de LDO (produits qui contiennent des LDO). M. Godfrey allègue que les défenderesses ont comploté pour fixer les prix des LDO et des produits munis de LDO.

[2] Le juge saisi de la demande d'autorisation de M. Godfrey a accueilli celle-ci. Deux groupes de défendeurs — l'un dirigé par Pioneer Corporation, et l'autre par Toshiba Corporation — ont tous deux fait appel sans succès de cette décision à la Cour d'appel de la Colombie-Britannique. Les présents pourvois soulèvent principalement la question de savoir s'il est évident et manifeste que la demande fondée sur l'al. 36(1)a) de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34, de ceux qu'on appelle les « acheteurs sous parapluie », qui ont acheté des LDO ou des produits munis de LDO fabriqués et fournis par quelqu'un d'*autre que* les défenderesses, mais qui allèguent que la fixation des prix par les défenderesses s'est traduite par une hausse du prix du produit sur le marché, ne peut être accueillie. La réponse à cette question dépend de la question de savoir si les acheteurs sous parapluie ont une cause d'action fondée sur l'al. 36(1)a). Pour les motifs qui suivent, je suis d'avis, à l'instar des tribunaux d'instance inférieure, qu'ils en ont une, si bien qu'il n'est pas évident et manifeste que leur demande ne peut être accueillie.

[3] En outre, les présents pourvois donnent à la Cour l'occasion d'apporter des précisions sur les délais de prescription applicables aux actions fondées sur l'al. 36(1)a) de la *Loi sur la concurrence*, de confirmer qu'il est possible de se prévaloir des recours de common law et d'equity alors qu'une demande a également été introduite sous le régime de l'al. 36(1)a) de la *Loi sur la concurrence*, et de rappeler la norme applicable à l'autorisation des questions liées à la perte en tant que questions communes à trancher dans un recours collectif.

[4] Comme je l'expliquerai plus loin, les conclusions auxquelles j'arrive sur ces questions m'amènent à rejeter les pourvois.

II. Contexte

[5] M. Godfrey a demandé l'autorisation d'un recours collectif visant 42 défenderesses (collectivement,

alleging a conspiracy to raise, maintain, fix and/or stabilize the price of ODDs between January 1, 2004 and January 1, 2010 ("class period"). He deposed that he purchased ODD products during the class period, and that he seeks to bring the proposed class proceeding on behalf of all British Columbia residents who purchased an ODD or an ODD product during the class period. The proposed class consists of:

(a) ***direct purchasers***, whose ODD or ODD product was manufactured or supplied *by a defendant* and purchased *from that defendant*,

(b) ***indirect purchasers***, whose ODD or ODD product was manufactured or supplied *by a defendant* and purchased *from a non-defendant*; and

(c) ***umbrella purchasers***, whose ODD or ODD product was manufactured *and* supplied *by a non-defendant*.

« Toshiba »), alléguant que celles-ci avaient comploté pour augmenter, maintenir, fixer ou stabiliser le prix des LDO entre le 1er janvier 2004 et le 1er janvier 2010 (« période visée par le recours collectif »). Il a déclaré avoir acheté des produits munis de LDO au cours de la période visée par le recours collectif, et qu'il cherche à intenter le recours collectif projeté au nom de tous les résidents de la Colombie-Britannique qui ont acheté un LDO ou un produit muni de LDO durant la période visée. Le groupe projeté est composé des acheteurs suivants :

a) ***acheteurs directs*** dont les LDO ou les produits munis de LDO ont été fabriqués ou fournis *par une défenderesse* et achetés *de cette défenderesse*,

b) ***acheteurs indirects*** dont les LDO ou les produits munis de LDO ont été fabriqués ou fournis *par une défenderesse* et achetés *d'une personne qui n'est pas une défenderesse*;

c) ***acheteurs sous parapluie*** dont les LDO ou les produits munis de LDO ont été fabriqués *et* fournis *par une personne qui n'est pas une défenderesse*.

III. Judicial History

A. *British Columbia Supreme Court, 2016 BCSC 844 — Masuhara J.*

[6] The certification judge certified the action as a class proceeding, subject to certain exceptions and conditions (para. 221 (CanLII)). One condition was that the class definition be amended so as to satisfy s. 4(1)(b) of the *Class Proceedings Act*. The certification judge held that the class definition ("[a]ll persons resident in British Columbia who purchased [ODDs and ODD products] in [the class period]") was insufficiently precise, as it was unclear which products were included (paras. 128-31).

[7] In his reasons, the certification judge resolved a number of matters, only two of which are relevant to these appeals: whether the pleadings disclose a cause

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique, 2016 BCSC 844 — le juge Masuhara*

[6] Le juge saisi de la demande d'autorisation a autorisé l'action comme recours collectif, sous réserve de certaines exceptions et conditions (par. 221 (CanLII)). Par exemple, il fallait modifier la définition du groupe pour qu'elle respecte l'al. 4(1)(b) de la *Class Proceedings Act*. Le juge saisi de la demande d'autorisation a conclu que la définition du groupe [TRADUCTION] (« [t]outes les personnes résidant en Colombie-Britannique qui ont acheté [des LDO et des produits munis de LDO] durant [la période visée par le recours collectif] ») n'était pas suffisamment précise, en ce qu'elle ne permettait pas de savoir quels produits étaient visés (par. 128-131).

[7] Dans ses motifs, le juge saisi de la demande d'autorisation a tranché plusieurs questions, dont seulement deux sont pertinentes pour les présents pourvois :

of action, and whether Godfrey's proposed questions relating to loss suffered by the class are certifiable as common questions.

(1) Do the Pleadings Disclose a Cause of Action?

[8] The certification judge first considered whether Godfrey's pleadings satisfy s. 4(1)(a) of the *Class Proceedings Act*, which conditions certification upon the pleadings disclosing a cause of action.

(a) *The Pioneer Claim*

[9] A subset of the named defendants ("Pioneer") opposed Godfrey's certification application, arguing that the action was bound to fail because it was barred by the two-year limitation period in s. 36(4) of the *Competition Act* (although the action against the other defendants was filed on September 27, 2010, the action against Pioneer was not filed until August 16, 2013). The certification judge held, however, that this argument could not be considered at the certification stage (para. 46). Further, it was not plain and obvious in any event that the limitation period could *not* be extended in this case by applying principles of discoverability or fraudulent concealment.

(b) *Umbrella Purchasers*

[10] Toshiba argued that the umbrella purchasers had no cause of action under s. 36(1)(a) of the *Competition Act*, because their inclusion would expose it to indeterminate liability. For four reasons, however, the certification judge held that the umbrella purchasers had a cause of action:

1. While "allowing umbrella claims is inconsistent with restitutionary law", restitutionary law does not determine the scope of the *Competition Act* claims, since s. 36 exists to

les actes de procédure révèlent-ils une cause d'action et les questions proposées par M. Godfrey relativement à la perte subie par le groupe peuvent-elles être autorisées en tant que questions communes?

(1) Les actes de procédure révèlent-ils une cause d'action?

[8] Le juge saisi de la demande d'autorisation s'est d'abord demandé si les actes de procédure produits par M. Godfrey respectaient l'al. 4(1)(a) de la *Class Proceedings Act*, qui impose comme condition à l'autorisation que les actes de procédures révèlent une cause d'action.

a) *L'action contre Pioneer*

[9] Un sous-groupe faisant partie des défenderesses désignées (« Pioneer ») s'est opposé à la demande d'autorisation de M. Godfrey, soutenant que l'action était vouée à l'échec parce qu'elle était prescrite en raison de l'écoulement du délai de prescription de deux ans prévu au par. 36(4) de la *Loi sur la concurrence* (bien que l'action contre les autres défenderesses ait été déposée le 27 septembre 2010, l'action contre Pioneer a seulement été déposée le 16 août 2013). Le juge saisi de la demande d'autorisation a conclu, cependant, qu'il ne pouvait pas tenir compte de cet argument à l'étape de l'autorisation (par. 46). Il a ajouté que, de toute façon, il n'était pas évident et manifeste que, dans la présente affaire, le délai de prescription *ne* pouvait *pas* être prorogé par application des principes de la possibilité de découvrir ou de la dissimulation frauduleuse.

b) *Acheteurs sous parapluie*

[10] Toshiba a fait valoir que les acheteurs sous parapluie n'avaient pas de cause d'action suivant l'al. 36(1)a) de la *Loi sur la concurrence*, car leur participation au recours collectif exposerait Toshiba à une responsabilité indéterminée. Le juge saisi de la demande d'autorisation a toutefois conclu, pour quatre motifs, que les acheteurs sous parapluie avaient une cause d'action :

1. S'il est vrai [TRADUCTION] « qu'autoriser l'instruction des demandes présentées par les acheteurs sous parapluie est incompatible avec le droit de la restitution », il reste que le droit de la

compensate for losses, not to restore wrongful gains (para. 73).

2. The possibility of indeterminate liability does not militate against affording umbrella purchasers a cause of action, since the defendants' liability exposure, while significant, would not be indeterminate (paras. 75-76).

3. While umbrella claims expose the defendants to liability for the pricing decisions of non-defendants, the pricing decisions of non-defendants, under the theory of umbrella effects, are not truly "independent" (para. 77).

4. The umbrella purchaser claims would further the goals of the *Competition Act*, including compensation and deterrence (para. 78).

(c) *"Unlawfulness" Element*

[11] The certification judge then considered Toshiba's argument that a breach of the *Competition Act* could not constitute the "unlawful" element of civil causes of action, such as the tort of unlawful means conspiracy (para. 83). He held that he was bound by *Watson v. Bank of America Corp.*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1, such that it could. While, for other reasons, the pleadings did not disclose a cause of action for the unlawful means tort, Godfrey was permitted to amend his pleadings (paras. 109-10). And, while finding that Godfrey's pleadings *did* disclose a cause of action in civil conspiracy (both predominant purpose conspiracy and unlawful means conspiracy), unjust enrichment and waiver of tort (paras. 100, 102, 115 and 119), the certification judge also found that the umbrella purchasers' claims in unjust enrichment and waiver of tort were bound to fail (paras. 116 and 120).

restitution ne définit pas la portée des demandes fondées sur la *Loi sur la concurrence*, puisque l'art. 36 vise l'indemnisation des pertes, non la restitution des gains illicites (par. 73).

2. L'éventualité d'une responsabilité indéterminée n'empêche pas de reconnaître une cause d'action aux acheteurs sous parapluie, étant donné que la responsabilité à laquelle s'exposent les défenderesses, quoiqu'importante, ne serait pas indéterminée (par. 75-76).

3. Bien que les demandes présentées par les acheteurs sous parapluie puissent exposer les défenderesses à une responsabilité quant à des décisions d'établissement des prix prises par des tiers, il reste que, selon la théorie de l'effet parapluie, ces décisions ne sont pas véritablement « indépendantes » (par. 77).

4. Les réclamations des acheteurs sous parapluie favoriseraient l'atteinte des objectifs de la *Loi sur la concurrence*, notamment l'indemnisation et la dissuasion (par. 78).

c) *Élément d'« illégalité »*

[11] Le juge saisi de la demande d'autorisation a ensuite examiné l'argument de Toshiba suivant lequel une infraction à la *Loi sur la concurrence* ne pouvait constituer l'élément [TRADUCTION] « illégal » d'une cause d'action civile, telle que le complot qui prévoit le recours à des moyens illégaux (par. 83). Il a conclu qu'il était lié par l'arrêt *Watson c. Bank of America Corp.*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1, et que cela se pouvait donc. Bien que, pour d'autres raisons, les actes de procédure n'aient pas révélé de cause d'action pour délit d'atteinte par un moyen illégal, M. Godfrey a été autorisé à les modifier (par. 109-110). Et bien qu'il ait conclu que les actes de procédure de M. Godfrey *révélaient* une cause d'action pour complot civil, à la fois pour complot visant principalement à causer un préjudice et complot d'atteinte par un moyen illégal, enrichissement sans cause et renonciation au recours délictuel (par. 100, 102, 115 et 119), le juge saisi de la demande d'autorisation a également conclu que les actions pour enrichissement sans cause et renonciation au recours délictuel intentées par les acheteurs sous parapluie étaient vouées à l'échec (par. 116 et 120).

(2) Do the Claims Raise Common Issues?

[12] Godfrey sought to have 25 questions certified as common questions under s. 4(1)(c) of the *Class Proceedings Act* (several of which related to loss alleged to have been suffered by the proposed class (para. 143)). Godfrey's expert, Dr. Keith Reutter, opined that (1) all the proposed class members would have been impacted by Toshiba's alleged conspiracy, and (2) there are methods available to estimate any overcharge that resulted from the alleged conspiracy, as well as aggregate damages (paras. 151-52). Some of the defendants, however, retained their own expert, Dr. James Levinsohn, who opined that it would not be possible to determine the fact of injury for the proposed class members using common evidence and analysis (para. 153).

[13] After examining Dr. Reutter's opinion in detail, the certification judge concluded that his was a plausible methodology which satisfied the standard set in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, for evidence to support certifying loss as a common issue. Specifically, it could establish that overcharges were passed on to the indirect purchaser level (paras. 167 and 179).

[14] The certification judge therefore certified all of the common issues with respect to the direct purchasers and indirect purchasers, except those relating to the unlawful means tort (para. 199). With respect to the umbrella purchasers, he certified all of the common issues except those relating to the unlawful means tort, unjust enrichment, waiver of tort (para. 200) and aggregate damages (para. 188).

B. *British Columbia Court of Appeal, 2017 BCCA 302, 1 B.C.L.R. (6th) 319 — per Savage J.A.*

[15] Pioneer appealed, arguing the certification judge erred in holding: (1) that the limitation period

(2) Les demandes soulèvent-elles des questions communes?

[12] M. Godfrey a demandé que 25 questions soient autorisées en tant que questions communes au titre de l'al. 4(1)(c) de la *Class Proceedings Act* (plusieurs de ces questions portent sur la perte que le groupe projeté aurait subie (par. 143)). L'expert de M. Godfrey, M. Keith Reutter, s'est dit d'avis que (1) tous les membres du groupe projeté ont été touchés par le complot auquel aurait participé Toshiba, et que (2) des méthodes permettent d'estimer la valeur de toute majoration ayant découlé du complot et le montant des dommages-intérêts globaux (par. 151-152). Certaines défenderesses ont cependant fait appel à leur propre expert, M. James Levinsohn, selon qui il ne serait pas possible d'établir le préjudice subi par les membres du groupe proposé au moyen d'une preuve et d'analyses communes (par. 153).

[13] Après avoir examiné en détail l'opinion de M. Reutter, le juge saisi de la demande d'autorisation a conclu que la méthode qu'il proposait était une méthode acceptable qui respectait la norme établie dans l'arrêt *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, et qui justifiait l'autorisation de la question liée à la perte en tant que question commune. Plus particulièrement, cette méthode permettait d'établir que la majoration a été refilée aux acheteurs indirects (par. 167 et 179).

[14] Le juge saisi de la demande d'autorisation a donc autorisé toutes les questions communes concernant les acheteurs directs et les acheteurs indirects, à l'exception de celles portant sur le délit d'atteinte par un moyen illégal (par. 199). Quant aux acheteurs sous parapluie, il a autorisé toutes les questions communes à l'exception de celles portant sur le délit d'atteinte par un moyen illégal, l'enrichissement sans cause, la renonciation au recours délictuel (par. 200) et les dommages-intérêts globaux (par. 188).

B. *Cour d'appel de la Colombie-Britannique, 2017 BCCA 302, 1 B.C.L.R. (6th) 319 — le juge Savage*

[15] Pioneer s'est pourvue en appel, soutenant que le juge saisi de la demande d'autorisation avait

defence cannot be considered at the certification stage; (2) that it is not plain and obvious that the discoverability rule never applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act*; and (3) that it is not plain and obvious that the doctrine of fraudulent concealment cannot toll the limitation period in this case (para. 45).

commis une erreur en concluant : (1) que la défense de prescription ne peut pas être prise en compte à l'étape de l'autorisation; (2) qu'il n'est pas évident et manifeste que la règle de la possibilité de découvrir ne s'applique jamais au délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*; et (3) qu'il n'est pas évident et manifeste que la doctrine de la dissimulation frauduleuse ne permet pas de repousser le point de départ du délai de prescription en l'espèce (par. 45).

[16] Toshiba also appealed, arguing the certification judge erred by: (1) recasting the standard for certifying loss as a common issue; (2) holding that a breach of s. 45 of the *Competition Act* can furnish the "unlawfulness" element for common law actions; and (3) allowing the umbrella purchasers' causes of action to proceed (para. 44).

[16] Toshiba s'est également pourvue en appel, soutenant que le juge saisi de la demande d'autorisation s'était trompé : (1) en reformulant le critère d'autorisation de la question liée à la perte à titre de question commune; (2) en concluant qu'une infraction à l'art. 45 de la *Loi sur la concurrence* peut offrir l'élément d'« illégalité » requis pour les actions en common law; et (3) en laissant les causes d'action des acheteurs sous parapluie suivre leur cours (par. 44).

[17] The Court of Appeal dismissed both sets of appeals.

[17] La Cour d'appel a rejeté les deux appels.

(1) Pioneer's Appeal

(1) Appel de Pioneer

[18] Agreeing with the certification judge, the Court of Appeal held that limitations arguments should, generally, not be considered at the certification stage. Further, and that aside, the limitations issue in this case was "intimately connected with the facts of the alleged conspiracy" and should be reserved for trial (paras. 67-68). Alternatively, were discoverability properly considered at the certification stage, it would not be plain and obvious that discoverability does not apply to delay the running of the limitation period in s. 36(4)(a)(i) of the *Competition Act*. While recognizing that some courts have declined to apply discoverability to s. 36(4)(a)(i) (para. 72), the Court of Appeal read this Court's decision in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, as directing that discoverability applies where the limitation period is explicitly linked to the injured party's knowledge or the basis of the cause of action (para. 89).

[18] Souscrivant à l'opinion du juge saisi de la demande d'autorisation, la Cour d'appel a conclu que, de façon générale, il ne convenait pas de tenir compte des arguments sur la prescription à l'étape de l'autorisation. Qui plus est, la question de la prescription en l'espèce était [TRADUCTION] « étroitement liée aux faits sous-tendant l'allégation de complot » et elle devait être tranchée au procès (par. 67-68). Subsidiairement, même si l'on tenait compte du principe de la possibilité de découvrir de manière adéquate au stade de l'autorisation, il ne serait pas évident et manifeste que ce principe ne permet pas de reporter le point de départ du délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*. Tout en reconnaissant que certains tribunaux ont refusé d'appliquer ce principe au sous-al. 36(4)a)(i) (par. 72), la Cour d'appel a jugé qu'il se dégage de l'arrêt *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53, que la règle de la possibilité de découvrir s'applique lorsque le délai de prescription est expressément lié à la connaissance de la partie lésée ou au fondement de la cause d'action (par. 89).

[19] Further, the certification judge was correct, said the Court of Appeal, to conclude that it is not plain and obvious that the doctrine of fraudulent concealment could not apply (para. 110). Equitable fraud was sufficient to invoke the doctrine, and a purely commercial relationship could support the requirement for a "special relationship" (paras. 102-3) between the parties so as to toll the applicable limitation period. Accordingly, Godfrey's failure to plead a "special relationship" would not preclude the doctrine's application here (para. 104).

[19] En outre, aux dires de la Cour d'appel, le juge saisi de la demande d'autorisation a eu raison de conclure qu'il n'était pas évident et manifeste que la doctrine de la dissimulation frauduleuse ne pouvait s'appliquer (par. 110). L'existence d'une fraude en equity suffit pour invoquer la doctrine, et l'existence d'un lien purement commercial permet de satisfaire à l'exigence d'une [TRADUCTION] « relation spéciale » (par. 102-103) entre les parties de manière à repousser le point de départ du délai de prescription applicable. Ainsi, l'omission de M. Godfrey de faire état d'une « relation spéciale » n'empêcherait pas l'application de la doctrine en l'espèce (par. 104).

(2) Certifying Loss as a Common Issue

(2) Autorisation de la question de la perte en tant que question commune

[20] Toshiba argued that, since Dr. Reutter's proposed methodology could neither demonstrate that loss was suffered by each class member nor identify the class members who did not suffer harm, the certification judge erred in certifying questions relating to harm as common questions (para. 113). It also saw error in the certification judge's reference (at para. 169) to the *Class Proceedings Act*'s aggregate damages provisions as supporting the possibility of liability, even where some class members have not demonstrated actual loss.

[20] Toshiba a fait valoir que, puisque la méthode proposée par M. Reutter ne permettait pas de démontrer que la perte a été subie par chacun des membres du groupe, ni d'identifier ceux du groupe qui n'ont pas subi de préjudice, le juge saisi de la demande d'autorisation avait commis une erreur en autorisant les questions liées au préjudice en tant que questions communes (par. 113). Elle considère également que le juge a commis une erreur en mentionnant (par. 169) que les dispositions de la *Class Proceedings Act* portant sur l'octroi de dommages-intérêts globaux peuvent étayer une déclaration de responsabilité, même si certains membres du groupe n'ont pas démontré qu'ils avaient réellement subi une perte.

[21] The Court of Appeal rejected these arguments, noting that *Microsoft* allows loss to be certified as a common issue if "the methodology [is] able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain" (para. 149, citing *Microsoft*, at para. 115). Certifying an issue as common does not create an ultimate right to recovery; it is merely a procedural step that does not change the substantive rights of the parties (para. 158). And, while the aggregate damages provisions in the *Class Proceedings Act* are applicable only once liability is established, they do indeed demonstrate that the statute contemplates recovery where certain class

[21] La Cour d'appel a rejeté ces arguments, soulignant que selon l'arrêt *Microsoft*, les questions liées à la perte peuvent être autorisées en tant que questions communes si « la méthode [permet d']établir que la majoration a été transférée à l'acheteur indirect situé en aval dans la chaîne de distribution » (par. 149, citant *Microsoft*, par. 115). Autoriser une question en tant que question commune ne crée aucun droit ultime d'indemnisation; il s'agit simplement d'une étape procédurale qui ne change rien aux droits substantiels des parties (par. 158). Et, bien que les dispositions relatives aux dommages-intérêts globaux contenues dans la *Class Proceedings Act* ne s'appliquent qu'une fois la responsabilité établie,

members have not proven that they suffered loss (paras. 160-61).

(3) Unlawfulness Element

[22] The Court of Appeal agreed with the certification judge that a breach of s. 45 of the *Competition Act* could represent the unlawfulness element of the various causes of action advanced by Godfrey (para. 186).

(4) The Umbrella Purchasers

[23] Here, too, the Court of Appeal found no error in the certification judge's reasons. Umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* based on a breach of s. 45(1) (paras. 247-48). Toshiba's arguments that the certification judge did not expressly consider whether the umbrella purchasers have claims at common law, and that the certification judge erred in his interpretation of s. 36, were rejected (paras. 188-89).

[24] Finally, the Court of Appeal agreed with the certification judge that Toshiba's concerns about indeterminate liability did not support denying certification of the umbrella purchasers' claims. An action under s. 36(1)(a) based on a breach of s. 45(1) is subject to internal limitations within ss. 36(1) and 45(1) which address indeterminacy such that it does not arise as a concern in this case (paras. 230-31). Further, Toshiba's additional potential liability to the umbrella purchasers would be significantly less, relative to its potential liability to non-umbrella purchasers (para. 236).

IV. Issues on Appeal

[25] Pioneer's appeal raises the issue of whether it is plain and obvious that the claim against it will not

elles démontrent que la loi envisage la possibilité d'indemnisation si certains membres du groupe n'ont pas démontré qu'ils avaient subi une perte (par. 160-161).

(3) Élément d'illégalité

[22] La Cour d'appel a convenu avec le juge saisi de la demande d'autorisation qu'une infraction à l'art. 45 de la *Loi sur la concurrence* pouvait constituer l'élément d'illégalité des diverses causes d'action avancées par M. Godfrey (par. 186).

(4) Les acheteurs sous parapluie

[23] Là encore, la Cour d'appel n'a relevé aucune erreur dans les motifs du juge saisi de la demande d'autorisation. Les acheteurs sous parapluie ont une cause d'action suivant l'al. 36(1)a) de la *Loi sur la concurrence*, laquelle est fondée sur une infraction au par. 45(1) (par. 247-248). Les arguments de Toshiba, selon lesquels le juge saisi de la demande d'autorisation n'aurait pas expressément examiné si les acheteurs sous parapluie disposaient de recours en common law et le juge aurait commis une erreur dans son interprétation de l'art. 36, ont été rejetés (par. 188-189).

[24] Enfin, la Cour d'appel a partagé l'avis du juge saisi de la demande d'autorisation selon lequel la crainte d'une responsabilité indéterminée manifestée par Toshiba ne justifiait pas le refus d'autoriser les demandes des acheteurs sous parapluie. Toute action fondée sur l'al. 36(1)a) au titre d'un manquement au par. 45(1) est assujettie aux restrictions inhérentes aux par. 36(1) et 45(1), qui circonscrivent la responsabilité de sorte qu'une telle crainte ne se pose pas en l'espèce (par. 230-231). Qui plus est, la responsabilité supplémentaire à laquelle Toshiba pourrait être tenue à l'égard des acheteurs sous parapluie serait substantiellement moindre comparativement à sa responsabilité éventuelle à l'égard des autres acheteurs (par. 236).

IV. Questions en litige

[25] Le pourvoi de Pioneer soulève la question de savoir s'il est évident et manifeste que la demande

succeed because it is statute-barred by s. 36(4)(a)(i) of the *Competition Act*. In answering this question, we must decide:

1. whether the principle of discoverability applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act*; and

2. whether, for fraudulent concealment to toll the limitation period in s. 36(4)(a)(i) of the *Competition Act*, a special relationship between the parties must be established.

[26] The appeals, taken together, raise three common issues:

1. whether it is plain and obvious that the umbrella purchasers' claim under s. 36(1)(a) of the *Competition Act* cannot succeed;

2. whether it is plain and obvious that s. 36(1) of the *Competition Act* bars a plaintiff from bringing concurrent common law and equitable claims; and

3. the required standard to certify loss as a common issue, and whether Dr. Reutter's evidence satisfies that standard.

V. Analysis

[27] Section 4(1) of the *Class Proceedings Act* contains the requirements for certification of a class proceeding in British Columbia. At issue is whether Godfrey has satisfied s. 4(1)(a), which requires that the pleadings disclose a cause of action, and s. 4(1)(c), which requires that the claims of the class members raise common issues. The former requirement is satisfied unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Microsoft*, at para. 63). The latter is satisfied where

contre elle ne sera pas accueillie parce qu'elle est prescrite par le sous-al. 36(4)a)(i) de la *Loi sur la concurrence*. Pour répondre à cette question, nous devons trancher les questions suivantes :

1. Le principe de la possibilité de découvrir s'applique-t-il au délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*?

2. Pour que la dissimulation frauduleuse repousse le point de départ du délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*, faut-il établir une relation spéciale entre les parties?

[26] Pris ensemble, les pourvois soulèvent trois questions communes :

1. Est-il évident et manifeste que la demande des acheteurs sous parapluie fondée sur l'al. 36(1)a) de la *Loi sur la concurrence* ne peut être accueillie?

2. Est-il évident et manifeste que le par. 36(1) de la *Loi sur la concurrence* empêche le demandeur d'exercer concurremment des recours de common law ou d'equity?

3. Quelle est la norme requise pour autoriser la question de la perte en tant que question commune et le témoignage de M. Reutter satisfait-il à cette norme?

V. Analyse

[27] Le paragraphe 4(1) de la *Class Proceedings Act* énonce les conditions d'autorisation d'un recours collectif en Colombie-Britannique. Il s'agit de savoir si M. Godfrey a respecté l'al. 4(1)a), qui exige que les actes de procédure révèlent une cause d'action, et l'al. 4(1)c), qui exige que les réclamations des membres du groupe soulèvent des questions communes. La première condition est respectée à moins que, en tenant tous les faits allégués pour avérés, il soit évident et manifeste que la réclamation du demandeur au fond est insoutenable (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 20; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25; *Microsoft*,

there is "some basis in fact" to support a common issue (*Hollick*, at para. 25; *Microsoft*, at paras. 99-100).

[28] Although at certification the plaintiff must satisfy s. 4(1)'s requirements that I have just described, the standard of review on appeal for each particular question depends on the nature of the question, and will be identified in turn.

A. *Pioneer's Appeal*

[29] Noting that the alleged conspiracy is said to have ended on January 1, 2010, and that the action against Pioneer was not commenced until August 16, 2013, Pioneer argues that Godfrey's claim is statute-barred, as it was commenced after the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act* expired. As I will explain, I agree that the discoverability rule applies to extend the limitation period in s. 36(4)(a)(i). It is not plain and obvious that Godfrey's claim against Pioneer will fail on this basis. Although it is therefore unnecessary to opine on whether the doctrine of fraudulent concealment would apply, I take this opportunity to briefly discuss why its application is not conditioned upon a special relationship between the parties.

[30] Determining whether discoverability applies to the limitation period in s. 36(4)(a)(i) is a question of law subject to a standard of correctness, as is the question of whether fraudulent concealment requires a special relationship to be established between the parties. The applicability of either doctrine is, however (and as noted by the Court of Appeal), "bound up in the facts" and must be left to the trial judge to decide (C.A. reasons, at para. 68).

par. 63). La dernière condition est respectée lorsqu'il existe un « certain fondement factuel » pouvant étayer une question commune (*Hollick*, par. 25; *Microsoft*, par. 99-100).

[28] Au stade de l'autorisation, le demandeur doit satisfaire aux exigences du par. 4(1) que je viens de décrire; toutefois, la norme de contrôle en appel applicable à chaque question en particulier dépend de la nature de la question et je préciserai quelle norme s'applique dans chaque cas.

A. *Appel formé par Pioneer*

[29] Soulignant que le complot allégué aurait pris fin le 1er janvier 2010 et que l'action intentée contre elle n'a été introduite que le 16 août 2013, Pioneer soutient que la demande de M. Godfrey est prescrite parce qu'elle a été introduite après l'expiration du délai de prescription de deux ans prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*. Comme je vais l'expliquer, je reconnais que la règle de la possibilité de découvrir s'applique de façon à prolonger le délai de prescription établi au sous-al. 36(4)a)(i). Il n'est pas évident et manifeste que la demande de M. Godfrey contre Pioneer doit être rejetée pour ce motif. Bien qu'il ne soit donc pas nécessaire que je me prononce sur la question de savoir si la doctrine de la dissimulation frauduleuse s'applique, je saisis l'occasion d'examiner brièvement les raisons pour lesquelles son application ne tient pas à l'existence d'une relation spéciale entre les parties.

[30] La question de savoir si la possibilité de découvrir s'applique au délai de prescription prévu au sous-al. 36(4)a)(i) est une question de droit contrôlée suivant la norme de la décision correcte, tout comme la question de savoir si la dissimulation frauduleuse oblige à établir l'existence d'une relation spéciale entre les parties. Toutefois, comme l'a souligné la Cour d'appel, l'applicabilité de ces deux doctrines est [TRADUCTION] « intimement liée aux faits » et il appartient au juge du procès de trancher cette question (motifs de la C.A., par. 68).

(1) Discoverability

(a) *Limitation Periods Run From the Accrual or Knowledge of the Cause of Action*

[31] This Court has recognized that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purposes of the running of a limitation period until "the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224; *Ryan*, at paras. 2 and 22).

[32] This discoverability rule does not apply automatically to every limitation period. While a "rule", it is not a universally applicable rule of *limitations*, but a rule of *construction* to aid in the interpretation of statutory limitation periods (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 37). It can therefore be displaced by clear legislative language (*Ermineskin Indian Band and Nation v. Canada*, 2006 FCA 415, [2007] 3 F.C.R. 245, at para. 333, aff'd 2009 SCC 9, [2009] 1 S.C.R. 222). In this regard, many provincial legislatures have chosen to enact statutory limitation periods that codify, limit or oust entirely discoverability's application, particularly in connection with ultimate limitation periods (see, e.g., *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4, 5 and 15; *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1); *Limitation Act*, S.B.C. 2012, c. 13, ss. 6 to 8 and 21; *The Limitations Act*, S.S. 2004, c. L-16.1, ss. 5 to 7; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, s. 5; *Limitation of Actions Act*, S.N.S. 2014, c. 35, s. 8; see also *Bowes v. Edmonton (City)*, 2007 ABCA 347, 425 A.R. 123, at paras. 146-58).

[33] Further, absent legislative intervention, the discoverability rule applies only where the limitation period in question runs from the accrual of the cause of action, or from some other event that

(1) Possibilité de découvrir

a) *Le délai de prescription commence à courir à compter de la naissance ou de la connaissance de la cause d'action*

[31] Notre Cour a reconnu que les délais de prescription peuvent être assujettis à la règle de la possibilité de découvrir, de sorte que la cause d'action prendra naissance, pour les besoins de l'écoulement du délai de prescription, « lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable » (*Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, p. 224; *Ryan*, par. 2 et 22).

[32] La règle de la possibilité de découvrir ne s'applique pas automatiquement à chaque délai de prescription. C'est une « règle », certes, mais ce n'est pas une règle de *prescription* d'application universelle; c'est plutôt une règle d'*interprétation* visant à faciliter l'interprétation des délais de prescription fixés par la loi (*Peixeiro c. Haberman*, [1997] 3 R.C.S. 549, par. 37). Elle peut donc être écartée par un texte législatif clair (*Bande et nation indienne d'Ermineskin c. Canada*, 2006 CAF 415, [2007] 3 R.C.F. 245, par. 333, conf. par 2009 CSC 9, [2009] 1 R.C.S. 222). À cet égard, plusieurs législatures provinciales ont choisi d'établir au moyen de lois des délais de prescription qui codifient, limitent ou écartent complètement l'application de la règle de la possibilité de découvrir, notamment en ce qui concerne les délais de prescription maximum (voir, p. ex., la *Loi de 2002 sur la prescription des actions*, L.O. 2002, c. 24, ann. B, art. 4, 5 et 15; *Limitations Act*, R.S.A. 2000, c. L-12, par. 3(1); *Limitation Act*, S.B.C. 2012, c. 13, art. 6 à 8 et 21; *The Limitations Act*, S.S. 2004, c. L-16.1, art. 5 à 7; *Loi sur la prescription*, L.N.-B. 2009, c. L-8.5, art. 5; *Limitation of Actions Act*, S.N.S. 2014, c. 35, art. 8; voir aussi *Bowes c. Edmonton (City)*, 2007 ABCA 347, 425 A.R. 123, par. 146-158).

[33] De plus, en l'absence d'intervention de la législature, la règle de la possibilité de découvrir ne s'applique que si le délai de prescription en cause commence à courir à compter de la naissance de la

occurs when the plaintiff has knowledge of the injury sustained:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at para. 22, cited in *Peixeiro*, at para. 37.)

[34] Two points flow from this statement. First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had knowledge of the existence of his or her legal rights before such rights expire (*Peixeiro*, at para. 39).

[35] Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff's knowledge of his or her injury, the rule of discoverability will not apply. In *Ryan*, for example, this Court held that discoverability did not apply to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which stated that an action against a deceased could not be brought after one year from the date of death. As the Court explained (para. 24):

> The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to

cause d'action ou de tout autre événement survenant au moment où le demandeur prend connaissance du préjudice subi :

> [TRADUCTION] À mon avis, la règle prétorienne de la possibilité de découvrir le dommage n'est rien de plus qu'une règle d'interprétation. Dans tous les cas où une loi indique que l'action en justice doit être intentée dans un certain délai après un événement donné, il faut interpréter les termes de cette loi. Lorsque ce délai court à partir du « moment où naît la cause d'action » ou de tout autre événement qui peut être interprété comme ne survenant qu'au moment où la [partie lésée] prend connaissance du dommage, c'est la règle prétorienne de la possibilité de découvrir le dommage qui s'applique. Toutefois, si le délai court à compter de la date d'un événement qui survient clairement, et sans égard à la connaissance qu'en a la [partie lésée], cette règle ne peut prolonger le délai fixé par le législateur. [Je souligne.]

(*Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200 (C.A. Man.), par. 22, cité dans *Peixeiro*, par. 37.)

[34] Deux points se dégagent de cet énoncé. Premièrement, lorsque le point de départ du délai de prescription dépend de la naissance de la cause d'action ou de quelque autre événement ne pouvant survenir qu'au moment où le demandeur prend connaissance de son préjudice, le principe de la possibilité de découvrir s'applique de manière à garantir que le demandeur avait connaissance des droits que la loi lui confère avant qu'ils expirent (*Peixeiro*, par. 39).

[35] Deuxièmement (et inversement), lorsqu'un délai de prescription légal commence à courir à compter d'un événement qui n'a rien à voir avec la naissance de la cause d'action ou qui n'exige pas que le demandeur ait connaissance du préjudice qu'il a subi, la règle de la possibilité de découvrir ne s'appliquera pas. Dans l'arrêt *Ryan*, par exemple, la Cour a conclu que la règle ne s'appliquait pas à l'art. 5 de la *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, qui dispose qu'aucune action ne peut être intentée contre une personne décédée après un an suivant la date de son décès. Comme la Cour l'a expliqué (par. 24) :

> Il n'est pas permis, en droit, de recourir à la règle prétorienne de la possibilité de découvrir le dommage dans les cas où la loi applicable lie expressément le délai de

the injured party's knowledge or the basis of the cause of action. [Emphasis added; citation omitted.]

By tying, then, the limitation period to an event unrelated to the cause of action, and which did not necessitate the plaintiff's knowledge of an injury, the legislature had clearly displaced the discoverability rule (*Ryan*, at para. 27).

[36] In determining whether a limitation period runs from the accrual of a cause of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from "the accrual of the cause of action", discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury. Indeed, clear statutory text is necessary to oust its application. In *Peixeiro*, for example, this Court applied the discoverability rule to s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, which stated that an action must be commenced within two years of the time when "damages were sustained" (para. 2). The use of the phrase "damages were sustained" rather than "when the cause of action arose" was a "distinction without a difference", as it was unlikely that the legislature intended that the limitation period should run without the plaintiff's knowledge (para. 38).

[37] It is therefore clear that the "the judge-made discoverability rule will apply when the requisite limitation statute indicates that time starts to run from when the cause of action arose (or other wording to that effect)" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016), at p. 103 (emphasis added)). And, while my colleague Côté J. claims to disagree with my analysis, I am fortified by the endorsement in her reasons of this formulation of discoverability (paras. 140 and 149).

prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance ou avec le fondement de la cause d'action. [Je souligne; référence omise.]

En rattachant, alors, le délai de prescription à un événement qui n'a aucun rapport avec la cause d'action et qui n'exige pas que le demandeur ait connaissance d'un préjudice, la législature a clairement écarté la règle de la possibilité de découvrir (*Ryan*, par. 27).

[36] Pour décider si un délai de prescription commence à courir à la date de la naissance de la cause d'action ou lorsque le demandeur a connaissance du préjudice qu'il a subi, de sorte que la règle de la possibilité de découvrir s'applique, le fond, non la forme, doit prévaloir : même si la loi ne précise pas que le délai de prescription commence à courir à compter de « la naissance de la cause d'action », le principe de la possibilité de découvrir s'applique s'il est évident que le point de départ du délai de prescription dépend, en substance, de la naissance de la cause d'action ou de la connaissance d'un préjudice. En fait, pour écarter l'application du principe, il faut un texte législatif clair. Dans l'arrêt *Peixeiro*, par exemple, notre Cour a appliqué la règle de la possibilité de découvrir au par. 206(1) du *Code de la route*, L.R.O. 1990, c. H.8, selon lequel l'action devait être intentée dans les deux ans de la date à laquelle les « dommages ont été subis » (par. 2). L'utilisation des mots « où les dommages ont été subis » plutôt que « date où la cause d'action a pris naissance » est une « distinction sans importance », puisqu'il est peu probable que la législature ait voulu que le délai de prescription commence à courir à l'insu du demandeur (par. 38).

[37] Il est donc clair que [TRADUCTION] « la règle prétorienne de la possibilité de découvrir s'applique quand la loi de prescription voulue indique que le délai commence à courir à la date de la naissance de la cause d'action (ou qu'il utilise d'autres mots en ce sens) » (G. Mew, D. Rolph et D. Zacks, *The Law of Limitations* (3e éd. 2016), p. 103 (je souligne)). Et, bien que ma collègue prétende être en désaccord avec mon analyse, elle me conforte dans mon opinion en cautionnant cette formulation de la règle de la possibilité de découvrir (par. 140 et 149).

[38] The issue raised by this appeal is what constitutes sufficiently clear legislative expression in this regard, such that discoverability will apply. In my view, where the event triggering the limitation period is an element of the cause of action, the legislature has shown its intention that the limitation period be linked to the cause of action's accrual, such that discoverability will apply. As this Court stated in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, the accrual of a cause of action is a "gradatio[n]" (p. 34). Where all the elements of a cause of action occur simultaneously, the cause of action accrues contemporaneously with the occurrence of each element (*M. (K.)*, at p. 34). Where, however, the occurrence of each element is separated in time, the accrual of the cause of action is a continuing (but not continual) process. That is, the cause of action will continue to accrue as each element of the cause of action occurs.

[39] This was what the Court in *Ryan* was referring to when it said that discoverability does not apply where the limitation period "is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge <u>or the basis of the cause of action</u>" (para. 24 (emphasis added)). In *Ryan*, discoverability did not apply because the action was "complete in all its elements" before the operation of the event triggering the limitation period (para. 18). The limitation period was not dependent upon the accrual of the cause of action and thus the limitation period would begin to run independent of the accrual of the cause of action (see *Ryan*, at paras. 16, 18, 20, 29 and 32). Citing the trial judge with approval, the Court added this:

> The fact of death is of no relevance to the cause of action in question. <u>It is not an element of the cause of action and is not required to complete the cause of action.</u> Whatever the nature of the cause of action, it is existing and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves

[38] Il s'agit en l'espèce de savoir ce qui constitue une expression suffisamment claire de la législature en ce sens pour que la règle de la possibilité de découvrir s'applique. À mon avis, lorsque l'événement marquant le point de départ du délai de prescription est un élément de la cause d'action, la législature a manifesté son intention que le délai de prescription soit lié à la naissance de la cause d'action, déclenchant du même coup l'application de la règle de la possibilité de découvrir. Comme l'a affirmé notre Cour dans *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, la cause d'action « peut prendre naissance [à différents moments] » (p. 34). Si tous les éléments d'une cause d'action apparaissent simultanément, la cause d'action prend naissance au moment où survient chaque élément (*M. (K.)*, p. 34). En revanche, si les éléments ne surviennent pas tous en même temps, la naissance de la cause d'action est un processus en cours (mais non continu). En d'autres termes, la cause d'action continue de prendre naissance à mesure que survient chacun de ses éléments.

[39] C'est ce dont parlait la Cour dans *Ryan* quand elle a dit que la règle de la possibilité de découvrir ne s'applique pas lorsque « la loi applicable lie expressément le délai de prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance <u>ou avec le fondement de la cause d'action</u> » (par. 24 (je souligne)). Dans *Ryan*, cette règle ne s'appliquait pas car « tous les éléments » de l'action « [étaient] présents » avant que ne survienne le fait qui marque le point de départ du délai de prescription (par. 18). Le délai de prescription ne dépendait pas de la naissance de la cause d'action et il commencerait donc à courir indépendamment de la naissance de la cause d'action (voir *Ryan*, par. 16, 18, 20, 29 et 32). Citant le juge de première instance avec approbation, la Cour a ajouté ceci :

> [TRADUCTION] Le décès en tant que tel n'a aucune pertinence en ce qui concerne la cause d'action en question. <u>Il ne constitue pas un élément de la cause d'action et n'est pas nécessaire pour compléter la cause d'action.</u> Quelle que soit la nature de la cause d'action, elle existe et est complète avant que la *Survival of Actions Act* s'applique, en cas de décès, pour la maintenir et fixer un délai limité dans lequel l'action devra être intentée. Le décès

only to provide a time from which the time within which to bring the action is to be calculated. [Emphasis added; para. 32.]

[40] Had, however, the event triggering the limitation period been an *element* of the cause of action, or had it been required to occur before the cause of action could accrue, discoverability *could* apply (*Ryan*, at paras. 29-30, citing *Burt v. LeLacheur*, 2000 NSCA 90, 189 D.L.R. (4th) 193). I do not see my colleague Côté J. as disagreeing on this point: she is quite right when she says that "the words 'basis of the cause of action' in para. 24 of *Ryan* should be understood as essentially synonymous with the 'arising or accrual of the cause of action'" (para. 148). As this Court held in *Peixeiro*, where the limitation period is based on an event that can be construed as synonymous with the accrual of the cause of action, discoverability will apply (para. 38).

[41] From all this, it is evident that discoverability continues to apply where the legislature has shown its intent that a limitation period shall run from "when the cause of action arose (or other wording to that effect)" or where the event triggering the limitation period requires the plaintiff's knowledge of his or her injury (Mew et al., at p. 103). Conversely, discoverability does not apply where that triggering event does not depend on the plaintiff's knowledge or is independent of the accrual of the cause of action. This is not, as my colleague suggests, a modified test for discoverability (reasons of Côté J., at para. 154), but rather is the product of this Court's application of *Fehr* in *Peixeiro* (regarding when discoverability *does* apply) and *Ryan* (regarding when discoverability *does not* apply).

en tant que tel n'est pas pertinent en ce qui concerne la cause d'action et sert seulement de point de départ pour calculer le délai dans lequel l'action devra être intentée. [Je souligne; par. 32.]

[40] Si en revanche le fait déclencheur du délai de prescription constituait un *élément* de la cause of action, ou s'il devait se produire avant que la cause d'action puisse prendre naissance, la règle de la possibilité de découvrir *pourrait* s'appliquer (*Ryan*, par. 29-30, citant *Burt c. LeLacheur*, 2000 NSCA 90, 189 D.L.R. (4th) 193). Je ne pense pas que ma collègue la juge Côté est en désaccord sur ce point : elle a parfaitement raison de dire que « l'expression "fondement de la cause d'action" figurant au par. 24 de l'arrêt *Ryan* devrait être considérée comme étant essentiellement synonyme de l'expression "naissance de la cause d'action" » (par. 148). Comme l'a conclu la Cour dans *Pexeiro*, lorsque le délai de prescription découle d'un fait susceptible d'être jugé synonyme de la naissance de la cause d'action, la règle de la possibilité de découvrir s'applique (par. 38).

[41] Il ressort clairement de tout ce qui précède que la règle de la possibilité de découvrir continue de s'appliquer lorsque la législature a manifesté son intention que le délai de prescription commence à courir [TRADUCTION] « à la naissance de la cause d'action (ou utilisé d'autres mots en ce sens) », ou encore lorsque le fait déclencheur du délai de prescription exige du demandeur qu'il ait connaissance du préjudice qu'il a subi (Mew et autres, p. 103). En revanche, la règle de la possibilité de découvrir ne s'applique pas lorsque le fait déclencheur ne dépend pas de la connaissance du demandeur ou est indépendant de la naissance de la cause d'action. Il ne s'agit pas là, contrairement à ce que laisse entendre ma collègue, d'un critère modifié relatif à la possibilité de découvrir (motifs de la juge Côté, par. 154). Il s'agit plutôt de la conséquence de l'application par notre Cour de l'arrêt *Fehr* dans *Peixeiro* (à propos des circonstances où la règle de la possibilité de découvrir *s'applique*) et dans *Ryan* (au sujet des circonstances où la règle de la possibilité de découvrir *ne* s'applique *pas*).

(b) The Statutory Scheme, and the Objects of Statutory Limitation Periods

[42] Bearing in mind that, as I have explained, the discoverability rule is a rule of *construction*, its application depends on an examination of the pertinent statutory text to assess what triggers the running of the limitation period in question, supplemented by consideration of the statutory scheme within which it operates, and of the legislature's purpose in enacting limitation periods (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[43] Turning first to the statutory text, the relevant provisions of s. 36 of the *Competition Act* state:

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, . . .

. . .

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

. . .

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; . . .

. . .

b) Le régime législatif et les objectifs des délais de prescription légaux

[42] Compte tenu du fait que, comme je l'ai expliqué, la règle de la possibilité de découvrir est une règle d'*interprétation*, son application dépend d'un examen du texte législatif pertinent visant à déterminer ce qui marque le point de départ du délai de prescription en question, complété par un examen du régime législatif dans lequel ladite disposition s'inscrit et de l'intention qu'avait la législature quand elle a fixé ce délai de prescription (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21).

[43] Passons d'abord au texte législatif. Les dispositions pertinentes de l'art. 36 de la *Loi sur la concurrence* prévoient :

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) . . . d'un comportement allant à l'encontre d'une disposition de la partie VI;

. . .

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

. . .

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,

(ii) soit la date où il est statué de façon définitive sur la poursuite;

. . .

[44] The text of s. 36(4)(a)(i) provides that no action may be brought under s. 36(1)(a) after two years from a day *on which conduct contrary to Part VI* occurred. From this, it is clear that the event triggering this particular limitation period is an element of the underlying cause of action. That is, the limitation period in s. 36(4)(a)(i) is triggered by the occurrence of an element of the underlying cause of action — specifically, conduct contrary to Part VI of the *Competition Act*. Therefore, it is subject to discoverability (*Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81, at para. 18).

[45] The scheme of s. 36(4) also supports the view that discoverability was intended to apply to the limitation period in s. 36(4)(a)(i). Section 36(4)(a) sets out two limitation periods — s. 36(4)(a)(i), which runs from the day on which the conduct occurred and s. 36(4)(a)(ii), which runs from the day on which criminal proceedings are disposed of. The applicable limitation period is whichever event occurs later. Pioneer argues that Parliament enacted s. 36(4)(a)(ii) to revive a cause of action where the limitation period has expired under s. 36(4)(a)(i), which revival would mitigate any unfairness created by the operation of the limitation period in s. 36(4)(a)(i) (A.F. (Pioneer), at para. 92). I do not view s. 36(4)(a)(ii)'s operation in this way. It is simply an example of a limitation period to which discoverability does not apply because, as the Court of Appeal for Ontario said in *Fanshawe*, the event triggering the limitation period under s. 36(4)(a)(ii) — the disposition of criminal proceedings — is "not connected to a plaintiff's cause of action or knowledge" (para. 47). When s. 36(4)(a)(i) is contrasted with s. 36(4)(a)(ii), it is likely that Parliament intended that discoverability apply to the former limitation period and not the latter. Further, where criminal proceedings are *not* brought against a wrongdoer, the putative mitigating effect of s. 36(4)(a)(ii) would be of no assistance to plaintiffs whose right of action has expired by operation of s. 36(4)(a)(i).

[44] Le texte du sous-al. 36(4)a)(i) prévoit que les actions visées à l'al. 36(1)a) se prescrivent dans les deux ans qui suivent la date du *comportement qui va à l'encontre de la partie VI*. Partant, il est évident que le fait déclencheur de ce délai de prescription est un élément de la cause d'action sous-jacente. En d'autres termes, le délai de prescription prévu au sous-al. 36(4)a)(i) court à compter de la survenance d'un élément de la cause d'action sous-jacente — plus précisément, le comportement qui va à l'encontre de la partie VI de la *Loi sur la concurrence*. Par conséquent, il est assujetti à la règle de la possibilité de découvrir (*Fanshawe College of Applied Arts and Technology c. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81, par. 18).

[45] Le régime établi par le par. 36(4) appuie également la thèse selon laquelle la règle de la possibilité de découvrir est censée s'appliquer au délai de prescription du sous-al. 36(4)a)(i). L'alinéa 36(4)a) prévoit deux délais de prescription : celui du sous-al. 36(4)a)(i), qui commence à courir à la date du comportement en question, et celui du sous-al. 36(4)a)(ii), qui commence à courir à la date où il est statué sur la poursuite. Le délai de prescription applicable est celui qui commence à courir à la dernière de ces dates. Pioneer soutient que le Parlement a adopté le sous-al. 36(4)a)(ii) en vue de faire renaître une cause d'action qui est prescrite suivant le sous-al. 36(4)a)(i), et que cette renaissance atténuerait toute iniquité créée par l'application du délai de prescription du sous-al. 36(4)a)(i) (m.a. (Pioneer), par. 92). Selon moi, ce n'est pas ainsi que fonctionne le sous-al. 36(4)a)(ii). Cette disposition n'est qu'un exemple de délai de prescription auquel la règle de la possibilité de découvrir ne s'applique pas parce que, comme l'a dit la Cour d'appel de l'Ontario dans l'arrêt *Fanshawe*, le fait déclencheur du délai de prescription prévu au sous-al. 36(4)a)(ii) — la date à laquelle il est statué sur la poursuite — n'est [TRADUCTION] « pas lié à la cause d'action ou à la connaissance du demandeur » (par. 47). Si l'on compare le sous-al. 36(4)a)(i) au sous-al. 36(4)a)(ii), le législateur voulait probablement que la règle de la possibilité de découvrir s'applique au premier délai de prescription, mais non au deuxième. Qui plus est, lorsqu'*aucune* poursuite *n'*est intentée contre le contrevenant, le soi-disant effet d'atténuation attribué au sous-al. 36(4)a)(ii) ne serait d'aucun secours au demandeur dont le droit d'action a expiré par application du sous-al. 36(4)a)(i).

[46] So much for the statutory text and scheme. I turn, then, to consider this limitation period's relation to the overall object of the *Competition Act*, which is to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy . . . and . . . provide consumers with competitive prices and product choices" (*Competition Act*, s. 1.1). Anti-competitive agreements — which represent "conduct that is contrary to . . . Part VI" (s. 36(1)(a)) — are invariably conducted through secrecy and deception (*Fanshawe*, at para. 46; C.A. reasons, at para. 93), meaning that they are, by their very nature, *unknown* to s. 36(1)(a) claimants. Parliament would have known this when enacting the limitation provision contained in s. 36(4)(a)(i). It would therefore be absurd, and would render the cause of action granted by s. 36(1)(a) almost meaningless, to state that Parliament did not intend for discoverability to apply, such that the plaintiff's right of action would expire prior to his or her acquiring knowledge of the anti-competitive behaviour. I agree with the Court of Appeal that "it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule in s. 36(4)" (C.A. reasons, at para. 93).

[46] Voilà pour le texte législatif et le régime qu'il établit. Je passe maintenant à l'examen du lien qui unit le délai de prescription à l'objet général de la *Loi sur la concurrence*, qui est de « préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne [. . .] de même que [. . .] d'assurer aux consommateurs des prix compétitifs et un choix dans les produits » (*Loi sur la concurrence*, art. 1.1). Les ententes anticoncurrentielles — qui participent des « comportement[s] allant à l'encontre [. . .] de la partie VI » (al. 36(1)a)) — font invariablement appel au secret et à la tromperie (*Fanshawe*, par. 46; motifs de la C.A., par. 93), ce qui veut dire qu'elles sont, de par leur nature même, *inconnues* des demandeurs visés par l'al. 36(1)a). Le législateur devait le savoir lorsqu'il a établi le délai de prescription du sous-al. 36(4)a)(i). Il serait non seulement absurde d'affirmer qu'il n'était pas dans l'intention du législateur que la règle de la possibilité de découvrir s'applique, de sorte que le droit d'action du demandeur expirerait avant qu'il prenne connaissance du comportement anticoncurrentiel, mais affirmer cela reviendrait à dénuer pratiquement de son sens la cause d'action reconnue par l'al. 36(1)a). Je conviens avec la Cour d'appel [TRADUCTION] « [qu']il est impossible de dire que le législateur a voulu accorder si peu d'importance aux intérêts des demandeurs lésés, dans les cas d'allégation de complot, qu'il a écarté le recours à la règle de la possibilité de découvrir au par. 36(4) » (motifs de la C.A., par. 93).

[47] The application of discoverability to the limitation period in s. 36(4)(a)(i) is also supported by the object of statutory limitation periods. This Court has recognized that three rationales underlie limitation periods (*M. (K.)*, at pp. 29-31), which courts must consider in deciding whether the discoverability rule applies to a particular limitation period. The first is that limitation periods foster *certainty*, in that "[t]here comes a time . . . when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations"(*M. (K.)*, at p. 29). This concern must be balanced against the unfairness of allowing a wrongdoer to escape liability while the victim of injury continues to suffer the consequences (*M. (K.)*,

[47] L'application de la règle de la possibilité de découvrir au délai de prescription prévu au sous-al. 36(4)a)(i) est également étayée par l'objet sous-tendant les délais de prescription légaux. Notre Cour a reconnu que les délais de prescription reposent sur trois justifications (*M. (K.)*, p. 29-31), dont les tribunaux doivent tenir compte pour décider si la règle de la possibilité de découvrir s'applique à un délai de prescription donné. La première est que les délais de prescription favorisent la *certitude*, en ce qu'« [i]l arrive un moment [. . .] où un éventuel défendeur devrait être raisonnablement certain qu'il ne sera plus redevable de ses anciennes obligations » (*M. (K.)*, p. 29). Ce souci de certitude doit être soupesé en regard de l'iniquité qui consiste à permettre à

at p. 29). The second rationale is *evidentiary*: limitation periods are intended to help prevent evidence from going stale, to the detriment of the plaintiff or the defendant (*M. (K.)*, at p. 30). Finally, limitation periods serve to encourage *diligence* on the part of plaintiffs in pursuing their claims (*M. (K.)*, at p. 30).

[48] Consideration of these rationales for limitation periods affirms discoverability's application here. Even recognizing that shorter limitation periods indicate that Parliament put a premium on the certainty that comes with a limitation statute's function of repose (*Peixeiro*, at para. 34), balancing all of the competing interests underlying s. 36(4)(a)(i) weighs in favour of applying discoverability. The ability of plaintiffs to advance claims for loss arising from conduct contrary to Part VI of the *Competition Act* outweighs defendants' interests in barring them, especially where such conduct is, as I have already noted, concealed from plaintiffs (*Fanshawe*, at para. 46) (such that the evidentiary rationale — that is, the concern about evidence going "stale" — has no place in the analysis). To hold otherwise would create perverse incentives, encouraging continued concealment of anti-competitive behaviour until the two-year limitation period has elapsed. It would therefore not only bar plaintiffs from pursuing their claims, but reward concealment that has been "particularly effective" (*Fanshawe*, at para. 49).

[49] In contrast, applying discoverability to s. 36(4)(a)(i) would not unduly affect the defendant's interests, as discoverability does not excuse the plaintiff from moving matters along, such that the rationale of encouraging diligence is still served (*Peixeiro*, at para. 39). Where plaintiffs sleep on their rights or otherwise do not diligently pursue their

un contrevenant d'échapper à sa responsabilité alors que la victime du préjudice continue à en subir les conséquences (*M. (K.)*, p. 29). La deuxième justification se rattache à la *preuve* : les délais de prescription visent à empêcher que des éléments de preuve deviennent périmés, au détriment du demandeur ou du défendeur (*M. (K.)*, p. 30). Enfin, les délais de prescription servent à encourager les demandeurs à faire preuve de *diligence* dans la poursuite de leurs actions (*M. (K.)*, p. 30).

[48] L'examen des justifications qui sous-tendent les délais de prescription confirme que le principe de la possibilité de découvrir s'applique en l'espèce. Même si je reconnais que la brièveté d'un délai de prescription tend à indiquer que le législateur attache une grande importance à la certitude qui découle de toute loi visant à assurer la tranquillité d'esprit (*Peixeiro*, par. 34), j'estime que la mise en balance de l'ensemble des intérêts divergents sur lesquels repose le sous-al. 36(4)a)(i) milite en faveur de l'application de la règle de la possibilité de découvrir. La capacité des demandeurs de poursuivre en justice pour les pertes découlant d'un comportement allant à l'encontre de la partie VI de la *Loi sur la concurrence* l'emporte sur l'intérêt des défendeurs à les en empêcher, surtout lorsqu'un tel comportement a lieu, comme je l'ai déjà mentionné, à l'insu des demandeurs (*Fanshawe*, par. 46) (de sorte que la justification rattachée à la preuve — la crainte que la preuve devienne « périmée » — n'a pas sa place dans l'analyse). Conclure autrement aurait pour effet indésirable d'inciter l'auteur du comportement anticoncurrentiel à continuer de garder le secret jusqu'à l'expiration du délai de prescription de deux ans. Non seulement les demandeurs ne pourraient pas intenter leurs recours, mais l'on se trouverait à récompenser l'auteur d'une tromperie qui a été [TRADUCTION] « particulièrement efficace » (*Fanshawe*, par. 49).

[49] Par contraste, l'application de la règle de la possibilité de découvrir au sous-al. 36(4)a)(i) ne nuirait pas indûment aux intérêts des défendeurs, car la règle de la possibilité de découvrir ne dispense pas le demandeur de faire avancer sa cause, de sorte que l'objectif d'encourager la diligence demeure atteint (*Peixeiro*, par. 39). Le demandeur qui tarde

claims, discoverability will not operate to extend the limitation period (Mew et al., at p. 83).

à exercer ses droits ou qui n'agit pas avec diligence dans la poursuite de son action ne pourra bénéficier de l'application de la règle de la possibilité de découvrir pour faire prolonger le délai de prescription (Mew et autres, p. 83).

[50] For all of these reasons, I find that the discoverability rule applies to the limitation period in s. 36(4)(a)(i), such that it begins to run only when the material facts on which Godfrey's claim is based were discovered by him or ought to have been discovered by him by the exercise of reasonable diligence.

[50] Pour toutes ces raisons, j'estime que la règle de la possibilité de découvrir s'applique au délai de prescription du sous-al. 36(4)a)(i), de sorte que ce délai n'a commencé à courir qu'à la date à laquelle M. Godfrey a découvert les faits importants sur lesquels repose sa demande ou encore à la date à laquelle il les aurait découverts s'il avait fait preuve de diligence raisonnable.

(2) Fraudulent Concealment

(2) Dissimulation frauduleuse

[51] In light of my finding that discoverability applies to s. 36(4)(a)(i), it is, strictly speaking, unnecessary to consider the doctrine of fraudulent concealment. Given, however, the submissions and attention given to this issue at the courts below, I will comment briefly here on whether fraudulent concealment requires establishing a special relationship between the parties.

[51] Étant donné ma conclusion que la règle de la possibilité de découvrir s'applique au sous-al. 36(4)a)(i), il est pour ainsi dire inutile d'examiner la doctrine de la dissimulation frauduleuse. Toutefois, compte tenu de l'attention accordée à cette question devant les juridictions inférieures, ainsi que des observations qui ont été présentées à ce sujet, je me prononcerai brièvement sur la question de savoir si la dissimulation frauduleuse exige la preuve d'une relation spéciale entre les parties.

[52] Fraudulent concealment is an equitable doctrine that prevents limitation periods from being used "as an instrument of injustice" (*M. (K.)*, at pp. 58-59). Where the defendant fraudulently conceals the existence of a cause of action, the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 390). It is a form of "equitable fraud" (*Guerin*, at p. 390; *M. (K.)*, at pp. 56-57), which is not confined to the parameters of the common law action for fraud (*M. (K.)*, at p. 57). As Lord Evershed, M.R. explained in *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), at p. 249, cited in *M. (K.)*, at pp. 56-57:

[52] La doctrine de la dissimulation frauduleuse est une doctrine d'equity qui vise à empêcher que les délais de prescription servent « à créer une injustice » (*M. (K.)*, p. 58-59). Si le défendeur a dissimulé frauduleusement l'existence d'une cause d'action, le délai de prescription est suspendu jusqu'au moment où le demandeur découvre, ou aurait raisonnablement dû découvrir, la fraude (*Guerin c. La Reine*, [1984] 2 R.C.S. 335, p. 390). Il s'agit d'une forme de « fraude d'*equity* » (*Guerin*, p. 390; *M. (K.)*, p. 56-57), qui n'est pas limitée par les paramètres de l'action pour fraude de la common law (*M. (K.)*, p. 57). Comme l'a expliqué le maître des rôles lord Evershed dans l'arrêt *Kitchen c. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), p. 249, cité dans l'arrêt *M. (K.)*, p. 56-57 :

> It is now clear . . . that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to

> [TRADUCTION] Il est maintenant évident [. . .] que le terme « fraude » employé à l'al. 26b) de la Limitation Act, 1939, n'est aucunement limité à une tromperie ou à une fraude de

the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which LORD HARDWICKE did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added in *M. (K.)*.]

[53] While it is therefore clear that equitable fraud *can* be established in cases where a special relationship subsists between the parties, Lord Evershed, M.R. did not limit its establishment to such circumstances, nor did he purport to define exhaustively the circumstances in which it would or would not apply (see *T.P. v. A.P.*, 1988 ABCA 352, 92 A.R. 122, at para. 10). Indeed, he expressly refused to do so: "What is covered by equitable fraud is a matter which LORD HARDWICKE did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now" (*Kitchen*, at p. 249 (emphasis added)).

[54] When, then, does fraudulent concealment arise so as to delay the running of a limitation period? Recalling that it is a form of *equitable* fraud, it becomes readily apparent that what matters is *not* whether there is a *special relationship* between the parties, but whether it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action. This was the Court's point in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 39:

[Equitable fraud] ". . . refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken" . . . . [Emphasis added.]

common law. Il est également clair, compte tenu de l'arrêt *Beaman c. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, qu'aucun degré de turpitude morale n'est nécessaire pour prouver qu'il y a fraude au sens de l'article. Ce que vise la fraude d'equity est une chose que LORD HARDWICKE n'a pas tenté de définir il y a deux cents ans et que je ne tenterai certainement pas de définir maintenant; toutefois, j'estime qu'il est clair que cette expression vise une conduite qui, compte tenu de la relation spéciale qui existe entre les parties concernées, est une iniquité de la part de l'une envers l'autre. [Souligné dans *M. (K.)*.]

[53] S'il est donc évident que la fraude d'equity *peut* être établie dans les cas où il existe une relation spéciale entre les parties, le maître des rôles lord Evershed ne l'a pas limitée à ces cas, non plus qu'il n'a tenté de définir de façon exhaustive les cas où elle pourrait, ou non, s'appliquer (voir *T.P. c. A.P.*, 1988 ABCA 352, 92 A.R. 122, par. 10). Il a d'ailleurs refusé expressément de le faire : [TRADUCTION] « Ce que vise la fraude d'equity est une chose que LORD HARDWICKE n'a pas tenté de définir il y a deux cents ans et que je ne tenterai certainement pas de définir maintenant » (*Kitchen*, p. 249 (je souligne)).

[54] Mais alors quand la présence d'une dissimulation frauduleuse permet-elle de retarder le point de départ d'un délai de prescription? Rappelons qu'il s'agit d'une forme de fraude d'equity. Partant, il devient évident que ce qui importe, ce *n'*est *pas* de savoir s'il existe une *relation spéciale* entre les parties, mais si, *pour quelque* raison *que ce soit*, il serait *abusif* pour le défendeur de profiter de l'avantage obtenu en dissimulant l'existence d'une cause d'action. C'est ce qu'a expliqué la Cour dans *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 CSC 19, [2002] 1 R.C.S. 678, par. 39 :

[La fraude d'equity] « . . . s'entend également d'opérations qui ne sont pas dolosives, mais à l'égard desquelles le tribunal estime qu'il serait abusif de laisser une personne profiter de l'avantage obtenu » (p. 37). Au « sens plus large » de fraude donnant ouverture à une réparation en equity, la fraude se présente sous [TRADUCTION] « un nombre tellement infini de formes que les tribunaux n'ont pas tenté de la définir », mais « elle vise toutes sortes de manœuvres déloyales et de conduites abusives en matière contractuelle » . . . [Je souligne.]

It follows that the concern which drives the application of the doctrine of equitable fraud is not limited to the unconscionability of taking advantage of a special relationship with the plaintiff. Nor is the doctrine's application limited, as my colleague suggests, to cases where there is something "tantamount to or commensurate with" a special relationship between the plaintiff and the defendant (paras. 171 and 173-74). While a special relationship is *a* means by which a defendant might conceal the existence of a cause of action, equitable fraud may also be established by pointing to other forms of unconscionable behaviour, such as (for example) "some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts" (*M. (K.)*, at p. 57, citing *Halsbury's Laws of England* (4th ed. 1979), vol. 28, at para. 919). In short, the inquiry is not into the *relationship* within which the conduct occurred, but into the *unconscionability* of the conduct itself.

[55] The question of whether Pioneer's alleged conduct amounts to fraudulent concealment will, of course, fall to be decided by a trial judge. Nevertheless, I agree with the Court of Appeal and the certification judge that it is not "plain and obvious" that fraudulent concealment could not delay the running of the limitation period in this case (C.A. reasons, at para. 110).

B. *Umbrella Purchasers' Cause of Action Under Section 36(1) of the Competition Act*

[56] Toshiba argues that the certification judge erred by certifying the umbrella purchasers' claims brought under s. 36(1)(a) of the *Competition Act.* For the following reasons, I disagree.

[57] Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of law, reviewable on a standard of correctness. Since, as I explain below, I have concluded that umbrella purchasers *do* have a cause of action

Il s'ensuit que ce n'est pas seulement l'iniquité qui découle du fait de laisser une personne profiter de l'avantage d'une relation spéciale avec le demandeur qui justifie l'application de la doctrine de la fraude d'equity. L'application de la doctrine n'est pas non plus restreinte, comme le suggère ma collègue, aux cas où il y a quelque chose d'« équivalen[t] ou correspondant à » une relation spéciale entre le demandeur et le défendeur (par. 171 et 173-174). Bien qu'une relation spéciale soit pour le défendeur *un* moyen de dissimuler l'existence d'une cause d'action, la fraude d'equity peut aussi être établie en invoquant d'autres formes de conduite abusive, par exemple [TRADUCTION] « que l'on [a] abusé d'une situation de confiance, que l'on [a] délibérément abusé de la bonté de quelqu'un ou délibérément caché des faits » (*M. (K.)*, p. 57, citant *Halsbury's Laws of England* (4e éd. 1979), vol. 28, par. 919). Bref, l'examen ne porte pas sur la *relation* dans le cadre de laquelle le comportement a eu lieu, mais sur le *caractère abusif* du comportement lui-même.

[55] La question de savoir si le comportement reproché à Pioneer constitue de la dissimulation frauduleuse devra, bien sûr, être tranchée par le juge de première instance. Néanmoins, je conviens avec la Cour d'appel et le juge saisi de la demande d'autorisation qu'il n'est pas « évident et manifeste » que la doctrine de la dissimulation frauduleuse ne pouvait retarder le point de départ du délai de prescription en l'espèce (motifs de la C.A., par. 110).

B. *La cause d'action que reconnaît le par. 36(1) de la Loi sur la concurrence aux acheteurs sous parapluie*

[56] Toshiba soutient que le juge saisi de la demande d'autorisation a commis une erreur en autorisant les réclamations présentées par les acheteurs sous parapluie sur le fondement de l'al. 36(1)a) de la *Loi sur la concurrence.* Pour les motifs qui suivent, je ne suis pas d'accord avec elle.

[57] La question de savoir si les acheteurs sous parapluie ont une cause d'action fondée sur l'al. 36(1)a) de la *Loi sur la concurrence* est une question de droit susceptible de contrôle selon la norme de la décision correcte. Puisque, comme je l'explique plus loin, j'ai

under s. 36(1)(a), it is *not* plain and obvious that their claim cannot succeed. Godfrey's pleadings disclose a cause of action for umbrella purchasers, thereby satisfying the conditions under s. 4(1)(a) of the *Class Proceedings Act* for certification.

conclu que les acheteurs sous parapluie *ont effectivement* une cause d'action fondée sur l'al. 36(1)a), il *n'*est *pas* manifeste et évident que leur demande ne peut être accueillie. Les actes de procédure de M. Godfrey révèlent une cause d'action dont sont titulaires les acheteurs sous parapluie, répondant ainsi aux conditions d'autorisation prévues à l'al. 4(1)a) de la *Class Proceedings Act*.

[58] The theory behind holding price-fixers liable to umbrella purchasers — who, it will be recalled are in this case persons who purchased ODDs or ODD products neither manufactured nor supplied by the defendants — is that the defendants' anti-competitive cartel activity creates an "umbrella" of supra-competitive prices, causing non-cartel manufacturers to raise their prices (*Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87 ("*Shah (Ont. S.C.J.)*"), at para. 159). Additionally, the European Court of Justice in *Kone AG and Others v. ÖBB-Infrastruktur AG*, [2014] EUECJ C-557/12, explained umbrella pricing as:

> Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or the size of the market covered by that cartel, it <u>cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition</u>, that is, in the absence of that cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that <u>such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules</u>. [Emphasis added; para. 29.]

[58] La logique qui sous-tend la recherche de la responsabilité des participants à un accord de fixation des prix envers les acheteurs sous parapluie — qui, rappelons-le, sont en l'espèce les personnes qui ont acheté des LDO ou des produits munis de LDO qui n'ont été ni fabriqués, ni fournis par les défenderesses — est que les activités anticoncurrentielles des défenderesses créent un « parapluie » ou une « ombrelle » de prix supraconcurrentiels qui provoque une hausse des prix chez les fabricants ne faisant pas partie du cartel (*Shah c. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87 (« *Shah (C.S.J. Ont.)* »), par. 159). En outre, la Cour de justice de l'Union européenne a expliqué en ces termes dans *Kone AG et autres c. ÖBB-Infrastruktur AG*, [2014] EUECJ C-557/12, l'effet d'ombrelle (ou effet parapluie) sur les prix :

> Lorsqu'une entente parvient à maintenir un prix artificiellement élevé pour certains produits et que certaines conditions du marché sont réunies, tenant, notamment, à la nature du produit ou à la taille du marché couvert par cette entente, <u>il ne peut être exclu que l'entreprise concurrente, extérieure à celle-ci, choisisse de fixer le prix de son offre à un montant supérieur à celui qu'elle aurait choisi dans des conditions normales de concurrence</u>, c'est-à-dire en l'absence de ladite entente. Dans un tel contexte, même si la détermination d'un prix d'offre est considérée comme une décision purement autonome, adoptée par l'entreprise ne participant pas à une entente, il y a lieu cependant de constater <u>que cette décision a pu être prise par référence à un prix du marché faussé par cette entente et, par conséquent, contraire aux règles de concurrence</u>. [Je souligne; par. 29.]

[59] In short, a rising tide lifts all boats; under the theory of umbrella pricing, the entire market for the subject product is affected:

> Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products.

[59] Bref, la marée monte également pour tous les bateaux; selon la théorie de l'effet parapluie sur les prix, c'est l'ensemble du marché du produit en cause qui est touché :

> [TRADUCTION] L'effet parapluie se produit habituellement lorsqu'une augmentation des prix donne lieu à

Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders. . . . [T]he increased demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market . . . or in neighboring markets.

(R. Inderst, F. Maier-Rigaud and U. Schwalbe, "Umbrella Effects" (2014), 10 *J. Competition L. & Econ.* 739, at p. 740)

[60] Several decisions of lower courts have certified umbrella purchaser actions brought under s. 36(1)(a) without expressly considering whether such purchasers had a cause of action (see: *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270; *Pro-Sys Consultants Ltd v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Irving Paper Ltd. v. Atofina Chemicals Inc*. (2009), 99 O.R. (3d) 358 (S.C.J.); *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 1682, 54 C.P.C. (7th) 111). Appellate decisions in British Columbia and Ontario have, however, expressly considered the issue and concluded that they *do* (see: C.A. reasons, at para. 247; *Shah v. LG Chem, Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721 ("*Shah (ONCA)*"), at para. 52).

[61] Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of statutory interpretation. The text of s. 36(1)(a) must therefore be read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme and objects of the *Competition Act*.

(1) <u>Text of Section 36(1)</u>

[62] As already noted, s. 36(1)(a) of the *Competition Act* creates a statutory cause of action which allows for the recovery of damages or loss that resulted from

un détournement de la demande vers des produits de substitution. Comme les participants à un cartel prospère s'entendent en général pour réduire les quantités et augmenter les prix, ce détournement se traduit par un abandon des produits du cartel au profit des produits fabriqués par des non participants au cartel. [. . .] [L]a demande accrue pour les produits de substitution entraîne habituellement une hausse des prix de ces produits. Cette hausse est appelée l'« effet parapluie » et cet effet peut se produire sur le même marché pertinent [. . .] ou sur des marchés voisins.

(R. Inderst, F. Maier-Rigaud et U. Schwalbe, « Umbrella Effects » (2014), 10 *J. Competition L. & Econ.* 739, p. 740)

[60] Dans plusieurs décisions, les juridictions inférieures ont autorisé des actions intentées par des acheteurs sous parapluie en vertu de l'al. 36(1)a) sans se demander explicitement si ces acheteurs avaient une cause d'action (voir : *Fairhurst c. Anglo American PLC*, 2014 BCSC 2270; *Pro-Sys Consultants Ltd c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Irving Paper Ltd. c. Atofina Chemicals Inc*. (2009), 99 O.R. (3d) 358 (C.S.J.); *Crosslink Technology Inc. c. BASF Canada*, 2014 ONSC 1682, 54 C.P.C. (7th) 111). Des tribunaux d'appel de la Colombie-Britannique et de l'Ontario ont toutefois expressément abordé la question et conclu qu'ils en *avaient* une (voir : motifs de la C.A., par. 247; *Shah c. LG Chem, Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721 (« *Shah (ONCA)* »), par. 52).

[61] La question de savoir si les acheteurs sous parapluie ont une cause d'action fondée sur l'al. 36(1)a) de la *Loi sur la concurrence* est une question d'interprétation législative. Le texte de l'al. 36(1)a) doit donc être lu dans son contexte global et en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie et les objets de la *Loi sur la concurrence*.

(1) <u>Texte du par. 36(1)</u>

[62] Comme je l'ai déjà expliqué, l'al. 36(1)a) de la *Loi sur la concurrence* crée une cause d'action qui permet l'indemnisation d'une perte ou des dommages

conduct contrary to Part VI. The relevant portion states:

Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI . . .

. . .

may . . . sue for and recover from the person who engaged in the conduct . . . an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[63] Godfrey relies on "conduct that is contrary to . . . Part VI" ("Offences in Relation to Competition"), since he alleges that Toshiba acted contrary to s. 45(1)(b), (c), and (d) of the *Competition Act*. During the class period,[1] s. 45(1) stated:

Conspiracy

45. (1) Every one who conspires, combines, agrees or arranges with another person

. . .

(*b*) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

[1] Section 45(1) was amended by the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 410. The amendments are not material to these reasons for judgment.

qui découlent d'un comportement allant à l'encontre de la partie VI. Voici les passages pertinents :

Recouvrement de dommages-intérêts

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) . . . d'un comportement allant à l'encontre d'une disposition de la partie VI;

. . .

peut [. . .] réclamer et recouvrer de la personne qui a eu un tel comportement [. . .] une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[63] M. Godfrey se fonde sur les termes « comportement allant à l'encontre [. . .] de la partie VI » (« Infractions relatives à la concurrence »), puisqu'il allègue que Toshiba a agi en contravention des al. 45(1)b), c), et d) de la *Loi sur la concurrence*. Durant la période visée par le recours collectif[1], le par. 45(1) était rédigé comme suit :

Complot

45. (1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale d'un million de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

. . .

b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, dans le prix d'assurances sur les personnes ou les biens;

[1] Le paragraphe 45(1) a été modifié par la *Loi d'exécution du budget de 2009*, L.C. 2009, c. 2, art. 410. Les modifications ne sont pas importantes pour les présents motifs.

(*d*) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million dollars or to both.

[64] The text of s. 36(1)(a) supports the view that umbrella purchasers have a cause of action thereunder for conduct contrary to s. 45(1) of the *Competition Act*. Section 36(1)(a) provides a cause of action to *any person* who has *suffered loss or damage* as a result of conduct contrary to s. 45. Significantly, Parliament's use of "any person" does not narrow the realm of possible claimants. Rather, it empowers *any* claimant who can demonstrate that loss or damage was incurred as a result of the defendant's conduct to bring a claim. On this point, the following paragraph from the Court of Appeal for Ontario's decision in *Shah (ONCA)* (at para. 34) is apposite, and I adopt it as mine:

On a plain reading, if the umbrella purchasers can prove loss resulting from a proven conspiracy under s. 45, s. 36(1) grants those purchasers a statutory means by which to recover those losses. Taking the language at face value, the umbrella purchasers' right of recovery is limited only by their ability to demonstrate two things: (1) that the respondents conspired within the meaning of s. 45; and (2) that the losses or damages suffered by the appellants resulted from that conspiracy.

(2) Purpose of the *Competition Act*

[65] As I have already recounted, the purpose of the *Competition Act* is to "maintain and encourage competition in Canada" with a view to providing consumers with "competitive prices and product choices" (s. 1.1). A conspiracy to price-fix is the "very antithesis of the *Competition Act*'s objective" (*Shah (ONCA)*, at para. 38). Monetary sanctions for such anti-competitive conduct therefore further the *Competition Act*'s purpose. This Court has also recognized two other objectives of the *Competition*

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

[64] Le texte de l'al. 36(1)a) étaye le point de vue selon lequel, sous son régime, les acheteurs sous parapluie ont une cause d'action pour tout comportement allant à l'encontre du par. 45(1) de la *Loi sur la concurrence*. L'alinéa 36(1)a) accorde un droit d'action à *toute personne* qui a *subi une perte ou des dommages* par suite d'un comportement allant à l'encontre de l'art. 45. Fait important, l'emploi, par le législateur, de l'expression « toute personne » n'a pas pour effet de restreindre les catégories de demandeurs éventuels. Cette expression a plutôt pour effet d'habiliter à intenter un recours *tout* demandeur capable de démontrer que la perte ou le dommage a été subi en raison du comportement du défendeur. Sur ce point, le paragraphe suivant tiré de l'arrêt *Shah (ONCA)* de la Cour d'appel de l'Ontario (par. 34) est pertinent et je le fais mien :

[TRADUCTION] Suivant le sens ordinaire des mots utilisés, si les acheteurs sous parapluie peuvent démontrer qu'ils ont subi une perte par suite d'un complot établi sur le fondement de l'art. 45, le par. 36(1) leur accorde un moyen de recouvrer cette perte. Interprété au pied de la lettre, le par. 36(1) confère aux acheteurs sous parapluie un droit de recouvrement qui n'est limité que par leur capacité à démontrer deux choses : (1) que les intimés ont comploté au sens de l'art. 45; et (2) que la perte ou les dommages subis par les appelants découlent de ce complot.

(2) Objet de la *Loi sur la concurrence*

[65] Comme je l'ai déjà mentionné, l'objet de la *Loi sur la concurrence* est de « préserver et de favoriser la concurrence au Canada » dans le but d'assurer aux consommateurs « des prix compétitifs et un choix dans les produits » (art. 1.1). Comploter en vue de fixer les prix va [TRADUCTION] « totalement à l'encontre de l'objet de la *Loi sur la concurrence* » (*Shah (ONCA)*, par. 38). Les sanctions pécuniaires imposées dans de tels cas de conduite anticoncurrentielle favorisent ainsi l'atteinte de la fin visée par la *Loi sur*

Act of particular relevance here, being deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour (*Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600 ("*Infineon*"), at para. 111; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545 ("*Sun-Rype*"), at paras. 24-27; *Microsoft*, at paras. 46-49). Interpreting s. 36(1)(a) so as to permit umbrella purchaser actions furthers both of these objectives.

la concurrence. Notre Cour a reconnu deux autres objectifs de la *Loi sur la concurrence* qui revêtent en l'espèce une importance particulière : la dissuasion des comportements anticoncurrentiels et l'indemnisation des victimes de ces comportements (*Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600 (« *Infineon* »), par. 111; *Sun-Rype Products Ltd. c. Archer Daniels Midland Company*, 2013 CSC 58, [2013] 3 R.C.S. 545 (« *Sun-Rype* »), par. 24-27; *Microsoft*, par. 46-49). Interpréter l'al. 36(1)a) de façon à autoriser les actions des acheteurs sous parapluie favorise l'atteinte de ces deux objectifs.

[66] Allowing umbrella purchaser actions furthers deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour (*Shah (ONCA)*, at para. 38). Here, Godfrey alleges that four of the named defendants controlled 94 percent of the global ODD market (A.R., vol. II, at para. 70). While this means that Toshiba's potential liability to the umbrella purchasers would only marginally increase its existing liability to non-umbrella purchasers, I accept that any increase in potential liability will likely carry a correspondingly deterrent effect.

[66] Autoriser les actions des acheteurs sous parapluie favorise la dissuasion, en ce que le risque de responsabilité auquel s'exposent ceux qui se livrent à des comportements anticoncurrentiels augmente (*Shah (ONCA)*, par. 38). En l'espèce, M. Godfrey allègue que quatre des défenderesses désignées contrôlaient 94 p. 100 du marché global des LDO (d.a., vol. II, par. 70). Bien que cela signifie que la responsabilité potentielle à laquelle s'expose Toshiba à l'égard des acheteurs sous parapluie ne ferait qu'augmenter légèrement la responsabilité qu'elle a envers les autres acheteurs que ceux sous parapluie, je reconnais que toute augmentation de sa responsabilité éventuelle aura probablement un effet dissuasif correspondant.

[67] The objective of compensation is also furthered by allowing umbrella purchaser actions, because doing so affords umbrella purchasers recourse to recover from loss arising from what, for the purposes of these appeals, is assumed to have been anti-competitive conduct. Barring a class of purchasers who were, on the theory pleaded, intended by the defendants to pay higher prices as a result of their price-fixing is inconsistent with the compensatory goal of the *Competition Act*.

[67] Autoriser les actions des acheteurs sous parapluie favorise également l'atteinte de l'objectif d'indemnisation, parce que ces acheteurs auraient ainsi la possibilité de recouvrer les pertes découlant de ce qui, pour les besoins des présents pourvois, est présumé être un comportement anticoncurrentiel. Exclure une catégorie d'acheteurs qui, selon la thèse avancée, devaient payer des prix plus élevés par suite du stratagème de fixation des prix établi par les défenderesses est incompatible avec l'objectif d'indemnisation de la *Loi sur la concurrence*.

[68] Relatedly, and while far from determinative, departmental and parliamentary statements fortify my view that Parliament intended that the cause of action in s. 36(1)(a) be broadly available, such that anyone who suffers a loss from anti-competitive behaviour could bring a private action. The briefing document accompanying the first stage of the

[68] Dans le même ordre d'idées, bien que ce soit loin d'être concluant, certaines déclarations ministérielles et parlementaires me confortent dans mon opinion que le législateur entendait que la cause d'action prévue à l'al. 36(1)a) soit largement accessible, de sorte que quiconque subit une perte par suite d'un comportement anticoncurrentiel peut intenter

modernization amendments (which introduced the original civil remedies provision) stated:

Under the existing law there is no civil recourse under the Act for persons injured by reason of the fact that others have participated in violation of the Combines Investigation Act. The provision dealing with civil damages, although it is expected to be of particular value to small businessmen who have been hurt by conduct contrary to the Act, will be equally available to consumers and to any other members of the public who have been so damaged.

The amendment provides that anyone who has suffered loss or damage because of such a violation . . . may . . . sue for and be awarded damages equal to the actual loss incurred . . . . [Emphasis added.]

(Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada* (1973), at pp. 48-49)

This is further supported by parliamentary committee discussions on the introduction of a private cause of action. In committee, the responsible minister explicitly stated that there was no reason to limit consumers' recourse under the private cause of action to direct loss or damage (House of Commons, Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence*, Issue No. 45, 1st Sess., 30th Parl., May 8 1975, at p. 45:18).

(3) Indeterminate Liability

[69] Toshiba argues that recognizing the umbrella purchasers as having a cause of action would expose Toshiba to a "potentially limitless scope of liability" (A.F. (Toshiba), at para. 97). This raises the question, first of all, of whether indeterminate liability is relevant *at all* to deciding the scope of possible s. 36(1)(a) claimants for conduct contrary to s. 45(1) of the *Competition Act*. On this point, the Court of Appeal considered that it might be relevant

une action privée. On peut lire ce qui suit dans le document d'information préparé à l'occasion de la première étape des modifications visant à moderniser la Loi (qui ont mené à l'adoption de la première disposition relative aux recours civils) :

En vertu de la loi actuelle, il n'existe pas de recours possible en dommages-intérêts pour les personnes lésées du fait que d'autres ont participé à des infractions à la Loi relative aux enquêtes sur les coalitions. La disposition visant les dommages-intérêts sera d'une valeur particulière pour les petites entreprises lésées par des actions contraire (*sic*) à la Loi mais ladite disposition pourra également être invoquée par les consommateurs et par toutes personnes ayant été ainsi lésées.

La modification stipule que toute personne qui a subi des pertes ou un préjudice à cause d'une telle infraction [. . .] peut intenter des poursuites et recevoir des dommages-intérêts équivalents à la perte réelle subie . . . [Je souligne.]

(Consommation et Corporations Canada, *Propositions pour une nouvelle politique de concurrence pour le Canada* (1973), p. 45)

Cette opinion est de plus étayée par les délibérations du comité parlementaire sur la création d'une cause d'action en droit privé. En comité, le ministre responsable a expressément déclaré qu'il n'y avait aucune raison de limiter le recours par les consommateurs à la cause d'action en droit privé pour recouvrer la perte ou les dommages directement subis (Chambre des communes, Comité permanent des finances, du commerce et des questions économiques, *Procès-verbaux et témoignages*, fasc. nº 45, 1re sess., 30e lég., 8 mai 1975, p. 45:18).

(3) Responsabilité indéterminée

[69] Toshiba soutient que la reconnaissance d'une cause d'action aux acheteurs sous parapluie aurait pour effet de l'exposer à une [TRADUCTION] « responsabilité potentiellement illimitée » (m.a. (Toshiba), par. 97). Ce qui nous amène, premièrement, à la question de savoir si la responsabilité indéterminée est un facteur d'une *quelconque* pertinence pour décider qui sont les demandeurs susceptibles de se prévaloir de l'al. 36(1)a) par suite d'un comportement allant à

(on the express assumption that concerns about indeterminate liability might properly be considered outside the context of a negligence action) (C.A. reasons, at para. 227). I note, parenthetically, that whether that assumption is valid — that is, whether indeterminate liability might properly be considered *at all* in the context of a claim under s. 36(1)(a) of the *Competition Act* — I am content to leave for another day since, for the reasons that follow, I am of the view that indeterminate liability would not arise in this case in any event.

l'encontre du par. 45(1) de la *Loi sur la concurrence*. Sur ce point, la Cour d'appel a jugé (en supposant expressément que les préoccupations au sujet de la responsabilité indéterminée pourraient valablement être examinées dans un contexte autre que celui d'une action pour négligence) qu'il pourrait s'agir d'un facteur pertinent (motifs de la C.A., par. 227). Je signale incidemment qu'il vaut mieux reporter à une autre occasion l'analyse de la question de savoir si cette hypothèse est valide — c'est-à-dire si la responsabilité indéterminée est *susceptible* d'être valablement examinée dans le contexte d'une demande fondée sur l'al. 36(1)a) de la *Loi sur la concurrence* — puisque, pour les motifs qui suivent, j'estime que la question de la responsabilité indéterminée ne se poserait pas en l'espèce de toute façon.

[70] Toshiba argues that indeterminate liability is a relevant consideration here because the umbrella purchasers seek to recover for pure economic loss. Toshiba relies upon this Court's statement in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, that "[t]he risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss" (para. 100). In *Imperial Tobacco*, a class proceeding was brought against Imperial Tobacco by persons who purchased "light" or "mild" cigarettes. Imperial Tobacco issued third-party notices to the Government of Canada, alleging it was liable to tobacco companies for, *inter alia*, negligent misrepresentation. This Court held that "the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation", since "Canada had no control over the number of people who smoked light cigarettes" (para. 99). Similarly, Toshiba argues that it had no control over the quantity of ODDs sold to the umbrella purchasers by non-defendant manufacturers or the number of purchasers to whom it may be liable, such that the extent of its liability is indeterminate (A.F. (Toshiba), at para. 102).

[70] Toshiba soutient que la responsabilité illimitée est une considération pertinente en l'espèce, parce que les acheteurs sous parapluie cherchent à être indemnisés d'une perte purement économique. Toshiba se fonde à cet égard sur une affirmation de notre Cour dans l'arrêt *R. c. Imperial Tobacco Canada Ltd.*, 2011 CSC 42, [2011] 3 R.C.S. 45 : « Le risque de responsabilité indéterminée est aggravé par le caractère purement financier de la perte alléguée » (par. 100). Dans *Imperial Tobacco*, un recours collectif avait été intenté contre Imperial Tobacco par des consommateurs de cigarettes « légères » ou « douces ». Imperial Tobacco avait mis en cause le gouvernement du Canada, alléguant qu'il était responsable envers les compagnies de tabac, entre autres, pour avoir fait des déclarations inexactes par négligence. La Cour a conclu que « la possibilité d'une responsabilité indéterminée porte un coup fatal aux allégations des compagnies de tabac relatives aux déclarations inexactes faites par négligence », puisque le « Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères » (par. 99). De même, toujours selon Toshiba, elle n'exerçait aucun contrôle sur le nombre de LDO vendus aux acheteurs sous parapluie par des fabricants autres que les défenderesses ou sur le nombre d'acheteurs envers qui elle risque d'être tenue responsable, de sorte que l'étendue de sa responsabilité est indéterminée (m.a. (Toshiba), par. 102).

[71] Several features of this case, however, lead me to the view that recognizing the umbrella purchasers'

[71] Toutefois, plusieurs éléments de la présente affaire m'amènent à conclure que la reconnaissance

cause of action under s. 36(1)(a) does not risk exposing Toshiba to indeterminate liability.

de la cause d'action des acheteurs sous parapluie fondée sur l'al. 36(1)a) ne risque pas d'exposer Toshiba à une responsabilité indéterminée.

[72] First, Toshiba's liability is limited by the class period, and by the specific products whose prices are alleged to have been fixed. Whereas in *Imperial Tobacco*, Canada had no control over who smoked light cigarettes (para. 99), the theory of umbrella effects links the pricing decisions of the non-defendant manufacturers to Toshiba's anti-competitive behaviour (C.A. reasons, at para. 239). I have already noted that Godfrey's pleadings allege that, during the class period, four of the named defendants collectively controlled 94 percent of the global ODD market. Godfrey also alleges that Toshiba intended to raise prices across that market (A.R., vol. II, at pp. 21-22). This allegation is rooted in the theory that, in order for Toshiba to profit from the conspiracy, the entire market price for ODDs had to increase. Otherwise, Toshiba would have lost market share to non-defendant manufacturers (transcript, at pp. 56-57, A.R., vol. III, at p. 166).

[72] Premièrement, la responsabilité de Toshiba est limitée par la période visée par le recours collectif et par les produits dont les prix auraient été fixés. Alors que dans l'affaire *Imperial Tobacco*, le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères (par. 99), la théorie de l'effet parapluie établit un lien entre les décisions prises par les fabricants autres que les défenderesses quant à l'établissement des prix et le comportement anticoncurrentiel de Toshiba (motifs de la C.A., par. 239). J'ai déjà mentionné que M. Godfrey allègue dans ses actes de procédure que, durant la période visée par le recours collectif, quatre des défenderesses désignées contrôlaient à elles seules 94 p. 100 du marché global des LDO. M. Godfrey a aussi allégué que Toshiba entendait augmenter les prix dans l'ensemble de ce marché (d.a., vol. II, p. 21-22). Cette allégation tire son origine de la thèse voulant que, pour que Toshiba puisse tirer profit du complot, les prix du marché global des LDO devaient augmenter. Sinon, Toshiba aurait perdu une part de marché en faveur des fabricants autres que les défenderesses (transcription, p. 56-57, d.a., vol. III, p. 166).

[73] This supports the submission made before us by Godfrey's counsel that umbrella effects are "not just a known and foreseeable consequence of what the defendants are doing, it's an intended consequence" (transcript, at p. 61). The point is that the results of Toshiba's alleged anti-competitive behaviour are not indeterminate. Intended results are *not indeterminate*, but *pre-determined*. I therefore agree with the Court of Appeal that there is "no reason why defendants who intend to inflict damage on umbrella purchasers should be exonerated from liability on the basis that they exercised no control over their liability" (C.A. reasons, at para. 241).

[73] Cela étaye l'observation faite devant nous par l'avocat de M. Godfrey selon qui l'effet parapluie n'est [TRADUCTION] « pas juste une conséquence connue et prévisible des agissements des défenderesses, c'est une conséquence voulue » (transcription, p. 61). Le fait est que les résultats du comportement anticoncurrentiel de Toshiba ne sont pas indéterminés. Des résultats voulus *ne* sont *pas indéterminés*, mais *déterminés à l'avance*. Je suis donc d'accord avec la Cour d'appel pour dire qu'il n'existe [TRADUCTION] « aucune raison pour que les défenderesses, dont l'intention était de causer un préjudice aux acheteurs sous parapluie, soient dégagées de toute responsabilité parce qu'elles n'exerçaient aucun contrôle sur leur responsabilité » (motifs de la C.A., par. 241).

[74] Secondly, and as I have already recounted, s. 36(1)(a) limits recovery to only those purchasers who can show that they suffered a loss or damage "as a result of" the defendants' conspiratorial conduct. In

[74] Deuxièmement, comme je l'ai déjà mentionné, l'al. 36(1)a) limite le recours en indemnisation aux seuls acheteurs qui peuvent démontrer qu'ils ont subi une perte ou des dommages « par suite » du complot

order to recover under s. 36(1)(a), then, the umbrella purchasers will have to demonstrate that Toshiba engaged in anti-competitive behaviour, that the umbrella purchasers suffered "loss or damage", and that such loss or damage was "as a result of" such behaviour. The statutory text "as a result of" imports both factual and legal causation into s. 36(1). Recovery under s. 36(1) is therefore limited to claimants with a loss that is not too remote from the conduct.

[75] Thirdly, the text of s. 45(1) in force during the class period is instructive. The elements of the wrongful conduct outlined therein were described by the British Columbia Court of Appeal in *Watson* (at paras. 73-74):

> [T]he *actus reus* elements of former s. 45 are:
>
> i) the defendant conspired, combined, agreed, or arranged with another person; and
>
> ii) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.
>
> The *mens rea* element of former s. 45 as defined in [*R.*] *v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (S.C.C.) at 659-660, (1992), 93 D.L.R. (4th) 36 (S.C.C.), requires:
>
> i) the defendant had a subjective intention to agree and was aware of the agreement's terms; and
>
> ii) the defendant had the required objective intention, that is, a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly.

(See also: *Shah (ONCA)*, at para. 50; *R. c. Proulx*, 2016 QCCA 1425, at para. 20 (CanLII).)

While the subjective *mens rea* does not require that the defendants' conduct be directed specifically towards the claimant, s. 45(1) "limits the reach of

des défenderesses. Pour être indemnisés en vertu de l'al. 36(1)a), les acheteurs sous parapluie devront démontrer que Toshiba a eu un comportement anticoncurrentiel, qu'ils ont subi une « perte ou des dommages » et que cette perte ou ces dommages ont été subis « par suite » du comportement en question. L'expression « par suite » intègre tant la causalité factuelle que la causalité juridique au par. 36(1). Seuls les demandeurs ayant subi une perte qui n'est pas trop éloignée du comportement peuvent donc être indemnisés en vertu du par. 36(1).

[75] Troisièmement, le libellé du par. 45(1) qui était en vigueur durant la période visée par le recours collectif est instructif. Les éléments constitutifs du comportement répréhensible sont décrits par la Cour d'appel de la Colombie-Britannique dans l'arrêt *Watson* (par. 73-74) :

> [TRADUCTION] [L]es éléments constitutifs de l'*actus reus* requis par l'ancien art. 45 sont :
>
> i) le défendeur a comploté, s'est coalisé ou a conclu un accord ou un arrangement avec une autre personne;
>
> ii) l'accord visait à élever déraisonnablement le prix d'un produit, ou à réduire indûment la fourniture d'un produit ou, de toute autre façon, à restreindre indûment la concurrence ou à lui nuire indûment.
>
> La *mens rea* de l'infraction prévue à l'ancien art. 45, telle que définie dans l'arrêt [*R.*] *c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606 (C.S.C.), p. 659-660, (1992), 93 D.L.R. (4th) 36 (C.S.C.), exige ce qui suit :
>
> i) le défendeur avait une intention subjective de conclure un accord et il était au courant des modalités de l'accord;
>
> ii) le défendeur avait l'intention objective requise, c'est-à-dire qu'un homme ou une femme d'affaires raisonnable saurait ou devrait savoir que l'accord aura vraisemblablement pour effet de restreindre indûment la concurrence.

(Voir aussi : *Shah (ONCA)*, par. 50; *R. c. Proulx*, 2016 QCCA 1425, par. 20 (CanLII).)

Bien que la *mens rea* subjective n'exige pas que le comportement des défendeurs soit dirigé directement contre le demandeur, le par. 45(1) [TRADUCTION] « limite liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct" (*Shah (ONCA)*, at para. 51).

[76] Taken together, these features of ss. 36(1)(a) and 45(1) of the *Competition Act* limit the availability of this cause of action to those claimants who can demonstrate: (1) a causal link between the loss suffered and the conspiratorial conduct; and (2) that the defendants' conduct satisfies the *actus reus* and *mens rea* elements of s. 45(1) of the *Competition Act*.

[77] This is not to say that umbrella purchasers' actions will not be complex or otherwise difficult to pursue. Marshalling and presenting evidence to satisfy the conditions placed by Parliament on recovery under ss. 36(1)(a) and 45(1) — showing a causal link between loss and conspiratorial conduct, and proving the *actus reus* and *mens rea* of s. 45(1) — represents a significant burden. That said, this Court's statement in *Microsoft* (at paras. 44-45) regarding indirect purchaser claims is, in my view, equally applicable to claims brought by umbrella purchasers:

> Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However, . . . these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case . . . .
>
> In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.

And, of course, in this case it will be for the trial judge to determine whether the umbrella purchaser

l'étendue de la responsabilité à ceux qui, au minimum, ont eu l'intention expresse de convenir d'un comportement anticoncurrentiel » (*Shah (ONCA)*, par. 51).

[76] Considérés ensemble, ces éléments de l'al. 36(1)a) et du par. 45(1) de la *Loi sur la concurrence* ont pour effet de limiter cette cause d'action aux demandeurs qui peuvent démontrer : (1) un lien de causalité entre la perte subie et le complot; et (2) que le comportement des défendeurs satisfait à l'*actus reus* et à la *mens rea* requis par le par. 45(1) de la *Loi sur la concurrence*.

[77] Cela ne veut pas dire qu'il ne sera pas compliqué ou autrement difficile pour les acheteurs sous parapluie de poursuivre leurs actions. Rassembler et présenter suffisamment d'éléments de preuve pour satisfaire aux conditions d'indemnisation imposées par le législateur à l'al. 36(1)a) et au par. 45(1) — établir un lien de causalité entre la perte et le complot, ainsi que l'*actus reus* et la *mens rea* de l'infraction prévue au par. 45(1) — représente un lourd fardeau. Cela dit, la déclaration de notre Cour dans l'arrêt *Microsoft* (par. 44-45) au sujet des recours des acheteurs indirects s'applique, à mon avis, tout autant aux actions intentées par les acheteurs sous parapluie :

> L'action intentée par un acheteur indirect, surtout sur le fondement des dispositions antitrust, comporte souvent une preuve volumineuse, la formulation de théories économiques complexes et l'existence de nombreuses parties le long de la chaîne de distribution, de sorte qu'il est d'autant plus ardu de retracer le parcours de la majoration d'un maillon à l'autre jusqu'à son aboutissement final. Toutefois, [. . .] il s'agit de caractéristiques communes à la plupart des affaires antitrust et elles ne devraient donc pas empêcher l'acheteur indirect de prouver ses allégations . . .
>
> L'acheteur indirect qui intente une action contracte volontairement l'obligation d'établir qu'il a subi une perte, ce qui peut fort bien nécessiter le témoignage d'experts et une preuve complexe de nature économique. À mon avis, la question de savoir si ces éléments lui permettront de s'acquitter de cette obligation tient aux faits de l'espèce. Il n'y a pas lieu de faire totalement obstacle à l'action de l'acheteur indirect pour la seule raison qu'il sera ardu d'établir le préjudice subi.

Bien entendu, il appartiendra au juge de première instance de décider en l'espèce si les acheteurs sous claimants have presented sufficient evidence to establish that, in the circumstances of the case and in the relevant market, Toshiba caused umbrella pricing.

[78] In view of the foregoing, it is not plain and obvious that the umbrella purchasers' cause of action under s. 36(1)(a) of the *Competition Act* cannot succeed, and I would reject this ground of appeal.

C. *Section 36(1) of the Competition Act Does Not Bar Common Law or Equitable Claims*

[79] In addition to his statutory claims under the *Competition Act*, Godfrey advances claims in, *inter alia*, civil conspiracy.

[80] Toshiba argues that the courts below erred in two respects concerning the relationship between a statutory claim under the *Competition Act* and the tort of civil conspiracy. First, it says that the tort of civil conspiracy based on a breach of the predecessor statute to the *Competition Act* (the *Combines Investigation Act*, R.S.C. 1970, c. C-23) was never available to plaintiffs prior to the enactment in 1975 of the private right of action. Secondly, and in any event, the courts below failed to recognize that, by legislating ss. 36(1) and 45(1) of the *Competition Act*, Parliament intended to oust the common law tort of civil conspiracy (A.F. (Toshiba), at para. 119).

[81] These arguments raise questions of law, and are therefore reviewed on a standard of correctness. For the reasons below, I reject both arguments, and it is therefore not plain and obvious that Godfrey's common law and equitable claims cannot succeed, except as was otherwise held by the certification judge.[2]

2 As recounted at para. 11, the certification judge held that the pleadings did not disclose a cause of action for unlawful means tort, or (in respect of the umbrella purchasers) for unjust enrichment and waiver of tort.

parapluie ont présenté suffisamment d'éléments de preuve pour établir que, dans les circonstances, Toshiba a entraîné un effet d'ombrelle sur les prix.

[78] Compte tenu de ce qui précède, il n'est pas évident et manifeste que la cause d'action des acheteurs sous parapluie fondée sur l'al. 36(1)a) de la *Loi sur la concurrence* ne peut être accueillie et je rejetterais ce moyen d'appel.

C. *Le paragraphe 36(1) de la Loi sur la concurrence ne fait pas obstacle aux recours de common law ou d'equity*

[79] Outre le recours qu'il a intenté sous le régime de la *Loi sur la concurrence,* M. Godfrey a intenté, entre autres, une action pour complot civil.

[80] Toshiba soutient que les tribunaux d'instance inférieure ont commis deux erreurs en ce qui concerne le lien entre une action intentée sous le régime de la *Loi sur la concurrence* et le délit de complot civil. Premièrement, elle fait valoir qu'un demandeur, avant l'adoption, en 1975, du droit d'action privé, ne pouvait jamais avoir recours au délit de complot civil fondé sur une violation de la loi qu'a remplacée la *Loi sur la concurrence* (la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, c. C-23). Deuxièmement, en tout état de cause, les tribunaux d'instance inférieure ont eu tort de ne pas reconnaître que, par l'adoption des par. 36(1) et 45(1) de la *Loi sur la concurrence*, le législateur entendait écarter le délit de common law qu'est le complot civil (m.a. (Toshiba), par. 119).

[81] Ces arguments soulèvent des questions de droit, et ils sont donc contrôlés suivant la norme de la décision correcte. Pour les motifs qui suivent, je rejette les deux arguments, si bien qu'il n'est pas évident et manifeste que les recours de common law ou d'equity exercés par M. Godfrey ne peuvent être accueillis, sauf indication contraire dans les conclusions du juge saisi de la demande d'autorisation[2].

2 Comme je l'ai mentionné au par. 11, le juge saisi de la demande d'autorisation a statué que les actes de procédure n'avaient pas révélé une cause d'action pour délit d'atteinte par un moyen illégal ou (à l'égard des acheteurs sous parapluie) pour enrichissement sans cause et renonciation au recours délictuel.

(1) The Tort of Civil Conspiracy Based on the Breach of a Statute Existed Prior to the Enactment of the Statutory Cause of Action

[82] To be clear, I do not dispute Toshiba's submission that the 1975 amendments were significant. The predecessor to the *Competition Act* (the *Combines Investigation Act*) was exclusively penal — indeed, its constitutionality as an exercise of Parliament's legislative authority over the criminal law was upheld in *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.). In 1975, Parliament supplemented this penal function with regulatory and civil enforcement provisions, including a civil remedy provision (now s. 36(1)) (*Watson*, at para. 36).

[83] All this said, our law had recognized the tort of civil conspiracy based on the breach of a statute long before Parliament legislated a civil right of action in 1975. In *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, and *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, this Court imposed liability on trade unions for unlawful means conspiracy for conduct prohibited by statute (*Therien*, at p. 280; *Gagnon*, at p. 446). And, in *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, which was decided on the basis of the *Combines Investigation Act*, this Court affirmed not only the existence of the tort of civil conspiracy, but also that a breach of the *Combines Investigation Act* could satisfy the "unlawful" element of unlawful means conspiracy (pp. 471-72). Any question on this point was settled when *LaFarge* was cited in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 64, for the same proposition — that a breach of statute could satisfy the "unlawful means" component of the tort of unlawful means conspiracy.

[84] The law admits of no ambiguity on this point. Prior to the enactment of the cause of action contained in what is now s. 36(1) of the *Competition Act*,

(1) Le délit de complot civil fondé sur la violation d'une loi existait avant l'adoption de la disposition conférant une cause d'action

[82] Pour être clair, je ne conteste pas l'argument de Toshiba selon lequel les modifications de 1975 étaient importantes. La loi ayant précédé la *Loi sur la concurrence* (la *Loi relative aux enquêtes sur les coalitions*) était de nature exclusivement pénale — en effet, comme elle résultait de l'exercice du pouvoir législatif fédéral en matière de droit criminel, sa constitutionnalité a été confirmée dans l'arrêt *Proprietary Articles Trade Association c. Attorney General for Canada*, [1931] A.C. 310 (C.P.). En 1975, le législateur a suppléé à la fonction pénale de cette loi en adoptant des dispositions d'exécution de nature réglementaire et civile, dont une disposition prévoyant un recours civil (l'actuel par. 36(1)) (*Watson*, par. 36).

[83] Tout cela étant dit, notre droit avait reconnu le délit de complot civil fondé sur la violation d'une loi bien avant que le législateur ait adopté une disposition créant un droit d'action au civil en 1975. Dans les arrêts *International Brotherhood of Teamsters c. Therien*, [1960] R.C.S. 265, et *Gagnon c. Foundation Maritime Ltd.*, [1961] R.C.S. 435, notre Cour a tenu les syndicats responsables de complot exécuté par des moyens illégaux car ils avaient agi en contravention de la loi (*Therien*, p. 280; *Gagnon*, p. 446). Et dans l'arrêt *Cement LaFarge c. B.C. Lightweight Aggregate*, [1983] 1 R.C.S. 452, qui repose sur la *Loi relative aux enquêtes sur les coalitions*, notre Cour a non seulement confirmé l'existence du délit de complot civil, mais elle a aussi reconnu qu'une violation de cette loi pouvait constituer l'élément d'« illégalité » du délit de complot exécuté par des moyens illégaux (p. 471-472). S'il subsistait le moindre doute sur ce point, il a été écarté lorsque, dans l'arrêt *A.I. Enterprises Ltd. c. Bram Enterprises Ltd.*, 2014 CSC 12, [2014] 1 R.C.S. 177, par. 64, la Cour a cité l'arrêt *LaFarge* à l'appui de la même proposition — qu'une violation de la loi pouvait satisfaire à l'élément « moyens illégaux » du délit de complot exécuté par des moyens illégaux.

[84] Le droit ne laisse place à aucune ambiguïté sur ce point. Avant l'adoption de la disposition conférant une cause d'action qui se trouve dans ce qui est

a breach of s. 45(1) of the *Competition Act* was, as it still is, able to satisfy the "unlawful means" element of the tort of civil conspiracy.

(2) The Enactment of the Statutory Cause of Action Did Not Oust Common Law and Equitable Actions

[85] Turning to Toshiba's other argument, the starting point in deciding whether a common law right of action has been legislatively ousted is the presumption that Parliament does not intend to abrogate common law rights (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 538). While s. 36(1) does not by its express terms oust common law causes of action, legislation may rebut this presumption by ousting the common law either expressly *or by necessary implication* (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1315-16).

[86] In *Gendron*, this Court held, for three reasons, that the *Canada Labour Code*, R.S.C. 1970, c. L-1 (as amended by S.C. 1972, c. 18; S.C. 1977-78, c. 27) ousted the common law duty of fair representation by necessary implication. First, the content of the duty in the *Canada Labour Code* was co-extensive with the common law duty such that "[t]he common law duty is . . . not in any sense additive; it is merely duplicative" (p. 1316). Secondly, in enacting the *Canada Labour Code*, Parliament enacted a comprehensive and exclusive code, which indicated an intention for the *Canada Labour Code* to "occupy the whole field in terms of a determination of whether or not a union has acted fairly" (p. 1317). Finally, the *Canada Labour Code* provided a "new and superior method of remedying a breach" of the duty of fair representation (p. 1319).

[87] None of these considerations apply to s. 36(1) of the *Competition Act*, relative to the common law tort of civil conspiracy. Section 36(1) is neither duplicative of the tort of civil conspiracy nor does it provide a "new and superior" remedy. Claims under

devenu le par. 36(1) de la *Loi sur la concurrence*, une infraction au par. 45(1) de la *Loi sur la concurrence* pouvait, et peut encore, satisfaire à l'élément « moyens illégaux » du délit de complot civil.

(2) L'adoption de la disposition conférant une cause d'action n'a pas écarté les recours de common law

[85] En ce qui concerne l'autre argument de Toshiba, le point de départ pour déterminer si un recours de common law a été écarté par une loi est la présomption que le législateur n'a pas l'intention d'abroger des droits reconnus par la common law (R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 538). Si le par. 36(1) n'exclut pas expressément les causes d'action fondées sur la common law, il reste qu'une loi peut réfuter cette présomption en écartant la common law de façon expresse *ou par déduction nécessaire* (*Gendron c. Syndicat des approvisionnements et services de l'Alliance de la Fonction publique du Canada, section locale 50057*, [1990] 1 R.C.S. 1298, p. 1315-1316).

[86] Dans l'arrêt *Gendron*, notre Cour a conclu, pour trois motifs, que le *Code canadien du travail*, S.R.C. 1970, c. L-1 (modifié par S.C. 1972, c. 18; S.C. 1977-78, c. 27) avait écarté, par déduction nécessaire, le devoir de juste représentation reconnu par la common law. Premièrement, le contenu du devoir imposé par le *Code canadien du travail* correspond à celui de common law, de sorte que « ce devoir n'ajoute rien; il fait simplement double emploi » (p. 1316). Deuxièmement, en adoptant le *Code canadien du travail,* le législateur a adopté un code complet et exclusif, ce qui témoignait de son intention que le *Code canadien du travail* « occupe tout le champ lorsqu'il s'agit de déterminer si un syndicat a agi de façon juste » (p. 1317). Enfin, le *Code canadien du travail* prévoit « une nouvelle façon, [. . .] supérieure [au devoir de common law], de remédier à un manquement » au devoir de juste représentation (p. 1319).

[87] Aucune de ces considérations ne s'applique au par. 36(1) de la *Loi sur la concurrence* relativement au délit de complot civil en common law. Le paragraphe 36(1) ne fait pas double emploi avec le délit de complot civil et il ne prévoit pas non plus de

s. 36(1) are subject to the limitation period stated in s. 36(4), whereas the tort of civil conspiracy is subject to provincial limitations statutes. Additionally, the tort of civil conspiracy allows for a broader range of remedies than is available under s. 36(1), such as punitive damages (*Watson*, at para. 57).

[88] Nor does s. 36(1) represent a comprehensive and exclusive code regarding claims for anti-competitive conspiratorial conduct. That this is so is made plain by s. 62 of the *Competition Act* ("Civil rights not affected") which contemplates the subsistence of common law and equitable rights of action by providing that "nothing in this Part [which includes s. 45(1), in respect of which s. 36(1) creates a statutory right of action] shall be construed as depriving any person of any civil right of action". This is also consistent with this Court's conclusion in *Infineon* (at para. 95) that it was open for a plaintiff to proceed with its claim under art. 1457 of the *Civil Code of Québec* ("*C.C.Q.*") for the alleged violation of s. 45(1) of the *Competition Act*. Were s. 36(1) a complete and exclusive code, no such claim under the *C.C.Q.* would have been possible.

[89] I therefore would reject this ground of appeal. The courts below correctly decided that it is not plain and obvious that Godfrey is precluded from bringing common law and equitable causes of action alongside his s. 36(1)(a) claim. Additionally, a breach of s. 45(1) of the *Competition Act* can supply the "unlawful" element of the tort of civil conspiracy. I see nothing in my colleague's reasons (at paras. 193-203) that deviates in any respect from my own on this point.

D. *Certifying Loss as a Common Issue*

[90] Toshiba's final ground of appeal relates to the requirement in s. 4(1)(c) of the *Class Proceedings Act* that class members' claims raise common issues.

« nouvelle façon [. . .] supérieure » de remédier à un manquement. Les actions fondées sur le par. 36(1) sont visées par le délai de prescription du par. 36(4), alors que le délit de complot civil est assujetti aux lois provinciales en matière de prescription. De plus, le délit de complot civil offre un éventail plus large de réparations que le par. 36(1), telles que les dommages-intérêts punitifs (*Watson*, par. 57).

[88] Le paragraphe 36(1) n'est pas non plus un code complet et exclusif régissant les actions pour comportement ou complot anticoncurrentiel. C'est ce qui ressort clairement de l'art. 62 de la *Loi sur la concurrence* (« Droits civils non atteints »), qui prévoit le maintien des droits d'action en common law et en equity : « . . . la présente partie [dont le par. 45(1), à l'égard duquel le par. 36(1) crée un droit d'action] n'a pas pour effet de priver une personne d'un droit d'action au civil ». Cela s'accorde également avec la conclusion de notre Cour dans l'arrêt *Infineon* (par. 95) qu'un demandeur pouvait choisir de se fonder sur l'art. 1457 du *Code civil du Québec* (« *C.c.Q.* ») pour faire valoir ses droits par suite d'une violation du par. 45(1) de la *Loi sur la concurrence*. Si le par. 36(1) avait constitué un code complet et exclusif, aucun recours n'aurait été possible sous le régime du *C.c.Q.*

[89] Je rejetterais donc ce moyen d'appel. Les tribunaux d'instance inférieure ont à juste titre décidé qu'il n'est pas évident et manifeste que M. Godfrey ne peut exercer des recours de common law et d'equity en même temps qu'une action fondée sur l'al. 36(1)a). J'ajouterai qu'une violation du par. 45(1) de la *Loi sur la concurrence* peut fournir l'élément d'« illégalité » du délit de complot civil. Je ne vois rien dans les motifs de ma collègue (par. 193-203) qui s'écarte d'une façon ou d'une autre de mon opinion sur ce point.

D. *Autorisation de la question de la perte en tant que question commune*

[90] Le dernier moyen d'appel avancé par Toshiba se rapporte à l'exigence imposée par l'al. 4(1)c) de la *Class Proceedings Act* que les demandes des membres du groupe soulèvent des questions communes.

[91] Godfrey sought to certify several loss-related questions as common issues, principally whether the class members suffered economic loss (Sup. Ct. reasons, at para. 143). These questions were stated broadly enough that they could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss. And, because they could be taken in two different ways they might, following the common issues trial, be answered in different ways.

[91] M. Godfrey a demandé qu'un certain nombre de questions relatives à la perte soient autorisées en tant que questions communes, principalement celle de savoir si les membres du groupe avaient subi une perte économique (motifs de la C.S., par. 143). Ces questions sont formulées de façon suffisamment large pour qu'elles puissent être interprétées comme demandant si *tous* les membres du groupe ont subi une perte économique ou si *l'un* d'entre eux a subi une perte économique. Parce que ces questions peuvent être interprétées de deux façons différentes, elles pourraient donc, à la suite de l'audition des questions communes, appeler des réponses différentes.

[92] The certification judge certified the common issues relating to loss on the basis that the standard outlined in *Microsoft* requires that a plaintiff's expert methodology need only establish loss at the indirect-purchaser level (Sup. Ct. reasons, at paras. 167 and 179). The questions, therefore, of whether *any* class members suffered loss and of whether *all* class members suffered loss, fulfill the requirements of a common question. Toshiba says that he erred, and argues that *Microsoft* requires, for loss to be certified as a common issue, that a plaintiff's expert's methodology be capable either of showing loss to *each and every class member*, or of distinguishing between those class members who suffered loss from those who did not (A.F. (Toshiba), at para. 63). Dr. Reutter's methodology, Toshiba says, does not meet this standard (A.F. (Toshiba), at para. 76).

[92] Le juge saisi de la demande d'autorisation a autorisé les questions communes liées à la perte au motif que, selon le critère établi dans l'arrêt *Microsoft*, la méthode proposée par l'expert d'un demandeur doit seulement permettre d'établir la perte subie par l'acheteur indirect (motifs de la C.S., par. 167 et 179). Les questions de savoir si *un* des membres du groupe a subi une perte et si *tous* les membres du groupe en ont subi une remplissent les conditions d'une question commune. Toshiba affirme qu'il s'agit là d'une erreur et que selon l'arrêt *Microsoft*, pour que la question de la perte puisse être autorisée en tant que question commune, la méthode proposée par l'expert d'un demandeur doit permettre soit d'établir la perte subie par *chacun des membres du groupe*, soit de faire la distinction entre les membres du groupe qui ont subi une perte et ceux qui n'en ont pas subi (m.a. (Toshiba), par. 63). La méthode proposée par M. Reutter, affirme Toshiba, ne respecte pas ce critère (m.a. (Toshiba), par. 76).

[93] Godfrey responds that the courts below correctly held that *Microsoft* requires, as a condition of certifying loss as a common issue, only a methodology capable of establishing that overcharges were passed on to the indirect-purchaser level (R.F. (Toshiba Appeal), at para. 93). This standard is consistent with the principles underlying the commonality requirement, since a single answer to whether loss reached the indirect-purchaser level significantly advances the litigation. Dr. Reutter's methodology meets this standard (R.F. (Toshiba Appeal), at para. 94).

[93] M. Godfrey répond que les juridictions inférieures ont conclu à bon droit que l'arrêt *Microsoft* assujettit l'autorisation d'une question de perte en tant que question commune à la condition que la méthode proposée permette d'établir que la majoration a été refilée à l'acheteur indirect (m.i. (pourvoi de Toshiba), par. 93). Ce critère respecte les principes qui sous-tendent l'exigence du caractère commun, puisque la moindre réponse à la question de savoir si la perte a été refilée à l'acheteur indirect fait avancer substantiellement l'instance. La méthode proposée par M. Reutter satisfait à ce critère (m.i. (pourvoi de Toshiba), par. 94).

[94] The appropriate standard for certifying loss as a common issue at the certification stage is a question of law, to be reviewed on appeal for correctness. If I conclude that the certification judge identified the correct standard, then the certification judge's decision to certify the issues as common may not be disturbed absent a palpable and overriding error.

(1) Dr. Reutter's Methodology

[95] Application of the *Microsoft* standard here requires some review of Dr. Reutter's report. In that report, he drew two conclusions:

(1) . . . all members of the proposed Class would have been impacted by the actions of defendants as alleged in the *Amended Notice of Civil Claim*, and

(2) . . . there are accepted methods available to estimate any overcharge and aggregate damages that resulted from the alleged wrongdoing using evidence common to the proposed Class.

(A.R., vol. III, at p. 119)

[96] These conclusions were based on the presence of four economic factors during the period of the alleged conspiracy that suggest that the ODD industry was vulnerable to collusive conduct (A.R., vol. III, at pp. 122-23 and 136). These factors are:

(1) [ODDs] are commodity-like and manufactured to conform to industry standards,

(2) during the proposed Class period [the] defendants accounted for a majority of all [ODDs] manufactured worldwide,

(3) there are no economic substitutes for [ODDs], and;

(4) the manufacture of [ODDs] exhibits barriers to entry.

(A.R., vol. III, at pp. 119-20)

[94] La norme qu'il convient d'appliquer pour autoriser la question de la perte en tant que question commune au stade de l'autorisation est une question de droit qui doit être contrôlée en appel suivant la norme de la décision correcte. Si je conclus que le juge saisi de la demande d'autorisation a identifié la bonne norme, la décision du juge saisi de la demande d'autorisation ne peut être modifiée en l'absence d'une erreur manifeste et dominante.

(1) Méthode proposée par M. Reutter

[95] L'application du critère de l'arrêt *Microsoft* à la présente affaire nous impose d'examiner le rapport de M. Reutter. Dans ce rapport, M. Reutter tire deux conclusions :

[TRADUCTION]

(1) . . . tous les membres du groupe projeté auraient été touchés par les actes des défenderesses, ainsi qu'il est allégué dans l'*Avis de poursuite civile modifié*.

(2) . . . des méthodes acceptables permettent d'estimer la valeur de toute majoration et de tout préjudice global qui ont découlé des actes fautifs reprochés, et ce, au moyen de la preuve commune du groupe projeté.

(d.a., vol. III, p. 119)

[96] Ces conclusions reposaient sur la présence, durant la période du complot allégué, de quatre facteurs économiques tendant à indiquer que l'industrie des LDO était vulnérable aux comportements collusoires (d.a., vol. III, p. 122-123 et 136). Voici ces facteurs :

[TRADUCTION]

(1) Les [LDO] s'apparentent à des produits de base et sont fabriqués selon les normes de l'industrie,

(2) durant la période visée par le recours collectif projeté, les défenderesses fabriquaient la majorité des [LDO] à l'échelle mondiale,

(3) il n'existe aucun substitut économique aux LDO, et

(4) la fabrication de LDO se heurte à des barrières à l'entrée.

(d.a., vol. III, p. 119-120)

Because of the presence of these four factors, and the laws of supply and demand, Dr. Reutter concluded that "any conspiratorial overcharge would have been absorbed in part and passed-through in part at each level of the distribution chain, thus impacting all members of the proposed Class" (A.R., vol. III, at pp. 120 and 148).

[97] In order to estimate overcharges and aggregate damages arising from the alleged price-fixing, Dr. Reutter developed a methodology to estimate the "but-for" price of the products subject to the anticompetitive conduct (A.R., vol. III, at p. 150). This involves use of mainstream and accepted economic methodologies based on multiple regression (Sup. Ct. reasons, at para. 158). In particular, it entails three steps:

> First, for the matter at hand, an economic model describing the interaction of the supply of and demand for [ODDs] must be developed. Second, based on the economic model, data will need to be collected from various sources, including defendants (when available), as well as public and third party vendors. Third, standard statistical and econometric techniques are used to determine the extent to which the alleged conspiracy resulted in supra-competitive prices for [ODDs].

(A.R., vol. III, at p. 150)

[98] In order to quantify the aggregate damages suffered by the proposed class, Dr. Reutter proposes to quantify the damages suffered by direct and indirect purchasers in the proposed class, which quantification can occur on a class-wide basis, using accepted economic and statistical methods (Sup. Ct. reasons, at para. 159). Overcharge, once estimated, can then be allocated among the class members (A.R., vol. III, at p. 167). Both aggregate damages and overcharge can be estimated using defendant transaction data, supplemented with data collected from public and private sources (A.R., vol. III, at p. 120).

À cause de la présence de ces quatre facteurs, ainsi que des lois de l'offre et de la demande, M. Reutter a conclu que [TRADUCTION] « toute majoration découlant d'une collusion aurait été absorbée en partie et refilée en partie à chacun des niveaux de la chaîne de distribution, de sorte que tous les membres du groupe projeté ont été touchés » (d.a., vol. III, p. 120 et 148).

[97] Afin d'estimer la valeur de la majoration et du préjudice global ayant découlé de la fixation des prix alléguée, M. Reutter a conçu une méthode permettant d'évaluer le prix des produits en cause en l'absence de tout comportement anticoncurrentiel (d.a., vol. III, p. 150). Il faut pour cela recourir aux méthodes économiques courantes et reconnues fondées sur la régression multiple (motifs de la C.S., par. 158). La méthode comporte, plus précisément, trois étapes :

> [TRADUCTION] Premièrement, s'agissant de l'affaire qui nous occupe, il faut élaborer un modèle économique qui décrit l'interaction entre l'offre et la demande de [LDO]. Deuxièmement, à partir de ce modèle économique, des données devront être recueillies auprès de diverses sources, notamment des défenderesses (si de telles données sont disponibles), ainsi que du public et des vendeurs autres que les défenderesses. Troisièmement, grâce à des techniques normalisées d'analyse statistique et économétrique, il faudra déterminer la mesure dans laquelle le complot allégué a mené à des prix supraconcurrentiels pour les [LDO].

(d.a., vol. III, p. 150)

[98] Afin de quantifier le préjudice global subi par le groupe proposé, M. Reutter propose de quantifier les dommages subis par les acheteurs directs et les acheteurs indirects du groupe proposé, ce qui peut se faire à l'échelle du groupe au moyen de méthodes reconnues d'analyse économique et statistique (motifs de la C.S., par. 159). Une fois estimée, la majoration peut être répartie entre les membres du groupe (d.a., vol. III, p. 167). Le préjudice global et la majoration peuvent être estimés à l'aide des données relatives aux opérations commerciales des défenderesses, ainsi que de renseignements recueillis auprès du public et de sources privées (d.a., vol. III, p. 120).

[99] The question of whether a plaintiff's methodology must show loss at the indirect purchaser level or loss to each and every class member appears to be moot, since Dr. Reutter opines that all class members were impacted by Toshiba's anti-competitive behaviour; his methodology therefore satisfies either standard. Toshiba, however, points to its cross-examination of Dr. Reutter at the certification hearing as obtaining the concession that his methodology cannot demonstrate that all class members suffered a loss (A.F. (Toshiba), at paras. 86-87). At the hearing before this Court, counsel for Godfrey argued that Toshiba's counsel mischaracterized what emerged from that cross-examination (transcript, at p. 59). Because of this dispute, it is important to examine what actually occurred.

[100] After confirming that Dr. Reutter would use an average selling price across the ODD market to estimate overcharge, the following exchange took place:

399 Q. And implicit in the average is the fact that some class members may not have suffered any loss, but they would be compensated by the amount of the average overcharge in relation to the purchase that they made?

A. It's an empirical question and I don't want to sound flippant, but it depends. There may be some -- there may be some small subset or subset, I don't want to put an adjective in front of it. <u>There may be some subset that were not impacted. I don't, from an economic standpoint, understand how that would be if there was, in fact, a conspiracy that fixed the price at the upstream and then that was, in fact, passed through.</u>

. . .

403 Q. . . . But if you conclude that some members were not impacted once you do the analysis, then they would be compensated even though they suffered no loss?

[99] La question de savoir si la méthode proposée par un demandeur doit démontrer que l'acheteur indirect a subi une perte ou bien que chaque membre du groupe a subi une perte semble être devenue théorique, puisque M. Reutter s'est également dit d'avis que tous les membres du groupe ont été touchés par le comportement anticoncurrentiel de Toshiba; la méthode qu'il propose satisfait donc aux deux critères. Toshiba signale toutefois que, lorsqu'elle a contre-interrogé M. Reutter lors de l'audition de la requête en autorisation, celui-ci aurait admis que sa méthode ne permet pas d'établir que tous les membres du groupe ont subi une perte (m.a. (Toshiba), par. 86-87). Devant nous, l'avocat de M. Godfrey a fait valoir que l'avocat de Toshiba s'était mépris sur ce qui s'est dégagé de ce contre-interrogatoire (transcription, p. 59). Vu ce différend, il importe d'examiner ce qui s'est vraiment produit.

[100] Après que M. Reutter eut confirmé qu'il utiliserait le prix de vente moyen des LDO dans l'ensemble du marché afin d'estimer la valeur de la majoration, l'échange suivant a eu lieu :

[TRADUCTION]

399 Q. Et il ressort implicitement de la moyenne que certains membres du groupe pourraient n'avoir subi aucune perte, mais qu'ils seraient indemnisés du montant de la majoration moyenne par rapport à l'achat qu'ils ont fait?

R. C'est là une question empirique et, sans vouloir paraître facétieux, je dirais que ça dépend. Il se pourrait que -- il se pourrait que quelques petits sous-groupes ou des sous-groupes, je ne veux pas les qualifier. <u>Il se pourrait que certains sous-groupes n'aient pas été touchés. D'un point de vue économique, je ne comprends pas comment cela pourrait arriver si, dans les faits, il y a eu complot pour fixer le prix en amont et puis si ce prix a été transféré en aval.</u>

. . .

403 Q. . . . Mais si, après analyse, vous concluez que certains membres n'ont pas été touchés, ils seraient alors indemnisés même s'ils n'ont subi aucune perte?

A. Again, it depends on how finely or where we want to draw the line of what we're analyzing or what we're measuring.

. . .

A. Someone could -- the average is an average and if you want to throw a zero in there, as Dr. Levinsohn does, and say that there could be zero damages, I can't deny that, you know, if you average zero with some other numbers you get something other than zero by the definition of mathematics.

. . .

407 Q. . . . Does the methodology which produces an average, is that average overcharge then applied to all class members irrespective of whether the average reflects the overage that they, in fact, incurred?

A. Yes.

408 Q. All right. And is there anything in the methodology that you are proposing that allows one to determine who those people are that suffered more or less? They're simply compensated on average?

. . .

410 . . .

A. In identifying him, no. [Emphasis added.]

(A.R., vol. V, at pp. 216-19)

Dr. Reutter went on to explain that his methodology is capable of creating subgroups within the class. For example, if the evidence after discovery suggests that Toshiba stopped price-fixing for a few months and then resumed again, the class members who purchased ODDs during that time would be excluded from the model (A.R., vol. V, at pp. 220-21).

[101] It is not at all apparent that this exchange shows Dr. Reutter resiling from his opinion that *all*

R. Encore là, ça dépend du soin avec lequel nous voulons tracer la ligne ou encore de l'endroit où nous voulons la tracer pour ce qui est de ce que nous analysons ou de ce que nous mesurons.

. . .

R. Quelqu'un pourrait -- la moyenne est une moyenne et si vous voulez y mettre un zéro, comme le fait M. Levinsohn, et dire qu'il se pourrait qu'il n'y ait aucun préjudice, je ne peux pas nier que, vous savez, si vous faites la moyenne entre zéro et certains autres chiffres, vous obtenez autre chose que zéro, c'est ce que sont les mathématiques.

. . .

407 Q. . . . Selon la méthode utilisée pour faire une moyenne, est-ce que la majoration moyenne s'applique à tous les membres du groupe peu importe si cette moyenne reflète l'excédent qu'on leur a, en fait, refilé?

R. Oui.

408 Q. Très bien. Et y a-t-il quelque chose dans la méthode que vous proposez qui permet de savoir qui sont ceux pour qui le préjudice est plus grand ou moins grand? Ils sont simplement indemnisés selon la moyenne?

. . .

410 . . .

R. De les identifier, non. [Je souligne.]

(d.a., vol. V, p. 216-219)

M. Reutter a ensuite expliqué que sa méthode permettait de créer des sous-groupes au sein du groupe. Par exemple, si après l'interrogatoire, la preuve démontre que Toshiba a cessé de fixer les prix pour ensuite recommencer à le faire quelques mois plus tard, les membres du groupe qui auraient acheté un LDO au cours de cette période seraient exclus du modèle (d.a., vol. V, p. 220-221).

[101] Il n'est absolument pas évident que cet échange démontre que M. Reutter est revenu sur

class members would be impacted. On the contrary, he stated that he did not understand, from an economic standpoint, how it would be possible for some members of the class *not* to have suffered a loss if there was a conspiracy and the fixed price was passed through. Dr. Reutter's methodology therefore satisfies both the standards argued for by Toshiba and Godfrey.

[102] In any event, even were Dr. Reutter's methodology incapable of showing loss to every class member, as I explain below, it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level. This leaves the only question being whether the courts below were correct in finding that Dr. Reutter's proposed methodology satisfies that required standard of commonality (C.A. reasons, at paras. 125 and 149). I see no reason to interfere with the certification judge's determination that Dr. Reutter's methodology satisfies this standard.

(2) What Is the Standard Required to Certify Loss as a Common Issue?

[103] The *Class Proceedings Act* provides that in order for an issue to be common, the issue need not "predominate over issues affecting only individual members" (s. 4(1)(c)). Section 1 of the *Class Proceedings Act* defines "common issues" as meaning:

(a) common but not necessarily identical issues of fact, or

son opinion que *tous* les membres du groupe avaient été touchés. Au contraire, il a dit qu'il ne comprenait pas, d'un point de vue économique, comment il serait possible que certains membres du groupe n'aient subi *aucune* perte alors qu'il y avait eu complot et que le prix établi leur avait été transféré. La méthode de M. Reutter satisfait donc aux normes proposées par Toshiba et par M. Godfrey.

[102] Quoi qu'il en soit, même si la méthode de M. Reutter ne permettait de démontrer que chaque membre du groupe a subi une perte, comme je l'expliquerai plus loin, il n'est pas nécessaire, pour justifier l'autorisation de la question de la perte en tant que question commune, que la méthode proposée par un expert du demandeur établisse que chaque membre du groupe a subi une perte. Il n'est pas non plus nécessaire que la méthode de M. Reutter permette d'identifier les membres du groupe qui n'ont subi aucune perte de manière à les distinguer de ceux qui en ont subi une. Pour que les questions relatives à la perte soient autorisées en tant que questions communes, la méthode de l'expert du demandeur n'a qu'à être suffisamment fiable ou acceptable pour établir que l'acheteur du niveau requis a subi une perte. Il reste seulement à déterminer si les juridictions inférieures ont eu raison de conclure que la méthode proposée par M. Reutter satisfait à la norme de communauté requise (motifs de la C.A., par. 125 et 149). Je ne vois aucune raison de modifier la décision du juge saisi de la demande d'autorisation portant que la méthode de M. Reutter satisfait à cette norme.

(2) Quelle est la norme applicable à l'autorisation d'une question liée à la perte en tant que question commune?

[103] La *Class Proceedings Act* dispose que, pour qu'une question soit commune, elle n'a pas à [TRADUCTION] « l'emporter sur les questions qui touchent uniquement les membres individuels » (al. 4(1)(c)). Selon l'art. 1 de la *Class Proceedings Act*, « question commune » (« *common issues* ») s'entend, selon le cas :

[TRADUCTION]

(a) d'une question de fait commune, mais pas nécessairement identique;

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts

[104] In *Microsoft*, at para. 108, this Court reaffirmed the principles of "common issues" for the purpose of certification, as they were explained in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534:

In [*Dutton*] this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

(1) The commonality question should be approached purposively.

(2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class [proceeding]. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[105] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court clarified that the "common success" requirement in *Dutton* should be applied flexibly. "Common success" denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another (para. 45). A question is

(b) d'une question de droit commune, mais pas nécessairement identique, qui découle de faits qui sont communs, mais pas nécessairement identiques;

[104] Au paragraphe 108 de l'arrêt *Microsoft*, la Cour a rappelé les principes relatifs à la « question commune » aux fins d'autorisation qu'elle avait expliqués dans *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534 :

Dans l'arrêt [*Dutton*] notre Cour aborde la notion de communauté et conclut que « [l]a question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition dans l'appréciation des faits ou l'analyse juridique » (par. 39). J'énumère les autres paramètres établis par la juge en chef McLachlin et qui figurent aux par. 39-40 de l'arrêt :

(1) Il faut aborder le sujet de la communauté en fonction de l'objet.

(2) Une question n'est « commune » que lorsque son règlement est nécessaire au règlement des demandes de chacun des membres du groupe.

(3) Il n'est pas essentiel que les membres du groupe soient tous dans la même situation par rapport à la partie adverse.

(4) Il n'est pas nécessaire que les questions communes l'emportent sur les questions non communes. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Le tribunal évalue l'importance des questions communes par rapport aux questions individuelles.

(5) Le succès d'un membre du groupe emporte nécessairement celui de tous. Tous les membres du groupe doivent profiter du dénouement favorable de l'action, mais pas nécessairement dans la même proportion.

[105] Dans l'arrêt *Vivendi Canada Inc. c. Dell'Aniello*, 2014 CSC 1, [2014] 1 R.C.S. 3, la Cour a précisé que le critère du « succès commun » dégagé dans *Dutton* devait être appliqué avec flexibilité. Le « succès commun » suppose non pas que le succès d'un membre du groupe entraîne celui de tous les membres du groupe, mais plutôt que le succès d'un membre du groupe

considered "common", then, "if it can serve to advance the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

[106] In *Microsoft*, the representative plaintiff sought to certify a class proceeding wherein the proposed class members consisted of the end consumers of products whose prices were allegedly fixed ("indirect purchasers"). After concluding that indirect purchasers have a cause of action for price-fixing, the Court considered the standard of expert methodology required to certify loss-related questions as common issues for indirect purchaser class proceedings. The key passage from the Court's reasons states:

> One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.
>
> The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha* [*v. Bayer Inc.* (2003), 63 O.R. (3d) 22], at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges

ne doit pas provoquer l'*échec* d'un autre membre (par. 45). Une question sera considérée comme « commune », donc, « si elle permet de faire progresser le règlement de la réclamation de chacun des membres du groupe », même si la réponse qu'on lui donne, bien que favorable, peut différer d'un membre à l'autre du groupe (par. 46).

[106] Dans l'arrêt *Microsoft*, le représentant des demandeurs a demandé l'autorisation d'un recours collectif pour lequel le groupe proposé était composé des consommateurs finaux des produits dont le prix aurait été fixé (« acheteurs indirects »). Après avoir conclu que les acheteurs indirects avaient une cause d'action en raison de la fixation des prix, la Cour s'est penchée sur la norme applicable pour déterminer si la méthode d'expert permet d'autoriser les questions liées à la perte en tant que questions communes aux acheteurs indirects d'un recours collectif. Voici le passage clé des motifs de la Cour :

> L'une des difficultés que pose le recours d'acheteurs indirects a trait à l'appréciation du caractère commun des questions liées au préjudice ou à la perte. Pour que ces questions puissent satisfaire à la norme d'« un certain fondement factuel », il doit être assez certain qu'elles peuvent faire l'objet d'un règlement commun. Dans le cadre d'actions intentées par des acheteurs indirects, les demandeurs tentent généralement de satisfaire à cette exigence en offrant une preuve d'expert qui revêt la forme de modèles et de méthodes économiques.
>
> La méthode proposée par l'expert vise à établir que la majoration a été transférée aux acheteurs indirects, ce qui rend la question commune au groupe dans son ensemble (voir *Chadha* [*c. Bayer Inc.* (2003), 63 O.R. (3d) 22], par. 31). À l'étape de [l'autorisation], la méthode n'a pas à déterminer le montant des dommages-intérêts, mais doit plutôt — et c'est là l'élément crucial — être susceptible de prouver « les conséquences communes », comme le conclut un tribunal américain dans une affaire antitrust, *In Re : Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). Les demandeurs doivent démontrer qu'une [TRADUCTION] « preuve permettra d'établir, lors du procès, les conséquences antitrust qui sont communes à tous les membres du groupe » (*ibid.*, p. 155). À l'étape de [l'autorisation], point n'est besoin que la méthode établisse la perte réellement subie par le groupe dans la mesure où le demandeur démontre qu'une méthode permet de le faire. Dans le cadre d'actions d'acheteurs indirects,

have been passed on to the indirect-purchaser level in the distribution chain.

The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis. The B.C.C.A. in *Infineon* [*Technologies AG v. Option Consommateurs*, 2013 SCC 29, [2013] 3 S.C.R. 600] called for the plaintiff to show "only a credible or plausible methodology" and held that "[i]t was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases" (para. 68). . . .

. . .

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied. [Emphasis added; paras. 114-18.]

[107] While there may be some room for debate arising from the references to "class-wide basis" in the above passages, in my view, the Court was employing the term "class-wide basis" synonymously with "indirect-purchaser level". *Microsoft*, therefore, directs that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers — that is, claimants at the "purchaser *level*". For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.

la méthode doit donc pouvoir établir que la majoration a été transférée à l'acheteur indirect situé en aval dans la chaîne de distribution.

La question la plus vivement débattue au chapitre de l'utilisation de la preuve d'expert est celle de savoir à quel point la preuve doit être concluante à l'étape de [l'autorisation] pour convaincre le tribunal qu'une méthode permet d'établir les conséquences communes à l'échelle du groupe. Dans l'affaire *Infineon* [*Technologies AG c. Option Consommateurs*, 2013 CSC 29, [2013] 3 R.C.S. 600], la C.A.C.-B. a invité la demanderesse à ne présenter [TRADUCTION] « qu'une méthode valable ou acceptable » pour ensuite conclure qu'« [i]l est bien établi que l'analyse de régression statistique offre en principe une estimation raisonnable du bénéfice ou du préjudice global et de l'étendue du transfert de la perte lorsqu'il y a eu fixation des prix » (par. 68). . .

. . .

À mon avis, la méthode d'expert doit être suffisamment valable ou acceptable pour établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune. Elle doit donc offrir une possibilité réaliste d'établir la perte à l'échelle du groupe, de sorte que, si la majoration est établie à l'issue de l'examen des questions communes au procès, un moyen permette de démontrer qu'elle est commune aux membres du groupe (c.-à-d. que le transfert a eu lieu). Or, il ne peut s'agir d'une méthode purement théorique ou hypothétique; elle doit reposer sur les faits de l'affaire. L'existence des données auxquelles la méthode est censée s'appliquer doit être étayée par quelque preuve. [Je souligne; par. 114-118.]

[107] Bien que la mention de la « perte à l'échelle du groupe » dans les passages précités puisse prêter à controverse, j'estime que la Cour a utilisé cette expression dans le même sens que « [niveau des] acheteurs indirects ». En conséquence, l'arrêt *Microsoft* prescrit que, pour autoriser les questions liées à la perte en tant que questions communes dans un recours collectif pour fixation du prix, le tribunal doit être convaincu que le demandeur a présenté une méthode valable pour établir que la perte a été transférée à un ou à plusieurs acheteurs, c'est-à-dire des demandeurs du « [*niveau* de] l'acheteur ». Dans le cas des acheteurs indirects, cela implique de démontrer que les acheteurs directs ont refilé la majoration.

[108] Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon Toshiba and will result in "common success" as explained in *Vivendi*, given that success for one class member will not result in failure for another. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level.

[108] Qui plus est, démontrer que la perte a été transférée aux acheteurs indirects satisfait au critère d'autorisation d'une question commune, puisqu'une telle démonstration permettra de faire progresser substantiellement l'instance, qu'elle est essentielle pour imposer une responsabilité à Toshiba et qu'elle débouche sur un « succès commun » tel que l'explique l'arrêt *Vivendi*, car le succès d'un membre du groupe ne se traduira pas par l'échec d'un autre membre. Démontrer que la perte a été transférée aux acheteurs du niveau requis fera progresser les réclamations de tous les acheteurs de ce niveau.

[109] When thinking about whether a proposed common question would "advance *the litigation*", it is the perspective of *the litigation*, not the plaintiff, that matters. A common issues trial has the potential to *either* determine liability *or* terminate the litigation (W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 108). Either scenario "advances" *the litigation* toward resolution. Here, if it cannot be shown that loss was suffered by *any* purchasers at the indirect purchaser level, then *none* of the indirect purchasers have a cause of action and the action with respect to *all* the indirect purchasers would fail. I endorse, in this regard, this statement of the Ontario Superior Court in *Shah (Ont. S.C.J.)* (at para. 69):

> Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff's expert's methodology failed in proof at trial, then the class members' claim would fail across the indirect class members' class because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or "level" of the distribution channel, and the Defendants would secure a discharge of liability against all the class members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution channel, then there might have to be individual issues trials to determine each class member's entitlement.

[109] Lorsqu'on pense à la question de savoir si une question commune proposée ferait « avancer *l'instance* », c'est le point de vue de *l'instance* et non celui du demandeur qui compte. L'audition des questions communes peut *soit* déterminer la responsabilité *soit* mettre fin au litige (W. K. Winkler et autres, *The Law of Class Actions in Canada* (2014), p. 108). Les deux scénarios « contribuent » au règlement *du litige*. En l'espèce, si l'on ne peut démontrer que la perte a été subie par *quelque acheteur indirect que ce soit*, *aucun* acheteur indirect n'a une cause d'action et l'action à l'égard de *tous* les acheteurs indirects échouerait. Je souscris à cet égard à l'affirmation qui suit de la Cour supérieure de l'Ontario dans *Shah (C.S.J. Ont.)* (par. 69) :

> [TRADUCTION] Ainsi, aux fins d'autorisation, il faut seulement démontrer que la méthode permettant d'établir l'existence d'une perte est une méthode acceptable, que la perte a été transférée à l'acheteur indirect situé en aval dans la chaîne de distribution et que des questions individuelles quant à savoir si certains membres ont été touchés par la fixation illégale des prix peuvent être soulevées. Si la méthode d'expert du demandeur ne permet pas d'en faire la preuve au procès, alors la demande du groupe sera rejetée à l'égard de la catégorie des membres indirects parce que chacun d'eux aura échoué à prouver un élément constitutif de sa cause d'action; c.-à-d. que la fixation des prix s'est rendue à eux ou à leur « niveau » dans la chaîne de distribution, et les défenderesses seront déchargées de toute responsabilité à l'égard de l'ensemble des membres du groupe. À l'inverse, si la méthode se révèle valable pour démontrer que la majoration a été transférée à l'acheteur indirect situé en aval de la chaîne de distribution, il pourrait alors être nécessaire de tenir des audiences individuelles pour statuer sur le droit de chaque membre de faire partie du groupe.

(3) Does Dr. Reutter's Methodology Meet the Standard?

[110] The certification judge identified the correct standard to certify commonality of loss as a common issue. As Toshiba acknowledges, the issue of whether the certification judge erred in applying that standard to Dr. Reutter's evidence is "subject to . . . deference from an appellate court" (A.F. (Toshiba), at para. 42). The certification judge's analysis of Dr. Reutter's methodology as supporting certification should not be overturned absent a palpable and overriding error.

[111] I agree with the Court of Appeal that the reasoning of the certification judge reveals no basis for interfering with his common issues determination (C.A. reasons, at para. 163). There is no palpable and overriding error in the certification judge's conclusion that Godfrey showed some basis in fact for finding the loss issues to be common (Sup. Ct. reasons, at para. 180). I would therefore reject this ground of appeal.

(4) Availability of Aggregate Damages

[112] I turn, finally, to Toshiba's final argument, which goes to the availability of the aggregate damages provisions found in Division 2 of the *Class Proceedings Act*, s. 29(1)(b), which states:

Aggregate awards of monetary relief

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

. . .

(3) La méthode proposée par M. Reutter satisfait-elle à la norme?

[110] Le juge saisi de la demande d'autorisation a arrêté la norme applicable à l'autorisation, en tant que question commune, de la question de la communauté de la perte. Toshiba le reconnaît : la question de savoir si le juge saisi de la demande d'autorisation s'est trompé en appliquant cette norme au témoignage de M. Reutter [TRADUCTION] « oblige la cour d'appel à faire preuve de déférence » (m.a. (Toshiba), par. 42). L'analyse de la méthode proposée par M. Reutter sur laquelle repose la décision du juge saisi de la demande d'autorisation ne devrait pas être annulée en l'absence d'erreur manifeste et déterminante.

[111] Je conviens avec la Cour d'appel que le raisonnement du juge saisi de la demande d'autorisation ne révèle aucune raison de modifier la décision qu'il a rendue au sujet des questions communes (motifs de la C.A., par. 163). Il n'y a aucune erreur manifeste et déterminante dans sa conclusion que M. Godfrey a établi un certain fondement factuel permettant de qualifier de communes les questions liées à la perte (motifs de la C.S., par. 180). Je rejetterais donc ce moyen d'appel.

(4) Possibilité d'obtenir des dommages-intérêts globaux

[112] Je passe finalement au dernier argument de Toshiba, qui intéresse la possibilité d'invoquer les dispositions sur les dommages-intérêts globaux qui figurent à l'al. 29(1)(b) de la *Class Proceedings Act*, lequel prévoit :

[TRADUCTION]

Octroi global d'une réparation pécuniaire

29 (1) Le tribunal peut accorder une réparation pécuniaire pour tout ou partie de la responsabilité du défendeur à l'endroit des membres du groupe et rendre jugement en conséquence si

. . .

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability . . .

[113] Because all other issues of fact and law must be decided before the aggregate damages provisions could apply, it is plain that aggregate damages under s. 29(1)(b) are purely remedial, available only after all other common issues have been determined, including liability (see *Microsoft*, at para. 134). Irrespective, then, of whether aggregate damages are certified as a common issue, it is for the trial judge to determine, following the common issues trial, whether the statutory criteria are met such that the aggregate damages provisions can be applied to award damages (*Microsoft*, at para. 134; Winkler et al., at p. 121).

[114] Here, the certification judge certified the following common issues related to aggregate damages for the non-umbrella purchasers (para. 143):

(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

. . .

(w) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

As I will explain below, I would not disturb the certification judge's decision to certify these issues as common issues. Again, it is important to remember that the certification of these issues in relation to the non-umbrella purchasers and the lack of certification in relation to the umbrella purchasers neither mandates nor forecloses the possibility of the trial judge awarding aggregate damages following the common issues trial. As this Court said in *Microsoft*

(b) il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire afin de quantifier la responsabilité pécuniaire du défendeur . . .

[113] Comme il faut trancher toutes les questions de fait et questions de droit avant que les dispositions sur les dommages-intérêts globaux puissent s'appliquer, il est clair que les dommages-intérêts globaux au sens de l'al. 29(1)(b) ont un objectif purement réparateur et ne peuvent être octroyés qu'après le règlement de toutes les autres questions communes, y compris la responsabilité (voir *Microsoft*, par. 134). Peu importe, donc, si les dommages-intérêts globaux sont autorisés en tant que question commune, il revient au juge du procès de décider, au terme de l'audition des questions communes, si les critères établis par la loi sont respectés de sorte que les dispositions sur les dommages-intérêts globaux peuvent s'appliquer pour octroyer ceux-ci (*Microsoft*, par. 134; Winkler et autres, p. 121).

[114] En l'espèce, le juge saisi de la demande d'autorisation a autorisé les questions communes suivantes liées à l'octroi de dommages-intérêt globaux aux acheteurs qui ne sont pas sous parapluie (par. 143) :

[TRADUCTION]

(k) Le montant des dommages-intérêts peut-il être arrêté globalement et, dans l'affirmative, quel est ce montant?

. . .

(w) Le montant de la restitution peut-il être arrêté globalement et, dans l'affirmative, quel est ce montant?

Comme je vais l'expliquer plus loin, je ne suis pas d'avis de modifier la décision du juge saisi de la demande d'autorisation d'autoriser ces questions en tant que questions communes. Là encore, il importe de se rappeler que l'autorisation de ces questions à l'égard des acheteurs qui ne sont pas sous parapluie et l'absence d'autorisation à l'endroit des acheteurs sous parapluie ne commande ni n'exclut la possibilité que le juge du procès accorde des dommages-intérêts (para. 134): ". . . the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found".

globaux au terme de l'audition des questions communes. Comme l'a mentionné notre Cour au par. 134 de l'arrêt *Microsoft* : « . . . l'omission de proposer ou d'autoriser à titre de question commune l'opportunité d'accorder des dommages-intérêts globaux ou une autre réparation n'empêche pas le juge de se fonder sur les dispositions s'il l'estime indiqué ».

[115] Toshiba has not appealed the certification of these issues as common issues. Rather, it takes issue with the certification judge's statement when discussing certification of the loss-related common issues that "the aggregate damage provisions [. . .] allow for an aggregate award even where some class members have suffered no financial loss" (Sup. Ct. reasons, at para. 169). Toshiba argues that this statement contradicts this Court's direction in *Microsoft* regarding the purely procedural quality of rights conferred by the *Class Proceedings Act* (A.F. (Toshiba), at para. 54). More particularly, Toshiba says that, by not confining its liability to class members who are able to show actual loss, the certification judge used the *Class Proceedings Act* to confer substantive (and not merely procedural) rights so as to grant a remedy to persons who cannot prove a loss. In this way, Toshiba argues that the certification judge treated the indirect and umbrella purchasers as "juridical entities" and eliminated the distinction between proof of harm and aggregate damages (A.F. (Toshiba), at para. 7).

[115] Toshiba n'a pas porté en appel l'autorisation des questions précitées en tant que questions communes. Elle s'inscrit plutôt en faux contre ce que le juge saisi de la demande d'autorisation a dit au moment d'analyser l'autorisation des questions communes liées à la perte : [TRADUCTION] « . . . les dispositions relatives aux dommages-intérêts globaux [. . .] permettent d'adjuger ceux-ci même si certains membres du groupe n'ont subi aucune perte financière » (motifs de la C.S., par. 169). Selon Toshiba, cette affirmation contredit l'orientation qu'a donnée notre Cour dans l'arrêt *Microsoft* au sujet du caractère purement procédural des droits conférés par la *Class Proceedings Act* (m.a. (Toshiba), par. 54). Plus particulièrement, Toshiba affirme que, en ne restreignant pas la responsabilité aux membres du groupe capables d'établir qu'ils ont subi une véritable perte, le juge saisi de la demande d'autorisation a utilisé la *Class Proceedings Act* pour conférer des droits substantifs (et pas simplement procéduraux) de manière à accorder réparation aux personnes qui ne sont pas en mesure de prouver qu'elles ont subi une perte. Toshiba plaide ainsi que le juge saisi de la demande d'autorisation a traité les acheteurs indirects et sous parapluie comme des [TRADUCTION] « entités juridiques » et a éliminé la distinction entre la preuve du préjudice et les dommages-intérêts globaux (m.a. (Toshiba), par. 7).

[116] On this point, I agree with Toshiba that the certification judge's statement that the aggregate damages provisions allow for an award of damages for class members that suffered no loss is inconsistent with this Court's jurisprudence. This Court has repeatedly affirmed that the advantages conferred by class proceeding legislation are purely procedural, and that they do not confer substantive rights (see: *Hollick*, at para. 14; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Microsoft*, at para. 131-32; *Sun-Rype*, at

[116] Sur ce point, je partage l'avis de Toshiba que l'affirmation du juge saisi de la demande d'autorisation — selon laquelle les dispositions sur les dommages-intérêts globaux permettent d'en adjuger aux membres du groupe qui n'ont subi aucune perte — est incompatible avec la jurisprudence de notre Cour. Cette dernière a maintes fois répété que les avantages offerts par les lois en matière de recours collectifs sont purement procédurales et ne confèrent pas de droit substantiels (voir : *Hollick*, par. 14; *Bisaillon c. Université Concordia*, 2006 CSC

para. 75). In *Microsoft*, this Court could not have been clearer that the aggregate damages provisions cannot be used to establish liability:

With respect, I do not agree with this reasoning. The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the B.C.S.C. in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (CanLII), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno's*, that "[t]he majority clearly recognized that s. 24 [of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6] is procedural and cannot be used in proving liability" (para. 55). [Emphasis added; paras. 131-32.]

[117] The foregoing signifies that, where (as here) loss is an element of the cause of action, using the aggregate damages provisions to distribute damages to class members who did not suffer a loss would be

19, [2006] 1 R.C.S. 666, par. 17; *Microsoft*, par. 131-132; *Sun-Rype*, par. 75). Dans l'arrêt *Microsoft*, notre Cour n'aurait pas pu dire plus clairement que les dispositions sur les dommages-intérêts globaux ne peuvent servir à établir la responsabilité :

Soit dit en tout respect, je n'adhère pas à ce raisonnement. Les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux ont trait à la réparation, sont de nature procédurale et ne peuvent permettre d'établir la responsabilité (*2038724 Ontario Ltd. c. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, par. 55). Le libellé de l'al. 29(1)(b) veut qu'il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire pour qu'une réparation pécuniaire globale puisse être accordée. À mon sens, il faut une conclusion préalable de responsabilité avant d'appliquer les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux, ce qui comprend, lorsque l'exige une cause d'action comme celles prévues à l'art. 36 de la *Loi sur la concurrence*, une conclusion sur la preuve de la perte. Je ne vois pas comment une disposition visant à accorder des dommages-intérêts de manière globale pourrait être le fondement d'une conclusion sur quelque volet de la responsabilité.

Je souscris à la conclusion de la juge Feldman dans *Chadha*, à savoir que les dispositions sur l'octroi de dommages-intérêts globaux [TRADUCTION] « s'appliquent seulement une fois la responsabilité établie et offrent une méthode d'évaluation globale des dommages-intérêts, mais ne permettent pas d'établir le préjudice » (par. 49). Je conviens également avec le juge Masuhara de la Cour suprême de la Colombie-Britannique qu'[TRADUCTION] « établir la responsabilité exige de prouver que le transfert de la perte a atteint les membres du groupe. Il faut statuer sur ce point avant d'appliquer les dispositions sur l'évaluation globale des dommages-intérêts, lesquelles n'offrent qu'un moyen d'attribuer l'indemnité » (voir *Infineon*, 2008 BCSC 575 (CanLII), par. 176). Aussi, je partage l'avis de la Cour d'appel de l'Ontario dans *Quizno's* selon lequel [TRADUCTION] « [l]es juges majoritaires reconnaissent clairement que l'art. 24 [de la *Loi de 1992 sur les recours collectifs* de l'Ontario, L.O. 1992, ch. 6] est de nature procédurale et ne peut servir d'assise à l'établissement de la responsabilité » (par. 55). [Je souligne; par. 131-132.]

[117] Les passages précités signifient que lorsque la perte est un élément de la cause d'action (comme c'est le cas en l'espèce), le fait de recourir aux dispositions sur les dommages-intérêts globaux pour

inconsistent with the purely procedural quality of the advantages conferred by the *Class Proceedings Act*. It follows that the reliance by the courts below (Sup. Ct. reasons, at para. 169; C.A. reasons, at para. 161) on s. 31(1)(a)(i) of the *Class Proceedings Act* (which provides that the court may order an aggregate damages award where it would be impractical or inefficient to identify the class members entitled to share in the award) as indicating that the plaintiff need not establish loss to each and every class member was, in my respectful view, mistaken. Section 31(1)(a)(i) is applicable only once liability has been established; otherwise, it would effectively confer substantive rights.

accorder ceux-ci aux membres du groupe qui n'ont subi aucune perte serait incompatible avec le caractère purement procédural des avantages conférés par la *Class Proceedings Act*. Soit dit en tout respect, il s'ensuit que les juridictions inférieures (motifs de la C.S., par. 169; motifs de la C.A., par. 161) ont eu tort de s'appuyer sur le sous-al. 31(1)(a)(i) de la *Class Proceedings Act* (lequel prévoit que le tribunal peut ordonner l'octroi de dommages-intérêts globaux lorsqu'il serait irréaliste ou inefficace d'identifier les membres du groupe qui ont droit à une part du montant global des dommages-intérêts adjugés) pour conclure que le demandeur n'a pas à établir que chacun des membres du groupe a subi une perte. Le sous-al. 31(1)(a)(i) ne s'applique qu'une fois la responsabilité établie; autrement, il se trouverait à conférer des droits substantiels.

[118] To be clear, I agree that the *Class Proceedings Act* permits individual members of the class to obtain a remedy where it may be difficult to demonstrate *the extent* of individual loss. What the jurisprudence of this Court maintains, however, is that, in order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has *actually suffered* a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that *all* class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have.

[118] Pour dissiper toute équivoque, je conviens que la *Class Proceedings Act* permet aux membres du groupe d'obtenir une réparation dans les cas où il peut être difficile d'établir *l'ampleur* de la perte individuelle. Toutefois, il ressort de la jurisprudence de la Cour que, pour que les membres du groupe participent à l'octroi des dommages-intérêts, le juge du procès doit être convaincu que chacun d'eux a *réellement subi* une perte lorsque la preuve de la perte est essentielle à une conclusion de responsabilité (comme c'est le cas de la responsabilité fondée sur l'art. 36 de la *Loi sur la concurrence*). Par conséquent, au bout du compte, pour se prévaloir des dispositions relatives aux dommages-intérêts globaux, le juge du procès doit être convaincu, à l'issue de l'audition des questions communes, que *tous* les membres du groupe ont subi une perte, ou qu'il peut distinguer ceux qui n'ont pas subi de perte de ceux qui en ont subi une.

[119] At this stage, it therefore remains possible that issues will arise, once it is determined that loss reached the indirect purchaser level, that affect individual class members' claims (*Microsoft*, at para. 140). In other words, while it was sufficient *for the purposes of certifying loss as a common issue* for Dr. Reutter's methodology to show merely that loss reached the indirect purchaser level, whether this methodology is sufficient *for the purposes of establishing* Toshiba's liability to *all* class members will depend on the findings of

[119] À ce stade, il se peut donc toujours que des questions touchant les demandes de membres du groupe se posent, une fois qu'il est établi que la perte a été refilée à l'acheteur indirect (*Microsoft*, par. 140). Autrement dit, bien qu'il ait été suffisant, *aux fins de l'autorisation de la perte en tant que question commune*, que la méthode de M. Reutter établisse simplement que la perte a été refilée aux acheteurs indirects, la réponse à la question de savoir si cette méthode suffit *pour établir* la responsabilité

the trial judge. In this case, Godfrey intends to use Dr. Reutter's methodology to prove that all class members suffered loss. It follows from the foregoing that, if he is successful in doing so, the same methodology can be used to establish both that Toshiba is liable to all class members and that aggregate damages are available to be awarded.

[120] It should be borne in mind that the trial judge, following the common issues trial, might reach any one of numerous possible conclusions on the question of whether the class members suffered loss. For example, the trial judge might accept Dr. Reutter's evidence that *all* class members suffered a loss, in which case it would be open to the trial judge to use the aggregate damages provisions to award damages to all class members. Alternatively, the trial judge might conclude that *no* purchasers suffered a loss — for example, if the trial judge does not accept that Dr. Reutter's methodology demonstrates that loss reached the direct and indirect purchaser levels. Were that the case, the action would fail. Or, it might be that the trial judge finds that an *identifiable subset* of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom Toshiba is liable and who are therefore entitled to share in the award of damages. At the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach. I outline these possibilities and the availability of aggregate damages merely to provide guidance.

de Toshiba envers *tous* les membres du groupe dépend des conclusions du juge du procès. En l'espèce, M. Godfrey compte employer la méthode de M. Reutter pour prouver que tous les membres du groupe ont subi une perte. Il s'ensuit de ce qui précède que, s'il parvient à faire cette démonstration, on peut employer la même méthode pour établir à la fois que Toshiba est responsable envers tous les membres du groupe et qu'il est possible d'accorder des dommages-intérêts globaux.

[120] Il convient de garder à l'esprit qu'après l'audition des questions communes, le juge du procès peut tirer l'une ou l'autre de nombreuses conclusions sur la question de savoir si les membres du groupe ont subi une perte. Par exemple, le juge du procès pourrait retenir le témoignage de M. Reutter selon lequel *tous* les membres du groupe ont subi une perte, auquel cas il serait loisible au juge du procès de recourir aux dispositions sur les dommages-intérêts globaux pour adjuger les dommages-intérêts à tous les membres du groupe. Le juge du procès pourrait aussi conclure qu'*aucun* acheteur n'a subi de perte — par exemple, s'il n'accepte pas que la méthode de M. Reutter démontre que la perte a été transférée aux acheteurs directs et indirects. Dans un tel cas, l'action échouerait. Peut-être encore que le juge du procès conclura qu'une *sous-catégorie identifiable* de membres du groupe n'a pas subi de perte, auquel cas il exclura ces membres de l'octroi des dommages-intérêts et recourra ensuite à la disposition sur l'octroi de dommages-intérêts globaux à l'égard des demandes de membres restants du groupe. Enfin, le juge du procès pourrait retenir l'argument de Toshiba selon lequel certains membres du groupe ont subi une perte tandis que d'autres n'en ont pas subie, mais conclure qu'il est impossible d'établir avec la méthode de l'expert quels membres du groupe ont subi une perte. Dans un tel cas, des procès portant sur des questions individuelles seraient nécessaires pour identifier les acheteurs envers qui Toshiba est responsable et qui ont donc le droit de prendre part à l'octroi des dommages-intérêts. Au stade de l'autorisation, il n'est pas possible ou indiqué de se prononcer sur les conclusions éventuelles du juge du procès. Je signale ces possibilités et l'ouverture à des dommages-intérêts globaux uniquement en vue de fournir des directives.

[121] But again, to be clear — neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue. As was the case in *Microsoft*, "[t]he aggregate damages questions [the certification judge] certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount" (para. 135). The certification judge's decision to certify the questions related to aggregate damages for the non-umbrella purchasers should therefore not be disturbed.

[121] Mais là encore, soyons clairs : ni l'éventail des conclusions que pourra tirer le juge du procès à l'issue de l'audition des questions communes, ni la possibilité d'accorder des dommages-intérêts globaux aux membres du groupe qui n'ont subi aucune perte, ne sont pertinents pour la décision d'autoriser les dommages-intérêts globaux en tant que question commune. Tout comme dans *Microsoft*, « [l]es questions [liées aux dommages-intérêts globaux que le juge saisi de la demande d'autorisation] certifie consistent seulement à savoir si le montant des dommages-intérêts peut être arrêté globalement et, dans l'affirmative, quel est ce montant » (par. 135). Il ne convient donc pas de modifier la décision du juge saisi de la demande d'autorisation d'autoriser les questions concernant l'octroi de dommages-intérêts globaux aux acheteurs qui ne sont pas sous parapluie.

VI. Conclusion

[122] I would dismiss the appeals.

[123] Section 37(1) of the *Class Proceedings Act* provides that "neither the [British Columbia] Supreme Court nor the Court of Appeal may award costs to any party to an application for certification". The parties appear to take this as precluding this Court from awarding costs at those courts, and seek only their costs at this Court. I would therefore award Godfrey costs in this Court only.

VI. Conclusion

[122] Je rejetterais les pourvois.

[123] Le paragraphe 37(1) de la *Class Proceedings Act* dispose que [TRADUCTION] « ni la Cour suprême [de la Colombie-Britannique] ni la Cour d'appel ne peuvent accorder des dépens à une partie à une demande d'autorisation ». Les parties semblent en avoir conclu que notre Cour ne peut octroyer des dépens devant ces cours et elles n'ont sollicité que leurs dépens devant notre Cour. J'accorderais donc à M. Godfrey ses dépens devant notre Cour seulement.

The following are the reasons delivered by

[124] CÔTÉ J. (dissenting in part) — These appeals raise a fundamental question: are courts at a stage where the balance struck by Parliament in Canada's competition law should be upset by applying new principles of liability for price-fixing cases, resulting in near-automatic certification of class actions? In doing so, are courts going a bridge too far?

Version française des motifs rendus par

[124] LA JUGE CÔTÉ (dissidente en partie) — Les présents pourvois soulèvent une question fondamentale : le moment est-il venu pour les tribunaux de rompre l'équilibre établi par le législateur dans les lois canadiennes sur la concurrence en appliquant de nouveaux principes de responsabilité dans des affaires de fixation des prix, de sorte que les recours collectifs seraient presque automatiquement autorisés? Ce faisant, les tribunaux iraient-ils trop loin?

I. Overview

[125] These appeals concern the certification of a proposed class action brought in British Columbia by

I. Aperçu

[125] Les présents pourvois concernent l'autorisation d'un recours collectif projeté intenté en

representative plaintiff Neil Godfrey (the "Plaintiff", respondent in these appeals) against a number of defendants (the "Defendants", appellants in these appeals) that manufacture or supply devices known as optical disc drives ("ODDs"). The Plaintiff alleges that the Defendants conspired to fix the prices of ODDs between January 1, 2004 and January 1, 2010 (the "Class Period"). He relies on five causes of action against the Defendants: a contravention of s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34 (which is actionable pursuant to s. 36(1) of that statute), the tort of unlawful means conspiracy, the tort of predominant purpose conspiracy, unjust enrichment, and waiver of tort.

[126] The proposed class is essentially comprised of three groups. Direct purchasers are the class members who purchased an ODD or an ODD product manufactured or supplied by a Defendant *from that Defendant*. Indirect purchasers are the class members who purchased an ODD or an ODD product manufactured or supplied by a Defendant *from a non-Defendant*. Neil Godfrey is one of those indirect purchasers. Finally, class members who purchased from a non-Defendant an ODD or an ODD product *that was not manufactured or supplied by a Defendant* are known as "Umbrella Purchasers". The Plaintiff alleges that all of the class members in these three groups have claims against the Defendants in respect of the alleged price-fixing conspiracy.

[127] The Plaintiff's action against most of the Defendants was commenced on September 27, 2010. He brought a separate action against certain additional Defendants — Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc. (the "Pioneer Defendants") — on August 16, 2013, roughly three and a half years following the end of the Class Period.

Colombie-Britannique par le représentant des demandeurs, Neil Godfrey (le « demandeur », l'intimé dans les présents pourvois), contre plusieurs défenderesses (les « défenderesses », les appelantes dans les présents pourvois) qui fabriquent ou fournissent des dispositifs appelés lecteurs de disques optiques (« LDO »). Le demandeur allègue que les défenderesses ont comploté dans le but de fixer les prix des LDO entre le 1er janvier 2004 et le 1er janvier 2010 (la « période visée par le recours collectif »). Il s'appuie sur cinq causes d'action contre les défenderesses : contravention à l'art. 45 de la *Loi sur la concurrence*, L.R.C. 1985, c. C-34 (qui ouvre droit à une action fondée sur le par. 36(1) de cette même loi), délit civil de complot exercé par des moyens illégaux, délit civil de complot visant principalement à causer un préjudice, enrichissement sans cause et renonciation au recours délictuel.

[126] Le groupe projeté est constitué essentiellement de trois catégories d'acheteurs. Les acheteurs directs sont les membres du groupe qui ont acheté un LDO ou un produit muni de LDO fabriqué ou fourni par une défenderesse *de cette défenderesse*. Les acheteurs indirects sont les membres du groupe qui ont acheté un LDO ou un produit muni de LDO fabriqué ou fourni par une défenderesse *d'une personne qui n'est pas une défenderesse*. Neil Godfrey est l'un de ces acheteurs indirects. Enfin, les membres du groupe qui ont acheté, d'une personne qui n'est pas une défenderesse, un LDO ou un produit muni de LDO *qui n'a pas été fabriqué ou fourni par une défenderesse* sont appelés les « acheteurs sous parapluie ». Le demandeur allègue que tous les membres du groupe faisant partie de ces catégories disposent de recours contre les défenderesses relativement au complot allégué de fixation des prix.

[127] Le recours du demandeur contre la plupart des défenderesses a été intenté le 27 septembre 2010. Le 16 août 2013, soit environ trois ans et demi après la fin de la période visée par le recours collectif, le demandeur a intenté une action distincte contre certaines autres défenderesses : Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. et Pioneer Électronique du Canada, Inc. (appelées collectivement les « défenderesses Pioneer »).

[128] At the certification stage, Masuhara J. (the "Certification Judge") consolidated the two actions and conditionally certified them as class proceedings, in accordance with the criteria set out in s. 4(1) of British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (2016 BCSC 844). The Defendants' appeals to the British Columbia Court of Appeal were unanimously dismissed (2017 BCCA 302, 1 B.C.L.R. (6th) 319).

[129] The Defendants that challenge the Court of Appeal's order before this Court in file no. 37810 (the "Toshiba Appeal") contend that both the Certification Judge and the Court of Appeal erred in three respects: (a) by permitting the Umbrella Purchasers to claim under the statutory cause of action in s. 36(1) of the *Competition Act*; (b) by allowing common law and equitable relief based on a breach of the anti-competitive prohibitions in Part VI of the *Competition Act*; and (c) by finding that loss-related issues were common among the indirect purchasers based on the expert methodology proposed by the Plaintiff.

[130] The appeal brought by the Pioneer Defendants in file no. 37809 (the "Pioneer Appeal") raises those same issues, as well as two unique issues pertaining to the treatment of the limitation defence by the courts below. The Pioneer Defendants argue that the Certification Judge erred in holding that the action against them can proceed — notwithstanding that it was commenced more than two years following the end of the Class Period — based on the application of the discoverability rule and the doctrine of fraudulent concealment. In this Court, the Pioneer Defendants submit (a) that the discoverability rule does not apply to postpone the commencement of the limitation period in s. 36(4)(a)(i) of the *Competition Act*, and (b) that the doctrine of fraudulent concealment cannot toll that limitation period unless the Plaintiff can establish that he and the other class members stand in a "special relationship" with the Pioneer Defendants. It follows, in their submission, that the Plaintiff's pleadings do not disclose a cause of action against them in

[128] À l'étape de l'autorisation, le juge Masuhara (le « juge saisi de la demande d'autorisation ») a réuni les deux actions et les a conditionnellement autorisées à titre de recours collectif conformément aux critères énoncés au par. 4(1) de la *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (2016 BCSC 844). Les pourvois interjetés par les défenderesses devant la Cour d'appel de la Colombie-Britannique ont été rejetés à l'unanimité (2017 BCCA 302, 1 B.C.L.R. (6th) 319).

[129] Les défenderesses qui contestent l'ordonnance de la Cour d'appel devant notre Cour dans le dossier n° 37810 (le « pourvoi de Toshiba ») soutiennent que le juge saisi de la demande d'autorisation et la Cour d'appel ont commis trois erreurs : a) en autorisant les acheteurs sous parapluie à se prévaloir de la cause d'action prévue au par. 36(1) de la *Loi sur la concurrence*, b) en autorisant les recours de common law et d'equity fondés sur une violation des prohibitions de comportement anticoncurrentiel prévues à la partie VI de la *Loi sur la concurrence*, et c) en concluant, d'après la méthode proposée par l'expert du demandeur, que les questions liées à la perte étaient communes aux acheteurs indirects.

[130] Le pourvoi interjeté par les défenderesses Pioneer dans le dossier n° 37809 (le « pourvoi de Pioneer ») soulève les mêmes questions, de même que deux questions uniques liées au traitement par les tribunaux d'instance inférieure de leur défense fondée sur la prescription. Les défenderesses Pioneer soutiennent que le juge saisi de la demande d'autorisation a commis une erreur en concluant que l'action intentée contre elles pouvait procéder — malgré le fait qu'elle avait été intentée plus de deux ans après la fin de la période visée par le recours collectif — compte tenu de l'application de la règle de la possibilité de découvrir et de la doctrine de la dissimulation frauduleuse. Devant notre Cour, les défenderesses Pioneer font valoir : a) que la règle de la possibilité de découvrir ne s'applique pas de façon à retarder le début du délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*, et b) que la doctrine de la dissimulation frauduleuse ne permet pas de repousser le point de départ du délai de prescription à moins que le demandeur puisse

accordance with s. 4(1)(a) of the *Class Proceedings Act*.

établir que lui et les autres membres du groupe entretiennent une « relation spéciale » avec les défenderesses Pioneer. Par conséquent, selon elles, les actes de procédure du demandeur ne révèlent aucune cause d'action contre elles en conformité avec l'al. 4(1)(a) de la *Class Proceedings Act*.

[131] I would allow both appeals in part. With respect to the limitations issues raised in the Pioneer Appeal, my view is that the discoverability rule does not apply to the limitation period in s. 36(4)(a)(i) because the event that triggers the commencement of the limitation period occurs without regard to the state of a plaintiff's knowledge. As for the doctrine of fraudulent concealment, my view is that it is not plain and obvious that it will toll the operation of the limitation period in this case only if the Plaintiff is capable of demonstrating a special relationship existed. It may be that something tantamount to or commensurate with the existence of a special relationship would be sufficient to toll the limitation period. However, simply establishing the existence of the conspiracy will not suffice.

[131] Je suis d'avis d'accueillir les deux pourvois en partie. En ce qui concerne les questions relatives aux délais de prescription soulevées dans le pourvoi de Pioneer, j'estime que la règle de la possibilité de découvrir ne s'applique pas au délai de prescription prévu au sous-al. 36(4)a)(i), puisque l'événement qui marque le point de départ du délai de prescription se produit peu importe si un demandeur a connaissance du préjudice. En ce qui a trait à la dissimulation frauduleuse, il ne me semble pas évident et manifeste que cette doctrine repoussera le point de départ du délai de prescription en l'espèce seulement si le demandeur arrive à démontrer qu'il existait une relation spéciale. Il se peut que quelque chose d'équivalent ou correspondant à une relation spéciale suffise à reporter le point de départ du délai de prescription. Cependant, le simple fait d'établir l'existence du complot ne suffira pas.

[132] With respect to the issues raised in the Toshiba Appeal, which are common to both appeals, I agree with my colleague Brown J. — although for different reasons — that the *Competition Act* does not prevent a plaintiff from advancing a claim at common law or in equity together with, or instead of, a claim pursuant to the statutory cause of action in s. 36(1) in respect of the same anti-competitive prohibitions. I disagree with my colleague on the other two issues raised in that appeal, however. In my view, the Umbrella Purchasers cannot succeed in their claims against the Defendants under s. 36(1) of the *Competition Act*. Likewise, I cannot accept that a methodology capable of proving only that loss reached the indirect purchaser level in the distribution chain (and incapable of establishing loss in any individualized manner) is sufficient for the purpose of certifying the loss-related questions proposed by the Plaintiff as "common issues", pursuant to s. 4(1)(c) of the *Class Proceedings Act*.

[132] Pour ce qui est des questions soulevées dans le pourvoi de Toshiba, lesquelles sont communes aux deux pourvois, je conviens avec mon collègue le juge Brown — quoique pour des motifs différents — que la *Loi sur la concurrence* n'empêche pas le demandeur d'intenter un recours en common law ou en equity en même temps, ou au lieu, d'un recours fondé sur la cause d'action prévue au par. 36(1) à l'égard des mêmes pratiques anticoncurrentielles. Toutefois, je ne souscris pas à l'opinion de mon collègue quant aux deux autres questions soulevées dans ce pourvoi. À mon sens, les acheteurs sous parapluie ne peuvent avoir gain de cause contre les défenderesses dans leurs réclamations fondées sur le par. 36(1) de la *Loi sur la concurrence*. De même, je ne puis accepter qu'une méthode permettant uniquement de prouver que la perte a atteint le niveau des acheteurs indirects dans la chaîne de distribution (et qui ne permet pas d'établir la perte de manière individuelle) suffit à l'autorisation des questions liées à la perte proposées par le demandeur en tant que « questions communes » au titre de l'al. 4(1)(c) de la *Class Proceedings Act*.

II. The Pioneer Appeal

[133] The two unique issues raised in the Pioneer Appeal are as follows:

(a) Does the discoverability rule apply to the limitation period established by s. 36(4)(a)(i) of the *Competition Act*?

(b) Must there be a special relationship between the parties to an action in order for the doctrine of fraudulent concealment to toll the limitation period?

[134] The statutory cause of action under s. 36(1)(a) of the *Competition Act*, which allows a claimant to recover for loss or damage resulting from conduct contrary to any provision of Part VI of that Act, is subject to the limitation period established by s. 36(4). These two provisions read as follows:

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

. . .

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

II. Le pourvoi de Pioneer

[133] Les deux questions uniques soulevées dans le pourvoi de Pioneer sont les suivantes :

a) La règle de la possibilité de découvrir s'applique-t-elle au délai de prescription établi au sous-al. 36(4)a)(i) de la *Loi sur la concurrence*?

b) Pour que la doctrine de la dissimulation frauduleuse repousse le point de départ du délai de prescription, doit-il y avoir une relation spéciale entre les parties à une action?

[134] La cause d'action prévue à l'al. 36(1)a) de la *Loi sur la concurrence*, qui permet à une personne ayant subi une perte ou des dommages par suite d'un comportement allant à l'encontre d'une disposition de la partie VI de cette loi de se faire indemniser, est assujettie au délai de prescription établi au par. 36(4). Ces deux dispositions sont ainsi libellées :

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

. . .

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later . . .

. . .

[135] The Plaintiff's action against the Pioneer Defendants, which is based in part on s. 36(1) of the *Competition Act*, was commenced on August 16, 2013 — more than two years following the end of the Class Period, which is the period during which the alleged price-fixing conspiracy took place. The Pioneer Defendants take the position that the Plaintiff's claim for recovery under s. 36(1) of the *Competition Act* is time-barred by the limitation period in s. 36(4)(a)(i). The Plaintiff, for his part, says that both the discoverability rule and the doctrine of fraudulent concealment apply to toll that limitation period. If either applies, then the limitation clock will have begun ticking on the date that he discovered, or ought to have discovered, the existence of the alleged conspiracy.

[136] In order to succeed, therefore, the Pioneer Defendants must persuade this Court that *neither* the discoverability rule *nor* the doctrine of fraudulent concealment has any application in this case.

A. *Does the Discoverability Rule Apply to the Limitation Period Contained in the Statutory Cause of Action in Section 36 of the Competition Act?*

[137] On this first limitations issue raised in the Pioneer Appeal, my colleague takes the view that the discoverability rule postpones the commencement of the limitation period in s. 36(4)(a)(i) until the time at which the potential claimant discovers, or is reasonably capable of discovering, the existence of the impugned conduct that forms the basis of a claim under s. 36(1). I respectfully disagree, for the reasons that follow.

(ii) soit la date où il est statué de façon définitive sur la poursuite;

. . .

[135] Fondée en partie sur le par. 36(1) de la *Loi sur la concurrence*, l'action du demandeur contre les défenderesses Pioneer a été intentée le 16 août 2013, plus de deux ans après la fin de la période visée par le recours collectif, soit la période durant laquelle le complot allégué de fixation des prix a eu lieu. Les défenderesses Pioneer sont d'avis que le recours en indemnisation intenté par le demandeur au titre du par. 36(1) de la *Loi sur la concurrence* est prescrit en raison du délai de prescription prévu au sous-al. 36(4)a)(i). Le demandeur, quant à lui, affirme que tant la règle de la possibilité de découvrir que la doctrine de la dissimulation frauduleuse s'appliquent de manière à repousser le point de départ de ce délai de prescription. Si l'une ou l'autre s'applique, alors le délai de prescription aura commencé à courir à la date à laquelle le demandeur a découvert, ou aurait dû découvrir, l'existence du complot allégué.

[136] Donc, pour obtenir gain de cause, les défenderesses Pioneer doivent convaincre notre Cour que *ni* la règle de la possibilité de découvrir *ni* la doctrine de la dissimulation frauduleuse ne s'appliquent en l'espèce.

A. *La règle de la possibilité de découvrir s'applique-t-elle au délai de prescription applicable à la cause d'action prévue à l'art. 36 de la Loi sur la concurrence?*

[137] En ce qui concerne la première question relative aux délais de prescription soulevée dans le pourvoi de Pioneer, mon collègue se dit d'avis que la règle de la possibilité de découvrir reporte le début du délai de prescription prévu au sous-al. 36(4)a)(i) jusqu'au moment où le demandeur éventuel découvre, ou est raisonnablement capable de découvrir, l'existence du comportement reproché qui constitue le fondement de l'action intentée au titre du par. 36(1). Avec égards, je ne partage pas cet avis pour les motifs qui suivent.

(1) The Discoverability Rule

[138] Limitation clauses are statutory provisions that place temporal limits on a claimant's ability to institute legal proceedings. The expiry of a limitation period has the effect of "extinguish[ing] a party's legal remedies and also, in some cases, a party's legal rights" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016) ("Mew et al."), at p. 3). As this Court explained in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, statutory limitation clauses reflect the balance struck by the legislature between three distinct policy rationales: granting repose to defendants, avoiding evidentiary issues relating to the passage of time, and encouraging diligence on the part of plaintiffs.

[139] As statutory provisions, limitation clauses give rise to a number of interpretative issues. One important issue is the point at which the limitation period begins running — and in particular, whether the legislature intended that it commence only when the plaintiff has knowledge that the event which sets the clock ticking (sometimes referred to as the "triggering event") has in fact occurred. This is key, because a determination of when a limitation period expires depends on both its duration and its commencement (Mew et al., at pp. 69-70).

[140] Discoverability is a judge-made rule of statutory interpretation that assists in determining whether the event triggering the commencement of a limitation period depends upon the state of the plaintiff's knowledge. In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, this Court recognized a "general rule that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (p. 224). What this means is that a limitation period that commences upon "the accrual of the [plaintiff's] cause of action", or wording to that effect, will begin running only when the plaintiff discovers, or is reasonably capable of discovering,

(1) La règle de la possibilité de découvrir

[138] Les dispositions de prescription sont des dispositions statutaires qui visent à fixer des limites temporelles à la faculté du demandeur de se pourvoir devant les tribunaux. L'expiration d'un délai de prescription a pour effet [TRADUCTION] « d'éteindre les recours en justice d'une partie et, dans certains cas, d'éteindre ses droits » (G. Mew, D. Rolph et D. Zacks, *The Law of Limitations* (3e éd. 2016) (« Mew et autres »), p. 3). Comme l'a expliqué la Cour dans *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, les dispositions législatives en matière de prescription reflètent l'équilibre établi par le législateur entre trois justifications d'ordre public distinctes : procurer la tranquillité d'esprit aux défendeurs, éviter les problèmes de preuve liés à l'écoulement du temps, et encourager les demandeurs à être diligents.

[139] À titre de dispositions statutaires, les dispositions de prescription soulèvent plusieurs questions d'interprétation. Une question importante concerne le moment où le délai de prescription commence à courir; plus particulièrement, il s'agit de savoir si le législateur voulait que le délai commence à courir uniquement au moment où le demandeur sait que l'événement qui marque le point de départ du délai (parfois appelé le « fait déclencheur ») s'est effectivement produit. Il est crucial de répondre à cette question puisque, pour déterminer quand un délai de prescription expire, il faut d'abord établir sa durée et la date de son début (Mew et autres, p. 69-70).

[140] La règle de la possibilité de découvrir est une règle prétorienne d'interprétation statutaire qui aide à déterminer si l'événement qui marque le point de départ du délai de prescription dépend de la connaissance qu'en avait le demandeur. Dans *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, la Cour a reconnu une « règle générale selon laquelle une cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable » (p. 224). Cette règle signifie qu'un délai de prescription qui commence quand [TRADUCTION] « la cause d'action [du demandeur] prend naissance », ou toute autre formulation allant dans le même sens,

the facts giving rise to the cause of action (Mew et al., at p. 69). That is the point at which that plaintiff's ability to sue the defendant crystalizes.

ne commencera à courir qu'à partir du moment où le demandeur découvre, ou peut raisonnablement découvrir, les faits à l'origine de la cause d'action (Mew et autres, p. 69). Il s'agit du moment où la capacité du demandeur d'intenter une action contre le défendeur se concrétise.

[141] This Court expanded upon the principles applicable to the discoverability rule in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. In that case, Major J. clarified that discoverability is not a general rule that applies *despite* the wording of a legislative enactment, but rather an "interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue" (para. 37). In so doing, he endorsed the approach to this rule that had been taken by the Manitoba Court of Appeal in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [para. 22]

[141] La Cour a expliqué plus en détail les principes applicables à la règle de la possibilité de découvrir dans *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549. Dans cet arrêt, le juge Major a précisé que la règle de la possibilité de découvrir ne constitue pas une règle générale qui s'applique *malgré* le libellé d'un texte de loi, mais constitue plutôt un « outil qui sert à interpréter les textes de loi établissant des délais de prescription et qui doit être pris en considération chaque fois qu'une telle disposition est en litige » (par. 37). Ce faisant, il a souscrit à la conception de cette règle qui avait été adoptée par la Cour d'appel du Manitoba dans l'arrêt *Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200 :

> [TRADUCTION] À mon avis, la règle prétorienne de la possibilité de découvrir le dommage n'est rien de plus qu'une règle d'interprétation. Dans tous les cas où une loi indique que l'action en justice doit être intentée dans un délai précis après un événement donné, il faut interpréter les termes de cette loi. Lorsque le délai court à partir du « moment où naît la cause d'action » ou de tout autre événement qui peut être interprété comme ne survenant qu'au moment où la [partie lésée] prend connaissance du dommage, c'est la règle prétorienne de la possibilité de découvrir le préjudice qui s'applique. Toutefois, si le délai court à compter de la date d'un événement qui survient clairement, et sans égard à la connaissance qu'en a la [partie lésée], cette règle ne peut prolonger le délai fixé par le législateur. [par. 22]

[142] The limitation period in *Peixeiro* ran for two years from the time when "damages were sustained" by the plaintiff (para. 2). Applying the test in *Fehr*, Major J. found it "unlikely that by using the words 'damages were sustained', the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge" (para. 38). In his view, "[t]he use of the phrase 'damages were sustained' rather than 'cause of action arose' . . . is a distinction without a difference" (*ibid.*). He therefore concluded

[142] Dans l'arrêt *Peixeiro*, le délai de prescription a couru durant deux ans à compter de la date où les « dommages ont été subis » par le demandeur (par. 2). Après avoir appliqué le critère établi dans l'arrêt *Fehr*, le juge Major a conclu qu'il était « peu probable qu'en utilisant les mots "où les dommages ont été subis" le législateur entendait que l'on détermine le point de départ du délai de prescription sans égard au moment où la personne blessée prend connaissance du préjudice » (par. 38). À son avis, « [l]'utilisation des mots "date où les dommages ont

that the discoverability rule applied to the limitation period at issue in that case.

été subis” au lieu des mots “date où la cause d’action a pris naissance” [. . .] est une distinction sans importance » (*ibid.*). Il a donc conclu que la règle de la possibilité de découvrir s’appliquait au délai de prescription en cause dans cette affaire.

[143] A different conclusion was reached by this Court on the facts in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. That dispute turned, in part, on the interpretation of a limitation period that “prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death” (para. 18, referring to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32). Bastarache J., writing for a unanimous Court, once again affirmed the test set out in *Fehr* and reiterated that discoverability is not a general rule but rather an “interpretative tool for construing limitation statutes” (para. 23). Applying the *Fehr* test to the limitation provision at issue in that case, Bastarache J. concluded as follows:

> Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. <u>The Act does not establish a relationship between these events and the injured party’s knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff.</u> We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the “limitation clock”, the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies. [Emphasis added; para. 27.]

[143] Notre Cour a tiré une conclusion différente au vu des faits dans l’arrêt *Ryan c. Moore*, 2005 CSC 38, [2005] 2 R.C.S. 53. Le litige portait en partie sur l’interprétation d’un délai de prescription selon lequel « aucune action ne peut être intentée après les six mois qui suivent la délivrance de lettres d’homologation ou d’administration de la succession de la personne décédée et après l’expiration d’un délai d’un an suivant la date du décès » (par. 18, renvoyant à l’art. 5 de la *Survival of Actions Act*, R.S.N.L. 1990, c. S-32). S’exprimant au nom d’une Cour unanime, le juge Bastarache a de nouveau confirmé le critère établi dans l’arrêt *Fehr* et a réaffirmé que la règle de la possibilité de découvrir n’est pas une règle générale, mais plutôt un « outil d’interprétation des lois qui établissent des délais de prescription » (par. 23). Après avoir appliqué le critère établi dans l’arrêt *Fehr* au délai de prescription en cause dans cette affaire, le juge Bastarache a conclu ce qui suit :

> Aux termes de la *Survival of Actions Act*, le délai de prescription court à compter du décès du défendeur ou de la délivrance, par un tribunal, de lettres d’administration ou d’homologation. L’article est clair et explicite : le délai commence à courir au moment où survient l’un de ces deux faits particuliers. <u>La Loi n’établit aucun lien entre ces faits et le moment où la partie lésée en prend connaissance. Je conviens avec les appelants que la connaissance n’est pas un facteur à considérer : le décès ou la délivrance des lettres survient indépendamment de l’état d’esprit du demandeur.</u> En l’espèce, nous nous trouvons devant une situation où, comme notre Cour l’a reconnu dans l’arrêt *Peixeiro*, la règle prétorienne de la possibilité de découvrir le dommage ne s’applique pas pour prolonger le délai fixé par le législateur. Je suis donc d’accord avec la Cour d’appel pour dire qu’en désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la *Survival of Actions Act* s’applique. [Je souligne; par. 27.]

[144] The Plaintiff in the instant case agrees that *Fehr* sets out the test for whether a limitation period

[144] Le demandeur en l’espèce convient que l’arrêt *Fehr* établit le critère à appliquer pour décider si

is subject to the discoverability rule (R.F. (Pioneer Appeal), at para. 29), and my colleague affirms this approach at paras. 31-35 of his reasons. However, he goes on to opine that "where the event triggering the limitation period is an element of the cause of action, the legislature has shown its intention that the limitation period be linked to the cause of action's accrual, such that discoverability will apply" (Brown J.'s reasons, at para. 38 (emphasis added)). In other words, he equates language referring to the *accrual* or *arising* of the cause of action in its entirety with language referring to the *occurrence of an element* of the cause of action; in his view, both evidence a legislative intent that the discoverability rule apply.

un délai de prescription est assujetti à la règle de la possibilité de découvrir (m.i. (pourvoi de Pioneer), par. 29), et mon collègue confirme cette approche aux par. 31-35 de ses motifs. Il ajoute cependant que « lorsque l'événement marquant le point de départ du délai de prescription est un élément de la cause d'action, la législature a manifesté son intention que le délai de prescription soit lié à la naissance de la cause d'action, déclenchant du même coup l'application de la règle de la possibilité de découvrir » (motifs du juge Brown, par. 38 (je souligne)). Autrement dit, il assimile les mots désignant la *naissance* de la cause d'action dans son ensemble à ceux qui désignent la *survenance d'un élément* de la cause d'action; selon lui, les deux témoignent de l'intention du législateur que la règle de la possibilité de découvrir s'applique.

[145] Although this approach accords with the view expressed by the British Columbia Court of Appeal in this case (paras. 89-90), as well as by the Ontario Court of Appeal in *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81, at paras. 40, 43 and 45, my respectful view is that it expands the scope of the discoverability rule in a manner that is neither consistent with precedent nor justifiable in principle.

[145] Bien que cette approche concorde avec l'avis exprimé par la Cour d'appel de la Colombie-Britannique en l'espèce (par. 89-90), ainsi qu'avec celui de la Cour d'appel de l'Ontario dans l'arrêt *Fanshawe College of Applied Arts and Technology c. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81, par. 40, 43 et 45, à mon humble avis, cette approche étend la portée de la règle de la possibilité de découvrir d'une manière qui n'est ni conforme à la jurisprudence ni justifiable en principe.

[146] First, the suggestion that discoverability applies in all cases where the triggering event is "the occurrence of an element of the underlying cause of action" (Brown J.'s reasons, at para. 44) broadens the test set out by the Manitoba Court of Appeal in *Fehr* — a test which my colleague purports to endorse at paras. 33-35 of his reasons. In that case, Twaddle J.A. was very clear in explaining that the discoverability rule applies "[w]hen time runs from 'the accrual of the cause of action' or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained" (para. 22). Only these two situations were identified; there was no indication whatsoever that the discoverability rule ought to apply *automatically* in circumstances where the triggering event is merely the occurrence of a component element of the cause of action (and not the accrual of the cause of action in its entirety).

[146] D'abord, l'idée selon laquelle la règle de la possibilité de découvrir s'applique dans tous les cas où le fait déclencheur est « la survenance d'un élément de la cause d'action » (motifs du juge Brown, par. 44) étend la portée du critère établi par la Cour d'appel du Manitoba dans l'arrêt *Fehr* — un critère auquel mon collègue semble souscrire aux par. 33-35 de ses motifs. Dans cette affaire, le juge Twaddle a expliqué très clairement que la règle de la possibilité de découvrir s'applique [TRADUCTION] « [l]orsque le délai court à partir du "moment où naît la cause d'action" ou de tout autre événement qui peut être interprété comme ne survenant qu'au moment où la partie lésée prend connaissance du préjudice qu'elle a subi » (par. 22). Seules ces deux situations ont été mentionnées; rien n'indiquait que la règle de la possibilité de découvrir doit s'appliquer *automatiquement* dans les cas où le fait déclencheur n'est que la survenance d'un élément de la cause d'action (et non la naissance de la cause d'action dans son ensemble).

[147] Not only did this Court endorse *Fehr* in both *Peixeiro* and *Ryan*, but both appeals were resolved on a fairly straightforward application of this approach to discoverability. In *Peixeiro*, this Court reasoned that the limitation period — which commenced when "damages were sustained" — fell within the first category outlined in *Fehr* (to which the discoverability rule applies), given that this triggering event did *not* occur without regard to the plaintiff's knowledge. Likewise, *Ryan* was decided on the basis that the events triggering the commencement of the limitation period at issue — the death of the defendant or the granting of letters of administration or probate — occurred regardless of the plaintiff's state of mind and therefore fell within the second category in *Fehr*, to which the discoverability rule has no application (para. 27). Put simply, neither case was resolved by determining whether the triggering event was "related to", "linked to the basis of" or "an element of" the plaintiff's cause of action.

[148] It is true that this Court in *Ryan* stated that the discoverability rule does not apply where the limitation period "is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge <u>or the basis of the cause of action</u>" (para. 24 (emphasis added)). The Court of Appeal in the present case characterized this as an "unequivocal statement . . . that the rule can apply where the limitation period is linked to 'the basis of the cause of action'" (para. 89). With respect, the Court of Appeal's narrow focus on this specific statement ignores the broader context in which it was made. In the immediately preceding paragraph in *Ryan* (i.e. para. 23), Bastarache J. reaffirmed — and reproduced in full — the approach to discoverability set out in *Fehr*, and the statement in question appears to be nothing more than a paraphrased summary of this well-accepted approach. Moreover, in the same paragraph (i.e. para. 24), Bastarache J. explained that the discoverability rule *does* apply where the commencement of the limitation period is "related by the legislation to the arising or accrual of the cause

[147] Non seulement notre Cour a souscrit à l'arrêt *Fehr* dans *Peixeiro* et *Ryan*, mais les deux pourvois ont été tranchés en appliquant, de façon relativement simple, la règle de la possibilité de découvrir. Dans l'arrêt *Peixeiro*, la Cour a jugé que le délai de prescription — qui avait commencé à courir au moment où les « dommages ont été subis » — appartenait à la première catégorie énoncée dans l'arrêt *Fehr* (à laquelle s'applique la règle de la possibilité de découvrir), puisque ce fait déclencheur *n'*était *pas* survenu indépendamment de la connaissance qu'en avait le demandeur. De même, dans l'arrêt *Ryan*, le pourvoi a été tranché à partir du principe que les événements qui ont marqué le point de départ du délai de prescription en question — soit le décès du défendeur ou la délivrance de lettres d'homologation ou d'administration — étaient survenus indépendamment de l'état d'esprit du demandeur et appartenaient donc à la deuxième catégorie énoncée dans l'arrêt *Fehr*, à laquelle la règle de la possibilité de découvrir ne s'applique pas (par. 27). Autrement dit, aucun des deux pourvois n'a été tranché en décidant si le fait déclencheur avait « un rapport avec » la cause d'action du demandeur, était « lié au fondement » de cette cause d'action ou « en constitu[ait] un élément ».

[148] Il est vrai que dans l'arrêt *Ryan*, notre Cour a déclaré que la règle de la possibilité de découvrir ne s'applique pas dans les cas où « la loi applicable lie expressément le délai de prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance <u>ou avec le fondement de la cause d'action</u> » (par. 24 (je souligne)). En l'espèce, la Cour d'appel a estimé que ces propos équivalaient à une [TRADUCTION] « déclaration sans équivoque [. . .] que la règle peut s'appliquer lorsqu'un délai de prescription est lié au "fondement de la cause d'action" » (par. 89). Avec égards, par son interprétation étroite de cette phrase précise, la Cour d'appel ne tient pas compte du contexte plus large dans lequel elle a été formulée. Au paragraphe précédent dans l'arrêt *Ryan* (soit le par. 23), le juge Bastarache a réitéré — et reproduit en entier — la conception de la règle de la possibilité de découvrir établie dans l'arrêt *Fehr*, et l'énoncé en question semble n'être rien de plus qu'un résumé paraphrasé de cette approche bien acceptée. En outre, dans le même paragraphe (soit le par. 24), le juge Bastarache

of action". From my reading of *Ryan*, I see no intent on the part of this Court to broaden the traditional approach to discoverability, and for this reason, my view is that the words "basis of the cause of action" in para. 24 of *Ryan* should be understood as essentially synonymous with the "arising or accrual of the cause of action".

a expliqué que la règle de la possibilité de découvrir *s'applique* lorsque « la loi lie le point de départ du délai de prescription à la naissance de la cause d'action ». À la lecture de l'arrêt *Ryan*, je ne puis discerner, de la part de la Cour, une quelconque intention d'étendre la conception traditionnelle de la règle de la possibilité de découvrir et, pour cette raison, je suis d'avis que l'expression « fondement de la cause d'action » figurant au par. 24 de l'arrêt *Ryan* devrait être considérée comme étant essentiellement synonyme de l'expression « naissance de la cause d'action ».

[149] In any event, principle also commands that the discoverability rule apply *only* where the limitation period runs from the "accrual of the cause of action" (or wording to that effect) or from the occurrence of some event that is related to the state of the plaintiff's knowledge. This is because discoverability is nothing more than a tool of statutory interpretation. Where a legislature provides that a limitation period is triggered by an event whose occurrence depends on the plaintiff's knowledge, courts give effect to this legislative direction by calculating the running of the limitation period from the point at which the plaintiff acquired or was capable of acquiring such knowledge. Conversely, where the legislature provides that a limitation period is triggered by an event that occurs without regard to the plaintiff's state of mind, the courts do not — and indeed, cannot — apply the discoverability rule to postpone the commencement of the limitation period until such time as the plaintiff discovered, or ought to have discovered, that the event had taken place. Courts are bound to interpret and apply statutory law; they cannot rewrite it (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at paras. 54-55 and 58).

[149] Quoi qu'il en soit, le principe commande également que la règle de la possibilité de découvrir s'applique *uniquement* dans les affaires où le délai de prescription commence à courir au moment où « la cause d'action prend naissance » (ou toute autre formulation allant dans le même sens) ou au moment où survient un événement qui a un rapport avec la connaissance du demandeur. Il en est ainsi parce que la règle de la possibilité de découvrir n'est rien d'autre qu'un outil d'interprétation statutaire. Lorsque le législateur précise que le point de départ d'un délai de prescription est marqué par un événement dont la survenance dépend de la connaissance qu'en a le demandeur, les tribunaux donnent effet à cette intention législative en calculant la durée du délai de prescription à partir du moment où le demandeur a pris connaissance, ou pouvait prendre connaissance, de l'événement. À l'inverse, lorsque le législateur prévoit que le point de départ d'un délai de prescription est marqué par un événement qui survient indépendamment de l'état d'esprit du demandeur, les tribunaux n'appliquent pas — et, en fait, ne peuvent appliquer — la règle de la possibilité de découvrir pour reporter le point de départ du délai de prescription jusqu'à ce que le demandeur découvre, ou aurait dû découvrir, la survenance de l'événement. Les tribunaux sont tenus d'interpréter et d'appliquer la loi; ils ne peuvent pas la réécrire (*Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48, [2018] 3 R.C.S. 189, par. 54-55 et 58).

[150] Limitation periods that begin running upon the accrual of the plaintiff's cause of action evidently fall within the first category outlined in the preceding paragraph. Mew et al. note that a cause

[150] Les délais de prescription qui commencent à courir lorsque prend naissance la cause d'action du demandeur appartiennent évidemment à la première catégorie énoncée au paragraphe précédent. Selon

of action arises only "when all of the elements of a wrong existed, such that an action could be brought" (p. 69), and conversely, that "no cause of action can be said to have accrued unless there is a plaintiff available who is capable of commencing an action and a defendant in existence who is capable of being sued" (p. 70 (footnotes omitted)). Because a cause of action cannot accrue before the plaintiff discovers that they have the right to commence proceedings against the defendant, a legislature which provides for a limitation period that begins running at that point in time necessarily intends the discoverability rule to apply. This explains the reasoning behind the "general rule" set out by this Court in *Central Trust* (see para. 140 above) and affirmed in *M. (K.)*. It is essential to recognize that the limitation period in each case was triggered by the accrual or arising of the plaintiff's cause of action.

Mew et autres, une cause d'action prend naissance uniquement [TRADUCTION] « lorsque sont survenus tous les éléments constitutifs d'une faute, de sorte qu'une action pourrait être intentée » (p. 69) et, inversement, « aucune cause d'action n'est réputée avoir pris naissance à moins qu'il existe un demandeur disponible et capable d'intenter une action et un défendeur qui puisse être poursuivi » (p. 70 (notes en bas de page omises)). Puisque la cause d'action d'un demandeur ne peut prendre naissance tant que celui-ci n'a pas découvert qu'il est en droit d'intenter une action contre le défendeur, le législateur qui prévoit qu'un délai de prescription commence à courir à ce moment précis entend nécessairement que la règle de la possibilité de découvrir s'applique. Cela explique le raisonnement qui sous-tend la « règle générale » établie par la Cour dans l'arrêt *Central Trust* (voir le par. 140 précité) et confirmée dans *M. (K.)*. Il est essentiel de reconnaître que la naissance de la cause d'action du demandeur a marqué le point du délai de prescription dans tous les cas.

[151] Conversely, "the occurrence of an element of the underlying cause of action" (Brown J.'s reasons, at para. 44) will not always fit within either category outlined above at para. 149. It may be that the occurrence of such an event does in fact depend on the state of the plaintiff's knowledge, but unlike the accrual of a cause of action, this does not invariably follow as a matter of logical necessity. In *Peixeiro*, for example, this Court held that the point at which damages are sustained — a constituent element of (among other things) the tort of negligence — depends on when the plaintiff actually has knowledge of his or her injury. Knowledge will not form part of every element of the cause of action in negligence, however. A breach of a standard of care, for example, may occur years or even decades before the plaintiff first learns about it. Although such a breach is a prerequisite to a successful claim in negligence, it is also something that takes place without any regard to the plaintiff's state of mind.

[151] Par contre, « la survenance d'un élément de la cause d'action » (motifs du juge Brown, par. 44) ne cadrera pas toujours avec l'une ou l'autre des catégories énoncées ci-dessus au par. 149. Il se peut que la survenance d'un tel élément dépende de la connaissance du demandeur, mais contrairement à la naissance de la cause d'action, cela ne constituera pas invariablement une nécessité logique. Dans l'arrêt *Peixeiro*, par exemple, la Cour a déclaré que le moment où les dommages sont subis — un élément constitutif du délit de négligence (entre autres) — dépend du moment où le demandeur a connaissance de son préjudice. Toutefois, la connaissance ne fera pas partie intégrante de chaque élément de la cause d'action dans un cas de négligence. Un manquement à la norme de diligence, par exemple, peut avoir eu lieu des années, voire des décennies, avant que le demandeur n'en ait pris connaissance. Bien que ce manquement constitue une condition préalable à remplir pour qu'une action pour négligence soit accueillie, il s'agit également d'un événement qui survient indépendamment de l'état d'esprit du demandeur.

[152] It is for this reason that I disagree in principle with the proposition that the discoverability rule must

[152] C'est pour cette raison que je suis en désaccord, en principe, avec la proposition selon laquelle

always apply where the triggering event "is related to", "is linked to the basis of" or "constitutes an element of" the plaintiff's cause of action. My position is instead consistent with that stated by Marshall J.A. of the Newfoundland Court of Appeal in *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182:

> Where the limitation period is set by the terms of the statute to run from the time when an action arises or accrues, as in *Kamloops* [*v. Nielsen*, [1984] 2 S.C.R. 2,] and *Central Trust*, there is room to imply that the legislation does not intend the period to commence until the injured party has, or ought to have, an awareness of the claim's existence. The criteria under such legislation provisions, therefore, imports a mental element. However, when the limitation statute explicitly ties the prescription period to a specific occurrence, such as the termination of professional services, knowledge of the claimant cannot be construed as a factor. In such instances it is the happening of the factual event which is explicitly relevant and any interpretation implying the period to be related to the claimant's consciousness of the circumstances is precluded. No scope exists to imply the discoverability rule into the legislative intent. [Emphasis added; para. 38.]

[153] With this in mind, I am respectfully of the view that my colleague's approach is undermined by the well-settled principle that the discoverability rule is fundamentally a rule of statutory interpretation. The fact that a limitation period begins running upon the *occurrence of an element* (and not upon the *accrual* or *arising*) of the plaintiff's cause of action is not, on its own, indicative of any legislative intent regarding the applicability of the discoverability rule. As I have already indicated, my colleague's conclusion is the same as the one reached by the Court of Appeal in this case and by the Ontario Court of Appeal in *Fanshawe*: in such circumstances, according to him, discoverability applies automatically. This, however, creates an arbitrary distinction between triggering events that are related to the cause of action and those that are not, despite the fact that both may occur independently of the plaintiff's state of mind. How can it fairly be said that the legislature

la règle de la possibilité de découvrir doit *toujours* s'appliquer lorsque le fait déclencheur « a un rapport avec », « est lié au fondement de » ou « constitue un élément de » la cause d'action du demandeur. Ma position concorde plutôt avec celle exprimée par le juge Marshall, de la Cour d'appel de Terre-Neuve, dans l'arrêt *Snow c. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 :

> [TRADUCTION] Lorsque le libellé de la loi prévoit que le délai de prescription doit commencer à courir au moment où la cause d'action prend naissance, comme dans les arrêts *Kamloops* [*(Ville de) c. Nielsen*, [1984] 2 R.C.S. 2,] et *Central Trust*, il y a lieu de présumer que le législateur ne souhaitait pas que le délai de prescription ne commence à courir qu'une fois que la partie lésée a découvert, ou aurait dû découvrir, l'existence de la faute. Par conséquent, le critère prévu par ces dispositions législatives suppose un élément mental. Cependant, lorsque la loi en matière de prescription lie expressément le délai de prescription à un événement précis, comme la résiliation de services professionnels, la connaissance du demandeur ne peut être considérée comme un facteur. Dans de tels cas, c'est la survenance de l'événement qui importe expressément, et toute interprétation donnant à penser que le délai de prescription est lié à la connaissance qu'a le demandeur des circonstances est exclue. La règle de la possibilité de découvrir le dommage ne doit en aucun cas être interprétée comme une intention du législateur. [Je souligne; par. 38.]

[153] Compte tenu de ce qui précède, je suis respectueusement d'avis que l'approche de mon collègue est sapée par le principe bien établi selon lequel la règle de la possibilité de découvrir constitue fondamentalement une règle d'interprétation statutaire. Le fait qu'un délai de prescription commence à courir au moment où *survient un élément* de la cause d'action du demandeur (et non au moment où celle-ci *prend naissance*) n'indique pas, à lui seul, que le législateur avait une quelconque intention quant à l'applicabilité de la règle de la possibilité de découvrir. Comme je l'ai déjà mentionné, la conclusion de mon collègue est la même que celle tirée par la Cour d'appel en l'espèce, et la même que celle tirée par la Cour d'appel de l'Ontario dans l'arrêt *Fanshawe* : en pareilles circonstances, selon lui, la règle de la possibilité de découvrir s'applique automatiquement. Cela crée toutefois une distinction arbitraire entre les faits déclencheurs ayant un rapport avec la cause

intended the discoverability rule to apply to one and not the other? Although knowledge is necessary for a cause of action to fully accrue to the plaintiff, it does not follow that an element of the cause of action also occurs only when the plaintiff has knowledge thereof.

[154] A preferable approach is instead one that considers each statutory limitation clause on its own terms, recognizing that a triggering event that relates to a cause of action can, *but need not*, be dependent upon the plaintiff's state of mind. This approach is faithful to this Court's jurisprudence, and respectful of the notion of discoverability as an interpretative tool and not a general rule that allows clear statutory wording to be disregarded. For my part, I would reaffirm the approach laid out in *Fehr* without any modification.

(2) Application of the Discoverability Rule to the Limitation Period in Section 36(4)(a)(i)

[155] Given the foregoing, it is no surprise that I disagree with my colleague that the discoverability rule applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act* on the basis that "the event triggering this particular limitation period is an element of the underlying cause of action" (Brown J.'s reasons, at para. 44). Rather, the conclusion that results from applying the law as I explained it in the preceding section is that this limitation period commences on the day on which the conduct contrary to Part VI actually takes place, and not the day on which a potential claimant discovers, or is reasonably capable of discovering, that it took place.

[156] Section 36 of the *Competition Act* was "carefully constructed" to create a limited cause of action in respect of serious criminal offences under Part VI

d'action et ceux qui n'en ont pas, même si les deux peuvent se produire indépendamment de l'état d'esprit du demandeur. Comment peut-on dire en toute équité que la législature *souhaitait* que la règle de la possibilité de découvrir s'applique à l'un et non à l'autre? Bien que la connaissance soit nécessaire pour qu'une cause d'action soit pleinement dévolue au demandeur, il ne s'ensuit pas qu'un élément de la cause d'action survient uniquement lorsque le demandeur en a connaissance.

[154] Il vaut mieux plutôt examiner chaque disposition statutaire de prescription selon ses propres termes, en tenant compte du fait qu'un fait déclencheur ayant un rapport avec une cause d'action peut, *mais ne doit pas nécessairement*, dépendre de la connaissance du demandeur. Cette approche est fidèle à la jurisprudence de la Cour et respecte l'idée selon laquelle la règle de la possibilité de découvrir constitue un outil d'interprétation et non une règle générale qui permet de passer outre au texte clair de la loi. Pour ma part, je suis d'avis de réitérer l'approche adoptée dans l'arrêt *Fehr* sans aucune modification.

(2) Application de la règle de la possibilité de découvrir au délai de prescription prévu au sous-al. 36(4)a)(i)

[155] Compte tenu de ce qui précède, il n'est guère étonnant que je sois en désaccord avec mon collègue que la règle de la possibilité de découvrir s'applique au délai de prescription prévu au sous-al. 36(4)a)(i) de la *Loi sur la concurrence* au motif que « le fait déclencheur de ce délai de prescription est un élément de la cause d'action sous-jacente » (motifs du juge Brown, par. 44). En fait, comme je l'ai expliqué dans la section précédente, l'application du droit mène à la conclusion que le délai de prescription commence à courir à la date à laquelle le comportement allant à l'encontre de la partie VI se produit, et non à la date où le demandeur éventuel découvre ou est raisonnablement capable de découvrir que le comportement en question s'est produit.

[156] L'article 36 de la *Loi sur la concurrence* a été « soigneusement défini », de manière à créer une cause d'action limitée à l'égard de certaines

of the *Competition Act* (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 689). For example, Parliament limited recovery to an amount "equal to the loss or damage proved to have been suffered" by the plaintiff as a result of the prohibited conduct, thereby foreclosing the availability of other types of damages, such as aggravated or punitive damages. Section 36(2) provides plaintiffs with a shortcut to proving conspiracy where the defendant was convicted of the underlying offence. And of significance for our purposes is the fact that this cause of action is circumscribed by a complex twofold limitation period at s. 36(4) that reflects the balance struck by Parliament among the certainty, evidentiary and diligence rationales that underlie this area of the law.

infractions criminelles graves visées par la partie VI de la *Loi sur la concurrence* (*General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, p. 689). Par exemple, le Parlement a restreint le recouvrement des dommages-intérêts à une somme « égale au montant de la perte ou des dommages [que le demandeur est reconnu] avoir subis » par suite du comportement reproché, écartant ainsi la possibilité d'obtenir d'autres types de dommages-intérêts, comme des dommages-intérêts majorés ou punitifs. Le paragraphe 36(2) prévoit un raccourci qui permet au demandeur de prouver l'existence d'un complot lorsque le défendeur est déclaré coupable de l'infraction sous-jacente. Je tiens également à souligner que la présente cause d'action est circonscrite par un délai de prescription complexe à deux volets au par. 36(4) qui illustre l'équilibre établi par le Parlement entre les justifications propres à ce domaine de droit, soit la certitude, la preuve et la diligence.

[157] The wording of the limitation period set out in s. 36(4)(a)(i) provides ample support for the proposition that the two-year period commences independently of when the plaintiff first learns of the wrongdoing. Rather than having the limitation period commence upon the accrual of the cause of action (as was the case in *Central Trust* and *M. (K.)*), Parliament decided that it would instead commence on "a day on which the conduct was engaged in" — which, contrary to the position taken by my colleague, is *not* "wording to [the same] effect" as "accrual of the cause of action" (paras. 37 and 41). There is simply no link between this triggering event and the plaintiff's state of mind; it is, in short, an "event which clearly occurs without regard to the injured party's knowledge". The Certification Judge's reading of this provision led him to the same conclusion (para. 54 (CanLII)). It was the existence of conflicting jurisprudence on this point that caused him "not [to be] satisfied that it is plain and obvious that the discoverability principle can never apply to the limitation period in s. 36(4)" (para. 58).

[157] Le libellé du sous-al. 36(4)a)(i) justifie amplement d'affirmer que le délai de prescription de deux ans commence à courir sans égard au moment où le demandeur apprend l'existence de l'acte fautif. Au lieu de prévoir que le délai de prescription commence à courir à la date où la cause d'action prend naissance (comme dans les affaires *Central Trust* et *M. (K.)*), le Parlement a décidé qu'il commençait plutôt à courir à la « date du comportement en question » — ce qui, contrairement à la position de mon collègue, *ne* sont *pas* des « mots [utilisés dans le] sens » de « naissance de la cause d'action » (par. 37 et 41). Il n'existe tout simplement aucun lien entre ce fait déclencheur et l'état d'esprit du demandeur. Il s'agit, en bref, d'un « événement qui survient clairement, et sans égard à la connaissance qu'en a la [partie lésée] ». L'interprétation que le juge saisi de la demande d'autorisation donne à cette disposition l'a amené à tirer la même conclusion (par. 54 (CanLII)). La jurisprudence contradictoire sur ce point a fait en sorte que le juge [TRADUCTION] « n'était pas convaincu qu'il est évident et manifeste que le principe de la possibilité de découvrir ne peut jamais s'appliquer au délai de prescription prévu au par. 36(4) » (par. 58).

[158] I acknowledge that the "discoverability rule has been applied by this Court even to statutes of

[158] Je conviens que la « règle de la possibilité de découvrir le dommage a été appliquée par la Cour

limitation in which plain construction of the language used would appear to exclude the operation of the rule" (*Peixeiro*, at para. 38). However, a consideration of the context surrounding s. 36(4)(a)(i) lends further support to the conclusion that the discoverability rule does not apply.

même à l'égard de textes de loi établissant des délais de prescription dont le libellé, interprété littéralement, semblait exclure l'application de la règle » (*Peixeiro*, par. 38). Toutefois, l'examen du contexte entourant le sous-al. 36(4)a)(i) étaye davantage la conclusion que cette règle ne s'applique pas.

[159] First, the cause of action in s. 36(1)(a) is based on two essential elements: (i) the defendant engaging in conduct contrary to any provision of Part VI, and (ii) the plaintiff suffering loss or damage as a result of such conduct. It is only upon the occurrence of both events that the plaintiff can commence proceedings on the basis of this statutory cause of action. Cognizant of this, and of the fact that conspiracies of this nature take place in secret, Parliament decided that the limitation period would not begin when the plaintiff actually sustained loss or damage, but rather when the defendant engaged in the prohibited conduct. It is important to keep in mind that the point at which the conduct is engaged in necessarily precedes the point at which a claimant will suffer loss or damage as a result of such conduct. I would also note that the offence under s. 45 is complete as soon as an unlawful agreement is made, meaning that the "conduct" is "engaged in" even if the agreement is not actually implemented or prices do not actually increase. It follows as a direct consequence of this legislative choice that the limitation period can in fact expire before the plaintiff is in a position to commence proceedings under s. 36(1)(a).

[159] Premièrement, la cause d'action prévue à l'al. 36(1)a) est fondée sur deux éléments essentiels : (i) le défendeur dont le comportement va à l'encontre d'une disposition de la partie VI, et (ii) le demandeur qui subit une perte ou des dommages par suite d'un tel comportement. Ce n'est que lorsque ces deux événements se produisent que le demandeur peut engager des poursuites sur le fondement de cette cause d'action prévue par la loi. Ainsi, et compte tenu de la nature secrète des complots de ce genre, le Parlement a décidé que le délai de prescription ne commencerait pas à courir à la date à laquelle le demandeur subit réellement une perte ou des dommages, mais plutôt à la date à laquelle le défendeur adopte le comportement reproché. Il est important de se rappeler que le moment où se produit le comportement en question précède forcément le moment où le demandeur subit une perte ou des dommages par suite d'un tel comportement. Je tiens également à faire remarquer que l'infraction prévue à l'art. 45 est commise dès la conclusion de l'accord illégal, ce qui signifie que le « comportement » a eu lieu même si l'accord n'est pas mis en œuvre ou il n'y a pas véritablement de majoration des prix. Le choix du législateur entraîne comme conséquence directe la possibilité que le délai de prescription expire avant que le demandeur soit en mesure d'intenter une action sur le fondement de l'al. 36(1)a).

[160] Second, s. 36(4)(a)(ii) provides a mechanism for the plaintiff to advance a claim that may be barred by s. 36(4)(a)(i): even if two years have expired from the day on which the prohibited conduct was engaged in, the limitation period will restart on the day on which criminal proceedings relating to the impugned conduct are finally disposed of. While s. 36(4)(a)(ii) applies only where the alleged conduct contrary to Part VI is the subject of criminal prosecution, it nevertheless provides an indication that Parliament was aware of the strictness of

[160] Deuxièmement, le sous-al. 36(4)a)(ii) prévoit un mécanisme permettant au demandeur d'intenter une action prescrite par le sous-al. 36(4)a)(i) : même s'il s'est écoulé deux ans depuis la date où le comportement prohibé a eu lieu, le délai de prescription recommence à courir à la date où il est statué de façon définitive sur la poursuite criminelle visant le comportement reproché. Bien que le sous-al. 36(4)a)(ii) s'applique seulement dans les cas où le comportement reproché contraire à la partie VI fait l'objet d'une poursuite criminelle, ce sous-alinéa révèle

s. 36(4)(a)(i) and chose to enact this provision as the *only* means of relieving against it.

[161] Third, and unlike claims subject to the general limitation period in British Columbia's *Limitation Act*, S.B.C. 2012, c. 13, s. 21, Parliament has not subjected claims under s. 36(1)(a) to any ultimate limitation period. Interpreting s. 36(4)(a)(i) as commencing only when the underlying conduct becomes discoverable will therefore have the effect of leaving defendants at risk of lawsuit indefinitely. As Paul-Erik Veel helpfully observes, the result would be that "[c]ompanies could face claims decades later, well after the employees involved in the alleged conspiracy may have left and documents lost, without any ability to defend themselves" (*Waiting forever for the axe to drop? Discoverability and the limitation period for Competition Act claims, Lenczner Slaght*, August 12, 2016 (online)). This runs contrary to the certainty and evidentiary rationales that underlie the law of limitations.

[162] Fourth, the two-year limitation period was enacted by Parliament at a time when limitation periods were comparatively much longer. For example, the provincial limitations statutes that were in force at the time in Ontario and British Columbia set out a general limitation period of six years (*The Limitations Act*, R.S.O. 1970, c. 246, s. 45(1); *Statute of Limitations*, R.S.B.C. 1960, c. 370, s. 3). The relatively short limitation period at issue here, which commences even before the cause of action fully crystalizes, provides a further indication of the premium that Parliament placed on granting repose to defendants and encouraging diligence by potential plaintiffs.

[163] The statutory provision at issue here is therefore akin to s. 138.14 of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, which this Court recently

néanmoins que le Parlement était conscient de la rigueur du sous-al. 36(4)a)(i) et a choisi de l'édicter parce qu'il s'agissait du *seul* moyen d'établir une exception à la règle.

[161] Troisièmement, contrairement aux demandes assujetties au délai de prescription général prévu par la *Limitation Act*, S.B.C. 2012, c. 13, art. 21, de la Colombie-Britannique, le Parlement n'a aucunement assorti le recours fondé sur l'al. 36(1)a) d'un délai de prescription ultime. Si l'on tient pour acquis que le délai prévu au sous-al. 36(4)a)(i) ne commence à courir que lorsque le comportement visé peut être découvert, il va sans dire que les défendeurs risquent de se faire poursuivre indéfiniment. Comme Paul-Erik Veel le fait observer à juste titre, il s'ensuivrait que [TRADUCTION] « [l]es entreprises risqueraient de se faire poursuivre des décennies plus tard, longtemps après que les employés ayant participé au complot allégué aient quitté leur poste et que les documents aient été égarés, et sans que les employés ne puissent se défendre » (*Waiting forever for the axe to drop? Discoverability and the limitation period for Competition Act claims*, *Lenczner Slaght*, 12 août 2016 (en ligne)). Cela va à l'encontre des justifications en matière de certitude et de preuve qui constituent le fondement du droit en matière de prescription.

[162] Quatrièmement, le Parlement a fixé le délai de prescription à deux ans à une époque où les délais étaient comparativement beaucoup plus longs. Par exemple, les lois provinciales sur la prescription en vigueur à l'époque en Ontario et en Colombie-Britannique prévoyaient un délai de prescription général de six ans (*The Limitations Act*, R.S.O. 1970, c. 246, par. 45(1); *Statute of Limitations*, R.S.B.C. 1960, c. 370, art. 3). Le délai relativement court en cause dans la présente affaire, qui commence à courir avant même que la cause d'action ne prenne entièrement forme, révèle là encore la grande importance que le Parlement a attachée aux objectifs d'assurer la tranquillité d'esprit des défendeurs et d'encourager les demandeurs potentiels à faire preuve de diligence.

[163] La disposition statutaire en cause dans l'affaire qui nous occupe s'apparente donc à l'art. 138.14 de la *Loi sur les valeurs mobilières*, L.R.O. 1990,

considered in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801; because there is no suspension mechanism built into that statutory limitation clause, "the limitation period begins to run regardless of knowledge on the plaintiff's part, be it on when a document containing a misrepresentation is released, when an oral statement containing a misrepresentation is made, or when there is a failure to make timely disclosure" (para. 79). Under both provisions, the limitation period is triggered by an event that is unrelated to the state of the plaintiff's knowledge. This is consistent with a number of judicial decisions that considered this issue as it pertains to s. 36 of the *Competition Act* (see: *CCS Corp. v. Secure Energy Services Inc.*, 2014 ABCA 96, 575 A.R. 1, at para. 4; *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825, 67 C.P.R. (4th) 241, at para. 488; *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996, 88 C.P.R. (4th) 7, at paras. 28-33; *Eli Lilly and Co. v. Apotex Inc.*, 2009 FC 991, 80 C.P.R. (4th) 1, at para. 729; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, at paras. 643-46 (CanLII)).

c. S.5, de l'Ontario, sur lequel s'est penché récemment notre Cour dans *Banque Canadienne Impériale de Commerce c. Green*, 2015 CSC 60, [2015] 3 R.C.S. 801. Faute de mécanisme interne de suspension prévu par la loi, « le délai de prescription commenc[e] à courir sans égard à la connaissance du demandeur, que ce soit lors de la publication d'un document contenant une déclaration inexacte de faits, lors d'une déclaration orale contenant une déclaration inexacte de faits, ou en cas de défaut de divulgation en temps utile » (par. 79). Selon les deux dispositions, le point de départ du délai de prescription est déclenché par un événement étranger à la connaissance du demandeur. Ce principe est conforme à plusieurs décisions judiciaires portant sur cette question, qui concerne l'art. 36 de la *Loi sur la concurrence* (voir : *CCS Corp. c. Secure Energy Services Inc.*, 2014 ABCA 96, 575 A.R. 1, par. 4; *Laboratoires Servier c. Apotex Inc.*, 2008 CF 825, 67 C.P.R. (4th) 241, par. 488; *Garford Pty Ltd. c. Dywidag Systems International, Canada, Ltd.*, 2010 CF 996, 88 C.P.R. (4th) 7, par. 28-33; *Eli Lilly and Co. c. Apotex inc.*, 2009 CF 991, 80 C.P.R. (4th) 1, par. 729; *Fairview Donut Inc. c. The TDL Group Corp.*, 2012 ONSC 1252, par. 643-646 (CanLII)).

[164] On a different note, I am not persuaded that a short limitation period, to which the discoverability rule does not apply, will defeat the purpose for which Parliament enacted s. 36 and the rest of the *Competition Act*. Civil liability under s. 36 is not the exclusive means by which persons are held to account for anti-competitive conduct: the statute also provides for a variety of penal and administrative consequences for activities that reduce competition in the marketplace. Moreover, as I will explain later in these reasons, alleged wrongdoers may also be liable at common law or in equity for conduct that constitutes an offence under Part VI. A short limitation period for the cause of action under s. 36(1) therefore does not defeat Parliament's objective of "maintain[ing] and encourag[ing] competition in Canada . . . in order to provide consumers with competitive prices and product choices" (*Competition Act*, s. 1.1).

[164] Dans un autre ordre d'idée, je ne suis pas convaincue qu'un court délai de prescription, auquel la règle de la possibilité de découvrir ne s'applique pas, viendra contrecarrer l'objectif que visait le Parlement par l'adoption de l'art. 36 et du reste de la *Loi sur la concurrence*. La responsabilité civile prévue à l'art. 36 n'est pas le seul moyen de tenir une personne responsable d'un comportement anticoncurrentiel : la loi prévoit également un éventail de conséquences pénales et administratives pour des activités qui diminuent la concurrence sur le marché. En outre, comme je l'expliquerai plus loin, l'auteur allégué d'une faute risque d'être tenu responsable en common law ou en equity d'un comportement qui constitue une infraction visée à la partie VI. Par conséquent, le court délai de prescription applicable à la cause d'action prévue au par. 36(1) ne vient pas contrecarrer l'objectif du Parlement de « préserver et de favoriser la concurrence au Canada [. . .] dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits » (*Loi sur la concurrence*, art. 1.1).

[165] As a result, I disagree with my colleague that the limitation period in s. 36(4)(a)(i) begins to run on the date that the conduct contrary to Part VI is either discovered or discoverable by the plaintiff. Properly interpreted, the triggering event in this statutory provision "clearly occurs without regard to the injured party's knowledge", and the provision does not contain "wording to [the same] effect" as "accrual" of the s. 36 cause of action. A proper application of the *Fehr* test therefore leads to the conclusion that the discoverability rule does not apply. Applying discoverability would make the limitation period chosen by Parliament virtually meaningless and create uncertainty around the likelihood and timing of significant litigation.

B. *Must There Be a Special Relationship Between the Parties to an Action in Order for the Doctrine of Fraudulent Concealment to Toll the Limitation Period?*

[166] The fraudulent concealment doctrine is a doctrine that operates to prevent a limitation clause from being used as an instrument of injustice in circumstances where a defendant conceals the facts giving rise to a potential cause of action from a plaintiff. Because it would be unconscionable for that defendant to then rely on the limitation clause as a defence to the claim, equity "suspend[s] the running of the limitation clock until such time as the injured party can reasonably discover the cause of action" (*Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), at para. 28). The Canadian approach to this doctrine has its origin in the England and Wales Court of Appeal's decision in *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), in which Lord Evershed, M.R., wrote as follows:

> It is now clear . . . that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear . . . that <u>no degree of moral turpitude is necessary to establish fraud within the section</u>. What is covered by equitable fraud is a matter which LORD HARDWICKE did not attempt to define two hundred years ago, and I certainly shall not attempt to

[165] Par conséquent, je suis en désaccord avec la conclusion de mon collègue selon laquelle le délai de prescription établi au sous-al. 36(4)a)(i) commence à courir à la date à laquelle le demandeur a découvert ou aurait pu découvrir le comportement allant à l'encontre de la partie VI. Si l'on interprète cette disposition correctement, le fait déclencheur dont il est question « survient clairement, et sans égard à la connaissance qu'en a la [partie lésée] » et la disposition en cause ne contient pas des « mots [dans le] sens » de « naissance » de la cause d'action fondée sur l'art. 36. L'application correcte du critère de l'arrêt *Fehr* mène à la conclusion que la règle de la possibilité de découvrir ne s'applique pas. Si cette règle s'appliquait, le délai de prescription choisi par le Parlement perdrait pratiquement tout son sens et laisserait planer l'incertitude quant à la probabilité d'engager de nombreuses poursuites et au moment de les engager.

B. *Pour que la doctrine de la dissimulation frauduleuse reporte le point de départ du délai de prescription, doit-il y avoir une relation spéciale entre les parties à une action?*

[166] La doctrine de la dissimulation frauduleuse vise à empêcher que le délai de prescription serve à créer une injustice lorsque le défendeur cache au demandeur les faits à l'origine d'une cause d'action potentielle. Puisqu'il serait abusif pour le défendeur d'invoquer la prescription comme défense, l'equity [TRADUCTION] « permet de suspendre l'écoulement du délai de prescription jusqu'à ce que la partie lésée puisse raisonnablement découvrir l'existence de la cause d'action » (*Giroux Estate c. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), par. 28). La conception canadienne de cette doctrine tire son origine de la décision de la Cour d'appel d'Angleterre et du Pays de Galles, *Kitchen c. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), où le maître des rôles lord Evershed s'est exprimé ainsi :

> [TRADUCTION] Il est maintenant clair [. . .] que le mot « fraude » employé à l'al. 26b) de la Limitation Act, 1939, ne désigne pas uniquement une tromperie ou une fraude en common law. Il est également clair [. . .] qu'<u>aucun degré de turpitude morale n'est nécessaire pour prouver qu'il y a fraude au sens de la disposition</u>. Ce que vise la fraude en equity est une chose que le LORD HARDWICKE

do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added; p. 249.]

[167] The Pioneer Defendants, relying on *Kitchen* and the jurisprudence that followed, argue that the existence of a "special relationship" between the plaintiff and the defendant is a necessary precondition to the application of the doctrine of fraudulent concealment. Because such a relationship was not pleaded by the Plaintiff, they say that this doctrine cannot operate to toll the limitation period and that the claim against them must fail accordingly.

[168] I would note that this Court has only ever considered the operation of fraudulent concealment in the context of a special relationship between the plaintiff and the defendant. This Court applied that doctrine in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, after Dickson J. (as he then was) found that the conduct of the Indian Affairs Branch of the federal government was "unconscionable, having regard to the fiduciary relationship between the Branch and the [Musqueam Indian] Band" (p. 390). Likewise, this Court recognized the existence of a special relationship between a parent and a child in *M. (K.)*, a case concerning incest. There, La Forest J. explained that such cases necessarily involve "a grievous abuse of a position of confidence", since "incest is really a double wrong — the act of incest itself is followed by an abuse of the child's innocence to prevent recognition or revelation of the abuse" (p. 58). Canadian courts have also found special relationships to exist between lawyers and clients, physicians and patients, employers and terminated employees, and trustees and beneficiaries (Mew et al., at p. 234).

[169] That said, I am not prepared to go so far as to say that a special relationship — which I understand to be one that is based on trust and confidence — is

n'a pas tenté de définir il y a deux cents ans et que je ne tenterai certainement pas de définir maintenant; toutefois, il m'apparaît clair que cette expression vise une conduite qui, compte tenu de l'existence d'une relation spéciale entre les parties concernées, est un abus de la part de l'une envers l'autre. [Je souligne; p. 249.]

[167] S'appuyant sur l'arrêt *Kitchen* et la jurisprudence subséquente, les défenderesses Pioneer font valoir que l'existence d'une « relation spéciale » entre le demandeur et le défendeur est une condition préalable nécessaire à l'application de la doctrine de la dissimulation frauduleuse. Vu que le demandeur en l'espèce n'a pas allégué l'existence d'une telle relation, elles affirment que cette doctrine ne permet pas de repousser le point de départ du délai de prescription et que la demande déposées contre elles est donc vouée à l'échec.

[168] Je ferais observer que notre Cour n'a toujours examiné l'application de la dissimulation frauduleuse que dans le contexte d'une relation spéciale entre le demandeur et le défendeur. Notre Cour a appliqué cette doctrine dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, à la suite de la conclusion du juge Dickson (plus tard juge en chef) qui qualifiait la conduite de la direction des Affaires indiennes du gouvernement fédéral, de « peu scrupuleuse, compte tenu du rapport fiduciaire qui exist[ait] entre la Direction et la bande [indienne Musqueam] » (p. 390). De même, notre Cour a reconnu l'existence d'une relation spéciale entre un parent et son enfant dans *M. (K.)*, une affaire d'inceste. Le juge La Forest y a expliqué que, forcément, dans de tels cas, « on abuse gravement d'une situation de confiance », puisque « l'inceste est réellement un double méfait — l'acte d'inceste est lui-même suivi d'un abus de l'innocence de l'enfant visant à l'empêcher de se rendre compte de l'agression ou d'en révéler l'existence » (p. 58). Les tribunaux canadiens ont également conclu à l'existence d'une relation spéciale entre les avocats et leurs clients, les médecins et leurs patients, les employeurs et les employés congédiés, ainsi que les fiduciaires et les bénéficiaires de la fiducie (Mew et autres, p. 234).

[169] Cela dit, je ne suis pas disposée à aller jusqu'à affirmer que l'existence d'une relation spéciale — fondée, selon moi, sur la confiance — constitue toujours

always a prerequisite or a necessary element for the operation of the fraudulent concealment doctrine. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, Binnie J. explained that fraud in equity is broader than it is at common law, as it captures "transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (para. 39 (emphasis added), citing *First City Capital Ltd. v. B.C. Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), at p. 37). He further noted that this ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", adding that "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken" (*ibid.* (emphasis added), citing *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19). What constitutes "unconscionable conduct" for the purposes of the doctrine of equitable fraud will vary from case to case and will depend in part on the connection between the parties. This is helpfully explained by Ian Spry in his leading textbook, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th ed. 2014):

> Fraud in this sense includes, not only fraud in the sense of active dishonesty that gave rise to an action of deceit at law, but also the taking of active steps with the intention of concealing the existence of the material cause of action. The better view is that it includes also, in cases where the defendant is under a special duty to the plaintiff, a failure to disclose the events which have taken place and which give rise to the cause of action in question. So it was said by Lord Evershed that in this context fraud includes "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other". [p. 440]

[170] In effect, in the commercial context, limiting the application of the fraudulent concealment doctrine to only those situations where there is a special relationship between the parties presupposes that, in that context, there can be no injustice resulting

une condition préalable ou un élément nécessaire à l'application de la doctrine de la dissimulation frauduleuse. Dans *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 CSC 19, [2002] 1 R.C.S. 678, le juge Binnie a expliqué que le terme « fraude » comporte un sens plus large en equity qu'en common law, car il s'entend également [TRADUCTION] « d'opérations qui ne sont pas dolosives, mais à l'égard desquelles le tribunal estime qu'il serait abusif de laisser une personne profiter de l'avantage obtenu » (par. 39 (je souligne), citant *First City Capital Ltd. c. B.C. Building Corp.* (1989), 43 B.L.R. 29 (C.S. C.-B.), p. 37). Le juge Binnie a également fait remarquer que la fraude donnant ouverture à une réparation en equity se présente sous « un nombre tellement infini de formes que les tribunaux n'ont pas tenté de la définir », et ajouté [TRADUCTION] « [qu']elle vise toutes sortes de manœuvres déloyales et de conduites abusives en matière contractuelle » (*ibid.* (je souligne), citant *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (H.C. Ont.), p. 19). Déterminer en quoi consiste « une conduite abusive » pour l'application de la doctrine de la fraude en equity varie d'une affaire à l'autre et dépend en partie du lien qui unit les parties. C'est ce qu'explique de manière utile Ian Spry dans son ouvrage qui fait autorité, *The Principles of Equitable Remedies : Specific Performance, Injunctions, Rectification and Equitable Damages* (9e éd. 2014) :

> [TRADUCTION] Dans ce sens, la fraude ne s'entend pas uniquement d'une activité malhonnête qui ouvre droit à une action pour dol, mais aussi de la prise de mesures concrètes dans le but de dissimuler l'existence de la cause d'action réelle. De fait, la fraude s'entend également, dans les cas où le défendeur assume un devoir particulier envers le demandeur, du défaut de révéler les faits qui se sont produits et qui donnent naissance à la cause d'action en question. Comme l'expliquait lord Evershed, dans ce contexte, le mot « fraude » vise « une conduite qui, compte tenu de la relation spéciale qui existe entre les parties concernées, est un abus de la part de l'une envers l'autre ». [p. 440]

[170] En fait, dans le contexte commercial, appliquer la doctrine de la dissimulation frauduleuse uniquement dans les cas où il existe une relation spéciale entre les parties suppose que, dans ce contexte, il ne peut y avoir d'injustice découlant de l'application

from the application of a limitation period *unless* a special relationship exists. Put differently, insofar as there may be situations in which the fraudulent concealment doctrine would rectify an injustice caused to a plaintiff by the application of a limitation period, *even though there exists no special relationship* between the parties, then limiting the doctrine by requiring such a relationship could be seen as contradicting the very spirit of a doctrine that aims to protect against unconscionable conduct.

[171] Based on this understanding of fraudulent concealment, my view is that it is not plain and obvious that equity can intervene to toll the applicable limitation period only in cases where there exists a special relationship; it may be that it can also intervene in cases — at least in the commercial context, as here — where the plaintiff can demonstrate something commensurate with or tantamount to a special relationship.

[172] To be sure, the mere allegation of a price-fixing agreement among defendants is not sufficient *on its own* for the fraudulent concealment doctrine to toll the applicable limitation period. If it were, the limitation period for which Parliament specifically provided in s. 36(4) of the *Competition Act* would be meaningless in these circumstances, given the fact that price-fixing agreements are, in practice, carried out in secret.

[173] In the case at hand, the Plaintiff did not plead that there was a special relationship between the class members and the Pioneer Defendants. However, as I explained above, it is not plain and obvious that this is fatal to the Plaintiff's fraudulent concealment claim, since a special relationship may not be a necessary precondition to the application of the fraudulent concealment doctrine. While the mere allegation of a price-fixing agreement among the Pioneer Defendants is not sufficient *on its own* for this doctrine to toll the applicable limitation period, in the commercial context, a showing of fraud in equity tantamount to or commensurate with the existence of a special relationship could be enough.

d'un délai de prescription *sauf* en présence d'une relation spéciale. Autrement dit, dans la mesure où il peut exister une situation dans laquelle cette doctrine corrigerait une injustice que fait subir à un demandeur l'application d'un délai de prescription, *malgré l'absence de relation spéciale* entre les parties, l'on pourrait considérer que restreindre l'application de la doctrine en exigeant la présence d'une telle relation contredit l'esprit même d'une doctrine qui vise à prévenir les comportements abusifs.

[171] Vu cette conception de la dissimulation frauduleuse, il ne me semble pas évident et manifeste que l'equity peut intervenir pour repousser le point de départ du délai de prescription uniquement dans les cas où il existe une relation spéciale; il se peut qu'elle puisse aussi intervenir dans les cas — du moins en matière commerciale, comme dans le cas présent — où le demandeur peut démontrer quelque chose correspondant ou d'équivalent à une relation spéciale.

[172] À n'en pas douter, la simple allégation que des défendeurs se sont entendus pour fixer les prix ne suffit pas *en soi* pour que la doctrine de la dissimulation frauduleuse repousse le point de départ du délai de prescription applicable. Si cette allégation était suffisante, le délai de prescription que le Parlement a expressément prévu au par. 36(4) de la *Loi sur la concurrence* serait dénué de sens dans les circonstances, vu que les ententes de fixation des prix sont, en pratique, mises en œuvre en secret.

[173] En l'espèce, le demandeur n'a pas invoqué l'existence d'une relation spéciale entre les membres du groupe et les défenderesses Pioneer. Toutefois, comme je l'ai expliqué précédemment, il n'est pas évident et manifeste que cette omission porte un coup fatal à l'allégation de dissimulation frauduleuse faite par le demandeur, car une relation spéciale ne saurait être une condition préalable à l'application de la doctrine de la dissimulation frauduleuse. Bien que la simple allégation qu'un accord de fixation des prix a été conclu entre les défenderesses Pioneer ne suffise pas, *à elle seule*, pour que cette doctrine repousse le point de départ du délai de prescription applicable, dans un contexte commercial, la démonstration qu'il y a eu fraude au sens de l'equity équivalente ou correspondant à l'existence d'une relation spéciale pourrait suffire.

[174] The Plaintiff pleaded that the Pioneer Defendants "took active steps to, and did, conceal the unlawful conspiracy from their customers" (R.F. (Pioneer Appeal, at para. 11)). Given that we are at the certification stage, I am prepared to conclude that it is not "plain and obvious" that the fraudulent concealment doctrine has no application in this case. Whether or not the Plaintiff will be successful in relying on this doctrine to toll the applicable limitation period in these circumstances, however, will depend on what he can prove at trial — that is, whether he can establish a special relationship, or maybe something tantamount to or commensurate with one could suffice.

[174] Le demandeur a fait valoir que les défenderesses Pioneer [TRADUCTION] « ont pris des mesures concrètes pour dissimuler, et ont effectivement dissimulé, le complot illégal à leurs clients » (m.i. (pourvoi de Pioneer), par. 11). Comme l'affaire se trouve à l'étape de l'autorisation, je suis disposée à conclure qu'il n'est pas « évident et manifeste » que la doctrine de la dissimulation frauduleuse ne trouve pas application en l'espèce. Toutefois, le point de savoir si le demandeur réussira à faire reporter le point de départ du délai de prescription applicable dans ces circonstances dépendra de ce qu'il peut prouver au procès; autrement dit, sera-t-il en mesure d'établir une relation spéciale, ou peut-être que quelque chose d'équivalent ou de correspondant à cette relation suffira.

[175] On the basis of the foregoing, while the discoverability rule does not apply to toll the limitation period, it may be that the fraudulent concealment doctrine does, and, accordingly, I would dismiss the Pioneer Appeal regarding that question. However, there remain three more issues, common to all Defendants, and because the Pioneer Defendants have adopted the submissions of the Toshiba Appeal with regards to these common issues, I will consider them together in the subsequent section. For the aforementioned reasons and for the reasons that follow, I would allow the Pioneer Appeal in part.

[175] Compte tenu de ce qui précède, même si la règle de la possibilité de découvrir ne s'applique pas de manière à reporter le point de départ du délai de prescription, il se peut que la doctrine de la dissimulation frauduleuse s'applique et, par conséquent, je suis d'avis de rejeter le pourvoi de Pioneer quant à cette question. Il reste cependant à trancher trois autres questions, communes à toutes les défenderesses, et, comme les défenderesses Pioneer ont fait leurs les arguments du pourvoi de Toshiba sur ces questions communes, je les examinerai ensemble dans la prochaine section. Pour les motifs qui précèdent et ceux qui suivent, j'accueillerais le pourvoi de Pioneer en partie.

III. The Toshiba Appeal

III. Le pourvoi de Toshiba

[176] The issues in the Toshiba Appeal, which are common to both appeals, are threefold:

(a) Is it plain and obvious that the Umbrella Purchasers' claims under s. 36(1)(a) of the *Competition Act* cannot succeed?

(b) Is it plain and obvious that s. 36(1) bars a plaintiff from alleging common law and equitable causes of action in respect of conduct that breaches the prohibitions in Part VI of the *Competition Act*?

[176] Le pourvoi de Toshiba soulève trois questions communes aux deux pourvois :

a) Est-il évident et manifeste que les réclamations présentées par les acheteurs sous parapluie sur le fondement de l'al. 36(1)a) de la *Loi sur la concurrence* ne peuvent être accueillies?

b) Est-il évident et manifeste que le par. 36(1) de la *Loi sur la concurrence* empêche le demandeur d'exercer des recours de common law et d'equity à l'égard d'un comportement qui enfreint les prohibitions prévues à la partie VI de la *Loi sur la concurrence*?

(c) What standard must a representative plaintiff meet in order to have loss-related questions certified as "common issues" among indirect purchasers, and has the Plaintiff met this standard in the present case?

[177] I write separately because my views diverge from those of my colleague on all three of these issues. I will address each in turn.

A. *Is it Plain and Obvious That the Umbrella Purchasers' Claims Under Section 36(1) of the Competition Act Cannot Succeed?*

[178] The first issue in the Toshiba Appeal is whether the Certification Judge erred in holding that the Umbrella Purchasers can advance claims under s. 36(1) of the *Competition Act* against the Defendants. The Defendants submit that the Certification Judge did so err, and that upholding his conclusion on this point will have the effect of opening up "a potentially limitless scope of liability that could not have been contemplated by Parliament and is contrary to the scheme of the *Competition Act*" (A.F. (Toshiba Appeal), at para. 97).

[179] I agree with my colleague that resolving this issue requires an exercise in statutory interpretation, under which the words of the *Competition Act* are to "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). However, we must not lose sight of the fact that our contextual approach to statutory interpretation also draws on the relevant legal principles and norms (see *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 43; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48).

c) Quelle est la norme à laquelle doit satisfaire le représentant des demandeurs pour que les questions liées à la perte soient autorisées en tant que « questions communes » aux acheteurs indirects? Le demandeur satisfait-il à cette norme en l'espèce?

[177] Je rédige ces motifs distincts parce que mon opinion et celle de mon collègue divergent sur toutes ces trois questions. Je les examinerai à tour de rôle.

A. *Est-il évident et manifeste que les réclamations présentées par les acheteurs sous parapluie sur le fondement du par. 36(1) de la Loi sur la concurrence ne peuvent être accueillies?*

[178] La première question soulevée dans le pourvoi de Toshiba est de savoir si le juge saisi de la demande d'autorisation a commis une erreur en concluant que les acheteurs sous parapluie peuvent poursuivre les défenderesses en justice sur le fondement du par. 36(1) de la *Loi sur la concurrence*. Les défenderesses font valoir que le juge a commis une telle erreur et que la confirmation de sa conclusion sur ce point aura pour effet d'établir une [TRADUCTION] « responsabilité potentiellement illimitée qui ne saurait figurer parmi les objectifs du Parlement et qui va à l'encontre du régime établi par la *Loi sur la concurrence* » (m.a. (pourvoi de Toshiba), par. 97).

[179] À l'instar de mon collègue, j'estime que pour trancher cette question, il faut se livrer à un exercice d'interprétation statutaire consistant à lire les termes de la *Loi sur la concurrence* [TRADUCTION] « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du législateur » (*Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26, citant E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87). Cependant, nous ne devons pas perdre de vue le fait que notre méthode contextuelle d'interprétation des lois s'appuie également sur les normes et principes juridiques pertinents (voir *R. c. Alex*, 2017 CSC 37, [2017] 1 R.C.S. 967, par. 31; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895, par. 43; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy & Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 48).

[180] On its face, s. 36(1) appears to be worded broadly enough to capture claims by umbrella purchasers, so long as they can prove that they "suffered loss or damage as a result of" the conduct specified in para. (a) or (b). According to the Defendants, however, this statutory provision must be interpreted in a manner that is consistent with the principles that limit the extent of liability at common law (A.F. (Toshiba Appeal), at paras. 97-99). They point specifically to two legal principles that are relevant for the purposes of liability to umbrella purchasers: indeterminacy and remoteness. At its core, therefore, the issue under this heading raises the question of whether those principles can inform our interpretation of s. 36(1) of the *Competition Act* — and in particular, the extent of a defendant's liability thereunder in the context of a price-fixing claim brought by persons whose ODD or ODD product was manufactured or supplied by a non-Defendant.

[180] À première vue, le libellé du par. 36(1) semble suffisamment général pour englober les réclamations des acheteurs sous parapluie, pourvu qu'ils puissent établir qu'ils ont « subi une perte ou des dommages par suite » des comportements énumérés aux al. a) et b). Les défenderesses affirment cependant qu'il faut interpréter cette disposition conformément aux principes qui limitent l'étendue de la responsabilité en common law (m.a. (pourvoi de Toshiba), par. 97-99). Elles invoquent précisément deux principes de droit pertinents pour la responsabilité envers les acheteurs sous parapluie : l'indétermination et le caractère éloigné. Essentiellement, la question à trancher sous cette rubrique consiste donc à savoir si ces principes peuvent guider notre interprétation du par. 36(1) de la *Loi sur la concurrence* — en particulier l'étendue de la responsabilité des défenderesses dans le contexte d'une action pour fixation des prix intentée par des acheteurs de LDO et de produits munis de LDO fabriqués ou fournis par une personne qui n'est pas une défenderesse.

[181] *Indeterminacy* is a policy consideration that negates the imposition of a duty of care in negligence where it would expose the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.C.A. 1931), at p. 444, per Cardozo C.J.). This concern arises where finding a duty of care between a plaintiff and a defendant would open the floodgates, resulting in "massive, uncontrolled liability" (A. M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 278). *Remoteness* is a related principle that limits the scope of liability in negligence where "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 12, citing A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 360). According to the authors of the 11th edition of that text:

[181] L'*indétermination* correspond à une considération de politique générale qui vient écarter l'imposition d'une obligation de diligence en droit de la négligence lorsque le défendeur serait exposé à [TRADUCTION] « une responsabilité pour un montant indéterminé, pour un temps indéterminé et envers une catégorie indéterminée » (*Ultramares Corp. c. Touche*, 174 N.E. 441 (C.A. N.Y. 1931), p. 444, le juge en chef Cardozo). Ce risque existe dans le cas où la reconnaissance d'une obligation de diligence entre le demandeur et le défendeur favoriserait la multiplication des actions en justice et entraînerait une [TRADUCTION] « responsabilité massive, échappant à tout contrôle » (A. M. Linden et autres, *Canadian Tort Law* (11e éd. 2018), p. 278). Le *caractère éloigné* est un principe connexe qui a pour effet de limiter l'étendue de la responsabilité pour négligence si [TRADUCTION] « le préjudice a trop peu de lien avec l'acte fautif pour que le défendeur puisse raisonnablement être tenu responsable » (*Mustapha c. Culligan du Canada Ltée*, 2008 CSC 27, [2008] 2 R.C.S. 114, par. 12, citant A. M. Linden et B. Feldthusen, *Canadian Tort Law* (8e éd. 2006), p. 360). Selon les auteurs de la 11e édition de cet ouvrage :

The losses or injuries incurred by plaintiffs must not be "too remote" a consequence of the defendants' negligent

[TRADUCTION] Les pertes ou les préjudices que subissent les demandeurs ne doivent pas constituer une conséquence act, in order for compensation to ensue. In other words, to use the older language, negligent defendants who owe a general duty of care are not liable unless their conduct is the "proximate cause" of the plaintiff's losses. Causation alone is not enough; it must be demonstrated that the conduct was the *proximate* cause of the damage. This issue is better described as the scope or extent of liability issue. [Emphasis in original; p. 307.]

[182] Although both indeterminacy and remoteness relate primarily to liability in negligence, I agree with the Defendants that the same underlying concerns can inform our analysis of the issue at hand, which involves claims under s. 36 of the *Competition Act* for pure economic losses. In *Taylor v. 1103919 Alberta Ltd.*, 2015 ABCA 201, 602 A.R. 105, at para. 50, for example, the Alberta Court of Appeal discerned "no principled reason why [the principle of remoteness] ought not to apply" to the statutory cause of action in Alberta's *Land Titles Act*, R.S.A. 2000, c. L-4. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, Rothstein J. considered the principle of remoteness, among other legal norms, in his analysis of whether indirect purchasers have a cause of action under s. 36 of the *Competition Act* (paras. 42-45).

[183] Similarly, in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983), the United States Supreme Court held that common law principles — including foreseeability and proximate cause, directness of injury, certainty of damages and privity of contract — can operate to limit the scope of a defendant's liability under the statutory cause of action for anti-competitive conduct in § 4 of the *Clayton Act*, 15 U.S.C. § 15.[3] In that case, the

[3] That provision read as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

« trop éloignée » de la négligence des défendeurs pour qu'il puisse y avoir indemnisation. Autrement dit, pour reprendre l'ancien libellé, les défendeurs négligents qui ont une obligation générale de diligence n'engagent leur responsabilité que si leur conduite est la « cause immédiate » des pertes subies par les demandeurs. La causalité à elle seule ne suffit pas; il faut établir que la conduite était la cause *immédiate* du préjudice. Cette question concerne davantage l'étendue ou la portée de la responsabilité. [En italique dans l'original; p. 307.]

[182] Bien que l'indétermination et le caractère éloigné se rapportent principalement à la responsabilité pour négligence, je suis d'accord avec les défenderesses pour dire que les mêmes préoccupations sous-jacentes peuvent guider notre analyse de la question à trancher, qui concerne les réclamations fondées sur l'art. 36 de la *Loi sur la concurrence* pour des pertes purement économiques. Dans l'arrêt *Taylor c. 1103919 Alberta Ltd.*, 2015 ABCA 201, 602 A.R. 105, par. 50, par exemple, la Cour d'appel de l'Alberta n'a relevé [TRADUCTION] « aucune raison logique de ne pas appliquer [le principe du caractère éloigné] » à la cause d'action prévue par la *Land Titles Act*, R.S.A. 2000, c. L-4, de l'Alberta. Dans *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, le juge Rothstein a examiné le principe du caractère éloigné, parmi d'autres normes juridiques, dans son analyse de la question de savoir si l'acheteur indirect avait une cause d'action au titre de l'art. 36 de la *Loi sur la concurrence* (par. 42-45).

[183] De même, dans *Associated General Contractors c. Carpenters*, 459 U.S. 519 (1983), la Cour suprême des États-Unis a statué que les principes de common law — dont la prévisibilité et la cause immédiate du préjudice, son caractère direct, la certitude du dommage et le lien contractuel — peuvent avoir pour effet de limiter l'étendue de la responsabilité du défendeur au regard du droit d'action prévu à l'art. 4 de la *Clayton Act*, 15 U.S.C. § 15[3] pour

[3] Cette disposition était ainsi rédigée : [TRADUCTION] « Toute personne qui a subi un préjudice dans ses activités commerciales ou relativement à ses biens par suite d'un comportement allant à l'encontre des lois antitrust peut engager des poursuites devant tout tribunal de district des États-Unis dans le district où le défendeur réside, se trouve ou dispose d'un mandataire, sans égard au montant en litige, et elle peut recouvrer le triple des dommages subis, ainsi que les dépens relatifs à l'instance, y compris les honoraires d'avocats raisonnables. »

majority held that a plaintiff could not recover under that provision for harm allegedly suffered by reason of the defendants' coercion of third parties. Although Stevens J. recognized that "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation" (p. 529), he nevertheless held that

> the question whether the [plaintiff] may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of [the applicable statutory provision]. Instead . . . the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. [p. 535]

[184] The issue in the instant case turns on whether the Defendants can be held liable for loss or damage of an economic nature suffered by the Umbrella Purchasers, a group of claimants who bought from non-Defendants ODDs that were manufactured or supplied by non-Defendants. Can the Umbrella Purchasers recover as against the Defendants — companies with which they have no commercial relationship whatsoever? In my view, the answer is no. Any overcharges that those claimants may have incurred were ultimately the direct result of pricing choices *made by those non-Defendant manufacturers and suppliers*, regardless of whether or not those choices were influenced by broader trends in the market. In short, the Defendants have control over their own business decisions, but not over those of non-Defendant manufacturers and suppliers. For this reason, and bearing in mind the principles underlying indeterminacy and remoteness, I am of the view that it would be unfair to hold the Defendants liable to the Umbrella Purchasers where they had no control over such liability. Indeed, interpreting s. 36(1) in the manner suggested by the Plaintiff might well expose the Defendants to unbounded liability — capable of encompassing not only the losses of those Umbrella Purchasers themselves, but also the losses of "[a]nyone who

comportement anticoncurrentiel. Dans cette affaire, les juges majoritaires ont conclu que le demandeur ne pouvait obtenir réparation en vertu de cette disposition pour un préjudice qu'il aurait subi par suite de la coercition exercée par le défendeur à l'endroit de tiers. Bien que le juge Stevens ait reconnu [TRADUCTION] « [qu'une] interprétation littérale de la loi est suffisamment large pour englober tout préjudice attribuable directement ou indirectement aux conséquences d'une violation des lois antitrust » (p. 529), il a néanmoins conclu ce qui suit :

> [TRADUCTION] . . . pour trancher la question de savoir si le [demandeur] peut obtenir réparation pour le préjudice qu'il aurait subi par suite de la coercition exercée par les défendeurs à l'endroit de certains tiers, il ne suffit pas de faire uniquement mention du libellé général [de la disposition statutaire applicable]. En fait, [. . .] nous sommes appelés à évaluer le préjudice subi par le demandeur, la faute reprochée aux défendeurs, ainsi que la relation entre eux. [p. 535]

[184] La question en litige dans le cas présent consiste à savoir si les défenderesses peuvent être tenues responsables de la perte ou des dommages de nature économique subis par les acheteurs sous parapluie, un groupe de demandeurs qui ont acheté d'autres personnes que les défenderesses des LDO fabriqués ou fournis par des personnes qui ne sont pas les défenderesses. Ces acheteurs peuvent-ils se faire indemniser par les défenderesses — des entreprises avec lesquelles les acheteurs sous parapluie n'ont aucune relation commerciale? À mon avis, il faut répondre à cette question par la négative. Toute majoration que ces demandeurs auraient pu absorber était en fin de compte la conséquence directe des choix en matière de prix *effectués par ces fabricants et fournisseurs autres que les défenderesses*, que ces choix aient ou non été influencés par des tendances générales du marché. Bref, les défenderesses exercent un contrôle sur leur propres décisions d'affaires, mais non sur celles des autres fabricants et fournisseurs. Pour ce motif, et gardant à l'esprit les principes qui sous-tendent l'indétermination et le caractère éloigné, je suis d'avis qu'il serait injuste de tenir les défenderesses responsables envers les acheteurs sous parapluie alors qu'elles n'avaient aucun contrôle sur cette responsabilité. En effet, interpréter

was affected by the economic ripples downstream of umbrella purchasers" (A.F. (Toshiba Appeal), at para. 105). In my opinion, this provision must be construed in a manner that prevents such a cascade of liability.

le par. 36(1) de la manière suggérée par le demandeur pourrait fort bien exposer les défenderesses à une responsabilité illimitée — susceptible de viser non seulement les pertes subies par les acheteurs sous parapluie, mais aussi les pertes de [TRADUCTION] « [t]oute personne qui a subi les conséquences de nature économique en aval des acheteurs sous parapluie » (m.a. (pourvoi de Toshiba), par. 105). À mon sens, il y a lieu d'interpréter cette disposition de manière à prévenir une telle responsabilité en cascade.

[185] This is consistent with the views expressed by Perell J. of the Ontario Superior Court of Justice in *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87, and by a unanimous Divisional Court in *Shah v. LG Chem, Ltd*., 2017 ONSC 2586, 413 D.L.R. (4th) 546. *Shah* involved the certification of a price-fixing class action brought by direct, indirect and umbrella purchasers of lithium ion batteries ("LIBs") manufactured by various defendants. On the question of whether the umbrella purchasers in that case could succeed in their claim under s. 36(1) of the *Competition Act*, Perell J. held as follows:

> . . . the Umbrella Purchasers' claim would impose indeterminate liability on the Defendants and the claim would be unfair because the law, generally speaking, does not impose liability on one person for the conduct of others, and in the instance of the Umbrella Purchasers, the Plaintiffs seek to make the Defendants liable for the advertent, inadvertent, voluntary or involuntary conduct of the non-Defendants in taking advantage of the price-fixing. [para. 175]

The Divisional Court unanimously upheld Perell J.'s conclusion on this point. As Nordheimer J. (as he then was) explained:

> What is alleged here is that the non-defendant [LIB] manufacturers took advantage of the higher market prices being set by the [defendants] through their conspiracy, to similarly increase the prices of their LIBs or LIB products. Assuming that that occurred, the [defendants] had no

[185] Cette conclusion cadre avec le point de vue exprimé par le juge Perell, de la Cour supérieure de justice de l'Ontario, dans *Shah c. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87, et par la Cour divisionnaire à l'unanimité dans *Shah c. LG Chem, Ltd*., 2017 ONSC 2586, 413 D.L.R. (4th) 546. Cette affaire concernait l'autorisation d'un recours collectif en matière de fixation des prix, intenté par les acheteurs directs, indirects et sous parapluie de piles au lithium-ion (« Pli ») fabriquées par diverses défenderesses. S'agissant de la question de savoir si les acheteurs sous parapluie pouvaient obtenir gain de cause dans leur recours fondé sur le par. 36(1) de la *Loi sur la concurrence*, le juge Perell a conclu ce qui suit :

> [TRADUCTION] . . . le recours des acheteurs sous parapluie imposerait aux défenderesses une responsabilité indéterminée et entraînerait une iniquité, car, de manière générale, le droit ne tient pas une personne responsable de la conduite d'autrui. Dans le cas des acheteurs sous parapluie, les demandeurs cherchent à tenir les défenderesses responsables de la conduite adoptée délibérément ou non en tirant un avantage volontairement ou non, par des personnes qui ne sont pas les défenderesses, car elles ont tiré parti de la fixation des prix. [par. 175]

La Cour divisionnaire a confirmé à l'unanimité la conclusion du juge Perell sur ce point. Comme l'expliquait le juge Nordheimer (maintenant juge à la Cour d'appel de l'Ontario) :

> [TRADUCTION] Il est allégué en l'espèce que les fabricants de [Pli] autres que les défenderesses ont tiré avantage de la hausse des prix sur le marché fixés par les [défenderesses] à la suite du complot qu'elles ont formé pour faire ainsi augmenter le prix de leurs Pli et de leurs produits munis

control over the actions of the non-defendant manufacturers. First and foremost, they had no control over whether the non-defendant manufacturers chose to match prices. Second, they had no control over the volume of LIBs or LIB products, that the non-defendant manufacturers chose to produce and sell. [para. 34]

[186] Both Perell J. and Nordheimer J. analogized the issue of liability to umbrella purchasers in *Shah* to the issue of indeterminacy that had arisen in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. In that case, a number of tobacco companies were facing lawsuits relating to the sale of "light" or "mild" cigarettes. Those companies, in turn, brought third-party claims against the Government of Canada, alleging that if they were found liable to the plaintiffs, they would be entitled to compensation from Canada for (among other things) negligent misrepresentation. The argument was that Canada had negligently misrepresented the health attributes of low-tar cigarettes to consumers and to those tobacco companies. Canada countered that allowing the tobacco companies' claims in negligent misrepresentation "would result in indeterminate liability", as "Canada had no control over the number of cigarettes being sold" (para. 97). This Court accepted Canada's argument; McLachlin C.J., writing for a unanimous Court, explained as follows:

I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, <u>Canada had no control over the number of people who smoked light cigarettes</u>. . . .

The risk of indeterminate liability is enhanced by the fact that the claims are <u>for pure economic loss</u>. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of

de Pli. Si l'on tient cela pour avéré, les [défenderesses] n'exerçaient aucun contrôle sur les actes des autres fabricants. D'abord et avant tout, les défenderesses n'avaient aucun contrôle sur le choix des autres fabricants de fixer des prix identiques. Ensuite, les défenderesses n'avaient aucun contrôle sur la quantité de Pli et de produits munis de Pli que les autres fabricants avaient choisi de fabriquer et de vendre. [par. 34]

[186] Les juges Perell et Nordheimer ont fait une analogie entre la question de la responsabilité envers les acheteurs sous parapluie soulevée dans l'arrêt *Shah* et la question de l'indétermination soulevée dans l'arrêt *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45. Dans cette affaire, des compagnies de tabac ont fait l'objet de poursuites pour avoir vendu des cigarettes « légères » ou « douces ». À leur tour, ces compagnies ont mis en cause le gouvernement du Canada, alléguant que, si elles étaient tenues responsables envers les demandeurs, elles auraient le droit d'être indemnisées par le Canada, entre autres, pour déclarations inexactes faites par négligence. Elles ont fait valoir que le Canada avait fait preuve de négligence en déclarant faussement aux fumeurs et aux compagnies de tabac que la cigarette à teneur réduite en goudron serait moins nocive pour la santé. Le Canada s'est opposé à cet argument en soutenant que, si l'on acceptait les allégations des compagnies de tabac en matière de déclaration inexacte faite par négligence, « cela entraînerait une responsabilité indéterminée de sa part » puisque « le nombre de cigarettes vendues était indépendant de sa volonté » (par. 97). Notre Cour a accepté l'argument du Canada, et la juge en chef McLachlin, rédigeant les motifs unanimes, a expliqué ce qui suit :

Je suis d'accord avec le Canada pour dire que la possibilité d'une responsabilité indéterminée porte un coup fatal aux allégations des compagnies de tabac relatives aux déclarations inexactes faites par négligence. Dans la mesure où les allégations reposent sur des déclarations faites aux consommateurs, <u>le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères</u>. . .

Le risque de responsabilité indéterminée est aggravé par le <u>caractère purement financier</u> de la perte alléguée. Dans *Design Services Ltd. c. Canada*, 2008 CSC 22, [2008] 1 R.C.S. 737, sous la plume du juge Rothstein, la Cour a pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate. [Emphasis added; paras. 99-100.]

[187] Although that case concerned indeterminacy in relation to the imposition of a duty of care in negligence, I agree with Nordheimer J. that "the fundamental principle is the same" (para. 32): s. 36(1) should not be interpreted in a manner that makes the Defendants liable to an indeterminate class of people for losses of an indeterminate nature that occurred as a result of business decisions over which they had no control. This accords with the approach taken by the United States Supreme Court in respect of a similar statutory cause of action for anti-competitive conduct: "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 [of the *Clayton Act*] there is a point beyond which the wrongdoer should not be held liable'" (*Associated General Contractors*, at pp. 534-35, citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), at pp. 476-77, citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), at p. 760, per Brennan J. dissenting). In my view, a preferable reading of the statutory cause of action in s. 36(1) of the *Competition Act* is one that, consistent with the principles underlying indeterminacy and remoteness which operate at common law, limits the potential scope of liability faced by defendants of price-fixing claims to losses flowing from their own pricing decisions, not those of third parties. This promotes the value of certainty so that commercial enterprises "have some appreciation of what risk is to be borne by whom" (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1139).

[188] The Ontario Divisional Court's decision in *Shah* was subsequently overturned by the Court of

mentionné que « dans les cas de perte purement financière, il faut, pour paraphraser le juge en chef Cardozo, prendre soin de ne reconnaître une obligation que dans la mesure où l'on peut déterminer la catégorie des demandeurs, la période et les montants en cause » (par. 62). Si le Canada avait une obligation de diligence envers les fumeurs de cigarettes légères, le nombre potentiel de demandeurs et l'ampleur de la responsabilité seraient indéterminés. [Je souligne; par. 99-100.]

[187] Même si cet arrêt concernait l'indétermination en lien avec l'imposition d'une obligation de diligence en négligence, je suis d'accord avec le juge Nordheimer pour dire que [TRADUCTION] « le principe fondamental est le même » (par. 32) : le par. 36(1) ne devrait pas être interprété de manière à ce que les défenderesses soient tenues responsables envers une catégorie indéterminée de personnes pour des pertes de nature indéterminée découlant de décisions d'affaires qui étaient indépendantes de leur volonté. Cette approche concorde avec celle adoptée par la Cour suprême des États-Unis à propos d'une cause d'action similaire conférée par la loi pour comportement anticoncurrentiel : [TRADUCTION] « On peut s'attendre à ce qu'une violation des lois antitrust ait des répercussions en chaîne sur l'économie de la nation; toutefois, "en dépit du libellé général de l'art. 4 [de la *Clayton Act*], le contrevenant ne peut être tenu responsable au-delà d'un certain point" » (*Associated General Contractors*, p. 534-535, citant *Blue Shield of Virginia c. McCready*, 457 U.S. 465 (1982), p. 476-477, citant *Illinois Brick Co. c. Illinois*, 431 U.S. 720 (1977), p. 760, le juge Brennan, dissident). À mon avis, il est préférable d'interpréter la cause d'action prévue au par. 36(1) de la *Loi sur la concurrence* conformément aux principes sous-tendant l'indétermination et le caractère éloigné qui s'appliquent en common law, de manière à limiter l'étendue de la responsabilité des défendeurs dans des recours en matière de fixation des prix aux pertes découlant de leurs propres décisions, et non de celles prises par des tiers. Cette interprétation promeut la notion de certitude, de sorte que les entreprises commerciales ont « une idée du risque qui doit être assumé et par qui » (*Cie des chemins de fer nationaux du Canada c. Norsk Pacific Streamship Co.*, [1992] 1 R.C.S. 1021, p. 1139).

[188] La décision *Shah* de la Cour divisionnaire de l'Ontario a été infirmée subséquemment par la Cour

Appeal, for reasons substantially similar to those set out by my colleague (*Shah v. LG Chem, Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721). The unanimous panel in that case took the position that "normative concerns about indeterminate liability" in negligence do not apply in the context of the statutory claim under ss. 36 and 45 of the *Competition Act*, since those concerns "have already been taken care of by Parliament" (para. 47). Like my colleague, the panel stated that, first, the scope of s. 36(1) limits recovery to persons who can prove that they suffered loss or damage "as a result of" the alleged conspiratorial conduct and that, second, the subjective *mens rea* in s. 45 "limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct" (*ibid.*, at para. 51, cited in Brown J.'s reasons, at para. 75).

[189] In my respectful view, neither of those considerations actually protects against the risk of limitless liability that would flow from recognizing the availability of umbrella purchaser claims under s. 36(1). On the first point, the fact that the text of this provision reads as permitting recovery for any person capable of proving that their loss was sustained "as a result of" an alleged price-fixing conspiracy does not end the interpretative exercise. As I explained above, the dispute here concerns whether those words should be taken as allowing recovery for any and all losses that can conceivably be linked to the alleged wrongdoing, or whether relevant legal norms and principles can assist in construing the provision so as to circumscribe what might otherwise be potentially indeterminate liability. And on the second point, while I accept that the *mens rea* in s. 45 limits liability to defendants who intend to agree upon anti-competitive conduct, this still tells us nothing about the scope of their liability under s. 36(1) — in other words, it tells us *who* is liable but not for *what* they are actually liable.

d'appel, pour des motifs en substance semblables à ceux exposés par mon collègue (*Shah c. LG Chem, Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721). Dans cet arrêt, la formation unanime était d'avis que les [TRADUCTION] « préoccupations normatives quant à la responsabilité indéterminée » dans les causes de négligence ne s'appliquent pas dans le contexte des actions fondées sur les art. 36 et 45 de la *Loi sur la concurrence*, car « le législateur a déjà répondu à ces préoccupations » (par. 47). À l'instar de mon collègue, la formation unanime a affirmé, d'une part, que la portée du par. 36(1) limite l'indemnisation aux personnes qui peuvent démontrer avoir subi une perte ou des dommages « par suite » du complot allégué et, d'autre part, que la *mens rea* subjective requise à l'art. 45 [TRADUCTION] « limite l'étendue de la responsabilité à ceux qui, au minimum, ont eu l'intention expresse de convenir d'un comportement anticoncurrentiel » (*ibid.*, par. 51, cité dans les motifs du juge Brown, par. 75).

[189] Avec égards, aucune de ces considérations ne protège réellement les fabricants contre le risque de responsabilité illimitée qui découlerait du fait de reconnaître que les acheteurs sous parapluie peuvent déposer des réclamations sur le fondement du par. 36(1). En ce qui concerne le premier point, le fait que le libellé de cette disposition soit interprété comme permettant à toute personne pouvant démontrer qu'elle a subi une perte « par suite » du complot allégué de fixation des prix d'être indemnisée ne met pas fin à l'exercice d'interprétation. Comme je l'ai déjà expliqué, le litige en l'espèce porte sur la question de savoir s'il faut interpréter cette disposition comme autorisant l'indemnisation pour toute perte qui peut vraisemblablement être associée aux fautes reprochées ou si les normes et principes juridiques applicables peuvent aider à interpréter cette disposition de manière à circonscrire ce qui pourrait autrement être une responsabilité indéterminée. En ce qui concerne le deuxième point, bien que j'admette que la *mens rea* prévue à l'art. 45 limite la responsabilité aux défendeurs qui ont l'intention de s'entendre sur un comportement anticoncurrentiel, ceci ne nous apprend rien à propos de l'étendue de leur responsabilité prévue au par. 36(1). Autrement dit, il indique *qui* doit être tenu responsable, mais pas de *quoi* ces défendeurs sont réellement responsables.

[190] Before concluding, I will add one final thought. Permitting umbrella purchaser claims under s. 36(1) opens up the possibility of recovery for overcharges that result from "conscious parallelism" — a phenomenon which occurs when parties not involved in a price-fixing conspiracy deliberately *choose* to adjust their prices in order to match those of their competitors, in the absence of any actual collusion between them. As recently observed by the Quebec Court of Appeal in *R. v. Proulx*, 2016 QCCA 1425, at para. 32 (CanLII), "[a]dopting a comparable or identical pricing policy without an agreement — which by definition requires a meeting of minds — does not fall within the scope of s. 45 of the *Competition Act*".[4] An interpretation of s. 36(1) that allows umbrella purchaser claims for these kinds of independent pricing decisions would effectively grant a right to recover (a) in circumstances where those decisions — to which the umbrella purchasers' alleged overcharges are directly attributable — are neither criminally prohibited nor actionable in and of themselves, and (b) from parties who neither made nor benefitted from those decisions.

[191] All of this leads me to conclude that s. 36(1) of the *Competition Act* should not be interpreted in a manner that would permit claimants to recover from defendants for *any* losses that in some way flowed from the alleged conspiracy. Doing so would have the undesirable effect of exposing defendants to liability that is potentially limitless in scope for loss and damage that are too remote from any price-fixing that occurred. I do not think that this could have been

[4] In its *Competitor Collaboration Guidelines* (December 2009), the Competition Bureau of Canada explains that it

> does not consider that the mere act of independently adopting a common course of conduct with awareness of the likely response of competitors or in response to the conduct of competitors, commonly referred to as "conscious parallelism", is sufficient to establish an agreement for the purpose of subsection 45(1). However, parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices, may be sufficient to prove that an agreement was concluded between the parties. [p. 7]

[190] Avant de conclure, j'ajouterai une dernière réflexion. Laisser libre cours aux réclamations fondées sur le par. 36(1) des acheteurs sous parapluie ouvre la possibilité d'un recouvrement des hausses de prix découlant d'un « parallélisme conscient » — un phénomène qui se produit lorsque les parties ne participant pas à un complot de fixation des prix *choisissent* délibérément d'ajuster leurs prix à ceux de leurs concurrents, sans qu'on puisse parler de collusion. Comme l'a récemment fait remarquer la Cour d'appel du Québec dans l'arrêt *R. c. Proulx*, 2016 QCCA 1425, par. 32 (CanLII), « [l]'adoption d'une politique de prix comparables ou identiques, sans l'existence d'une entente qui par définition nécessite l'accord de deux volontés, ne tombe donc pas sous le coup de l'article 45 de la *Loi sur la concurrence* »[4]. Interpréter le par. 36(1) de façon à permettre aux acheteurs sous parapluie d'intenter une action pour ce type de décision indépendante quant à l'établissement des prix conférerait un droit de recouvrement a) dans les cas où ces décisions — auxquelles la majoration alléguée qui aurait été refilée à ces acheteurs est directement attribuable — ne sont ni interdites par le droit criminel ni susceptibles de poursuites en soi, et b) auprès de parties qui n'ont pas pris ces décisions et n'en ont pas tiré profit.

[191] Tout cela m'amène à conclure que le par. 36(1) de la *Loi sur la concurrence* ne devrait pas recevoir une interprétation qui permettrait aux demandeurs de se faire indemniser par des défendeurs pour *toute* perte découlant d'une façon ou d'une autre du complot allégué. Cela aurait pour effet indésirable d'exposer des défendeurs à une responsabilité potentiellement illimitée, ainsi qu'à une responsabilité à l'égard de pertes et de dommages qui sont trop éloignés de toute

[4] Dans ses *Lignes directrices sur la collaboration entre concurrents* (décembre 2009), le Bureau de la concurrence du Canada explique qu'il

> ne considère pas que le simple fait d'adopter indépendamment un comportement commun en connaissant la réaction probable des concurrents ou en réponse au comportement des concurrents, qu'on appelle communément « parallélisme conscient », suffit à établir qu'il y a eu entente au sens du paragraphe 45(1). Cependant, lorsqu'il est combiné à des pratiques facilitantes comme la mise en commun de renseignements délicats sur le plan de la concurrence ou des activités qui aident les concurrents à surveiller réciproquement leurs prix, le comportement parallèle peut suffire à prouver qu'une entente a été conclue entre les parties. [p. 7]

Parliament's intention when it enacted this statutory right of action.

fixation des prix. Je ne crois pas que cela ait pu être l'intention du Parlement lorsqu'il a édicté la disposition de la Loi qui confère ce droit d'action.

[192] In light of the principles to which I have referred above, my view is that the line should be drawn at loss and damage that flowed from the pricing decisions of the Defendants themselves (that is, the loss claimed by the direct and indirect purchasers), and not those that are attributable to third parties who did not participate in — but who nevertheless would have benefitted from — the alleged price-fixing conspiracy. Because the Umbrella Purchasers' losses are indeed attributable to the pricing decisions of non-Defendant ODD manufacturers and suppliers, I find it plain and obvious that their claims in this action under s. 36(1) of the *Competition Act* cannot succeed.

[192] Compte tenu des principes susmentionnés, je suis d'avis qu'une ligne de démarcation doit être tracée entre les pertes et dommages qui découlent des décisions des défenderesses elles-mêmes quant à la fixation des prix (c'est-à-dire les pertes déplorées par les acheteurs directs et indirects) et les pertes et dommages qui sont attribuables aux tiers qui n'ont pas participé au complot allégué de fixation des prix, mais qui en auraient néanmoins bénéficié. Comme les pertes des acheteurs sous parapluie sont attribuables aux décisions relatives à la fixation des prix prises par des fabricants et fournisseurs de LDO autres que les défenderesses, je suis d'avis qu'il est évident et manifeste que leurs réclamations fondées en l'espèce sur le par. 36(1) de la *Loi sur la concurrence* ne peuvent être accueillies.

B. *Is It Plain and Obvious That Section 36(1) Bars a Plaintiff From Alleging Common Law and Equitable Causes of Action in Respect of Conduct That Breaches the Prohibitions in Part VI of the Competition Act?*

B. *Est-il évident et manifeste que le par. 36(1) empêche le demandeur d'exercer des recours de common law et d'equity à l'égard d'un comportement qui enfreint les prohibitions prévues à la partie VI de la Loi sur la concurrence?*

[193] The second issue raised in the Toshiba Appeal turns on whether the cause of action in s. 36(1) of the *Competition Act* is the exclusive civil remedy for conduct that breaches the criminal offence provisions in Part VI of that statute. The Defendants argue that it is, and that allowing claims in respect of such conduct under common law and equitable causes of action undermines the principle of parliamentary sovereignty. The Plaintiff, by contrast, says that Parliament did not intend to preclude private law remedies for such conduct when it enacted s. 36(1) of the *Competition Act*.

[193] La deuxième question soulevée dans le pourvoi de Toshiba consiste à savoir si la cause d'action fondée sur le par. 36(1) de la *Loi sur la concurrence* est le seul recours civil possible contre un comportement allant à l'encontre des dispositions de la partie VI de cette loi relativement aux infractions criminelles. Les défenderesses répondent par l'affirmative et soutiennent qu'autoriser les réclamations liées à un tel comportement sur le fondement de la common law et de l'equity mine le principe de la souveraineté parlementaire. Le demandeur soutient plutôt que le Parlement n'avait pas l'intention d'écarter la possibilité d'exercer des recours en droit privé à l'encontre d'un tel comportement lorsqu'il a édicté le par. 36(1) de la *Loi sur la concurrence*.

[194] At its core, the issue under this heading is whether a claimant can rely on the common law and equity *as a supplement* to the right of action under s. 36(1) of the *Competition Act* — or put differently, whether a claimant can advance a common law or

[194] La question à trancher sous cette rubrique consiste essentiellement à savoir si un demandeur peut se prévaloir de la common law et de l'equity *en sus* du droit d'action reconnu par le par. 36(1) de la *Loi sur la concurrence*. Autrement dit, il s'agit de

equitable cause of action instead of, or together with, the statutory cause of action in respect of the same allegation of anti-competitive conduct.

[195] In her leading textbook, *Sullivan on the Construction of Statutes* (6th ed. 2014), Professor Ruth Sullivan explains that "[t]he issue of supplementation arises when there is overlap between legislation and the common law such that both may apply to a particular set of facts and also when legislation is incomplete in that it says nothing of, or does not fully address, a matter relating to the subject of the legislation" (p. 549). On this point, she adds the following:

> When the issue of supplementing legislation arises, the focus may be on the application of common law rules, entitlement to common law remedies or access to common law courts. Although rules, remedies and jurisdiction raise distinct concerns, in each case the fundamental question is the same: <u>is it permissible in the circumstances to supplement the legislation by resorting to the common law</u>? If there is a conflict, the answer is clearly no. <u>In the absence of conflict, the answer to the question depends first of all on legislative intent, which is discovered using the usual methods of interpretation. However, the courts pay particular attention to whether the legislation in question constitutes a complete or exhaustive code</u>. The adequacy of the legislation and the continuing usefulness of the common law rule, remedy or jurisdiction are important considerations. [Emphasis added; p. 549.]

[196] As with the Umbrella Purchasers issue, resolving this issue requires an exercise in statutory interpretation: it must be determined, based on a proper reading of the *Competition Act*, whether Parliament intended s. 36(1) to provide the exclusive civil remedy for persons claiming to have suffered loss or damage as a result of conduct contrary to Part VI.

[197] Like my colleague, I begin my analysis with the presumption against interpreting legislation in a

déterminer si un demandeur peut invoquer une cause d'action fondée sur la common law ou l'equity au lieu d'une cause d'action prévue par la loi, ou les deux, à l'égard d'une même allégation de comportement anticoncurrentiel.

[195] Dans son ouvrage de premier plan intitulé *Sullivan on the Construction of Statutes* (6e éd. 2014), la professeure Ruth Sullivan explique que [TRADUCTION] « [l]a question de la complémentarité se pose lorsqu'il existe un chevauchement tel entre la loi et la common law que les deux peuvent s'appliquer à un ensemble de faits donné et également lorsque la loi est incomplète parce qu'elle ne fait aucune mention, ou ne traite pas entièrement, d'une question relative à l'objet du texte législatif » (p. 549). À cet égard, la professeure Sullivan ajoute ce qui suit :

> [TRADUCTION] Lorsque la question de la complémentarité de la loi se pose, l'accent peut être mis sur l'application des règles de common law, sur le droit aux recours de common law ou sur l'accès aux tribunaux de common law. Bien que les règles, les recours et la compétence soulèvent des préoccupations distinctes, dans chaque cas, la question fondamentale est la même : <u>est-il permis dans les circonstances de compléter la loi en ayant recours à la common law?</u> S'il y a conflit, la réponse est manifestement non. <u>En l'absence de conflit, la réponse à cette question dépend d'abord de l'intention du législateur, que l'on discerne par les méthodes habituelles d'interprétation. Toutefois, les tribunaux accordent une attention particulière à la question de savoir si la loi en question constitue un code complet ou exhaustif.</u> Le caractère suffisant de la loi et l'utilité continue de la règle, du recours ou de la compétence de common law sont des considérations importantes. [Je souligne; p. 549.]

[196] Tout comme pour la question des acheteurs sous parapluie, un exercice d'interprétation législative s'impose pour trancher la question en cause : il faut déterminer, suivant une juste interprétation de la *Loi sur la concurrence*, si le Parlement voulait que le par. 36(1) réserve exclusivement le recours civil possible aux personnes qui prétendent avoir subi une perte ou un préjudice par suite d'un comportement allant à l'encontre de la partie VI.

[197] À l'instar de mon collègue, je me pencherai d'abord sur la présomption selon laquelle il ne faut

manner that would interfere with common law rights. According to Professor Sullivan, such a presumption allows "the courts to insist on precise and explicit direction from the legislature before accepting any change", so as to shield the law "from inadvertent legislative encroachment" (p. 539). Such an intention can be found either in the express wording of the statute or by necessary implication (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1315-16).

pas interpréter une loi d'une manière qui porte atteinte aux droits reconnus par la common law. Selon la professeure Sullivan, une telle présomption permet aux [TRADUCTION] « tribunaux de mettre l'accent sur des directives précises et explicites formulées par le législateur avant d'accepter tout changement » afin d'éviter tout « empiétement législatif involontaire » sur la loi (p. 539). Pareille intention peut être dégagée du libellé explicite de la loi ou par inférence nécessaire (*Gendron c. Syndicat des approvisionnements et services de l'Alliance de la Fonction publique du Canada, section locale 50057*, [1990] 1 R.C.S. 1298, p. 1315-1316).

[198] I agree with my colleague that the *Competition Act* does not expressly preclude claimants from supplementing the right of action in s. 36(1) with claims based on causes of action at common law or in equity. However, I am not convinced that the reasoning in *Gendron* applies to the case at hand; while that case dealt with a statutory provision that *codified* a common law right, s. 36 of the *Competition Act* is distinguishable in that it *created* a new right that did not exist before. Instead, I would resolve this issue simply on the basis that the coexistence of statutory and common law or equitable claims arising from conduct contrary to Part VI of the *Competition Act* is in fact contemplated by s. 62 of that statute, which reads as follows:

> **62** Except as otherwise provided in [Part VI], nothing in [Part VI] shall be construed as depriving any person of any civil right of action.

[199] In my view, this provision evinces a legislative intention that the provisions of Part VI (which is titled "Offences in Relation to Competition") not abrogate any right of action a claimant has — which might include a right of action founded on the tort of unlawful means conspiracy or in unjust enrichment — that is predicated upon a breach of the offence provisions of the *Competition Act*. As the Manitoba Court of Appeal recognized in *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335, the inclusion of this provision in the statutory framework suggests

[198] Je suis d'accord avec mon collègue pour dire que la *Loi sur la concurrence* n'empêche pas expressément les demandeurs de présenter, en sus du droit d'action prévu au par. 36(1), des réclamations fondées sur des causes d'action reconnues en common law ou en equity. Je ne suis toutefois pas convaincue de l'applicabilité en l'espèce du raisonnement adopté dans *Gendron*; si cette affaire portait sur une disposition statutaire qui *codifiait* un droit issu de la common law, on peut distinguer l'art. 36 de la *Loi sur la concurrence* en ce qu'il a *créé* un nouveau droit qui n'existait pas auparavant. Je suis plutôt d'avis de régler cette question en affirmant simplement que la coexistence des recours fondés sur la loi et des recours fondés sur la common law ou l'equity découlant d'un comportement allant à l'encontre de la partie VI de la *Loi sur la concurrence* est en fait prévue à l'art. 62 de la Loi, qui est ainsi rédigé :

> **62** Sauf disposition contraire de la [partie VI], celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

[199] À mon avis, cette disposition illustre une intention du législateur de prévoir que les dispositions de la partie VI (intitulée « Infractions relatives à la concurrence ») n'abrogent pas les droits d'action dont jouit un demandeur — y compris les droits fondés sur le délit de complot exercé par des moyens illégaux ou sur l'enrichissement sans cause — qui reposent sur une violation des dispositions de la *Loi sur la concurrence* en matière d'infractions. Comme l'a reconnu la Cour d'appel du Manitoba dans l'arrêt *Westfair Foods Ltd. c. Lippens Inc.* (1989), 64 D.L.R. (4th) 335,

that Parliament did not intend the provisions of the *Competition Act* to intrude upon the provinces' jurisdiction over civil rights and liberties.

[200] The fact that s. 62 applies only to Part VI of the *Competition Act* — and therefore is not *directly* applicable to s. 36(1), which is instead located in Part IV — is not, in my view, consequential. The cause of action created by s. 36(1)(a) is expressly tied to conduct that would constitute an offence under Part VI of the statute. This Court recognized in *General Motors*, at p. 673, that the purpose of this remedial provision is to "help enforce the substantive aspects of the Act", such as the prohibitions against anti-competitive conduct.

[201] It is also essential to note that s. 62 uses the phrase "<u>any</u> civil right of action", which suggests that Parliament contemplated the preservation of the various civil rights of action that may exist in respect of conduct prohibited under Part VI, beyond the one provided for in s. 36(1). Indeed, the former provision would be redundant and pointless if it merely affirmed what the latter already states: that perpetrators of conduct prohibited by Part VI are subject *both* to criminal prosecution *and* to civil proceedings under s. 36(1)(a). This is especially the case given that s. 36(2) and s. 36(4)(a)(ii) indicate that statutory claims can be brought against defendants even after any criminal proceedings against them were finally disposed of.

[202] Therefore, when I read the words of s. 62 "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (Driedger, at p. 87; *Bell ExpressVu*, at para. 26), I am led to the conclusion that this provision has the effect of preserving all civil rights of action that a claimant may have — over and above the right of action available under s. 36(1) of the *Competition Act* — in respect of anti-competitive conduct that would constitute an offence under Part VI of that Act. Indeed, s. 62 would be meaningless if s. 36(1)

l'inclusion de cette disposition dans le cadre législatif donne à penser que le Parlement ne voulait pas que les dispositions de la *Loi sur la concurrence* portent atteinte à la compétence des provinces sur les droits et libertés civils.

[200] Le fait que l'art. 62 s'applique seulement à la partie VI de la *Loi sur la concurrence* — et qu'il ne s'applique donc pas *directement* au par. 36(1), qui se trouve plutôt à la partie IV — me paraît sans conséquence. La cause d'action créée par l'al. 36(1)a) est expressément liée au comportement qui constituerait une infraction sous le régime de la partie VI de la Loi. Dans l'arrêt *General Motors*, p. 673, notre Cour a reconnu que l'objet de cette disposition réparatrice est de « faciliter l'exécution des aspects fondamentaux de la Loi », comme les prohibitions visant le comportement anticoncurrentiel.

[201] Il est également essentiel de souligner que l'art. 62 contient l'expression « <u>un</u> droit d'action au civil », ce qui donne à penser que le Parlement a envisagé de préserver les différents droits d'action au civil qui peuvent être exercés par suite d'un comportement interdit par la partie VI en plus de celui prévu au par. 36(1). En effet, l'art. 62 serait redondant et inutile s'il confirmait simplement ce que dit déjà le par. 36(1), à savoir que les auteurs d'un comportement prohibé par la partie VI peuvent faire l'objet *à la fois* de poursuites criminelles *et* de poursuites civiles en vertu de l'al. 36(1)a). Cela est d'autant plus vrai puisque le par. 36(2) et le sous-al. 36(4)a)(ii) prévoient qu'une action peut être intentée contre un défendeur même après qu'il eut été statué de façon définitive sur la poursuite au criminel.

[202] Par conséquent, lorsque je lis les termes de l'art. 62 [TRADUCTION] « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du [Parlement] » (Driedger, p. 87; *Bell ExpressVu*, par. 26), j'en arrive à la conclusion que cette disposition a pour effet de préserver tous les droits d'action au civil que peut exercer le demandeur — en sus du droit d'action prévu au par. 36(1) de la *Loi sur la concurrence* — relativement à un comportement anticoncurrentiel qui constituerait une infraction sous le régime de la partie VI de cette loi.

were to be interpreted as exhaustive in respect of civil claims for such conduct.

En effet, l'art. 62 serait vide de sens si le par. 36(1) était interprété comme une disposition exhaustive en ce qui concerne les recours civils relatifs à ce type de comportement.

[203] On the basis of this reasoning, I agree with the result reached by my colleague: the courts below did not err in permitting the Plaintiff to advance the pleaded common law and equitable causes of action together with the statutory cause of action under s. 36(1) in this case.

[203] Sur le fondement de ce raisonnement, je souscris au résultat auquel arrive mon collègue : les tribunaux d'instance inférieure n'ont pas commis d'erreur en permettant au demandeur de faire valoir les causes d'action en common law et en equity ainsi que la cause d'action fondée sur le par. 36(1) en l'espèce.

C. *What Standard Must a Representative Plaintiff Meet in Order to Have Loss-Related Questions Certified as "Common Issues" Among Indirect Purchasers, and Has the Plaintiff Met This Standard in the Present Case?*

C. *Quelle est la norme à laquelle doit satisfaire le représentant des demandeurs pour que les questions liées à la perte soient autorisées comme des « questions communes » aux acheteurs indirects? Le demandeur satisfait-il à cette norme en l'espèce?*

[204] The final issue on appeal relates to the requirement of common issues in s. 4(1)(c) of the *Class Proceedings Act*. What is it that the Plaintiff must be capable of establishing at the certification stage in order to provide the necessary assurance that his loss-related questions are capable of resolution on a common basis, and does his proposed methodology for establishing loss satisfy this requirement?

[204] La dernière question à trancher dans le pourvoi concerne l'exigence des questions communes énoncée à l'al. 4(1)(c) de la *Class Proceedings Act*. À l'étape de l'autorisation, que doit être en mesure d'établir le demandeur pour convaincre le tribunal que ses questions liées à la perte peuvent être résolues sur une base commune, et est-ce que la méthode qu'il propose pour prouver la perte respecte cette exigence?

(1) Background

(1) Contexte

[205] The existence of common issues among the individual class members lies at the very heart of a class proceeding. The procedural ability to aggregate these issues and to consider them at once, and for all class members, during a common issues trial is what alleviates the need for each class member to seek redress via separate actions (M. A. Eizenga et al., *Class Actions Law and Practice* (2nd ed. (loose-leaf)), at p. 3-101). The authors of *The Law of Class Actions in Canada* explain the importance of commonality in the following terms:

[205] L'existence de questions communes aux membres individuels du groupe est au cœur même d'un recours collectif. La capacité, sur le plan procédural, de regrouper ces questions communes et de les étudier une seule fois, et ce pour l'ensemble des membres du groupe, lors de l'audition des questions communes élimine la nécessité que chacun des membres du groupe demande réparation en intentant des actions distinctes (M. A. Eizenga et autres, *Class Actions Law and Practice* (2e éd. (feuilles mobiles)), p. 3-101). Les auteurs de *The Law of Class Actions in Canada* expliquent l'importance de la notion de caractère commun en ces termes :

The presence of significant common issues provides the access to justice and judicial economies that ultimately

[TRADUCTION] L'existence de questions communes importantes favorise l'accès à la justice et l'économie des justify certifying a class proceeding. Common issues are what actually unite and define the class. The mere fact that a group of people suffers a wrong does not justify certifying a class proceeding unless there are common issues to be decided for the defendant and the members of the group.

(W. K. Winkler et al. (2014), at p. 107)

For this reason, the determination of what constitute the common issues in any proposed class action is a key aspect of a certification motion.

[206] In his Proposed Litigation Plan, the Plaintiff submitted a number of questions for resolution on a common basis at trial (A.R., vol. II, at pp. 125-27), including questions that essentially relate to whether the class members suffered a loss in connection with the alleged price-fixing conspiracy.

[207] In order to satisfy the Certification Judge that these loss-related questions were capable of resolution on a common basis, the Plaintiff adduced evidence from an expert economist named Dr. Keith Reutter. In his expert report, Dr. Reutter took the position that "all members of the proposed Class would have been impacted" by the alleged price-fixing conspiracy and that "there are accepted methods available to estimate any overcharge and aggregate damages that resulted from the alleged wrongdoing using evidence common to the proposed Class" (A.R., vol. III, at p. 119). His methods would involve constructing an economic model to estimate the "but-for" price of the ODDs, that is, their price if the alleged anticompetitive conduct had not occurred (Certification Judge's reasons, at para. 156), and would include "econometric methods based on multiple regression to determine the overcharge and pass-through rates" (*ibid.*, at para. 158).

[208] The suggestion that Dr. Reutter's methodology could establish that all class members would have been impacted by the alleged price-fixing conspiracy was called into question during his cross-examination,

ressources judiciaires, ce qui, au bout du compte, justifie l'autorisation d'un recours collectif. En fait, les questions communes unifient et définissent le groupe. Le simple fait qu'un groupe de personnes subisse un tort ne justifie pas l'autorisation d'un recours collectif, à moins qu'il faille se prononcer sur des questions communes au défendeur et aux membres du groupe.

(W. K. Winkler et autres (2014), p. 107)

Pour ce motif, dans le contexte d'une requête en autorisation d'un recours collectif projeté, il est essentiel d'identifier les questions communes.

[206] Dans le plan de déroulement de l'instance qu'il a proposé, le demandeur a énoncé plusieurs questions qui peuvent faire l'objet d'une résolution commune (d.a., vol. II, p. 125-127). Certaines de ces questions visaient essentiellement à savoir si les membres du groupe ont subi une perte liée au complot allégué de fixation des prix.

[207] Dans le but de convaincre le juge saisi de la demande d'autorisation que ces questions liées à la perte pouvaient faire l'objet d'une résolution commune, le demandeur a produit le rapport d'un économiste expert, M. Keith Reutter. Dans son rapport d'expert, M. Reutter soutient que [TRADUCTION] « tous les membres du groupe projeté auraient été touchés » par le complot allégué de fixation des prix et que « certaines méthodes permettraient d'estimer la valeur de toute hausse et de tout préjudice global ayant découlé des actes fautifs reprochés au moyen de la preuve commune au groupe projeté » (d.a., vol. III, p. 119). Ses méthodes supposeraient l'élaboration d'un modèle économique servant à évaluer le prix hypothétique des LDO s'il n'y avait pas eu comportement anticoncurrentiel (motifs du juge saisi de la demande d'autorisation, par. 156), de même que l'utilisation de [TRADUCTION] « méthodes économétriques fondées sur la régression multiple pour calculer la majoration et le montant de la perte transférée » (*ibid.*, par. 158).

[208] Toutefois, la suggestion selon laquelle la méthode de M. Reutter permettrait de prouver que tous les membres du groupe ont été touchés par le complot allégué de fixation des prix a été mise en question

however (see A.R., vol. V, at pp. 210-25). The Defendants therefore resisted certification of the loss-related questions, arguing that the Plaintiff's methodology could not address the issue of loss *on a class-wide basis* because it would not make it possible to answer the Plaintiff's proposed questions at trial in respect of every class member — either by establishing that all of them were overcharged for their ODDs, or by identifying those who were, and distinguishing them from those who were not. In the Defendants' submission, unless it could be determined at the common issues trial that a loss had actually been incurred by at least some specific indirect purchasers, then those loss-related questions could not be decided on a common basis at trial and should therefore not be certified as common issues.

[209] For his part, the Plaintiff argued that, from a factual standpoint, his expert's methodology would be capable of establishing that all class members (including the indirect purchasers) had suffered a loss. As an alternative legal argument, he submitted that he was not required to demonstrate to the Certification Judge that, using his expert's methodology, he would be able to prove at trial that all class members were harmed or to distinguish those who were from those who were not in an individualized fashion (R.F. (Toshiba Appeal), at para. 96). Instead, his position was that it would be sufficient, at the certification stage, if the methodology were simply capable of proving that loss had reached the indirect purchaser *level* in the distribution chain — that is, that some overcharges were passed on to some indirect purchasers, without having to identify which ones.

[210] What is key, for the purposes of the commonality issue, is the difference between demonstrating that loss reached the indirect purchaser *level* — that is, that some overcharges were passed on to some *unidentified* indirect purchasers — and proving that loss reached *all* or *an identified group* of indirect purchasers.

pendant son contre-interrogatoire (d.a., vol. V, p. 210-225). Les défenderesses se sont donc opposées à l'autorisation des questions liées à la perte. Elles ont fait valoir que la méthode du demandeur ne pouvait aborder la question de la perte subie à l'*échelle du groupe*, car elle ne permettra pas de répondre aux questions proposées par le demandeur au procès à l'égard de chacun des membres du groupe — que ce soit en prouvant que tous les membres du groupe ont payé un prix trop élevé pour leurs LDO ou en identifiant les membres qui ont payé un prix trop élevé et en les distinguant de ceux qui ont payé un juste prix. Selon les arguments des défenderesses, à moins qu'il ne soit déterminé lors de l'audition des questions communes qu'une perte a effectivement été subie par au moins quelques acheteurs indirects précis, ces questions liées à la perte ne peuvent être tranchées sur une base commune au procès et ne devraient donc pas être autorisées en tant que questions communes.

[209] Pour sa part, le demandeur a fait valoir que, du point de vue factuel, la méthode proposée par son expert permettrait de prouver que tous les membres du groupe (y compris les acheteurs indirects) ont subi une perte. À titre d'argument juridique subsidiaire, il a affirmé qu'il n'était pas tenu de démontrer au juge saisi de la demande d'autorisation que la méthode proposée par son expert lui permettrait de prouver au procès que tous les membres du groupe ont subi un préjudice ou d'établir de manière individuelle une distinction entre ceux qui ont subi un préjudice et ceux qui n'en ont pas subi (m.i. (pourvoi de Toshiba), par. 96). Le demandeur était plutôt d'avis qu'il lui suffirait de démontrer, à l'étape de l'autorisation, que sa méthode permet d'établir que la perte a atteint le *niveau* de l'acheteur indirect situé en aval dans la chaîne de distribution. Autrement dit, il lui suffirait d'établir qu'une certaine majoration atteint certains acheteurs indirects, sans avoir à les identifier individuellement.

[210] En ce qui concerne la question du caractère commun, l'élément clé est la différence entre la démonstration que la perte a atteint le *niveau* de l'acheteur indirect — c'est-à-dire qu'une certaine majoration a atteint quelques acheteurs indirects *non identifiés* — et la preuve que la perte a atteint *la totalité* des acheteurs indirects ou *un groupe précis* d'acheteurs indirects.

[211] My colleague seems to accept that there is some basis in fact for finding that Dr. Reutter's methodology will have a reasonable prospect of establishing, at the common issues trial, that all of the indirect purchasers suffered a loss. In his view, however, nothing turns on this given his conclusion as to the law:

> . . . it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, <u>in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level</u>. [Emphasis added; para. 102.]

[212] For the purposes of my analysis, I am prepared to accept that there is some basis in fact on which the Certification Judge could have found that the proposed methodology would be capable of proving at trial that loss had reached the indirect purchaser level. My disagreement with my colleague lies elsewhere. In my view, a methodology that is incapable of establishing at trial that at least some *identifiable* indirect purchasers actually suffered a loss, but that can instead show only that loss occurred somewhere at the indirect purchaser *level* in the distribution chain, does not allow any of the loss-related questions proposed by the Plaintiff in this case to be answered on a "common" or "class-wide" basis.

(2) <u>Analysis</u>

[213] In *Microsoft*, this Court affirmed that, in order to have a question certified as a common issue, the representative plaintiff must show that there is some basis in fact for the commonality requirement in s. 4(1)(c) of the *Class Proceedings Act* — that is, that the question be capable of resolution *on a class-wide basis* (see paras. 99-114). What the "some basis in fact" standard requires in any given case depends on what it is that the proposed question asks;

[211] Mon collègue semble accepter qu'il existe un certain fondement factuel pour conclure que la méthode de M. Reutter permettra raisonnablement d'établir, lors de l'audition des questions communes, que tous les acheteurs indirects ont subi une perte. Il estime cependant que cela n'est pas pertinent compte tenu de sa conclusion à l'égard du droit :

> . . . il n'est pas nécessaire, pour justifier l'autorisation de la question de la perte en tant que question commune, que la méthode proposée par un expert du demandeur établisse que chaque membre du groupe a subi une perte. Il n'est pas non plus nécessaire que la méthode de M. Reutter permette d'identifier les membres du groupe qui n'ont subi aucune perte de manière à les distinguer de ceux qui en ont subi une. <u>Pour que les questions relatives à la perte soient certifiées en tant que questions communes, la méthode de l'expert du demandeur n'a qu'à être suffisamment valable ou acceptable pour établir que l'acheteur du niveau requis a subi une perte.</u> [Je souligne; par. 102.]

[212] Aux fins de mon analyse, je suis disposée à accepter qu'il existe un certain fondement factuel permettant au juge saisi de la demande d'autorisation de conclure que la méthode proposée permettrait d'établir au procès que la perte a atteint le niveau des acheteurs indirects. Mon désaccord avec mon collègue porte sur un autre point. À mon sens, une méthode qui ne permet pas d'établir au procès qu'au moins un certain nombre d'acheteurs indirects *identifiables* ont effectivement subi une perte et qui permet seulement de démontrer que la perte a atteint le *niveau* de l'acheteur indirect situé en aval dans la chaîne de distribution ne peut être utilisée pour résoudre l'une ou l'autre des questions relatives à la perte proposées par le demandeur en l'espèce de façon commune ou à l'échelle du groupe.

(2) <u>Analyse</u>

[213] Dans l'arrêt *Microsoft*, notre Cour a affirmé que pour qu'une question soit autorisée en tant que question commune, le représentant des demandeurs doit établir l'existence d'un certain fondement factuel pour respecter l'exigence de la question commune énoncée à l'al. 4(1)(c) de la *Class Proceedings Act*, c'est-à-dire que la question doit pouvoir faire l'objet d'une résolution *à l'échelle du groupe* (voir par. 99-114). Dans un cas donné, la norme fondée

different questions will impose different requirements upon the representative plaintiff.

[214] In the case at hand, the loss-related questions proposed by the Plaintiff include the following: What damages, if any, are payable to the Class Members pursuant to s. 36 of the *Competition Act*? Did the Class Members suffer economic loss? Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of ODDs?

[215] The term "Class Member" or "Class Members" is defined in the Plaintiff's Proposed Litigation Plan as "one or more members of the proposed class", which is comprised of:

> All persons resident in British Columbia who, during the period commencing at least as early as January 1, 2004 and continuing through January 1, 2010 (the "Class Period"), purchased optical disc drives ("ODD") or products that contained ODD. [A.R., vol. II, at p. 114]

[216] The broad definition of the term "Class Members", and the use of that term in stating the proposed loss-related questions, reflects the possibility that the Plaintiff might not be able to prove at trial that *everyone* who purchased an ODD or an ODD product actually suffered a loss in connection with the alleged price-fixing conspiracy. Rather, the evidence might be such that loss is provable only in respect of *some* class members. My colleague says that these questions are stated in such a way that they "could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss", and adds that "because they could be taken in two different ways they might, following the common issues trial, be answered in different ways" (para. 91 (emphasis in original)).

[217] Regardless of how flexible these questions might be, however, they cannot be answered on a "class-wide" or "common" basis at trial if the

sur l'existence d'« un certain fondement factuel » dépend de la teneur de la question proposée; des exigences différentes seront imposées au représentant des demandeurs selon les questions soulevées.

[214] En l'espèce, les questions liées à la perte proposées par le demandeur sont notamment les suivantes : Quel est le montant des dommages-intérêts, s'il en est, payables aux membres du groupe conformément à l'art. 36 de la *Loi sur la concurrence*? Les membres du groupe ont-ils subi une perte financière? Les membres du groupe se sont-ils appauvris d'un montant égal à celui de la majoration du prix de vente des LDO?

[215] Les termes [TRADUCTION] « membre du groupe » et « membres du groupe » sont définis dans le plan de déroulement de l'instance proposé par le demandeur comme « un ou plusieurs membres du groupe projeté », qui est composé de :

> [TRADUCTION] Tous les résidents de la Colombie-Britannique qui, pendant la période allant au moins du 1er janvier 2004 au 1er janvier 2010 (la « période visée par le recours collectif ») ont acheté des lecteurs de disques optiques (« LDO ») ou des produits munis de LDO. [d.a., vol. II, p. 114]

[216] La définition large du terme « membres du groupe », et l'utilisation de ce terme pour formuler les questions proposées liées à la perte, démontrent la possibilité que le demandeur ne soit pas en mesure de prouver au procès que *toutes* les personnes ayant acheté un LDO ou un produit muni d'un LDO ont effectivement subi une perte à cause du complot allégué de fixation des prix. En fait, la preuve pourrait être telle que seule la perte qu'auraient subie *certains* membres du groupe est susceptible d'être prouvée. Mon collègue affirme que ces questions sont formulées de manière à ce qu'elles « puissent être interprétées comme demandant si *tous* les membres du groupe ont subi une perte économique ou si *l'un* d'entre eux a subi une perte économique » et il ajoute que, « [p]arce que ces questions peuvent recevoir deux interprétations différentes, elles pourraient donc, à la suite de l'audition des questions communes, appeler des réponses différentes » (par. 91 (en italique dans l'original)).

[217] Aussi souples ces questions soient-elles, cependant, elles ne peuvent faire l'objet d'une résolution commune ou d'une résolution à l'échelle du

Plaintiff's methodology is incapable of establishing loss in any identifiable manner. This is because mere proof that some loss reached the indirect purchaser level in the distribution chain does not dispose of any element of liability for any indirect purchaser, nor does it otherwise advance the litigation in any meaningful way.

groupe au procès si la méthode du demandeur ne permet pas d'établir la perte d'une manière identifiable. Il en est ainsi parce que la simple preuve qu'une partie de la perte a atteint le niveau de l'acheteur indirect situé en aval dans la chaîne de distribution ne permet pas de démontrer l'existence d'une responsabilité quelconque envers les acheteurs indirects ou de faire progresser l'instance d'une manière utile.

(a) *Proof at trial that loss reached the indirect purchaser level, without anything more, does not dispose of any element of liability for any indirect purchaser*

a) *La simple démonstration au procès que la perte a atteint le niveau de l'acheteur indirect ne prouve pas l'existence d'une responsabilité quelconque envers les acheteurs indirects*

[218] As my colleague seems to implicitly acknowledge in his reasons, proof that loss reached the indirect purchaser *level* is insufficient for any finding of liability to be made at the common issues trial. This is because loss or deprivation suffered by the claimant is an essential element of the causes of action under s. 36 of the *Competition Act*, under the common law tort of civil conspiracy, and in unjust enrichment. This is key: the Defendants can be held liable under these causes of action only to those class members who (among other things) are found to have suffered a loss in connection with the price fixing.[5] For this reason, the common issues trial judge cannot impose any liability on the Defendants if the Plaintiff cannot show which class members actually suffered a loss. Individual trials will then be necessary (see Brown J.'s reasons, at para. 120; C.A. reasons, at para. 158; *Shah* (Ont. S.C.J.), at para. 69). Indeed, the Plaintiff acknowledges as much in his Proposed Litigation Plan, when he states the following:

[218] Comme semble le reconnaître implicitement mon collègue dans ses motifs, la preuve que la perte a atteint le *niveau* d'acheteurs indirects est insuffisante pour tirer une conclusion de responsabilité lors de l'audition des questions communes. Cela tient au fait que la perte ou l'appauvrissement subi par le demandeur est un élément essentiel des causes d'actions fondées sur l'art. 36 de la *Loi sur la concurrence*, fondées sur le délit de complot civil reconnu en common law et en matière d'enrichissement sans cause. Ceci est un élément clé : les défenderesses peuvent être tenues responsables relativement à ces causes d'action seulement envers les membres du groupe à l'égard desquels (notamment) il est conclu qu'ils ont subi une perte liée à la fixation des prix[5]. Pour cette raison, le juge saisi des questions communes ne peut imputer une quelconque responsabilité aux défenderesses si le demandeur n'est pas en mesure d'identifier les membres du groupe qui ont effectivement subi une perte. Des procès individuels seraient donc nécessaires (voir les motifs du juge Brown, par. 120; motifs de la C.A., par. 158; *Shah* (C.S.J. Ont.), par. 69). En effet, le demandeur le reconnaît dans son plan de déroulement de l'instance proposé, où il affirme ce qui suit :

The common issues trial will determine the existence and scope of the alleged conspiracy. The common issues trial

[TRADUCTION] L'audition des questions communes permettra de déterminer l'existence et l'ampleur du complot

[5] The degree of "connection" varies among the different causes of action. For example, the cause of action under s. 36 of the *Competition Act* is for loss or damage that has occurred "as a result of" anti-competitive conduct. Recovery in unjust enrichment is available to a claimant who suffered a deprivation that "corresponds" to the defendant's enrichment in circumstances where there is no juristic reason for either the enrichment or the deprivation.

[5] Le degré d'un « lien » varie parmi les différentes causes d'action. Par exemple, la cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence* concerne la perte ou les dommages subis « par suite » d'un comportement anticoncurrentiel. Un demandeur ayant subi un appauvrissement qui « correspond » à l'enrichissement du défendeur peut demander un recouvrement pour enrichissement sans cause lorsqu'aucun motif juridique ne justifie l'enrichissement ou l'appauvrissement.

may also determine on a class-wide basis whether Class Members were injured, leading to a finding of liability and a determination of aggregate damages. If the common issues trial does not determine injury on a class-wide basis, liability and damages will be determined on an individual basis in a manageable process. [Emphasis added; A.R., vol. II, at p. 118.]

[219] This, of course, makes sense when we consider the fact that a class action is essentially an aggregation of individual actions that share common issues of fact and law (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 27). In *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, this Court reiterated that the class proceeding is merely a procedural vehicle which "cannot be used to make up for the absence of one of the constituent elements of the cause of action", adding that such a proceeding "can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings" (para. 52 (emphasis added)). By way of illustration, a claimant in an individual trial would not be entitled to a remedy under s. 36(1) of the *Competition Act* merely upon establishing that loss had reached some unidentified persons at his or her level in the distribution chain; that claimant would likewise have no such entitlement in a class proceeding (see *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 75).

[220] Moreover, and again as my colleague's reasons make clear, the aggregate damages provisions of the *Class Proceedings Act* (ss. 29 to 34) cannot be of any assistance to the Plaintiff in establishing liability to all of the class members in a case like this, where proof of loss is a constituent element of the cause(s) of action. As Rothstein J. explained in *Microsoft*:

The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's Canada*

allégué. Elle permettra également de déterminer à l'échelle du groupe si les membres du groupe ont subi un préjudice, ce qui mènera à une conclusion de responsabilité et à la fixation des dommages-intérêts globaux. Si l'audition des questions communes ne permet pas de déterminer qu'un préjudice a été subi à l'échelle du groupe, la responsabilité et les dommages-intérêts seront établis individuellement au moyen d'un processus fonctionnel. [Je souligne; d.a., vol. II, p. 118.]

[219] Bien sûr, cela est logique lorsque nous tenons compte du fait qu'un recours collectif est essentiellement un regroupement d'actions individuelles qui partagent des questions communes de fait et de droit (*Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, par. 27). Dans l'arrêt *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 CSC 9, [2011] 1 R.C.S. 214, notre Cour a réaffirmé que le recours collectif ne constitue qu'un mécanisme procédural dont « on ne peut s'autoriser [. . .] pour suppléer à l'absence d'un des éléments constitutifs du droit d'action », ajoutant qu'une telle procédure « ne pourra réussir que si chacune des réclamations prises individuellement justifiait le recours aux tribunaux » (par. 52 (je souligne)). À titre d'exemple, le demandeur qui intente une action à titre individuel n'aurait pas droit à une réparation au titre du par. 36(1) de la *Loi sur la concurrence* simplement en établissant qu'une perte a été subie par des personnes non identifiées situées à son niveau de la chaîne de distribution; ce demandeur n'aurait pas non plus droit à une telle réparation dans un recours collectif (voir *Sun-Rype Products Ltd. c. Archer Daniels Midland Company*, 2013 CSC 58, [2013] 3 R.C.S. 545, par. 75).

[220] De plus, et comme mon collègue l'indique clairement dans ses motifs, les dispositions de la *Class Proceedings Act* relatives aux dommages-intérêts globaux (art. 29 à 34) ne peuvent être d'aucune utilité au demandeur pour établir la responsabilité envers tous les membres du groupe dans une affaire comme celle qui nous occupe, où la preuve de la perte est un élément constitutif de la ou des causes d'action. Comme l'a expliqué le juge Rothstein dans *Microsoft* :

Les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux ont trait à la réparation, sont de nature procédurale et ne peuvent permettre d'établir la responsabilité

Restaurant Corp., 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability. [Emphasis added; para. 131.]

(*2038724 Ontario Ltd. c. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, par. 55). Le libellé de l'al. 29(1)(b) veut qu'il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire pour qu'une réparation pécuniaire globale puisse être accordée. À mon sens, il faut une conclusion préalable de responsabilité avant d'appliquer les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux, ce qui comprend, lorsque l'exige une cause d'action comme celles prévues à l'art. 36 de la *Loi sur la concurrence*, une conclusion sur la preuve de la perte. Je ne vois pas comment une disposition visant à accorder des dommages-intérêts de manière globale pourrait être le fondement d'une conclusion sur quelque volet de la responsabilité. [Je souligne; par. 131.]

[221] The aggregate damages provisions of the *Class Proceedings Act* therefore cannot be interpreted and applied in such a way as to give a remedy to class members who could not obtain a remedy in an individual trial due to their inability to show that they suffered a loss in connection with the alleged conspiracy. It is important not to conflate the assessment of aggregate damages with the rationale for awarding them.

[221] Les dispositions de la *Class Proceedings Act* relatives aux dommages-intérêts globaux ne peuvent donc être interprétées et appliquées de manière à accorder une réparation aux membres du groupe qui ne pouvaient en obtenir une dans un procès individuel en raison de leur incapacité à démontrer qu'ils ont subi une perte par suite du complot allégué. Il est important de ne pas confondre l'évaluation des dommages-intérêts globaux avec la justification de leur octroi.

[222] What all of this means is that a determination at a common issues trial of whether loss reached the indirect purchaser *level* in the distribution chain is of no assistance in resolving the question of whether the Defendants are actually liable to any or all of the indirect purchasers under the causes of action listed above. From the Plaintiff's perspective, the best case scenario is that there is a need for individual trials on the question of which indirect purchasers actually suffered a loss. His worst case scenario is that it cannot be proved that any indirect purchasers suffered a loss at all, which would terminate the litigation altogether as it pertains to those class members. Contrary to what the Certification Judge stated in his reasons (at para. 168), establishing at trial that "the defendants took part in a conspiracy, that they sometimes or always overcharged direct purchasers, and that at least some direct purchasers passed on these overcharges" to the indirect purchasers will *not* be "sufficient to establish the fact of the defendants' liability". It follows, therefore, that the Certification Judge did not identify the correct

[222] Compte tenu de tout ce qui précède, lors de l'audition des questions communes, déterminer si la perte a atteint le *niveau* d'acheteurs indirects situés en aval dans la chaîne de distribution ne permet pas d'établir si les défenderesses sont responsables envers l'ensemble ou une partie des acheteurs indirects relativement aux causes d'action énumérées ci-dessus. Du point de vue du demandeur, dans le meilleur des cas, il faudrait tenir des procès individuels afin de déterminer qui, parmi les acheteurs indirects, a réellement subi une perte. Le pire des cas serait de ne pas pouvoir démontrer que l'un ou l'autre des acheteurs indirects a subi une perte, ce qui mettrait carrément fin au litige visant ces membres du groupe. Contrairement à ce qu'a indiqué le juge saisi de la demande d'autorisation dans ses motifs (par. 168), démontrer au procès que [TRADUCTION] « les défenderesses ont participé à un complot, qu'elles ont parfois ou toujours imposé une majoration aux acheteurs directs et qu'au moins certains de ces acheteurs directs ont refilé ces majorations » aux acheteurs indirects « [*ne*] suffira [*pas*] à établir la responsabilité des défenderesses ». Par

standard for certifying loss as a common issue (see Brown J.'s reasons, at para. 110).

(b) *Proof at trial that loss reached the indirect purchaser level, without anything more, does not allow for any loss-related determination that would advance the litigation in a manner that satisfies the commonality requirement*

[223] My colleague states that the loss-related questions proposed by the Plaintiff in this case satisfy the commonality requirement in s. 4(1)(c) of the *Class Proceedings Act*, based on a methodology that is capable of proving that overcharges were passed on somewhere at the indirect purchaser level, *even though* such a methodology cannot allow any finding of liability to be made at trial (see paras. 109 and 120). Similarly, the Plaintiff takes the position that a "single analysis of whether there was an overcharge and whether that overcharge was passed on to the indirect purchaser level would significantly advance the claim for all class members by avoiding repetition of the collection and analysis of large quantities of economic data" (R.F. (Toshiba Appeal), at para. 106).

[224] In light of the legal principles set out by my colleague at paras. 103-5 of his reasons, however, I cannot agree. To begin with, the fact that losses might have occurred somewhere at the indirect purchaser level in the distribution chain does not assist us in determining which specific indirect purchasers suffered losses in order to identify the class members to whom the Defendants might be liable. If the common issues trial judge finds that overcharges were passed on to at least one unidentifiable indirect purchaser, there would still be a need for individual trials; therefore, duplication of fact-finding would not be eliminated (*Dutton*, at para. 39). And if such individual trials are indeed required, then proof that loss occurred somewhere at the indirect purchaser level is not truly "necessary to the resolution of each class member's claim", is not a "substantial common ingredient" of their causes of action, and cannot in fact result in

conséquent, le juge saisi de la demande d'autorisation n'a pas appliqué la bonne norme pour autoriser la question de la perte en tant que question commune (voir les motifs du juge Brown, par. 110).

b) *La simple démonstration au procès que la perte a atteint le niveau de l'acheteur indirect ne permet pas de rendre une décision sur la perte qui ferait progresser l'instance d'une manière qui respecte l'exigence d'une question commune*

[223] Mon collègue affirme que les questions de perte proposées par le demandeur en l'espèce répondent à l'exigence d'une question commune prévue à l'al. 4(1)(c) de la *Class Proceedings Act*, sur le fondement d'une méthode qui permet de prouver qu'une majoration a été refilée au niveau de l'acheteur indirect, *même si* cette méthode ne permet pas de tirer une conclusion de responsabilité au procès (voir par. 109 et 120). De même, le demandeur soutient que [TRADUCTION] « une seule analyse visant à déterminer s'il y a eu majoration et si celle-ci est passée au niveau de l'acheteur indirect ferait considérablement progresser la demande pour tous les membres du groupe, car elle aurait pour effet d'éviter de répéter la collecte et l'analyse de grandes quantités de données économiques » (m.i. (pourvoi de Toshiba), par. 106).

[224] Compte tenu des principes de droit énoncés par mon collègue aux par. 103-105 de ses motifs, cependant, je ne puis être d'accord. Premièrement, le fait que des acheteurs indirects situés en aval dans la chaîne de distribution pourraient avoir subi une perte ne nous aide pas à déterminer précisément de quels acheteurs indirects il s'agit, d'une manière qui nous permettrait d'identifier les membres du groupe envers lesquels les défenderesses pourraient être responsables. Si le juge appelé à statuer sur les questions communes conclut qu'une majoration a atteint le niveau d'au moins un acheteur indirect non identifiable, il serait tout de même nécessaire de tenir des procès individuels; la répétition de l'appréciation des faits ne serait donc pas éliminée (*Dutton*, par. 39). Et si de tels procès individuels sont vraiment nécessaires, la preuve qu'une perte a été subie quelque part au niveau des acheteurs indirects n'est

"success" for any of those indirect purchasers (*ibid.*, at paras. 39-40 (emphasis added)).

pas réellement « nécessaire pour la résolution des demandes de chaque membre du groupe », n'est pas un « élément commun important » de leurs causes d'action et ne peut en fait entraîner le « succès » d'aucun de ces acheteurs indirects (*ibid.*, par. 39-40 (je souligne)).

[225] My colleague nevertheless opines that the requisite commonality derives from the fact that failure to show that loss was suffered by *any* indirect purchasers would mean that *none* of them could succeed against the Defendants (para. 108). With respect, however, the function of the common issues trial is not to screen out unmeritorious claims; it is to allow issues of fact and law that are common among many claimants to be determined *at once*, so as to avoid the need for individual determinations for each and every class member. Furthermore, it is unclear why any representative plaintiff would seek the certification of a question that can meaningfully "advance the litigation" only if it results in failure for all indirect purchasers (see Brown J.'s reasons, at para. 109). In any event, I agree that "it would be a gross waste of private and public resources to litigate if the only prospective 'benefit' was to show that there was no point bringing the case in the first place" (K. Wright, T. Shikaze and E. Snow, "On the 'Level' After *Godfrey*: Proving Liability in Canadian Price Fixing Class Actions" (2017), 12 *C.A.D.Q.* 13, at p. 18).[6]

[225] Mon collègue estime néanmoins que l'exigence d'une question commune découle du fait que si l'on ne peut démontrer que la perte a été subie par *quelque* acheteur indirect *que ce soit*, *aucun* d'entre eux ne peut obtenir gain de cause contre les défenderesses (par. 108). Avec égards, cependant, l'audition des questions communes n'a pas pour fonction d'écarter les demandes non fondées; elle sert plutôt à permettre de trancher *simultanément* des questions de fait et de droit qui sont communes à un grand nombre de demandeurs, de manière à éviter de devoir juger individuellement de ces questions pour chacun des membres du groupe. Qui plus est, on ne sait pas avec certitude pourquoi le représentant des demandeurs solliciterait l'autorisation d'une question qui peut uniquement « faire avancer l'instance » de façon utile si elle entraîne un échec pour tous les acheteurs indirects (voir les motifs du juge Brown, par. 109). Quoi qu'il en soit, je conviens que [TRADUCTION] « ce serait un énorme gaspillage de ressources privées et publiques d'intenter une poursuite si le seul "avantage" éventuel était de démontrer que, dès le départ, il n'y avait pas lieu de porter l'affaire devant les tribunaux » (K. Wright, T. Shikaze et E. Snow, « On the "Level" After *Godfrey* : Proving Liability in Canadian Price Fixing Class Actions » (2017), 12 *C.A.D.Q.* 13, p. 18)[6].

[226] All of this leads me to the conclusion that proof that loss reached the indirect purchaser *level* in the distribution chain would not, without more, allow the common issues trial judge to make any loss-related determinations on a class-wide basis so as to permit the proposed questions to be certified as common issues for trial.

[226] Tout ce qui précède m'amène à conclure que la preuve selon laquelle la perte a atteint le *niveau* de l'acheteur indirect situé en aval dans la chaîne de distribution, à elle seule, ne permettrait pas au juge appelé à statuer sur les questions communes de tirer une conclusion sur la perte à l'échelle du groupe, de manière à permettre l'autorisation des questions proposées en tant que questions communes pour audition.

6 One of the authors of this article served as counsel for certain defendants in this litigation (although not before this Court) and in *Shah*.

6 L'un des auteurs de cet article était l'avocat de certaines défenderesses en l'espèce (mais non devant notre Cour) et dans *Shah*.

(c) *Microsoft does not indicate that loss-related questions are certifiable in indirect purchaser class actions so long as the representative plaintiff has a plausible methodology for proving solely that some overcharges were passed on to the indirect purchaser level*

[227] Like the courts below, my colleague relies on this Court's decision in *Microsoft* to support his conclusion that loss-related questions in indirect purchaser class actions are certifiable even if the representative plaintiff's methodology can show only that loss reached the indirect purchaser *level* (but cannot establish loss on any individualized basis). Because that case raised a number of issues that are similar to those in the case at hand, it is worth analyzing it in some depth.

[228] As in this case, the class action in *Microsoft* was based on an allegation of price manipulation by the defendants, Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE (collectively, "Microsoft"). The representative plaintiffs — Pro-Sys Consultants Ltd. and Neil Godfrey (collectively, "Pro-Sys") — specifically alleged, on behalf of all class members, that Microsoft had engaged in unlawful conduct by overcharging for its operating systems. The class was made up of indirect purchasers who had acquired Microsoft products from resellers that had themselves purchased the products from Microsoft or another reseller higher up in the distribution chain. Pro-Sys pleaded causes of action under the common law torts of intentional interference with economic interests and conspiracy, sought damages pursuant to ss. 36, 45 and 52 of the *Competition Act*, and claimed in unjust enrichment and waiver of tort.

[229] Although the loss-related questions in that case are very similar to those proposed in the case at hand, they explicitly asked whether losses or overcharges had been passed on to *all* of the indirect

c) *Microsoft n'indique pas que les questions de perte peuvent être autorisées dans des recours collectifs formés par des acheteurs indirects dès que le représentant des demandeurs emploie une méthode acceptable pour prouver uniquement qu'une majoration a atteint le niveau de l'acheteur indirect*

[227] À l'instar des tribunaux d'instance inférieure, mon collègue se fonde sur l'arrêt *Microsoft* de notre Cour à l'appui de sa conclusion que les questions de perte dans des recours collectifs formés par des acheteurs indirects peuvent être autorisées même si la méthode proposée par le représentant des demandeurs permet seulement de démontrer que la perte a été refilée à l'acheteur indirect (sans prouver la perte de façon individuelle). Comme cette affaire a soulevé plusieurs questions semblables à celles en l'espèce, elle vaut la peine d'être examinée en profondeur.

[228] Comme dans le cas présent, le recours collectif dans *Microsoft* reposait sur une allégation de manipulation des prix de la part des défenderesses, Microsoft Corporation et Microsoft Canada Co./Microsoft Canada CIE (appelées collectivement « Microsoft »). Les représentants des demandeurs, Pro-Sys Consultants Ltd. et Neil Godfrey (appelées collectivement « Pro-Sys »), avaient précisément allégué, au nom de tous les membres du groupe, que Microsoft avait agi illégalement en majorant le prix de ses systèmes d'exploitation. Le groupe était composé d'acheteurs indirects qui avaient acheté des produits de Microsoft de revendeurs qui les avaient eux-mêmes achetés de Microsoft ou d'autres revendeurs situés en amont dans la chaîne de distribution. Pro-Sys invoquait des causes d'action pour délits d'atteinte intentionnelle aux intérêts financiers et de complot reconnus en common law, sollicitait des dommages-intérêts sur le fondement des art. 36, 45 et 52 de la *Loi sur la concurrence* et demandait restitution pour enrichissement sans cause et renonciation au recours délictuel.

[229] Bien que les questions de perte dans cette affaire ressemblaient beaucoup à celles proposées en l'espèce, elles visaient expressément à savoir si la perte ou la majoration avait été transférée à *tous*

purchaser class members.[7] Among the issues at the certification stage was "whether Pro-Sys' proposed methodology will be able to show the initial overcharges and the pass-through to the proposed class members" (*Pro-Sys v. Microsoft*, 2010 BCSC 285 ("*Microsoft* (BCSC)"), at para. 8 (CanLII) (emphasis added)).

[230] Rothstein J., writing for a unanimous Court, clarified that the onus on the representative plaintiff at the certification stage is to establish that there is some basis in fact for the commonality requirement. In the context of loss-related questions, he observed that this requires the proposed methodology to "offer a realistic prospect of establishing loss on a class-wide basis" (para. 118 (emphasis added)). Importantly, Rothstein J. also expanded on how commonality can be established in indirect purchaser class actions where expert evidence is adduced to show that the issue of loss is resolvable on a class-wide basis:

> The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common

7 The loss-related questions proposed by Pro-Sys included the following: Are the Class Members entitled to losses or damages pursuant to s. 36 of the *Competition Act*, and, if so, in what amount? Did the Class Members suffer economic loss? Did the Class Members suffer economic loss as a result of the Defendants' interference? Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge? (See *Microsoft*, Appendix.) The term "Class Members" was defined in Pro-Sys's proposed litigation plan to mean "all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing" (Pro-Sys A.R., vol. III, at p. 196 (emphasis added)).

les acheteurs indirects du groupe[7]. Au nombre des questions soulevées à l'étape de l'autorisation, il y avait celle de savoir [TRADUCTION] « si la méthode proposée par Pro-Sys permettra d'établir la majoration initiale ainsi que son transfert aux membres du groupe projeté » (*Pro-Sys c. Microsoft*, 2010 BCSC 285 (« *Microsoft* (BCSC) »), par. 8 (CanLII) (je souligne)).

[230] Rédigeant l'arrêt unanime de la Cour, le juge Rothstein a précisé qu'à l'étape de l'autorisation, il incombe au représentant des demandeurs d'établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune. Dans le cas des questions de perte, il a fait remarquer que la méthode proposée doit « offrir une possibilité réaliste d'établir la perte à l'échelle du groupe » (par. 118 (je souligne)). Fait important, le juge Rothstein a également donné des précisions sur la manière dont le caractère commun de la perte peut être établi dans le cadre de recours collectifs formés par des acheteurs indirects où une preuve d'expert est présentée pour démontrer que la question de la perte peut être résolue à l'échelle du groupe :

> La méthode proposée par l'expert vise à établir que la majoration a été transférée aux acheteurs indirects, ce qui rend la question commune au groupe dans son ensemble (voir *Chadha*, par. 31). À l'étape de la certification, la méthode n'a pas à déterminer le montant des dommages-intérêts, mais doit plutôt — et c'est là l'élément crucial — être susceptible de prouver « les conséquences communes », comme le conclut un tribunal américain dans une affaire antitrust, *In Re : Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). Les demandeurs doivent démontrer qu'une [TRADUCTION] « preuve

7 Les questions de perte proposées par Pro-Sys étaient notamment les suivantes : Les membres du groupe ont-ils droit, suivant l'art. 36 de la *Loi sur la concurrence*, au recouvrement des pertes ou des dommages subis et, dans l'affirmative, à raison de quel montant? Les membres du groupe ont-ils subi une perte financière? Les membres du groupe ont-ils subi une perte financière par suite de cette atteinte? Les membres du groupe se sont-ils appauvris d'un montant égal à celui de la majoration? (Voir *Microsoft*, annexe.) Selon le plan de déroulement de l'instance proposé par Pro-Sys, le terme « membres du groupe » signifie [TRADUCTION] « toutes les personnes résidant en Colombie-Britannique qui, depuis le 1er janvier 1994, ont acquis indirectement une licence pour un système d'exploitation ou un logiciel d'application de Microsoft à leur usage personnel, et non aux fins de revente ou de location » (d.a. Pro-Sys, vol. III, p. 196 (je souligne)).

to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain. [Emphasis added; para. 115.]

[231] In the case at hand, the courts below interpreted this passage as meaning that loss-related questions will always be certifiable as common issues in the context of indirect purchaser class actions so long as the representative plaintiff's methodology is capable of showing loss at the indirect purchaser level of the distribution chain. Respectfully, this reading of *Microsoft* — which focuses almost exclusively on the final sentence in the above-reproduced passage — is not consistent with the reasons as a whole, when read alongside those of the motion judge in that case.

[232] For our purposes, it is significant that the loss-related questions in *Microsoft* concerned whether *all* of the indirect purchasers had suffered a loss. Rothstein J. agreed that the class members' claims raised common issues because the resolution of those issues "would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis" (para. 111). He also declined to interfere with the motion judge's finding that Pro-Sys "has a credible or plausible methodology to show that all class members were harmed by Microsoft's alleged illegal activities" (*Microsoft* (BCSC), at para. 122 (emphasis in original); see also *Microsoft*, at para. 126). This led Rothstein J. to conclude as follows:

Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing

permettra d'établir, lors du procès, les conséquences antitrust qui sont communes à tous les membres du groupe » (*ibid.*, p. 155). À l'étape de la certification, point n'est besoin que la méthode établisse la perte réellement subie par le groupe dans la mesure où le demandeur démontre qu'une méthode permet de le faire. Dans le cadre d'actions d'acheteurs indirects, la méthode doit donc pouvoir établir que la majoration a été transférée à l'acheteur indirect situé en aval dans la chaîne de distribution. [Je souligne; par. 115.]

[231] Dans le cas présent, les tribunaux d'instance inférieure ont interprété cet extrait comme signifiant que les questions de perte pourront toujours être autorisées en tant que questions communes dans le contexte de recours collectifs formés par des acheteurs indirects dans la mesure où la méthode proposée par le représentant des demandeurs permet de démontrer que la perte a atteint le niveau de l'acheteur indirect situé en aval dans la chaîne de distribution. Avec égards, cette interprétation de *Microsoft* — axée presque exclusivement sur la dernière phrase de l'extrait reproduit ci-dessus — ne cadre pas avec les motifs dans leur ensemble, lorsqu'ils sont lus conjointement avec ceux du juge saisi de la requête dans cette affaire.

[232] Pour les besoins du présent dossier, il est révélateur que les questions de perte dans *Microsoft* visaient à établir si *tous* les acheteurs indirects avaient subi une perte. Le juge Rothstein a convenu que les réclamations des membres du groupe soulevaient des questions communes, car la résolution de ces questions « permettrait de faire progresser l'examen des allégations du groupe dans son ensemble et d'éviter la répétition dans l'analyse du droit et des faits » (par. 111). Il a également refusé de modifier la conclusion du juge saisi de la requête selon laquelle Pro-Sys [TRADUCTION] « [a] adopt[é] une méthode valable ou acceptable pour démontrer que tous les membres du groupe ont été lésés par les activités illégales reprochées à Microsoft » (*Microsoft* (BCSC), par. 122 (souligné dans l'original); voir également *Microsoft*, par. 126). Le juge Rothstein a donc conclu ce qui suit :

Contrairement à l'affaire *Hollick*, on peut dire en l'espèce que la perte constitue une question commune car il a été déterminé qu'une méthode proposée par un expert loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of [the motion judge] that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. [Emphasis added; para. 140.]

[233] A careful reading of *Microsoft* therefore makes it clear that Pro-Sys's loss-related questions were found to be resolvable on a "class-wide" basis because there was a credible and plausible methodology capable of answering them in respect of *all of the class members* at the common issues trial. Rothstein J. most likely referred to a methodology that is "able to establish that the overcharges have been passed on to the indirect purchaser level in the distribution chain" (para. 115) because of the motion judge's observation that, in order to succeed, Pro-Sys "must show that the alleged increased charges to the direct customers were not absorbed by any subsequent level in the distribution channel" before reaching the indirect purchasers who formed part of the class (*Microsoft* (BCSC), at para. 6). Indeed, Rothstein J. went so far as to say that "[t]he role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole", and that what the plaintiff "must demonstrate [is] that 'sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class' ([*In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002)], at p. 155)" (para. 115 (emphasis added)).

[234] *Microsoft* is therefore a case in which the representative plaintiffs obtained the certification of questions asking whether *all* indirect purchasers had suffered a loss, by providing the motion judge with

permettrait assez certainement d'établir la perte à l'échelle du groupe. Le règlement des questions communes devrait permettre de statuer sur la responsabilité de Microsoft et sur le transfert de la majoration aux acheteurs indirects. Puisqu'il est essentiel de statuer sur ces points afin que les membres du groupe puissent recouvrer le montant de la perte, on peut soutenir en l'espèce que le règlement des questions communes fera progresser substantiellement l'instance. Bien qu'il soit possible que des questions individuelles soient soulevées à l'audition des questions communes, le juge Myers indique implicitement dans ses motifs que, à l'étape de la certification, les questions communes l'emportent sur les questions qui ne touchent que des membres individuels. [Je souligne; par. 140.]

[233] Il ressort donc d'une lecture attentive de l'arrêt *Microsoft* que notre Cour a conclu que les questions de perte soulevées par Pro-Sys pouvaient être réglées à « l'échelle du groupe », car il existait une méthode valable et acceptable permettant d'y répondre pour *tous les membres du groupe* lors de l'audition des questions communes. La mention, dans les motifs du juge Rothstein, d'une méthode pouvant « établir que la majoration a été transférée à l'acheteur indirect situé en aval dans la chaîne de distribution » (par. 115) reprend fort probablement la remarque du juge saisi de la requête selon laquelle, pour avoir gain de cause, Pro-Sys [TRADUCTION] « doit démontrer que la majoration alléguée transférée aux clients directs n'a pas été absorbée par un niveau subséquent de la chaîne de distribution » avant d'être refilée aux acheteurs indirects qui faisaient partie du groupe (*Microsoft* (BCSC), par. 6). En effet, le juge Rothstein est allé jusqu'à dire que « [l]a méthode proposée par l'expert vise à établir que la majoration a été transférée aux acheteurs indirects, ce qui rend la question commune au groupe dans son ensemble », et que le demandeur « [doit] démontrer qu'une [TRADUCTION] "preuve permettra d'établir, lors du procès, les conséquences antitrust qui sont communes à tous les membres du groupe" ([*In Re : Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002)], p. 155) » (par. 115 (je souligne)).

[234] Ainsi, *Microsoft* est une affaire où les représentants des demandeurs ont obtenu l'autorisation de questions visant à déterminer si *tous* les acheteurs indirects ont subi une perte, en fournissant au juge

some basis in fact on which to find that the representative plaintiffs would be capable of proving at trial that they all had. Because the methodology made it possible for the common issues trial judge to resolve a necessary component of everyone's claim at once, without the need for individual trials, the commonality requirement was clearly met. As I have explained, however, *Microsoft* does not support the proposition that loss-related questions concerning indirect purchasers are certifiable, as a matter of course, so long as the plaintiff's methodology can show that some loss reached their level in the distribution chain. My colleague provides no reason for reading *Microsoft* in any other way (see Brown J.'s reasons, at para. 107).

saisi de la requête un certain fondement factuel sur lequel s'appuyer pour conclure que les représentants des demandeurs seraient en mesure de prouver au procès qu'ils avaient tous subi une perte. Comme la méthode a permis au juge appelé à statuer sur les questions communes de régler en même temps un élément nécessaire des demandes de tous, sans la tenue de procès individuels, l'exigence d'une question commune a manifestement été respectée. Cependant, comme je l'ai expliqué, *Microsoft* ne permet pas d'affirmer que les questions de perte subie par les acheteurs indirects peuvent être automatiquement autorisées, dès que la méthode proposée par le demandeur permet de démontrer qu'une perte a été refilée à leur niveau dans la chaîne de distribution. Mon collègue n'indique pas pourquoi il y a lieu d'interpréter autrement cet arrêt (voir les motifs du juge Brown, par. 107).

(3) Conclusion on the Commonality Issue

(3) Conclusion sur la question du caractère commun

[235] The legal dispute between the parties turns on whether loss-related questions that pertain to indirect purchasers in a price-fixing class action can be certified as common issues *even if* the representative plaintiff's methodology is capable only of establishing at trial that loss was occasioned somewhere at the indirect purchaser level of the distribution chain. I would respectfully answer this question in the negative. If the methodology is such that the common issues trial judge will be unable to make any findings as to which class members actually suffered a loss (for the purpose of making determinations as to liability), then those loss-related questions proposed by the plaintiff will not be capable of resolution on a "class-wide" or "common" basis. Indeed, this Court explained in *Sun-Rype* that "where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss" (para. 76 (emphasis added)). No two persons can prove that *they* are the ones who incurred a loss if a representative plaintiff's methodology can demonstrate only that loss reached some unidentified persons at their level in the distribution chain; by itself, such a methodology does not establish an

[235] Le litige juridique opposant les parties porte sur la question de savoir si les questions de perte visant les acheteurs indirects dans un recours collectif en matière de fixation des prix peuvent être autorisées en tant que questions communes *même si* la méthode proposée par le représentant des demandeurs permet seulement d'établir au procès qu'une perte a été subie quelque part au niveau de l'acheteur indirect dans la chaîne de distribution. Avec égards, je réponds à cette question par la négative. Si la méthode proposée est telle que le juge appelé à statuer sur les questions communes sera incapable de tirer des conclusions quant à l'identité des membres du groupe ayant réellement subi une perte (afin de trancher la question de la responsabilité), ces questions de perte proposées par le demandeur ne pourront donc pas être résolues « à l'échelle du groupe » ou en « commun ». En effet, dans *Sun-Rype*, notre Cour a expliqué que « dans les cas où les causes d'action proposées assujettissent la preuve de la responsabilité notamment à celle de la perte, le juge saisi de la demande d'autorisation doit être convaincu qu'il existe un certain fondement factuel pour dire qu'au moins deux personnes sont en mesure de démontrer avoir essuyé une perte » (par. 76 (je souligne)). Deux personnes ne peuvent prouver qu'*elles* sont celles qui

essential element of liability for anyone. The need for individual trials in those circumstances is indicative of the absence of commonality.

ont subi une perte si une méthode du représentant des demandeurs permet seulement de démontrer qu'une perte a été transférée à des personnes non identifiées situées à leur niveau dans la chaîne de distribution; à elle seule, cette méthode ne permet pas d'établir un élément essentiel de la responsabilité pour qui que ce soit. La nécessité de tenir des procès individuels dans ces circonstances témoigne de l'absence de caractère commun.

[236] That being said, what is required of the Plaintiff in this case is a methodology capable of answering the loss-related questions on an individualized basis, either by showing that all of the indirect purchasers suffered a loss or at least by identifying those who did and separating them from those who did not or those about whom we cannot be sure (and for whom individual hearings will therefore be necessary). In light of "Dr. Reutter's admissions on cross-examination that there may be some subset of class members who were not impacted, and that it would not be possible, using his methodology, to determine which class members were actually harmed" (C.A. reasons, at para. 125), the loss-related questions should not have been certified as common issues under s. 4(1)(c) of the *Class Proceedings Act*.

[236] Cela dit, il incombe au demandeur en l'espèce de proposer une méthode permettant de répondre aux questions liées à la perte de façon individuelle : en démontrant que tous les acheteurs indirects ont subi une perte ou, à tout le moins, en identifiant ceux qui ont subi une perte et en les distinguant de ceux qui n'en ont pas subi, ou de ceux à l'égard de qui il est impossible d'affirmer avec certitude qu'ils en ont subi une (et pour qui il sera donc nécessaire de tenir des audiences individuelles). À la lumière des [TRADUCTION] « admissions faites par M. Reutter en contre-interrogatoire voulant qu'il existe peut-être un certain sous-groupe au sein du groupe qui n'a pas été touché et qu'il soit impossible, à l'aide de sa méthode, d'identifier les membres du groupe qui ont réellement été lésés » (motifs de la C.A., par. 125), ces questions de perte n'auraient pas dû être autorisées en tant que questions communes en application de l'al. 4(1)(c) de la *Class Proceedings Act*.

IV. Conclusion

[237] Regarding the limitations issues raised in the Pioneer Appeal, I respectfully disagree that the discoverability rule has any application to s. 36(4)(a)(i). As for the doctrine of fraudulent concealment, the Plaintiff did not plead that there is any special relationship between the Pioneer Defendants and the class members, but did plead that the Pioneer Defendants took active steps to conceal the existence of the alleged conspiracy. While these pleadings are sufficient for the purposes of s. 4(1)(a) of the *Class Proceedings Act*, whether any such steps are sufficient to trigger the operation of this equitable doctrine will depend on what the Plaintiff actually proves at trial. As I explained earlier, what is necessary in the commercial context, such as here, could be the demonstration of the existence of *either* a

IV. Conclusion

[237] En ce qui a trait aux questions de prescription soulevées dans le pourvoi de Pioneer, avec égards, je ne suis pas d'accord que la règle de la possibilité de découvrir s'applique au sous-al. 36(4)a)(i). Pour ce qui est de la doctrine de la dissimulation frauduleuse, le demandeur n'a pas invoqué l'existence d'une relation spéciale entre les défenderesses Pioneer et les membres du groupe, mais il a plaidé que ces défenderesses ont pris des mesures concrètes pour dissimuler l'existence du complot allégué. Bien que ces arguments soient suffisants pour l'application de l'al. 4(1)(a) de la *Class Proceedings Act*, la question de savoir si de telles mesures suffisent à déclencher l'application de cette doctrine d'equity dépendra de ce que le demandeur réussira à prouver au procès. Comme je l'ai déjà expliqué, ce qu'il faut peut-être

special relationship, *or* something tantamount to or commensurate with one.

[238] Regarding the issues in the Toshiba Appeal, which are common to both appeals, I agree with my colleague — though for different reasons — that the existence of the statutory cause of action in s. 36(1) of the *Competition Act* does not preclude claimants from also advancing claims at common law or in equity based on the same conduct prohibited by Part VI. However, I part ways with my colleague in two important respects. First, I do not agree that the Umbrella Purchasers have a claim against the Defendants under s. 36(1) of the *Competition Act*. Second, I cannot accept that the questions proposed by the Plaintiff that pertain to the commonality of loss among indirect purchasers can be certified where his proposed methodology will be capable of showing nothing more than the fact that some overcharges reached the indirect purchaser level of the distribution chain. In class actions where loss is an essential element of liability (as here), my view is that loss-related questions can be certified as common issues only if the representative plaintiff will be able to actually identify which class members suffered a loss at trial — either by proving that they all did or by distinguishing those who did from those who did not. Because Dr. Reutter admitted on cross-examination that his methodology would be incapable of allowing the Plaintiff to make such an identification at trial, it follows that the loss-related questions proposed by the Plaintiff in this case should not have been certified.

[239] I would therefore allow the appeals in part.

Appeals dismissed with costs, CÔTÉ J. *dissenting in part.*

Solicitors for the appellants Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics

accomplir en matière commerciale, comme en l'espèce, c'est de démontrer l'existence d'une relation spéciale *ou* de quelque chose d'équivalent ou de correspondant à une telle relation.

[238] En ce qui concerne les questions soulevées dans le pourvoi Toshiba qui sont communes aux deux pourvois, je conviens avec mon collègue — bien que pour des motifs différents — que l'existence de la cause d'action prévue au par. 36(1) de la *Loi sur la concurrence* n'empêche pas les demandeurs d'intenter des recours en common law ou en equity qui visent le même comportement interdit par la partie VI. Cependant, je ne suis pas d'accord avec mon collègue sur deux aspects importants. Premièrement, je ne suis pas d'avis que les acheteurs sous parapluie ont un recours contre les défenderesses en vertu du par. 36(1) de la *Loi sur la concurrence*. Deuxièmement, je ne saurais accepter que les questions proposées par le demandeur quant au caractère commun de la perte entre les acheteurs indirects peuvent être autorisées si la méthode qu'il propose permettra seulement de démontrer qu'une majoration a atteint le niveau des acheteurs indirects de la chaîne de distribution. Dans des recours collectifs où la perte constitue un élément essentiel pour établir la responsabilité (comme en l'espèce), je suis d'avis que les questions de perte ne peuvent être autorisées en tant que questions communes que si le représentant des demandeurs est capable d'identifier les membres du groupe qui ont subi une perte — soit en prouvant qu'ils ont tous subi une perte ou en distinguant ceux qui ont subi une perte de ceux qui n'en ont pas subi. Comme M. Reutter a admis en contre-interrogatoire que sa méthode ne permettrait pas au demandeur de procéder à une telle identification au procès, il s'ensuit que les questions de perte proposées par le demandeur en l'espèce n'auraient pas dû être autorisées.

[239] Je suis donc d'avis d'accueillir les pourvois en partie.

Pourvois rejetés avec dépens, la juge CÔTÉ *est dissidente en partie.*

Procureurs des appelantes Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics

(USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc.: Cassels Brock & Blackwell, Toronto.

Solicitors for the appellants Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd. and Toshiba America Information Systems, Inc.: Fasken Martineau DuMoulin, Toronto.

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Solicitors for the appellants Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc. and Philips Electronics Ltd.: McMillan, Toronto.

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Solicitors for the appellants BENQ Corporation, BENQ America Corporation and BENQ Canada Corp.: Shapray Cramer Fitterman Lamer, Vancouver.

Solicitors for the respondent: Camp Fiorante Matthews Mogerman, Vancouver; Siskinds, London.

Solicitors for the intervener Option consommateurs: Belleau Lapointe, Montréal.

Solicitors for the intervener the Consumers Council of Canada: Harrison Pensa, London.

Solicitors for the intervener the Canadian Chamber of Commerce: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener the Consumers' Association of Canada: Sotos, Toronto.

(USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. et Pioneer Électronique du Canada, inc. : Cassels Brock & Blackwell, Toronto.

Procureurs des appelantes Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba du Canada Limitée et Toshiba America Information Systems, Inc. : Fasken Martineau DuMoulin, Toronto.

Procureurs des appelantes Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc. et Samsung Electronics America, Inc. : Blake, Cassels & Graydon, Toronto.

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Procureurs des appelantes Panasonic Corporation, Panasonic Corporation of North America et Panasonic Canada Inc. : Bennett Jones, Toronto.

Procureurs des appelantes BENQ Corporation, BENQ America Corporation et BENQ Canada Corp. : Shapray Cramer Fitterman Lamer, Vancouver.

Procureurs de l'intimé : Camp Fiorante Matthews Mogerman, Vancouver; Siskinds, London.

Procureurs de l'intervenante Option consommateurs : Belleau Lapointe, Montréal.

Procureurs de l'intervenant Consumers Council of Canada : Harrison Pensa, London.

Procureurs de l'intervenante la Chambre de commerce du Canada : Davies Ward Phillips & Vineberg, Toronto.

Procureurs de l'intervenante l'Association des consommateurs du Canada : Sotos, Toronto.

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Pro-Sys Consultants Ltd. and Neil Godfrey *Appellants*

v.

Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE *Respondents*

and

Attorney General of Canada *Intervener*

Indexed as: Pro-Sys Consultants Ltd. *v.* Microsoft Corporation

2013 SCC 57

File No.: 34282.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Class actions — Certification — Indirect purchasers — Plaintiffs suing defendants for unlawful conduct in overcharging for its PC operating systems and PC applications software — Plaintiffs seeking certification of action as class proceeding under provincial class action legislation — Whether indirect purchaser actions are available as a matter of law in Canada — Whether certification requirements are met — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

P brought a class action against M, alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. P sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"). The proposed class is made up of ultimate consumers, known as "indirect purchasers", who acquired M's products from re-sellers.

Pro-Sys Consultants Ltd. et Neil Godfrey *Appelants*

c.

Microsoft Corporation et Microsoft Canada Co./Microsoft Canada CIE *Intimées*

et

Procureur général du Canada *Intervenant*

Répertorié : Pro-Sys Consultants Ltd. *c.* Microsoft Corporation

2013 CSC 57

N° du greffe : 34282.

2012 : 17 octobre; 2013 : 31 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Recours collectifs — Certification — Acheteurs indirects — Action intentée contre les défenderesses au motif qu'elles auraient agi illégalement en majorant le prix de leurs systèmes d'exploitation et de leurs logiciels d'application pour ordinateur personnel — Demande de certification d'une action à titre de recours collectif en application des dispositions provinciales sur les recours collectifs — L'acheteur indirect dispose-t-il d'un recours en droit canadien? — Respect des conditions de certification — Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1).

P a intenté contre M un recours collectif dans lequel elle allègue que, à compter de 1988, M a agi illégalement en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur personnel compatibles avec le processeur Intel. P a demandé la certification de son action à titre de recours collectif en application de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (« *CPA* »). Le groupe proposé se compose des consommateurs finaux, appelés « acheteurs indirects », qui ont acheté des produits de M à des revendeurs.

The British Columbia Supreme Court found that the certification requirements set out in s. 4(1) of the *CPA* were met and certified the action. The majority of the Court of Appeal allowed M's appeal, set aside the certification order and dismissed the action, determining that indirect purchaser actions were not available as a matter of law in Canada and therefore that the class members had no cause of action under s. 4(1)(a) of the *CPA*.

Held: The appeal should be allowed.

Indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured the indirect purchasers as a result of the overcharge being "passed on" to them through the chain of distribution. The argument that indirect purchasers should have no cause of action because passing on has been rejected as a defence in Canada should fail.

The passing-on defence, which was typically advanced by an overcharger at the top of a distribution chain, was invoked under the proposition that if the direct purchaser who sustained the original overcharge then passed that overcharge on to its own customers, the gain conferred on the overcharger was not at the expense of the direct purchaser because the direct purchaser suffered no loss. As such, the fact that the overcharge was "passed on" was argued to be a defence to actions brought by the direct purchaser against the party responsible for the overcharge. This defence has been rejected by this Court in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, and that rejection is not limited to the context of the imposition of *ultra vires* taxes; the passing-on defence is rejected throughout the whole of restitutionary law.

However, the rejection of the passing-on defence does not lead to a corresponding rejection of the offensive use of passing on. Therefore, indirect purchasers should not be foreclosed from claiming losses passed on to them. The risk of double or multiple recovery where actions by direct and indirect purchasers are pending at the same time or where parallel suits are pending in other jurisdictions can be managed by the court. Furthermore, indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages. In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss, and whether they have met their burden of

La Cour suprême de la Colombie-Britannique a conclu que les conditions de certification prévues au par. 4(1) de la *CPA* étaient réunies et elle a certifié l'action. Les juges majoritaires de la Cour d'appel ont accueilli l'appel de M, annulé l'ordonnance de certification et rejeté l'action après avoir statué que l'acheteur indirect n'a pas de recours en droit canadien et que les membres du groupe n'avaient donc pas de cause d'action comme l'exige l'al. 4(1)(a) de la *CPA*.

Arrêt : Le pourvoi est accueilli.

L'acheteur indirect a une cause d'action contre l'auteur de la majoration qui se situe au sommet de la chaîne de distribution et qui l'aurait indirectement lésé du fait que la majoration lui a été « transférée » en aval dans la chaîne de distribution. On ne peut retenir l'argument selon lequel l'acheteur indirect ne doit se voir reconnaître aucune cause d'action en raison du rejet du transfert de la perte comme moyen de défense au Canada.

Le moyen de défense fondé sur le transfert de la perte, généralement invoqué par l'auteur de la majoration situé au sommet de la chaîne de distribution, voulait que si l'acheteur direct absorbait la majoration puis la transférait à ses propres clients, l'auteur de la majoration ne réalisait pas le bénéfice au détriment de l'acheteur direct, celui-ci ne subissant aucune perte. Ce « transfert » de la majoration était donc invoqué en défense à l'action intentée par l'acheteur direct contre l'auteur de la majoration. La Cour a rejeté ce moyen de défense dans *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, et ce rejet ne vaut pas que pour l'imposition d'une taxe *ultra vires*; le moyen de défense fondé sur le transfert de la perte est toujours exclu aux fins du droit de la restitution.

Cependant, le rejet du transfert de la perte comme moyen de défense n'entraîne pas son exclusion comme cause d'action. En conséquence, l'acheteur indirect ne doit pas se voir empêcher de recouvrer le montant de la perte qui lui a été transférée. Le tribunal peut gérer le risque de recouvrement double ou multiple lorsque l'action de l'acheteur direct et celle de l'acheteur indirect sont en instance simultanément ou lorsque des poursuites sont intentées parallèlement dans d'autres ressorts. Par ailleurs, il n'y a pas lieu de faire totalement obstacle à l'action de l'acheteur indirect pour la seule raison qu'il sera ardu d'établir le préjudice subi. L'acheteur indirect qui intente une action contracte volontairement l'obligation d'établir qu'il a subi une perte, et la question proof is a factual question to be decided on a case-by-case basis. In addition, allowing the offensive use of passing on will not frustrate the deterrence objectives of Canadian competition laws. Indirect purchaser actions may, in some circumstances, be the only means by which overcharges are claimed and deterrence is promoted. Finally, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than reserving these actions for direct purchasers who may have in fact passed on the overcharge.

The first requirement for certification at s. 4(1) of the *CPA* requires that the pleadings disclose a cause of action. A plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed. In the case at bar, the pleadings disclose causes of action that should not be struck out at this stage of the proceedings.

First, it cannot be said that the pleadings do not disclose a cause of action under s. 36 of the *Competition Act*. The contention that the s. 36 cause of action is not properly pleaded because it was not included in the statement of claim and that any attempt to add it now would be barred by the two-year limitation period contained in s. 36(4) of the Act is purely technical and should be rejected. The argument that the Competition Tribunal should have jurisdiction over the enforcement of the competition law should also be rejected, since s. 36 expressly confers jurisdiction on the court to entertain the claims of any person who suffered loss by virtue of a breach of Part VI of the Act.

Next, it is not plain and obvious that the claim in tort for predominant purpose conspiracy cannot succeed. The contention that the tort of predominant purpose conspiracy is not made out because the statement of claim fails to identify one true predominant purpose and instead lists overlapping purposes should fail at this stage of the proceedings. Similarly, the argument that the predominant purpose conspiracy claim should be struck as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should fail because it is not plain and obvious that the law considers parent and wholly-owned subsidiary corporations to always act in combination.

Similarly, at this point, it is not plain and obvious that there is no cause of action in tort for unlawful means conspiracy or intentional interference with economic

de savoir s'il s'est acquitté ou non de son fardeau de preuve tient aux faits de l'espèce. En outre, permettre d'alléguer en demande le transfert de la perte ne nuira pas aux objectifs de dissuasion des dispositions canadiennes sur la concurrence. Dans certaines circonstances, l'action de l'acheteur indirect peut offrir le seul moyen de recouvrer la majoration et d'assurer la dissuasion. Enfin, permettre à l'acheteur indirect d'intenter une action en justice s'accorde avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, peut ainsi être indemnisée.

La première condition de certification prévue au par. 4(1) de la *CPA* veut que les actes de procédure révèlent une cause d'action. Le demandeur ne satisfait pas à la condition lorsque, à supposer que les faits invoqués soient vrais, la demande ne pourrait manifestement pas être accueillie. En l'espèce, les actes de procédure révèlent des causes d'action qu'on ne saurait radier à ce stade de l'instance.

Premièrement, on ne peut affirmer que les actes de procédure ne révèlent pas une cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence*. La prétention que la cause d'action fondée sur l'art. 36 est irrégulièrement plaidée parce qu'elle ne figure pas dans la déclaration et que le délai de prescription de deux ans imparti au par. 36(4) de la Loi fait obstacle à l'ajout de cette cause d'action est purement technique et doit être rejetée. Celle voulant que c'est au Tribunal de la concurrence qu'il appartient de faire respecter le droit de la concurrence doit également être rejetée puisque l'art. 36 confère expressément compétence à une cour de justice pour statuer sur toute réclamation d'une personne à qui une violation de la partie VI a infligé une perte.

Ensuite, on ne saurait dire qu'il ne peut manifestement pas être fait droit à l'allégation relative au délit civil de complot visant principalement à causer un préjudice. La thèse voulant que l'allégation ne soit pas étayée parce que la déclaration ne révèle pas un véritable objet principal, mais en énumère en fait plusieurs qui se chevauchent, doit être rejetée à ce stade de l'instance. Il convient également de rejeter la demande de radiation de l'allégation de complot entre une société mère et une filiale visant principalement à causer un préjudice car il n'est pas manifeste que, sur le plan juridique, une société mère et une filiale à 100 p. 100 agissent toujours de concert.

Aussi, l'inexistence d'une cause d'action en responsabilité délictuelle pour complot en vue de recourir à des moyens illégaux ou pour atteinte intentionnelle interests. These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. Depending on the decision of this Court in *Bram*, it will be open to M to raise the matter at trial should it consider it advisable to do so.

aux intérêts financiers n'est pas manifeste à ce stade. Ces causes d'action alléguées doivent être examinées sommairement car, dans le dossier *Bram Enterprises Ltd. c. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 R.N.-B. (2e) 215, autorisation d'appel accordée, [2012] 3 R.C.S. v., actuellement en délibéré, notre Cour ne s'est pas encore prononcée sur l'approche qui s'impose à l'égard de l'exigence, commune aux deux délits civils, du recours à des moyens illégaux. Selon l'issue du pourvoi dans *Bram*, M pourra demander à la juridiction de première instance de statuer sur ce point si elle le juge opportun.

With respect to the restitutionary claim in unjust enrichment, it is not plain and obvious that it cannot succeed. With respect to the argument that any enrichment received by M came from the direct purchasers and not from the class members, and that this lack of a direct connection between it and the class members forecloses the claim of unjust enrichment, it is not plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct. The question of whether the contracts between M and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers, which could constitute a juristic reason for the enrichment, are illegal and void should not be resolved at this stage of the proceedings and must be left to the trial judge.

S'agissant de la demande de restitution fondée sur l'enrichissement sans cause, il n'est pas manifeste qu'il ne peut y être fait droit. En ce qui concerne la thèse voulant que l'enrichissement de M provienne des acheteurs directs, et non des membres du groupe, et que son absence de lien direct avec ces derniers scelle le sort de l'allégation d'enrichissement sans cause, il n'est pas manifeste que l'enrichissement sans cause ne sera établi que si le lien entre la demanderesse et la défenderesse est direct. Il n'y a pas lieu, à ce stade de l'instance, de statuer sur la question de savoir si les contrats entre M et les acheteurs directs et entre les acheteurs directs et les acheteurs indirects, lesquels pourraient constituer la cause juridique de l'enrichissement, sont illégaux et nuls; il appartient au juge du procès de le faire.

The pleadings based on constructive trust must be struck. In order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property. In the present case, there is no referential property. P makes a purely monetary claim. As the claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that this claim cannot succeed.

Les allégations relatives à l'existence d'une fiducie par interprétation doivent être radiées. Pour faire la preuve d'une fiducie par interprétation, le demandeur doit pouvoir établir un lien ou un rapport de causalité entre sa contribution et l'acquisition d'un bien. Nul bien n'est en cause en l'espèce. P réclame seulement une réparation pécuniaire. Étant donné qu'elle n'indique pas en quoi une réparation pécuniaire serait inappropriée ou insuffisante, et qu'elle n'établit pas de lien avec un bien en particulier, l'allégation ne satisfait pas aux conditions d'imposition d'une fiducie par interprétation. Au vu des actes de procédure, il est manifeste qu'on ne saurait faire droit à cette allégation.

Finally, it is not plain and obvious that a cause of action in waiver of tort would not succeed. There is contradictory law as to the question of whether the underlying tort needs to be established in order to sustain an action in waiver of tort. This appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded.

Enfin, il n'est pas manifeste que le demandeur qui fonde son action sur la renonciation au recours délictuel sera débouté. Le droit est contradictoire quant à savoir si le délit civil sous-jacent doit être prouvé ou non pour les besoins d'une action fondée sur la renonciation au recours délictuel. Il ne convient pas de statuer plus avant, dans le cadre du pourvoi, sur le droit applicable en matière de renonciation au recours délictuel, ni sur le contexte particulier dans lequel on peut invoquer celle-ci.

The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158: the class representative must show some basis in fact for each of the certification requirements set out in the provincial class action legislation, other than the requirement that the pleadings disclose a cause of action. The certification stage is not meant to be a test of the merits of the action, rather, this stage is concerned with form and with whether the action can properly proceed as a class action. The standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. Although evidence has a role to play in the certification process, the standard of proof does not require evidence on a balance of probabilities. The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action, rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements not having been met.

In the case at bar, the applications judge's finding that the claims raised common issues is entitled to deference. In order to establish commonality, evidence that the acts alleged actually occurred is not required, rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members. With respect to the common issues that ask whether loss to the class members can be established on a class-wide basis, they require the use of expert evidence in order for commonality to be established. The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement — it must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question, and there must be some evidence of the availability of the data to which the methodology

Le point de départ pour déterminer la norme de preuve applicable aux autres conditions de certification réside dans l'arrêt *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158 : le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions que prévoient les dispositions provinciales sur les recours collectifs, sauf celle voulant que les actes de procédure révèlent une cause d'action. L'examen au fond est écarté à l'étape de la certification, laquelle intéresse plutôt la forme et le caractère approprié de la poursuite par voie de recours collectif. Suivant la norme de preuve applicable, la question n'est pas celle de savoir si la demande a un certain fondement factuel, mais bien si un certain fondement factuel établit chacune des conditions de certification. Bien que la preuve importe aux fins de la certification, la norme de preuve n'exige pas une preuve selon la prépondérance des probabilités. La procédure de certification ne comporte pas d'examen au fond de la demande et elle ne vise pas à déterminer le bien-fondé des allégations; elle intéresse plutôt la forme que revêt l'action pour déterminer s'il convient de procéder par recours collectif. L'issue d'une affaire dépend des faits qui lui sont propres. Suffisamment de faits doivent permettre de convaincre le tribunal que les conditions de certification sont réunies de telle sorte que l'instance puisse suivre son cours sous forme de recours collectif sans s'écrouler à l'étape de l'examen au fond à cause du non-respect des conditions applicables.

En l'espèce, la conclusion du juge selon laquelle les demandes soulèvent des questions communes commande la déférence. Établir la communauté des questions n'exige pas la preuve que les actes allégués ont effectivement eu lieu; à ce stade, il faut plutôt établir que les questions soulevées sont communes à tous les membres du groupe. Démontrer le caractère commun des questions — la perte subie par les membres peut-elle être circonscrite à l'échelle du groupe? — commande le recours à une preuve d'expert. La méthode d'expert doit être suffisamment valable ou acceptable pour établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune; elle doit offrir une possibilité réaliste d'établir la perte à l'échelle du groupe, de sorte que, si la majoration est établie à l'issue de l'examen des questions communes au procès, un moyen permette de démontrer qu'elle est commune aux membres du groupe. Il ne peut s'agir d'une méthode purement théorique ou hypothétique; elle doit reposer sur les faits de l'affaire, et l'existence des données auxquelles la méthode est censée s'appliquer is to be applied. Resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification.

The applications judge's decision to certify as common issues whether damages can be determined on an aggregate basis and if so, in what amount, should not be disturbed. The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue should only be determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. The failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate.

The applications judge's finding that the class action is the preferable procedure should not be interfered with. In the present case, there are common issues related to the existence of the causes of action and there are also common issues related to loss to the class members. The loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of M's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover in this case, a resolution of the common issues would significantly advance the action.

Cases Cited

Referred to: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55, aff'd 2013 SCC 58, [2013] 3 S.C.R. 545; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161;

doit être étayée par quelque preuve. Trancher entre des preuves d'expert contradictoires relève du juge du procès et ne doit pas intervenir à l'étape de la certification.

La décision de certifier à titre de questions communes l'opportunité d'établir les dommages-intérêts de manière globale et, dans l'affirmative, la détermination du montant de ces dommages-intérêts, ne doit pas être réformée. La question de savoir si l'octroi de dommages-intérêts globaux constitue une réparation appropriée peut être certifiée comme question commune. Cependant, cette question commune ne sera tranchée qu'au procès, une fois la responsabilité établie. La décision relative à l'applicabilité des dispositions de la *CPA* sur les dommages-intérêts globaux doit appartenir en fin de compte au juge du procès appelé à statuer sur les questions communes. L'omission de proposer ou de certifier à titre de question commune l'opportunité d'accorder des dommages-intérêts globaux ou une autre réparation n'empêche pas le juge du procès de se fonder sur les dispositions s'il l'estime indiqué.

La conclusion du juge saisi des demandes selon laquelle le recours collectif constitue la meilleure procédure ne doit pas être modifiée. Dans la présente affaire, non seulement l'existence de causes d'action, mais aussi la perte subie par les membres du groupe, constituent des questions communes. On peut dire que la perte constitue une question commune car il a été déterminé qu'une méthode proposée par un expert permettrait assez certainement d'établir la perte à l'échelle du groupe. Le règlement des questions communes devrait permettre de statuer sur la responsabilité de M et sur le transfert de la majoration aux acheteurs indirects. Puisqu'il est essentiel de statuer sur ces points afin que les membres du groupe puissent recouvrer le montant de la perte, le règlement des questions communes ferait progresser substantiellement l'instance.

Jurisprudence

Arrêts mentionnés : *Sun-Rype Products Ltd. c. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55, conf. par 2013 CSC 58, [2013] 3 R.C.S. 545; *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600; *Hanover Shoe, Inc. c. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Commissioner of State Revenue (Victoria) c. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51; *Colombie-Britannique c. Canadian Forest Products Ltd.*, 2004 CSC 38, [2004] 2 R.C.S. 74; *Southern Pacific Co. c. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Illinois Brick Co. c. Illinois*, 431 U.S. 720 (1977);

Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22; *California v. ARC America Corp.*, 490 U.S. 93 (1989); *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306; *Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81, leave to appeal refused, [2006] 1 S.C.R. xii; *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1; *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1; *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665; *National Trust Co. v. Gleason*, 77 N.Y. 400 (1879); *Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.*, 268 F. 575 (1920); *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374; *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, [1983] A.C. 366; *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61; *Reid v. Ford Motor Co.*, 2006 BCSC 712 (CanLII); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272, rev'g 2008 BCSC 575 (CanLII); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; *In re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (2008); *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358; *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (2002); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011); *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721.

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J. J. Camp, *Q.C.*, *Reidar Mogerman*, *Melina Buckley* and *Michael Sobkin*, for the appellants.

Neil Finkelstein, *James Sullivan*, *Catherine Beagan Flood* and *Brandon Kain*, for the respondents.

John S. Tyhurst, for the intervener.

The judgment of the Court was delivered by

Rothstein J. —

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J. J. Camp, *c.r.*, *Reidar Mogerman*, *Melina Buckley* et *Michael Sobkin*, pour les appelants.

Neil Finkelstein, *James Sullivan*, *Catherine Beagan Flood* et *Brandon Kain*, pour les intimées.

John S. Tyhurst, pour l'intervenant.

Version française du jugement de la Cour rendu par

Le juge Rothstein —

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APPENDIX: Common Issues Certified by Myers J.

I. Introduction

[1] It is no simple task to assess liability and apportion damages in situations where the wrongdoer and the harmed parties are separated by a long and complex chain of distribution, involving many parties, purchasers, resellers and intermediaries. Such is the problem presented by indirect purchaser actions in which downstream individual purchasers seek recovery for alleged unlawful overcharges that were passed on to them through the successive links in the chain.

[2] The complexities inherent in indirect purchaser actions are magnified when such actions are brought as a class proceeding. When that happens, the courts are required to grapple with not only the difficulties associated with indirect purchaser actions, but are also then asked to decide whether the requirements for certification of a class action are met. These are the questions the Court is faced with in this appeal.

II. Background

[3] The representative plaintiffs in this action, Pro-Sys Consultants Ltd. and Neil Godfrey (collectively "Pro-Sys"), brought a class action against Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE (collectively "Microsoft") alleging that beginning in 1988, Microsoft engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. Pro-Sys claims that as a direct consequence of Microsoft's unlawful conduct, it and all the class members paid and continue to pay higher prices for Microsoft operating systems and applications software than they would have paid absent the unlawful conduct.

V. Conclusion 143

ANNEXE : Questions communes certifiées par le juge Myers

I. Introduction

[1] Ce n'est pas tâche facile que de statuer sur la responsabilité et de répartir les dommages-intérêts lorsque le fautif et les parties lésées se trouvent aux extrémités d'une chaîne de distribution longue et complexe constituée de nombreuses personnes, qu'il s'agisse d'acheteurs, de revendeurs ou d'intermédiaires. Là réside la difficulté que présente l'action intentée par l'acheteur indirect, lequel se situe en aval dans la chaîne de distribution, en vue de recouvrer la majoration illégale qui lui aurait été transférée d'un maillon à l'autre de la chaîne.

[2] La complexité de l'action de l'acheteur indirect s'accentue lorsqu'il y a regroupement au sein d'un recours collectif. Les tribunaux doivent alors non seulement se colleter avec les problèmes liés à une telle action, mais aussi déterminer si les conditions de certification d'un recours collectif sont réunies. Telles sont les questions sur lesquelles la Cour doit se prononcer dans le présent pourvoi.

II. Contexte

[3] Les demandeurs constitués représentants en l'espèce, Pro-Sys Consultants Ltd. et Neil Godfrey (collectivement, « Pro-Sys »), ont intenté un recours collectif contre Microsoft Corporation et Microsoft Canada Co./Microsoft Canada CIE (collectivement, « Microsoft »). Ils allèguent qu'à compter de 1988, Microsoft a agi illégalement en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur personnel compatibles avec le processeur Intel. Selon Pro-Sys, le comportement illégal de Microsoft a eu pour conséquence directe que tous les membres du groupe et elle ont payé et paient toujours, pour les systèmes d'exploitation et les logiciels d'application de Microsoft, un prix supérieur à celui qu'ils auraient payé n'eût été ce comportement.

[4] Pro-Sys sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*").

[4] Pro-Sys a demandé la certification de l'action à titre de recours collectif en application de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (« *CPA* »).

[5] The proposed class is made up of ultimate consumers who acquired Microsoft products from re-sellers, re-sellers who themselves purchased the products either directly from Microsoft or from other re-sellers higher up the chain of distribution. These consumers are known as the "indirect purchasers". The proposed class was defined in the statement of claim as

> all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing.

(2010 BCSC 285 (CanLII), at para. 16)

[5] Le groupe proposé se compose des consommateurs finaux qui ont acheté des produits Microsoft à des revendeurs qui les avaient eux-mêmes achetés soit directement à Microsoft, soit à d'autres revendeurs situés en amont dans la chaîne de distribution. On les qualifie d'« acheteurs indirects ». Le groupe proposé est défini comme suit dans la déclaration :

> [TRADUCTION] . . . toutes les personnes résidant en Colombie-Britannique qui, depuis le 1er janvier 1994, ont acquis indirectement une licence pour un système d'exploitation ou un logiciel d'application de Microsoft à leur usage personnel, et non aux fins de revente ou de location.

(2010 BCSC 285 (CanLII), par. 16)

III. The Proceedings Below

III. Décisions des tribunaux inférieurs

A. *Certification Proceedings in the British Columbia Supreme Court*

A. *Procédure de certification devant la Cour suprême de la Colombie-Britannique*

[6] Pro-Sys filed its original statement of claim in the British Columbia Supreme Court ("B.C.S.C.") in December 2004. Thereafter numerous amendments to the Statement of Claim were made with the approval of Tysoe J., ultimately resulting in the Third Further Amended Statement of Claim. A Fourth Further Amended Statement of Claim has not officially been filed.

[6] Pro-Sys a déposé sa déclaration initiale à la Cour suprême de la Colombie-Britannique (« C.S.C.-B. ») en décembre 2004. Puis, avec l'approbation du juge Tysoe, elle y a apporté de nombreuses modifications pour arriver finalement à la troisième déclaration modifiée. Une quatrième déclaration modifiée n'a pas été officiellement déposée au dossier.

[7] In 2006, Microsoft sought an order striking out the claim altogether and an order dismissing the action. In the alternative, it sought to strike out only portions of the claim. The parties agreed that the outcome of the application to strike would be determinative of the certification requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action.

[7] En 2006, Microsoft a demandé la radiation de la demande et le rejet de l'action. À titre subsidiaire, elle a demandé la radiation de certaines parties seulement de la demande. Les parties conviennent que le sort réservé à la demande de radiation sera déterminant sur le respect de la condition de certification, prévue à l'al. 4(1)(a) de la *CPA*, voulant que les actes de procédure révèlent une cause d'action.

[8] Tysoe J. found causes of action under s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, in tort

[8] Le juge Tysoe conclut, pour les besoins de l'art. 36 de la *Loi sur la concurrence*, L.R.C. 1985,

for conspiracy and intentional interference with economic interests and in restitution for waiver of tort (2006 BCSC 1047, 57 B.C.L.R. (4th) 323). He ordered that the portions of the pleadings dealing with unjust enrichment and constructive trust should be struck out as they were not sufficient to support such claims, unless they were amended by Pro-Sys. Upon further motion to amend the claims (2006 BCSC 1738, 59 B.C.L.R. (4th) 111), Tysoe J. allowed amendments to support the claims of unjust enrichment and constructive trust.

[9] Following his rulings on the applications to strike and to amend, Tysoe J. was appointed to the British Columbia Court of Appeal ("B.C.C.A."), and Myers J. assumed management of the case. Myers J. assessed the remaining certification requirements set out in s. 4(1) of the *CPA*, namely (i) whether there was an identifiable class (s. 4(1)(b)); (ii) whether the claims of the class members raised common issues (s. 4(1)(c)); (iii) whether the class action was the preferable procedure (s. 4(1)(d)); and (iv) whether Pro-Sys and Neil Godfrey could adequately represent the class (s. 4(1)(e)). Myers J. certified the action, finding that all four of the remaining requirements for certification were met (2010 BCSC 285 (CanLII)). The common issues certified by Myers J. are listed in the appendix to these reasons.

B. *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 186, 304 B.C.A.C. 90*

[10] Microsoft appealed from the decisions of Tysoe and Myers JJ. The majority of the B.C.C.A., *per* Lowry J.A. (Frankel J.A. concurring), allowed the appeal, set aside the certification order and dismissed the action, finding it plain and obvious that the class members had no cause of action under s. 4(1)(a) of the *CPA*. The majority reached this conclusion after determining that indirect purchaser actions were not available as a matter of law

ch. C-34, à l'existence de causes d'action en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers, et en restitution pour renonciation au recours délictuel (2006 BCSC 1047, 57 B.C.L.R. (4th) 323). Il ordonne que les éléments des actes de procédure qui concernent l'enrichissement sans cause et la fiducie par interprétation soient radiés au motif que, dans leur libellé actuel et sauf modification par Pro-Sys, ils n'appuient pas les allégations. Sur demande de modification des actes de procédure, le juge Tysoe autorise ensuite leur modification (2006 BCSC 1738, 59 B.C.L.R. (4th) 111) afin qu'ils appuient les allégations d'un enrichissement sans cause et d'une fiducie par interprétation.

[9] Après avoir statué sur les demandes de radiation et de modification, le juge Tysoe a été nommé à la Cour d'appel de la Colombie-Britannique (« C.A.C.-B. »), et le juge Myers s'est vu confier la gestion de l'instance. Le juge Myers a examiné les autres conditions de certification prévues au par. 4(1) de la *CPA*, à savoir (i) l'existence d'un groupe identifiable de personnes (al. 4(1)(b)), (ii) le fait que les demandes des membres du groupe soulèvent une question commune (al. 4(1)(c)), (iii) le fait que le recours collectif constitue la meilleure procédure pour régler la question (al. 4(1)(d)) et (iv) l'aptitude de Pro-Sys et de Neil Godfrey à bien représenter le groupe (al. 4(1)(e)). Il a certifié le recours et conclu que ces quatre autres conditions étaient réunies (2010 BCSC 285 (CanLII)). Les questions communes certifiées par le juge Myers sont énumérées en annexe.

B. *Appel de la certification devant la Cour d'appel de la Colombie-Britannique, 2011 BCCA 186, 304 B.C.A.C. 90*

[10] Microsoft a porté en appel les décisions des juges Tysoe et Myers. Les juges majoritaires de la Cour d'appel, par la voix du juge Lowry (avec l'accord du juge Frankel), accueillent l'appel, annulent l'ordonnance de certification et rejettent l'action au motif qu'il est manifeste que les membres du groupe n'ont pas de cause d'action comme l'exige l'al. 4(1)(a) de la *CPA*. Ils arrivent à cette conclusion après avoir établi qu'un acheteur indirect

in Canada. As such, it did not consider the other certification requirements.

ne peut légalement intenter une action au Canada. Ils n'examinent donc pas les autres conditions de certification.

[11] Donald J.A., dissenting, would have dismissed the appeal and certified the action, finding indirect purchaser actions to be permitted in Canada, and finding sufficient grounds for the action.

[11] Dissident, le juge Donald aurait rejeté l'appel et certifié l'action car, selon lui, l'acheteur indirect peut poursuivre au Canada et l'action est suffisamment étayée.

[12] In the B.C.C.A., the present case was heard together with another case dealing with substantially similar issues (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55). Counsel for the plaintiffs was the same in both appeals and the appeals were heard by the same panel of judges. As in the present appeal, in *Sun-Rype*, the issue of whether indirect purchaser actions are available in Canada was determinative. In reasons released simultaneously with the reasons in this appeal, the majority of the B.C.C.A. disposed of *Sun-Rype* in the same manner, decertifying and dismissing the indirect purchasers' class action on the basis that indirect purchaser actions were not available under Canadian law. Donald J.A. dissented, finding, as in this appeal, that indirect purchaser actions were permitted.

[12] La Cour d'appel a entendu l'appel de pair avec un autre dont l'objet est assez semblable, soit *Sun-Rype Products Ltd. c. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55. Les demandeurs étaient représentés par les mêmes avocats, et les deux appels ont été entendus par la même formation de juges. Dans *Sun-Rype*, comme en l'espèce, la question déterminante était celle de savoir si, au Canada, un acheteur indirect peut intenter un recours. Dans des motifs rendus en même temps que dans la présente affaire, les juges majoritaires de la Cour d'appel réservent le même sort à l'appel, annulent la certification et rejettent le recours collectif des acheteurs indirects au motif que le droit canadien n'autorise pas le recours de l'acheteur indirect. Dissident, le juge Donald conclut que l'acheteur indirect possède un recours.

[13] Leave to appeal was granted in both cases by this Court. They were heard with another indirect purchaser class action originating in Quebec, *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, which this Court has addressed in separate reasons, *per* LeBel and Wagner JJ. Reasons in *Sun-Rype* can be found at 2013 SCC 58, [2013] 3 S.C.R. 545.

[13] L'autorisation de pourvoi devant notre Cour a été accordée dans les deux affaires. Il y a eu audition commune des deux appels, ainsi que d'*Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600, une autre affaire de recours collectif intenté au Québec par des acheteurs indirects dans laquelle les juges LeBel et Wagner se prononcent dans des motifs distincts. Les motifs de l'arrêt *Sun-Rype* sont publiés sous la référence 2013 CSC 58, [2013] 3 R.C.S. 545.

IV. Analysis

IV. Analyse

[14] The issues are addressed in the following order:

(1) Did the majority of the B.C.C.A. err in finding that indirect purchaser actions were not available as a matter of law in Canada?

[14] La Cour examine les questions en litige dans l'ordre suivant :

(1) Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont-ils tort de conclure qu'un acheteur indirect ne peut légalement intenter une action au Canada?

(2) Were the findings of Tysoe J. as to the requirement that the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* correct?

(3) Were the findings of Myers J. as to the balance of the certification requirements under s. 4(1) of the *CPA* correct?

A. *Indirect Purchaser Actions (the "Passing-On" Issue)*

[15] In this appeal, the parties have introduced numerous issues. The one occupying the largest portion of the factums and the oral argument was the question of whether indirect purchasers have the right to bring an action to recover losses that were passed on to them. Some sources have treated this issue as one of standing. I think it more appropriate to treat it as a threshold issue to be determined before moving into the specific causes of action alleged in the certification application.

[16] As I have described above, indirect purchasers are consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger's direct purchasers, or from some other intermediary in the chain of distribution. The issue is whether indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured them indirectly as the result of the overcharge being "passed on" down the chain to them.

[17] Microsoft argues that indirect purchasers should have no such cause of action. Its submits that permitting indirect purchasers to bring an action against the alleged overcharger to recover loss that has been "passed on" would be inconsistent with this Court's jurisprudence, which it says rejected passing on as a defence. Microsoft says that the rejection of the "passing-on" *defence* necessarily entails a rejection of the *offensive* use of passing on by indirect purchasers to recover overcharges that were passed on to them. I begin with a description

(2) Le juge Tysoe a-t-il raison de conclure que les actes de procédure révèlent une cause d'action comme l'exige l'al. 4(1)(a) de la *CPA*?

(3) La conclusion du juge Myers sur les autres conditions de certification prévues au par. 4(1) de la *CPA* est-elle fondée?

A. *Action de l'acheteur indirect (la question du « transfert de la perte »)*

[15] Les parties au pourvoi soulèvent de nombreuses questions, dont celle qui revient le plus souvent dans les mémoires et les plaidoiries, à savoir si l'acheteur indirect peut intenter une action pour recouvrer la perte qui lui a été transférée. D'aucuns estiment qu'il s'agit de savoir s'il a ou non qualité pour agir. Je pense qu'il convient davantage d'y voir une question préliminaire à trancher avant l'examen des causes d'action précises alléguées dans la demande de certification du recours collectif.

[16] Comme je l'indique précédemment, l'acheteur indirect est un consommateur qui n'a pas acheté le produit directement à l'auteur de la majoration, mais à un acheteur direct ou à un autre intermédiaire dans la chaîne de distribution. Dès lors, a-t-il une cause d'action contre l'auteur de la majoration qui se situe au sommet de la chaîne de distribution et qui l'aurait indirectement lésé du fait que la majoration lui a été « transférée » à l'autre extrémité de la chaîne de distribution?

[17] Microsoft fait valoir que l'acheteur indirect ne doit pas se voir reconnaître une telle cause d'action, car selon elle, l'autoriser à ester contre l'auteur allégué de la majoration pour recouvrer la perte qui lui a été « transférée » est incompatible avec la jurisprudence de notre Cour, qui écarte le moyen de défense fondé sur pareil transfert. Microsoft affirme que le rejet du transfert de la perte comme *moyen de défense* implique nécessairement son exclusion comme cause d'action aux fins de recouvrer la perte qui découle d'une

of the passing-on defence and then deal with its impact on indirect purchaser actions.

(1) Rejection of Passing On as a Defence

[18] The passing-on defence was typically advanced by an overcharger at the top of a distribution chain. It was invoked under the proposition that if the direct purchaser who sustained the original overcharge then passed that overcharge on to its own customers, the gain conferred on the overcharger was not at the expense of the direct purchaser because the direct purchaser suffered no loss. As such, the fact that the overcharge was "passed on" was argued to be a defence to actions brought by the direct purchaser against the party responsible for the overcharge.

[19] The passing-on defence has been rejected in both Canadian and U.S. jurisprudence. It was first addressed by the Supreme Court of the United States in 1968 in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In that case, Hanover sued United for damages under U.S. antitrust laws because United would only lease, not sell, its shoe machinery, which Hanover claimed resulted in an overcharge to it. United argued that Hanover had passed on the overcharge to its own customers and had therefore suffered no harm. The U.S. Supreme Court (*per* White J., Stewart J. dissenting) rejected the passing-on defence to overcharging. It cited difficulties in ascertaining the nature and extent of the passing on of the overcharge as the reason for rejecting the defence:

> Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price

majoration refilée à l'acheteur indirect. Je ferai d'abord état du moyen de défense fondé sur le transfert de la perte, puis j'examinerai son incidence sur l'action de l'acheteur indirect.

(1) Rejet du transfert de la perte comme moyen de défense

[18] Le transfert de la perte a généralement été invoqué en défense par l'auteur de la majoration situé au sommet de la chaîne de distribution. L'argument voulait que si l'acheteur direct absorbait la majoration puis la transférait à ses propres clients, l'auteur de la majoration ne réalisait pas le bénéfice au détriment de l'acheteur direct, car celui-ci ne subissait aucune perte. Ce « transfert » de la majoration était donc invoqué en défense à l'action intentée par l'acheteur direct contre l'auteur de la majoration.

[19] Les tribunaux tant canadiens qu'américains ont rejeté le moyen de défense fondé sur le transfert de la perte. La question a d'abord été examinée en 1968 par la Cour suprême des États-Unis dans *Hanover Shoe, Inc. c. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Dans cette affaire, Hanover avait poursuivi United en dommages-intérêts sous le régime des dispositions américaines antitrust au motif que cette dernière offrait seulement la location, et non la vente, de ses équipements de fabrication de chaussures, ce qui coûtait plus cher. United avait fait valoir que Hanover avait transféré le surcoût à ses propres clients et n'avait donc pas subi de préjudice. La Cour suprême des États-Unis (le juge White, sous réserve de la dissidence du juge Stewart) a rejeté le moyen de défense fondé sur le transfert de la perte. Elle a invoqué la difficulté de déterminer la nature et la portée du transfert du surcoût :

> [TRADUCTION] Même si l'on pouvait montrer que l'acheteur a augmenté son prix à cause du surcoût, et en proportion du surcoût, et que sa marge bénéficiaire et son chiffre de ventes total n'ont pas baissé après cela, il resterait une difficulté quasi insurmontable, c'est-à-dire de démontrer que, n'eût été le surcoût, le demandeur en cause n'aurait pas pu augmenter

had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. [p. 493]

[20] The court added that to leave the only actionable causes in the hands of the indirect purchasers who "have only a tiny stake in a lawsuit and little interest in attempting a class action", would mean that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality" (*Hanover Shoe*, at p. 494). The court thus rejected the passing-on defence. Since *Hanover Shoe*, defendants who effectuate illegal overcharges have been precluded from employing the passing-on defence as a means of absolving themselves of liability to their direct purchasers.

[21] The passing-on defence was rejected in Canada in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, in the context of a claim for the recovery of taxes paid pursuant to *ultra vires* legislation. The dispute in that case arose out of a claim for the recovery of *ultra vires* user charges on liquor levied by the province of New Brunswick against Kingstreet Investments, whose business, among other things, involved the operation of night clubs. Bastarache J., writing for a unanimous Court, held that a public authority who had illegally overcharged a taxpayer could not reduce its liability for the overcharge simply by establishing that some or all of the overcharge was passed on to the taxpayer's customers.

[22] Bastarache J. found the passing-on defence to be inconsistent with the basic premise of restitution law. Basic restitutionary principles "provide for restoration of 'what has been taken or received from the plaintiff without justification' . . . . Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall precisely because it is not founded on the concept of compensation for

ou n'aurait pas augmenté ses prix, ou qu'il n'aurait pas pu maintenir le prix plus élevé si le surcoût n'avait pas été imposé. Comme la preuve de l'applicabilité du moyen de défense fondé sur le transfert de la perte exigerait une démonstration convaincante à l'égard de chacune de ces données pratiquement impossible à établir, la tâche se révélerait normalement insurmontable. [p. 493]

[20] La cour ajoute que reconnaître une cause d'action au seul acheteur indirect, qui [TRADUCTION] « n'a qu'un intérêt minime dans la poursuite judiciaire et que peu d'intérêt à intenter un recours collectif » revient à permettre à « celui qui enfreint les dispositions antitrust interdisant la fixation des prix ou la monopolisation de conserver le fruit de ses actes illégaux » (*Hanover Shoe*, p. 494). Elle rejette donc le moyen de défense fondé sur le transfert de la perte. Depuis *Hanover Shoe*, le défendeur qui impose un surcoût illégal ou effectue une majoration illégale ne peut invoquer le transfert de la perte en défense pour échapper à sa responsabilité envers son acheteur direct.

[21] Au Canada, le moyen de défense fondé sur le transfert de la perte a été rejeté dans *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, une affaire de recouvrement de taxes payées en application de dispositions *ultra vires*. Le litige découlait d'une action intentée par Kingstreet Investments, qui exploitait entre autres des boîtes de nuit, pour recouvrer le montant de redevances d'exploitation perçues illégalement par la province du Nouveau-Brunswick sur les boissons alcooliques. Au nom des juges unanimes de la Cour, le juge Bastarache conclut que l'autorité publique qui perçoit illégalement une taxe ne peut limiter sa responsabilité à cet égard en établissant simplement que le contribuable a refilé la taxe à ses clients en totalité ou en partie.

[22] Le juge Bastarache estime que ce moyen de défense est incompatible avec le fondement premier du droit de la restitution. Les principes fondamentaux applicables en la matière « pourvoient à la restitution au demandeur de [TRADUCTION] « "ce qui lui a été pris ou a été reçu de lui sans justification" [. . .] La possibilité que le demandeur obtienne un profit fortuit n'a pas d'importance du

loss" (*Kingstreet*, at para. 47, quoting *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 (H.C.A.), at p. 71). Accordingly, "[a]s between the taxpayer and the Crown, the question of whether the taxpayer has been able to recoup its loss from some other source is simply irrelevant" (*Kingstreet*, at para. 45, quoting P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf 2005), at p. 11-45).

[23] Bastarache J. also found the passing-on defence to be "economically misconceived" (*Kingstreet*, at para. 48). By this he accepted that the task of determining the ultimate location of the harm of the overcharge is "exceedingly difficult and constitutes an inappropriate basis for denying relief" (para. 44). Echoing the misgivings expressed in *Hanover Shoe*, he cited the inherent difficulty in accounting for the effects of market elasticities on the prices charged by direct purchasers as the basis for this conclusion. He found these complexities made it impossible to tell what part, if any, of the overcharge was actually passed on (*Kingstreet*, at para. 48).

[24] Pro-Sys says that *Kingstreet* stands only for the rejection of the defence in the context of *ultra vires* taxes. In my view, however, there are three reasons that lead to the conclusion that Bastarache J.'s rejection of the passing-on defence in *Kingstreet* was not limited to that context.

[25] First, this Court's jurisprudence supports the broader rejection of the passing-on defence. In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 ("*Canfor*"), the Crown claimed "diminution of the value of the timber" that it sold, following a forest fire caused largely by Canfor. Though the Court ultimately held in that case that the Crown had not in fact suffered loss because it was able to recover its damages through the regulatory scheme it had

point de vue du droit de la restitution, précisément parce que celui-ci ne repose pas sur le concept de l'indemnisation d'une perte » (*Kingstreet*, par. 47, citant *Commissioner of State Revenue (Victoria) c. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 (H.C.A.), p. 71). Par conséquent, « [d]u point de vue des rapports entre le contribuable et l'État, la question de savoir si le contribuable a été en mesure de récupérer sa perte auprès d'une autre source n'est tout simplement pas pertinente » (*Kingstreet*, par. 45, citant P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (feuilles mobiles 2005), p. 11-45).

[23] Le juge Bastarache conclut en outre que le moyen de défense fondé sur le transfert de la perte n'est pas « judicieux sur le plan économique » (*Kingstreet*, par. 48). Il admet ainsi que déterminer l'identité de celui à qui incombe en dernier ressort la charge de la taxe « s'avère extrêmement difficile, et il ne convient pas de refuser une réparation en se basant sur ce motif » (par. 44). Revenant sur les réserves exprimées dans *Hanover Shoe*, il évoque à l'appui de sa conclusion la difficulté de déterminer les effets que l'élasticité du marché aura sur les prix demandés par les acheteurs directs. Il conclut qu'en raison de cette difficulté, il est impossible de dire quelle partie de la perte, s'il en est, a été effectivement transférée (*Kingstreet*, par. 48).

[24] Selon Pro-Sys, l'arrêt *Kingstreet* ne milite en faveur du rejet du moyen de défense que dans le contexte du prélèvement d'une taxe *ultra vires*. J'estime toutefois qu'il y a lieu trois raisons de conclure que le juge Bastarache n'écarte pas le transfert de la perte comme moyen de défense que dans ce seul cas.

[25] Premièrement, la jurisprudence de notre Cour appuie le rejet général du moyen de défense fondé sur le transfert de la perte. Dans *Colombie-Britannique c. Canadian Forest Products Ltd.*, 2004 CSC 38, [2004] 2 R.C.S. 74 (« *Canfor* »), la Couronne invoquait la « diminution de la valeur du bois » qu'elle avait vendu par suite d'un incendie de forêt imputable en grande partie à Canfor. Même si, en fin de compte, la Cour conclut que la Couronne n'a pas subi de préjudice puisqu'elle a pu

instituted, Binnie J. stated (albeit in *obiter*) that "[i]t is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been 'passed on' by the plaintiff" because this would burden courts with "the endlessness and futility of the effort to follow every transaction to its ultimate result" (para. 111, quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), at p. 534). Likewise, in the same decision LeBel J., dissenting, though not on this point, said that "the passing-on defence, on the facts of this case and generally, must not be allowed to take hold in Canadian jurisprudence" (para. 197). To allow otherwise, LeBel J. indicated, would force a difficult burden of proof on the plaintiff to demonstrate not only that it had suffered a loss, but that it did not engage in any other transactions that would have offset the loss (para. 203).

recouvrer ses pertes grâce au régime réglementaire applicable, le juge Binnie fait remarquer (de manière incidente) qu'« [i]l n'est généralement pas loisible à l'auteur d'une faute de contester l'existence d'une perte au motif qu'elle a été "transférée" par le demandeur », car pareille prétention obligerait le tribunal à entreprendre « la tâche interminable et futile de suivre chaque opération jusqu'à son aboutissement ultime » (par. 111, citant *Southern Pacific Co. c. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), p. 534). De même, le juge LeBel, dissident, mais non sur ce point, opine qu'« au regard des faits de l'espèce et en général, il ne faut pas laisser ce moyen de défense s'enraciner dans la jurisprudence canadienne » (par. 197). Selon lui, admettre ce moyen de défense obligerait le demandeur à prouver non seulement qu'il a subi une perte, mais aussi qu'il n'a pas réalisé d'autres opérations commerciales qui l'ont indemnisé de la perte, ce qui serait ardu (par. 203).

[26] In *Kingstreet*, Bastarache J. endorsed the reasons for rejecting the passing-on defence advanced by LeBel J. in the tort law context in *Canfor*, saying such rejection was of equal if not greater consequence in restitution law (para. 49).

[26] Dans *Kingstreet*, le juge Bastarache souscrit aux motifs pour lesquels, dans *Canfor*, le juge LeBel rejette le moyen de défense fondé sur le transfert de la perte en droit de la responsabilité délictuelle et opine que ce rejet vaut tout autant, sinon plus, en droit de la restitution (par. 49).

[27] Second, in *Kingstreet*, Bastarache J. found that the rejection of the passing-on defence was consistent with basic restitutionary law principles. Specifically, the rejection of the defence accords with the principle against unjust enrichment or *nullus commodum capere potest de injuria sua propria* (barring wrongdoers from benefiting from their unlawful actions). Preventing defendants from invoking passing on as a defence helps to ensure that wrongdoers are not permitted to retain their ill-gotten gains simply because it would be difficult to ascertain the precise extent of the harm. Likewise, it is important as a matter of restitutionary law to ensure that wrongdoers who overcharge their purchasers do not operate with impunity, on the grounds that complexities in tracing the overcharge through the chain of distribution will serve to shield them from liability.

[27] Deuxièmement, dans *Kingstreet*, le juge Bastarache conclut qu'écarter le moyen de défense fondé sur le transfert de la perte est compatible avec les principes fondamentaux du droit de la restitution. Plus précisément, c'est observer la règle qui interdit l'enrichissement sans cause ou la maxime *nullus commodum capere potest de injuria sua propria* (selon laquelle le fautif ne saurait tirer avantage de son acte illégal). Empêcher le défendeur d'invoquer le transfert de la perte en défense contribue à faire en sorte que le fautif ne puisse conserver le gain mal acquis seulement parce qu'il est difficile de circonscrire le préjudice avec précision. De même, en matière de restitution, il importe de s'assurer que le fautif qui majore le prix exigé de l'acheteur ne le fasse pas impunément parce que la difficulté de retracer le parcours de la majoration d'un maillon à l'autre de la chaîne de distribution ne permet pas d'établir sa responsabilité.

[28] Finally, there is support in the academic commentary for the broader rejection of the passing-on defence. Maddaugh and McCamus have stated that *Kingstreet* was an "authoritative and apparently comprehensive rejection" of the passing-on defence in Canada, and that "[i]n reaching this conclusion, the Supreme Court reflected a broad international consensus with respect to the unsuitability of this defence" ((loose-leaf 2013), at p. 11-46).

[28] Enfin, l'exclusion générale du moyen de défense fondé sur le transfert de la perte trouve appui chez les auteurs de doctrine. Ainsi, selon Maddaugh et McCamus, l'arrêt *Kingstreet* constitue une [TRADUCTION] « exclusion globale à la fois péremptoire et manifeste » du moyen de défense fondé sur le transfert de la perte au Canada; « [p]our tirer cette conclusion, la Cour adhère au large consensus international sur l'inapplicabilité de ce moyen de défense » ((feuilles mobiles 2013), p. 11-46).

[29] For these reasons, I conclude that the rejection of the passing-on defence in *Kingstreet* is not limited to the context of the imposition of *ultra vires* taxes. There is no principled reason to reject the defence in one context but not another; the passing-on defence is rejected throughout the whole of restitutionary law.

[29] C'est pourquoi je conclus que le rejet de ce moyen de défense dans *Kingstreet* ne vaut pas que pour l'imposition d'une taxe *ultra vires*. Nul motif rationnel ne permet d'écarter le moyen de défense dans un contexte, mais pas dans un autre; il est toujours exclu aux fins du droit de la restitution.

(2) Significance of the Passing-On Defence in This Appeal

(2) Importance en l'espèce du moyen de défense fondé sur le transfert de la perte

[30] As described above, the offensive use of passing on would provide the basis for indirect purchaser actions. Microsoft argues that this Court's rejection of the passing-on defence carries, as a necessary corollary, a corresponding rejection of the offensive use of passing on. The rationale is that the rejection should apply equally so that if overchargers are not permitted to rely on passing on in their own defence, indirect purchasers should also not be able to invoke passed on overcharges as a basis for their cause of action.

[30] Comme je l'indique précédemment, le transfert de la perte comme cause d'action fonderait le recours de l'acheteur indirect. Pour Microsoft, le rejet par notre Cour du transfert de la perte comme moyen de défense a nécessairement pour corollaire son rejet comme cause d'action. Or, si l'auteur de la majoration ne peut invoquer le transfert de la perte en défense, l'acheteur indirect ne devrait pas non plus pouvoir l'invoquer en demande.

[31] Microsoft relies on the 1977 decision of the U.S. Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Illinois Brick manufactured concrete block and sold it to masonry contractors who in turn provided their services to general contractors. The general contractors incorporated the concrete block into buildings and sold the buildings to customers such as the State of Illinois. The State was therefore an indirect purchaser of the products of Illinois Brick (p. 726). The State alleged that Illinois Brick had engaged in a conspiracy to fix the prices of concrete block, contrary to U.S. antitrust legislation,

[31] Microsoft cite l'arrêt *Illinois Brick Co. c. Illinois*, 431 U.S. 720 (1977), rendu par la Cour suprême des États-Unis en 1977. Illinois Brick fabriquait des blocs de béton qu'elle vendait à des entrepreneurs en maçonnerie qui, à leur tour, fournissaient leurs services à des entrepreneurs généraux. Ces derniers utilisaient les blocs de béton pour construire des bâtiments qu'ils vendaient notamment à l'État de l'Illinois, lequel était donc un acheteur indirect des produits d'Illinois Brick (p. 726). À titre d'acheteur indirect, l'État a poursuivi Illinois Brick pour participation à un complot visant à fixer le prix des blocs de béton,

and brought an indirect purchaser action against the company (p. 727).

[32] The U.S. Supreme Court found against the State of Illinois. It held that since, according to *Hanover Shoe*, passing on may not be used defensively, it should not be available to indirect purchasers to use offensively by bringing an action alleging that an overcharge was passed down to them. The court explained that "whatever rule [was] to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants" (*Illinois Brick*, at p. 728).

[33] Microsoft argues that, just as the prohibition on the offensive use of passing on in *Illinois Brick* was considered a necessary corollary to the rejection of the passing-on defence in *Hanover Shoe*, the same result should flow in Canada from the rejection of the passing-on defence in *Kingstreet*. The passing-on issue was not raised before either of the applications judges because those decisions were released prior to *Kingstreet*. However, the majority of the B.C.C.A. accepted this argument in dismissing the Pro-Sys claim.

(3) Analysis of the "Necessary Corollary" Argument

[34] As I will explain, despite the rejection of the passing-on defence, the arguments advanced by Microsoft as to why there should be a corresponding rejection of the offensive use of passing on are not persuasive. Symmetry for its own sake without adequate justification cannot support the "necessary corollary" argument. In my view, the arguments advanced by Microsoft do not provide such justification.

(a) *Double or Multiple Recovery*

[35] Microsoft submits that the offensive use of passing on through indirect purchaser actions leaves it exposed to liability from all purchasers in the chain of distribution. It says that its inability to

contrairement aux dispositions américaines antitrust (p. 727).

[32] La Cour suprême des États-Unis l'a débouté. À son avis, puisque le transfert de la perte ne pouvait être invoqué en défense suivant l'arrêt *Hanover Shoe*, l'acheteur indirect ne pouvait non plus ester en alléguant que la majoration de prix lui avait été transférée. Selon la cour, [TRADUCTION] « quelle que soit la règle applicable au transfert de la perte pour les besoins d'une action antitrust en dommages-intérêts, elle doit s'appliquer tant au demandeur qu'au défendeur » (*Illinois Brick*, p. 728).

[33] Selon Microsoft, étant donné que, dans *Illinois Brick*, l'impossibilité d'invoquer en demande le transfert de la perte est considérée comme le corollaire nécessaire du rejet, dans *Hanover Shoe*, du transfert de la perte comme moyen de défense, le rejet du moyen de défense fondé sur le transfert de la perte dans *Kingstreet* doit emporter la même exclusion en demande au Canada. Les juges de première instance en l'espèce ayant été saisis des demandes avant l'arrêt *Kingstreet*, la question du transfert de la perte n'a pas été soulevée devant eux. Toutefois, les juges majoritaires de la C.A.C.-B. font droit à la prétention et rejettent l'action de Pro-Sys.

(3) L'argument du « corollaire nécessaire »

[34] Comme je l'explique plus loin, malgré le rejet du transfert de la perte comme moyen de défense, les arguments invoqués par Microsoft pour justifier également son exclusion comme cause d'action ne sont pas convaincants. À défaut d'une justification suffisante, la symétrie ne peut étayer à elle seule la thèse du « corollaire nécessaire ». À mon avis, la thèse avancée par Microsoft n'offre pas une telle justification.

a) *Recouvrement double ou multiple*

[35] Microsoft soutient que l'allégation en demande du transfert de la perte par un acheteur indirect lui fait courir le risque d'être tenue responsable vis-à-vis de tous les acquéreurs dans

employ the passing-on defence means that direct purchasers would be able to seek recovery for the entire amount of the overcharge. If, at the same time, indirect purchasers bring actions, this would result in both direct and indirect purchasers seeking recovery of the same amount. Microsoft argues that this potential for double or even multiple recovery should be a sufficient reason to reject the offensive use of passing on.

[36] In *Illinois Brick*, the U.S. Supreme Court considered multiple recovery to be a "serious risk" and said that it was "unwilling to 'open the door to duplicative recoveries'" (pp. 730-31, *per* White J.):

> A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications — and therefore of unwarranted multiple liability for the defendant — by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff . . . . [Emphasis deleted; p. 730.]

[37] This concern cannot be lightly dismissed. However, in my view, there are countervailing arguments to be considered. Practically, the risk of duplicate or multiple recoveries can be managed by the courts. Brennan J., dissenting in *Illinois Brick*, indicated that the risk of overlapping recovery exists only where additional suits are filed after an award for damages has been made or where actions by direct and indirect purchasers are pending at the same time. In both cases, he said, the risk is remote (pp. 762-64).

[38] In the first situation, Brennan J. stated that the complex and protracted nature of antitrust actions, coupled with the short four-year statute of limitations, "make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit" (*Illinois Brick*, at p. 764). With respect to actions under the *Competition Act*, the same reasoning would apply in Canada where our competition actions are similarly complex and where legislation restricts individual

la chaîne de distribution. Elle ajoute que l'impossibilité d'invoquer en défense le transfert de la perte permettra à l'acheteur direct d'obtenir le recouvrement intégral de la somme payée en trop. Si l'acheteur indirect intente lui aussi une action, tant l'acheteur direct que l'acheteur indirect pourront tenter de recouvrer la même somme. Microsoft fait valoir que ce risque de recouvrement double, voire multiple, justifie que l'on exclut l'allégation en demande du transfert de la perte.

[36] Dans *Illinois Brick*, la Cour suprême des États-Unis estime que le recouvrement multiple constitue un [TRADUCTION] « risque sérieux » et elle se dit « non disposée à y donner ouverture » (p. 730-731, le juge White) :

> [TRADUCTION] L'application asymétrique de l'arrêt *Hanover Shoe* augmente considérablement le risque de décisions contradictoires et, par conséquent, de responsabilité multiple imputée sans fondement au défendeur en ce qu'elle présume qu'un des demandeurs (l'acheteur direct) a droit au recouvrement intégral et qu'elle refuse au défendeur le droit d'invoquer cette présomption contre l'autre demandeur . . . [Italiques omis; p. 730.]

[37] On ne saurait écarter cette préoccupation à la légère, mais j'estime que des arguments à l'effet contraire doivent être considérés. Dans les faits, les tribunaux peuvent gérer le risque de recouvrement double ou multiple. Dans *Illinois Brick*, le juge Brennan, dissident, indique que ce risque n'existe que lorsque d'autres poursuites sont intentées après l'indemnisation ou que les actions d'acheteurs directs et indirects sont simultanément en instance. Selon lui, le risque demeure faible dans les deux cas (p. 762-764).

[38] Dans le premier cas, le juge Brennan affirme que la complexité et la durée des poursuites antitrust, auxquelles s'ajoute le court délai de prescription de quatre ans, [TRADUCTION] « peuvent empêcher les demandeurs éventuels d'attendre le prononcé d'un premier jugement pour faire valoir leurs droits » (*Illinois Brick*, p. 764). Le même raisonnement vaut au Canada pour les actions intentées sous le régime de la *Loi sur la concurrence*, qui sont tout aussi complexes et

recovery for damages for violations to just two years (see *Competition Act*, at s. 36(4)(*a*)).

auxquelles s'applique un délai de prescription de seulement deux ans lorsqu'une personne réclame une somme égale au montant des dommages qu'elle a subis (voir la *Loi sur la concurrence*, al. 36(4)*a*)).

[39] As for the risk of double recovery where actions by direct and indirect purchasers are pending at the same time, it will be open to the defendant to bring evidence of this risk before the trial judge and ask the trial judge to modify any award of damages accordingly. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, in discussing the risk of a plaintiff seeking double recovery under separate legal provisions, Dickson J. (as he then was), writing for the majority, held that

> [t]he courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions. . . . [T]he Court at the final stage of finding and quantifying liability could prevent double recovery if in fact compensation and an accounting had already been made by a defendant. No court would permit double recovery. [p. 191]

If the defendant is able to satisfy the judge that the risk is beyond the court's control, the judge retains the discretion to deny the claim.

[39] Dans le second cas — le risque de double indemnisation lorsque l'action de l'acheteur direct et celle de l'acheteur indirect sont en instance simultanément —, le défendeur peut présenter une preuve de ce risque au juge du procès et lui demander de modifier en conséquence tout octroi de dommages-intérêts. Dans *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, au nom des juges majoritaires, le juge Dickson (plus tard Juge en chef) dit ce qui suit lorsqu'il se penche sur le risque que le demandeur invoque des régimes législatifs distincts pour être indemnisé deux fois :

> Les cours sont à même d'empêcher le double recouvrement dans le cas théorique et peu probable où des demandeurs cherchent à se faire indemniser en vertu des deux ensembles de dispositions. [. . .] [À] l'étape finale dans laquelle elle conclut à la responsabilité et en fixe le montant, la cour peut empêcher le double recouvrement si, en fait, un défendeur a déjà versé une indemnité et produit une reddition de compte. Aucune cour ne permettra le double recouvrement. [p. 191]

Si le défendeur est en mesure de le convaincre que le risque ne peut être géré par le tribunal, le juge conserve le pouvoir discrétionnaire de rejeter la demande.

[40] Likewise, if the defendant presents evidence of parallel suits pending in other jurisdictions that would have the potential to result in multiple recovery, the judge may deny the claim or modify the damage award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery.

[40] De même, si le défendeur établit que des poursuites sont intentées parallèlement dans d'autres ressorts et qu'elles peuvent entraîner une indemnisation supplémentaire, le juge peut rejeter la demande ou modifier l'octroi de dommages-intérêts en fonction des réparations sollicitées ou accordées dans les autres ressorts afin d'empêcher le cumul des indemnités.

[41] In view of these practical tools at the courts' disposal, I would agree with Donald J.A. of the B.C.C.A., dissenting in *Sun-Rype*, that "the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided" (para. 30). At this stage of the proceeding, Microsoft has not produced evidence

[41] Au vu de ces mécanismes dont disposent les tribunaux, je conviens avec le juge Donald, de la C.A.C.-B., dissident dans *Sun-Rype*, que [TRADUCTION] « la règle théorique selon laquelle il ne peut y avoir double recouvrement ne devrait pas s'appliquer pour faire obstacle à une action dans une affaire réelle où il est possible d'empêcher

to demonstrate that the courts in B.C. could not preclude double or multiple recovery. I would thus not reject indirect purchaser actions because of the risk of multiple recovery.

le double recouvrement » (par. 30). À ce stade de l'instance, Microsoft n'a produit aucun élément de preuve selon lequel les tribunaux de la Colombie-Britannique ne peuvent empêcher le recouvrement double ou multiple. Je suis donc d'avis de ne pas écarter l'action de l'acheteur indirect en raison du risque de recouvrement multiple.

(b) *Remoteness and Complexity*

b) *Caractère indirect et complexité*

[42] Microsoft's second argument is that the remoteness of the overcharge and the complexities associated with tracing the loss constitute "'serious' and 'inherent' difficulties of proof associated with pass-on" (R.F., at para. 20). These difficulties are said to give rise to confusion and uncertainty and place a burden on the institutional capacities of the courts tasked with following each overcharge to its ultimate result.

[42] Microsoft soutient deuxièmement que le caractère indirect de la majoration et la difficulté d'établir la perte subie constituent [TRADUCTION] « des obstacles "importants" et "fondamentaux" à la preuve du transfert de la perte » (m.i., par. 20). Ces obstacles seraient sources de confusion et d'incertitude et grèveraient les capacités institutionnelles des tribunaux appelés à retracer le parcours de chacune des majorations jusqu'à son aboutissement final.

[43] Microsoft relies on the reasoning of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22. In *Chadha*, that court denied certification of an indirect purchaser action citing "the many problems of proof facing the appellants . . . , including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price" (para. 45 (adopting the findings of the Divisional Court)). Microsoft argues that if any part of the overcharge was absorbed by any party in the chain, "the chain would be broken" and the extent of the overcharge would become increasingly difficult to trace (R.F., at para. 22, quoting *Chadha*, at para. 45). The reasons on this point in *Illinois Brick*, on which Microsoft relies heavily, point out that there are significant "uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model'" (pp. 731-32). The court lamented the "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom" (p. 732).

[43] Microsoft invoque le raisonnement de la Cour d'appel de l'Ontario dans *Chadha c. Bayer Inc.* (2003), 63 O.R. (3d) 22, où cette dernière refuse de certifier l'action d'un acheteur indirect en raison [TRADUCTION] « des nombreux problèmes de preuve qui attendent les appelants [. . .], y compris le nombre des maillons de la chaîne de distribution et la "multitude de variables" qui jouent dans la détermination du prix d'achat final » (par. 45 (adhérant aux conclusions de la Cour divisionnaire)). Selon Microsoft, si quelque partie de la majoration était absorbée par l'un de ses maillons, [TRADUCTION] « la chaîne serait rompue » et il serait d'autant plus ardu de retracer le parcours de la majoration d'un maillon à l'autre (m.i., par. 22, citant *Chadha*, par. 45). Il appert des motifs formulés sur ce point dans *Illinois Brick*, et sur lesquels Microsoft insiste beaucoup, que [TRADUCTION] « l'analyse des décisions en matière de prix et de production comporte une grande part d'incertitude et de difficulté lorsqu'elle intervient "dans le monde économique réel plutôt que dans le cadre d'un modèle économique fictif" » (p. 731-732). Le tribunal déplore « les coûts supportés par le système judiciaire et les mécanismes d'application des dispositions antitrust lorsqu'il s'agit de reconstituer ces décisions en salle d'audience » (p. 732).

[44] Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However, Brennan J., dissenting in *Illinois Brick*, observed that these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case:

Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. In others, the portion of the overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." . . . Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages. [Text in brackets in original; pp. 759-60.]

[45] In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.

(c) *Deterrence*

[46] A third argument, which was not raised by Microsoft, but which was discussed in *Illinois Brick* and is particularly relevant to competition actions, is that allowing the offensive use of passing

[44] L'action intentée par un acheteur indirect, surtout sur le fondement des dispositions antitrust, comporte souvent une preuve volumineuse, la formulation de théories économiques complexes et l'existence de nombreuses parties le long de la chaîne de distribution, de sorte qu'il est d'autant plus ardu de retracer le parcours de la majoration d'un maillon à l'autre jusqu'à son aboutissement final. Toutefois, selon le juge Brennan, dissident dans *Illinois Brick*, il s'agit de caractéristiques communes à la plupart des affaires antitrust et elles ne devraient donc pas empêcher l'acheteur indirect de prouver ses allégations :

[TRADUCTION] Certes, dans bien des cas, le demandeur ne sera pas en mesure de prouver le transfert de la majoration. Dans d'autres, la partie transférée ne pourra être déterminée qu'approximativement. Mais là encore, ce problème distingue à peine l'espèce d'une autre affaire antitrust. Dans ce domaine, toute instance exige une estimation raisonnée, mais « bien que les dommages [dans les affaires de cette nature] ne puissent être déterminés au moyen de simples spéculations ou conjectures, il suffira d'inférer de manière juste et raisonnable l'étendue des dommages, même si le résultat ne sera qu'approximatif. » [. . .] L'imprécision de la répartition des dommages-intérêts entre l'acheteur direct et l'acheteur indirect n'est donc pas une considération suffisante pour priver l'acheteur indirect de la possibilité d'établir le préjudice subi. [Texte entre crochets dans l'original; p. 759-760.]

[45] L'acheteur indirect qui intente une action contracte volontairement l'obligation d'établir qu'il a subi une perte, ce qui peut fort bien nécessiter le témoignage d'experts et une preuve complexe de nature économique. À mon avis, la question de savoir si ces éléments lui permettront de s'acquitter de cette obligation tient aux faits de l'espèce. Il n'y a pas lieu de faire totalement obstacle à l'action de l'acheteur indirect pour la seule raison qu'il sera ardu d'établir le préjudice subi.

c) *Effet dissuasif*

[46] Selon un troisième argument que ne soulève pas Microsoft, mais qui est examiné dans *Illinois Brick* et qui vaut particulièrement dans le cas d'actes anticoncurrentiels, permettre d'invoquer

on frustrates the enforcement of competition laws, thus reducing deterrence. While enforcement of competition laws is generally a question for the government, private individuals are engaged in the enforcement by way of s. 36 which gives them a right of recovery for breaches of Part VI of the *Competition Act*.

en demande le transfert de la perte ferait obstacle à l'application des dispositions sur la concurrence et nuirait ainsi à la dissuasion. Bien que cette application incombe généralement à l'État, une personne privée peut, suivant l'art. 36, faire respecter la loi et demander le recouvrement d'une somme par suite de la violation de la partie VI de la *Loi sur la concurrence*.

[47] The majority in *Illinois Brick* understood *Hanover Shoe* to stand for the proposition that "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it" (p. 735). The majority in *Illinois Brick* agreed, finding that direct purchasers would be in the best position to bring an action because the "massive evidence and complicated theories" that are characteristic of indirect purchaser actions impose an unacceptable burden on those plaintiffs, making success of such actions unlikely and thereby defeating the deterrence objectives of antitrust laws (p. 741).

[47] Dans *Illinois Brick*, les juges majoritaires concluent de l'arrêt *Hanover Shoe* que [TRADUCTION] « les lois antitrust seront mieux appliquées si on assure le recouvrement intégral de la majoration par l'acheteur direct au lieu de permettre à chacune des personnes touchées par la majoration de recouvrer uniquement la partie qu'elle peut prouver avoir absorbée » (p. 735). Ils partagent ce point de vue et estiment que l'acheteur direct est le mieux placé pour ester en justice, car [TRADUCTION] « la preuve volumineuse et les théories compliquées » associées à l'instance engagée impose un trop lourd fardeau à l'acheteur indirect, de sorte qu'il est peu probable qu'il ait gain de cause, ce qui va à l'encontre des fins dissuasives des dispositions antitrust (p. 741).

[48] In my opinion, allowing the offensive use of passing on should not frustrate the deterrence objectives of Canadian competition laws. I agree with Brennan J., dissenting in *Illinois Brick*, that the offensive use of passing on, unlike the passing-on defence, creates little danger that the overcharger will escape liability and frustrate deterrence objectives but, "[r]ather, the same policies of insuring the continued effectiveness of the [antitrust] action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them" (p. 753). The rationale for rejecting the passing-on defence because it frustrates enforcement is not a reason for denying an action to those who have a valid claim against the overcharger.

[48] À mon avis, permettre d'alléguer en demande le transfert de la perte ne devrait pas nuire aux objectifs de dissuasion des dispositions canadiennes sur la concurrence. Je conviens avec le juge Brennan, dissident dans *Illinois Brick*, que contrairement au fait d'invoquer le transfert de la perte en défense, le fait d'alléguer le transfert de la perte en demande risque peu de faire en sorte que l'auteur de la majoration échappe à sa responsabilité et que la dissuasion soit compromise; [TRADUCTION] « [l]es mêmes principes qui consistent à assurer l'efficacité constante de l'action [antitrust] et à empêcher le fautif de conserver le gain mal acquis militent plutôt en faveur de la possibilité que l'acheteur indirect prouve que la majoration lui a été refilée » (p. 753). L'exclusion du transfert de la perte comme moyen de défense, afin de ne pas nuire à l'application de la loi, ne justifie pas de refuser son allégation en demande dans une action par ailleurs bien-fondée intentée contre l'auteur de la majoration.

[49] Further, despite evidence advanced by the respondents in the *Sun-Rype* appeal that direct purchasers are often the parties most likely to take action against the overchargers, there may be some situations where direct purchasers will have been overcharged but will be reticent to bring an action against the offending party for fear of jeopardizing a valuable business relationship. In this case, it is alleged that Microsoft's direct purchasers are parties to the overcharging arrangements and would themselves not be likely plaintiffs. Indirect purchaser actions may, in such circumstances, be the only means by which overcharges are claimed and deterrence is promoted. The rejection of indirect purchaser actions in such cases would increase the possibility that the overcharge would remain in the hands of the wrongdoer. For these reasons, I would be of the view that an absolute bar on indirect purchaser actions, thus leaving any potential action exclusively to direct purchasers, would not necessarily result in more effective deterrence than exclusively direct purchaser actions.

(d) *Restitutionary Principles*

[50] Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing (see Maddaugh and McCamus (2013), at pp. 3-1 to 3-3). In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.

(e) *Departure From the Rule in Illinois Brick in the United States*

[51] Although *Illinois Brick* remains the law at the federal level, it has been made inapplicable at the state level in many states through so-called "repealer statutes" or by judicial decisions. In 2007, the Antitrust Modernization Commission issued a report to Congress indicating that "more than thirty-five states permit indirect, as well as direct, purchasers to sue for damages under state law" (*Antitrust Modernization Commission: Report and*

[49] En outre, malgré la preuve des intimées dans *Sun-Rype* voulant que l'acheteur direct soit souvent le plus susceptible de poursuivre l'auteur de la majoration, il peut arriver qu'un acheteur direct hésite à intenter une action contre le fautif par crainte de mettre en péril de bonnes relations d'affaires. On soutient en l'espèce que les acheteurs directs sont parties aux arrangements de majoration de Microsoft, de sorte qu'il est peu probable qu'ils intentent quelque recours. Dans ces circonstances, les actions d'acheteurs indirects peuvent offrir le seul moyen de recouvrer la majoration et d'assurer la dissuasion. Exclure ces actions en pareil cas augmenterait le risque que la majoration demeure entre les mains du fautif. Pour ces motifs, je suis d'avis qu'écarter tout recours de l'acheteur indirect de sorte que seul l'acheteur direct puisse se pourvoir en justice n'accroîtrait pas nécessairement l'effet dissuasif.

d) *Principes de la restitution*

[50] De nature réparatrice, le droit de la restitution a pour objet le recouvrement du gain mal acquis (voir Maddaugh et McCamus (2013), p. 3-1 à 3-3). J'estime que permettre à l'acheteur indirect d'intenter une action en justice s'accorde avec l'objectif de réparation du droit de la restitution, car la personne qui a effectivement subi un préjudice, et non seulement l'acheteur direct qui a pu en fait transférer la majoration, peut ainsi être indemnisée.

e) *Dérogation à la règle établie aux États-Unis dans l'arrêt Illinois Brick*

[51] Bien que l'arrêt *Illinois Brick* établisse toujours le droit applicable au palier fédéral, de nombreux États l'ont écarté par voie législative ou judiciaire. En 2007, la commission de modernisation des lois antitrust a déposé au Congrès un rapport selon lequel [TRADUCTION] « plus de trente-cinq États permettaient à l'acheteur indirect, comme à l'acheteur direct, d'intenter une action en dommages-intérêts en application de la

Recommendations (2007) (online), at p. 269). It recommended to Congress that the rule in *Illinois Brick* be statutorily repealed at the federal level (p. 270). The validity of the "repealer statutes" came before the U.S. Supreme Court in *California v. ARC America Corp.*, 490 U.S. 93 (1989). That court held that *Illinois Brick* did not preempt the enactment of state antitrust laws, even if they had the effect of repealing the rule in *Illinois Brick*. These developments cast doubt on the "necessary corollary" approach in *Illinois Brick*.

(f) *Doctrinal Commentary*

[52] Doctrinal discussions of indirect purchaser actions are still shaped by the initial exchange that occurred directly following the release of *Illinois Brick*. Shortly after the judgment was issued, American scholars William M. Landes and Richard A. Posner (now a judge of the U.S. Court of Appeals for the Seventh Circuit) published an article defending the rule barring indirect purchaser actions (see "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*" (1979), 46 *U. Chi. L. Rev.* 602, at pp. 634-35). They argued that reserving the right to bring an action against overchargers to the direct purchasers alone would best promote the antitrust laws. They wrote that allowing indirect purchasers to bring actions would have little to no effect on the objectives of compensation and deterrence because direct purchasers would be more likely to discover the overcharges in the first place and would be more likely to have the information and resources required to bring a successful antitrust action. They called the direct purchaser a more "efficient enforcer" of antitrust laws, and opined that with indirect purchasers, apportionment of the damages is so costly that it becomes a disincentive to sue and that sharing the right to sue among multiple parties has the effect of making the claims small and of weakening the deterrence effect (pp. 608-9). As to compensation, they argued that even if indirect

loi de l'État » (*Antitrust Modernization Commission : Report and Recommendations* (2007) (en ligne), p. 269). Elle recommandait l'« abrogation » de la règle issue de l'arrêt *Illinois Brick* par une loi fédérale (p. 270). Dans *California c. ARC America Corp.*, 490 U.S. 93 (1989), la Cour suprême des États-Unis a été appelée à se prononcer sur la validité des « lois abrogatoires ». Elle a conclu que l'arrêt *Illinois Brick* ne faisait pas obstacle à l'adoption de dispositions antitrust par un État, même si ces dispositions avaient pour effet d'écarter la règle issue de cet arrêt. Voilà des éléments qui sont de nature à remettre en cause la thèse du « corollaire nécessaire » retenue dans *Illinois Brick*.

f) *Doctrine*

[52] Les débats des auteurs sur le recours de l'acheteur indirect demeurent axés sur les échanges qui ont tout juste suivi la publication de l'arrêt *Illinois Brick*. Peu après celle-ci, les Américains William M. Landes et Richard A. Posner (maintenant juge de la Cour d'appel des États-Unis pour le septième circuit) ont défendu dans un article la règle qui refusait le droit d'action à l'acheteur indirect (voir « Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick* » (1979), 46 *U. Chi. L. Rev.* 602, p. 634-635). Selon eux, réserver à l'acheteur direct le droit d'intenter une action contre l'auteur de la majoration était l'option la plus susceptible de promouvoir les dispositions antitrust. Ils ajoutent que permettre à l'acheteur indirect d'intenter une action n'aura pas d'effet ou en aura peu sur la réalisation des objectifs d'indemnisation et de dissuasion, car l'acheteur direct sera plus susceptible de constater la majoration et, ensuite, de disposer des données et des ressources nécessaires pour avoir gain de cause dans une action antitrust. Ils voient dans l'acheteur direct un « agent efficace d'application » des dispositions antitrust et font valoir que permettre à l'acheteur indirect de se pourvoir en justice rendra la répartition des dommages-intérêts si coûteuse que les intéressés hésiteront à poursuivre et que le partage du droit d'action entre de multiples parties réduira l'importance des

purchasers had no independent right of action, they were nonetheless compensated by the ability of direct purchasers to bring an action because the benefit accruing to the direct purchaser as a result of an anticipated successful antitrust action against the overcharger would be reflected in the prices charged by the direct purchasers to the indirect purchasers (p. 605).

[53] Shortly after the publication of Landes and Posner's article, two other antitrust authorities, Robert G. Harris and Lawrence A. Sullivan, expressed an opposing viewpoint (see "Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis" (1979), 128 *U. Pa. L. Rev.* 269, at pp. 351-52). Harris and Sullivan argued that direct purchasers would be reluctant to disrupt valued supplier relationships and would thus be more likely to pass on the overcharge to their own customers. They would not therefore serve as efficient enforcers of the antitrust laws and, rather, it would be more suitable to vest standing in the indirect purchasers in order to best achieve deterrence.

[54] Landes and Posner published a direct response to Harris and Sullivan the next year (see "The Economics of Passing On: A Reply to Harris and Sullivan" (1980), 128 *U. Pa. L. Rev.* 1274). In response to Harris and Sullivan's argument that direct purchasers would be reticent to sue so as not to compromise valuable commercial relationships, they stated that "any forbearance by the direct purchaser to sue will be compensated. The supplier must pay something to bind the direct purchaser to him and this payment is, functionally, a form of antitrust damages" (p. 1278). In other words, the direct purchaser is receiving a financial inducement to be a part of the conspiracy and this benefit could be passed along to the indirect purchasers.

[55] In the years since the exchange between Landes and Posner and Harris and Sullivan, the literature has reflected an ongoing debate on the issue of indirect purchaser actions and specifically the rule in *Illinois Brick*. A survey of the literature

demandes et affaiblira l'effet dissuasif (p. 608-609). Quant à l'indemnisation, ils soutiennent que, même s'il n'a pas de droit d'action indépendant, l'acheteur indirect sera néanmoins « indemnisé » grâce à la faculté de l'acheteur direct d'intenter une action, car ce dernier répercutera sur le prix demandé à l'acheteur indirect les retombées éventuelles d'une action antitrust contre l'auteur de la majoration (p. 605).

[53] Peu après la publication de l'article de Landes et Posner, deux autres spécialistes du droit antitrust, Robert G. Harris et Lawrence A. Sullivan, ont exprimé l'opinion contraire (voir « Passing On the Monopoly Overcharge : A Comprehensive Policy Analysis » (1979), 128 *U. Pa. L. Rev.* 269, p. 351-352). Selon Harris et Sullivan, l'acheteur direct hésitera à compromettre ses bonnes relations avec son fournisseur et sera donc plus enclin à refiler la note à ses clients à lui. Il ne serait donc pas un « agent efficace d'application » des dispositions antitrust; pour les besoins de l'effet dissuasif, mieux vaudrait reconnaître la qualité pour agir à l'acheteur indirect.

[54] L'année suivante, Landes et Posner répliquaient directement à la thèse de Harris et Sullivan (voir « The Economics of Passing On : A Reply to Harris and Sullivan » (1980), 128 *U. Pa. L. Rev.* 1274). En réponse à la thèse de leurs détracteurs, à savoir qu'un acheteur direct hésitera à intenter une action en justice afin de ne pas compromettre de bonnes relations commerciales, ils affirment que [TRADUCTION] « l'omission de l'acheteur direct d'intenter une action en justice sera récompensée. Le fournisseur doit verser quelque chose pour s'attacher l'acheteur direct et il s'agit en quelque sorte d'une indemnisation antitrust » (p. 1278). En d'autres termes, l'acheteur direct obtient pour sa participation au complot une gratification financière qui peut être transmise à l'acheteur indirect.

[55] Depuis ce débat entre Landes et Posner, d'une part, et Harris et Sullivan, d'autre part, la question du droit d'action de l'acheteur indirect et, en particulier, la règle issue de l'arrêt *Illinois Brick*, continuent d'alimenter la discussion. Plus

reveals that most recently, however, there is a significant body of academic authority in favour of repealing the decision in *Illinois Brick* in order to best serve the objectives of the antitrust laws.

[56] Some authors, including Gregory J. Werden and Marius Schwartz, joined Harris and Sullivan in their critique of Landes and Posner, stating specifically that the notion that indirect purchasers would see any of the benefits accruing to a direct purchaser as the result of an anticipated recovery was "quite implausible" ("*Illinois Brick* and the Deterrence of Antitrust Violations — An Economic Analysis" (1984), 35 *Hastings L.J.* 629, at p. 638-39).

[57] The theory that direct purchasers may be unwilling to sue for fear of disrupting an important supplier relationship has also found favour among academics (see e.g. K. J. O'Connor, "Is the *Illinois Brick* Wall Crumbling?" (2001), 15:3 *Antitrust* 34, at p. 38 (noting that indirect purchasers are perhaps more likely to sue than are direct purchasers because they do not risk severing a "direct business relationship with the alleged violator"); A. Thimmesch, "Beyond Treble Damages: *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.*" (2005), 90 *Iowa L. Rev.* 1649, at p. 1668 and fn. 127 (stating that in many situations the direct purchaser is in fact dependent upon the supplier and as such would be reticent to sue)). As recently as 2012, the same opinion has been expressed: "This is especially true if direct purchasers are able to pass on any overcharges that result from antitrust violations to consumers. . . . [T]he Supreme Court [of the United States]'s all-or-nothing 'Indirect Purchaser Rule' sweeps too broadly" (J. M. Glover, "The Structural Role of Private Enforcement Mechanisms in Public Law" (2012), 53 *Wm. & Mary L. Rev.* 1137, at p. 1187).

[58] As to the objective of compensation, several authors have commented that the rule in *Illinois Brick* in fact runs contrary to the goal of compensation, with one author calling it "[t]he

récemment, de nombreux auteurs ont cependant préconisé la neutralisation de l'arrêt afin de favoriser la réalisation des objectifs des dispositions antitrust.

[56] Certains, dont Gregory J. Werden et Marius Schwartz, se sont joints à Harris et Sullivan pour critiquer Landes et Posner. Ils qualifient d'[TRADUCTION] « assez invraisemblable » l'idée que l'acheteur indirect puisse bénéficier des retombées pour l'acheteur direct d'un recouvrement anticipé (« *Illinois Brick* and the Deterrence of Antitrust Violations — An Economic Analysis » (1984), 35 *Hastings L.J.* 629, p. 638-639).

[57] La thèse voulant qu'un acheteur direct hésite à poursuivre un fournisseur important par crainte de mettre en péril ses rapports avec lui a aussi ses tenants parmi les auteurs de doctrine (voir p. ex. K. J. O'Connor, « Is the *Illinois Brick* Wall Crumbling? » (2001), 15:3 *Antitrust* 34, p. 38 (selon lequel l'acheteur indirect est peut-être plus susceptible d'intenter une poursuite que l'acheteur direct parce qu'il ne risque pas la rupture de ses [TRADUCTION] « liens d'affaires directs avec le présumé contrevenant »); A. Thimmesch, « Beyond Treble Damages : *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.* » (2005), 90 *Iowa L. Rev.* 1649, p. 1668 et note en bas de page 127 (selon lequel, dans bien des cas, l'acheteur direct est en situation de dépendance vis-à-vis du fournisseur et hésitera donc à le poursuivre)). Tout récemment, en 2012, on a avancé la même idée : [TRADUCTION] « Cela est particulièrement vrai lorsque l'acheteur direct peut transférer au consommateur toute somme payée en trop par suite d'une entorse à la concurrence. [. . .] [L]a règle par laquelle la Cour suprême [des États-Unis] refuse catégoriquement à "l'acheteur indirect le droit de poursuivre l'auteur" de la majoration a une portée excessive » (J. M. Glover, « The Structural Role of Private Enforcement Mechanisms in Public Law » (2012), 53 *Wm. & Mary L. Rev.* 1137, p. 1187).

[58] En ce qui concerne l'objectif d'indemnisation, plusieurs auteurs font observer que la règle issue de l'arrêt *Illinois Brick* va en fait à l'encontre de sa réalisation; l'un d'eux dit de cette décision

most far-reaching deviation from the compensatory rationale" (C. C. Van Cott, "Standing at the Fringe: Antitrust Damages and the Fringe Producer" (1983), 35 *Stan. L. Rev.* 763, at p. 775). Likewise, Andrew I. Gavil, an antitrust scholar, has stated that "providing compensation to all victims of unlawful conduct for the harms inflicted by the wrongdoer is a secondary but also essential goal of a comprehensive remedial system, one that *Illinois Brick* disserves in many common circumstances" ("Thinking Outside the *Illinois Brick* Box: A Proposal for Reform" (2009), 76 *Antitrust L.J.* 167, at p. 170).

[59] As can be seen from this overview, despite initial support from well-reputed antitrust scholars, it cannot be said that the rule in *Illinois Brick* still finds favour in the academic literature.

(4) Conclusion on the Offensive Use of Passing On

[60] Although the passing-on *defence* is unavailable as a matter of restitution law, it does not follow that indirect purchasers should be foreclosed from claiming losses passed on to them. In summary:

(1) The risks of multiple recovery and the concerns of complexity and remoteness are insufficient bases for precluding indirect purchasers from bringing actions against the defendants responsible for overcharges that may have been passed on to them.

(2) The deterrence function of the competition law in Canada is not likely to be impaired by indirect purchaser actions.

(3) While the passing-on defence is contrary to basic restitutionary principles, those same principles are promoted by allowing passing on to be used offensively.

qu'elle est celle qui [TRADUCTION] « s'écarte le plus de l'objectif d'indemnisation » (C. C. Van Cott, « Standing at the Fringe : Antitrust Damages and the Fringe Producer » (1983), 35 *Stan. L. Rev.* 763, p. 775). Dans le même ordre d'idées, selon Andrew I. Gavil, spécialiste en matière antitrust, [TRADUCTION] « indemniser toutes les victimes du comportement illégal pour les préjudices causés par le contrevenant constitue un objectif secondaire, mais aussi essentiel, d'un régime de réparation complet, un objectif que l'arrêt *Illinois Brick* méconnaît dans bien des situations courantes » (« Thinking Outside the *Illinois Brick* Box : A Proposal for Reform » (2009), 76 *Antitrust L.J.* 167, p. 170).

[59] Comme il appert de cet aperçu, malgré son appui initial par des auteurs de renom du domaine antitrust, la règle dégagée dans l'arrêt *Illinois Brick* ne remporte plus la faveur des juristes versés en la matière.

(4) Conclusion sur l'allégation en demande du transfert de la perte

[60] Malgré l'impossibilité d'invoquer le transfert de la perte en défense à une action en restitution, l'acheteur indirect ne doit pas pour autant se voir empêcher de recouvrer la perte qui lui a été transférée. En bref, voici les éléments à retenir :

(1) Le risque de recouvrement multiple et les obstacles liés à la complexité de la preuve et au caractère indirect de la majoration ne constituent pas des considérations suffisantes pour priver l'acheteur indirect d'un recours contre l'auteur de la majoration dont le montant lui aurait été transféré.

(2) Le recours de l'acheteur indirect ne portera vraisemblablement pas atteinte à l'effet dissuasif que sont censées avoir les dispositions canadiennes sur la concurrence.

(3) Même si invoquer le transfert de la perte en défense à une action va à l'encontre des principes fondamentaux de la restitution, permettre son allégation en demande est dans le droit fil de ces mêmes principes.

(4) Although the rule in *Illinois Brick* remains good law at the federal level in the United States, its subsequent repeal at the state level in many jurisdictions and the report to Congress recommending its reversal demonstrate that its rationale is under question.

(5) Despite some initial support, the recent doctrinal commentary favours overturning the rule in *Illinois Brick*.

For these reasons, I would not agree with Microsoft's argument that this Court's rejection of the passing-on defence in previous cases and affirmed here precludes indirect purchaser actions.

B. *Certification of the Class Action*

[61] Having answered the threshold question and determined that indirect purchasers may use passing on offensively to bring an action, I turn to the question of whether the present action should be certified as a class action. Because the majority of the B.C.C.A. disposed of the appeal based on its finding that indirect purchaser actions were not available in Canada, it did not consider the certification requirements dealt with by Tysoe J. (causes of action under s. 4(1)(a) of the *CPA*) and Myers J. (balance of the certification requirements under s. 4(1)(b) to (e) of the *CPA*). It therefore remains for this Court to review the certification analysis carried out by the two applications judges. Microsoft contests their findings as to only three of the certification requirements: (1) whether the pleadings disclose a cause of action; (2) whether the claims raise common issues; and (3) whether a class action is the preferable procedure.

(1) <u>The Requirements for Certification Under the British Columbia *Class Proceedings Act*</u>

[62] Section 4(1) of the *CPA* provides:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2

(4) Bien que, aux États-Unis, la règle issue de l'arrêt *Illinois Brick* demeure valable au palier fédéral, son « abrogation » dans de nombreux États et le rapport recommandant au Congrès de l'infirmer remettent en question sa raison d'être.

(5) Malgré un certain appui initial, la doctrine récente penche en faveur de la suppression de la règle.

Pour ces motifs, je ne conviens pas avec Microsoft que le rejet par notre Cour dans des affaires antérieures et en l'espèce du moyen de défense fondé sur le transfert de la perte fait obstacle au recours de l'acheteur indirect.

B. *Certification du recours collectif*

[61] Après avoir tranché la question préliminaire et conclu que l'acheteur indirect peut invoquer le transfert de la perte en demande, j'examine maintenant s'il y a lieu ou non de certifier l'action intentée en l'espèce à titre de recours collectif. Étant donné que les juges majoritaires de la C.A.C.-B. statuent que l'acheteur indirect ne peut pas légalement intenter d'action au Canada, ils ne se penchent pas sur les conditions de certification examinées par le juge Tysoe (cause d'action exigée à l'al. 4(1)(a) de la *CPA*) et par le juge Myers (les autres conditions prévues aux al. 4(1)(b) à (e) de la *CPA*). Il nous faut donc contrôler l'analyse des deux juges saisis des demandes en ce qui concerne la certification. Microsoft ne conteste leurs conclusions qu'à l'égard de trois des conditions : (1) les actes de procédure révèlent une cause d'action, (2) les demandes soulèvent une question commune et (3) le recours collectif constitue la meilleure procédure pour régler cette question.

(1) <u>Les conditions de certification selon la *Class Proceedings Act* de la Colombie-Britannique</u>

[62] Le paragraphe 4(1) de la *CPA* dispose :

[TRADUCTION]

4 (1) Le tribunal saisi d'une demande visée à l'article 2 ou 3 certifie une instance à titre de recours or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) Do the Pleadings Disclose a Cause of Action?

[63] The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta Elders*, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[64] Pro-Sys has alleged causes of action (1) under s. 36 of the *Competition Act*, (2) in tort

collectif lorsque les conditions suivantes sont réunies :

(a) les actes de procédure révèlent une cause d'action;

(b) il existe un groupe identifiable de deux personnes ou plus;

(c) les demandes des membres du groupe soulèvent une question commune, que celle-ci l'emporte ou non sur les questions qui touchent uniquement les membres individuels;

(d) le recours collectif serait la meilleure procédure pour régler la question commune de manière juste et efficace;

(e) un demandeur-représentant :

(i) défendrait de manière juste et appropriée les intérêts du groupe,

(ii) a présenté, pour le recours collectif, un plan qui établit une méthode praticable de faire progresser l'instance au nom du groupe et d'aviser les membres du groupe de l'existence du recours collectif,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les questions communes.

(2) Les actes de procédure révèlent-ils une cause d'action?

[63] La première condition de certification veut que les actes de procédure révèlent une cause d'action. Dans *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261 (« *Alberta Elders* »), notre Cour explique que le respect de cette condition est apprécié au regard de la norme de preuve applicable à la requête en radiation selon l'arrêt *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980. Le demandeur ne satisfait donc pas à la condition lorsque, à supposer que les faits invoqués soient vrais, la demande ne pourrait manifestement pas être accueillie (*Alberta Elders*, par. 20; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25).

[64] Pro-Sys prétend avoir des causes d'action (1) suivant l'art. 36 de la *Loi sur la concurrence*,

for conspiracy and intentional interference with economic interests, and (3) in restitution for unjust enrichment, constructive trust and waiver of tort. For the reasons that follow, I would agree with Tysoe J. that the pleadings disclose causes of action that should not be struck out at this stage of the proceedings.

(a) *Section 36 of the Competition Act*

[65] Under s. 36 of the *Competition Act*, any person who has suffered loss or damage as a result of conduct engaged in by any person contrary to Part VI of the Act may sue for and recover that loss or damage. Section 36 provides:

> **36.** (1) Any person who has suffered loss or damage as a result of
>
> (*a*) conduct that is contrary to any provision of Part VI . . .
>
> . . .
>
> may in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[66] Part VI of the *Competition Act* is entitled "Offences in Relation to Competition". The Part VI offences alleged in this appeal are (1) conspiracy, contrary to s. 45(1), and (2) false or misleading representations, contrary to s. 52(1). At the time of the hearing before Tysoe J., those provisions read as follows:

> **45.** (1) [Conspiracy] Every one who conspires, combines, agrees or arranges with another person

(2) en responsabilité délictuelle pour complot et atteinte intentionnelle aux intérêts financiers et (3) en restitution pour enrichissement sans cause, existence d'une fiducie par interprétation et renonciation au recours délictuel. Pour les motifs qui suivent, je conviens avec le juge Tysoe que les actes de procédure révèlent des causes d'action qu'on ne saurait radier à ce stade de l'instance.

a) *Article 36 de la Loi sur la concurrence*

[65] Selon l'art. 36 de la *Loi sur la concurrence*, toute personne qui a subi une perte ou des dommages par suite d'un comportement contraire à la partie VI de la Loi peut réclamer et recouvrer une somme égale au montant de la perte ou des dommages subis. Voici le libellé de l'art. 36 :

> **36.** (1) Toute personne qui a subi une perte ou des dommages par suite :
>
> *a*) . . . d'un comportement allant à l'encontre d'une disposition de la partie VI;
>
> . . .
>
> peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[66] La partie VI de la *Loi sur la concurrence* est intitulée « Infractions relatives à la concurrence ». Les infractions qu'elle crée et dont la perpétration est alléguée en l'espèce sont (1) le complot, au par. 45(1), et (2) les indications fausses ou trompeuses, au par. 52(1). Voici quel était le libellé de ces dispositions lors de l'audience présidée par le juge Tysoe :

> **45.** (1) [Complot] Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

(*a*) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(*b*) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(*d*) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

52. (1) [False or misleading representations] No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[67] The bulk of Microsoft's objections to the cause of action under s. 36 of the *Competition Act* are tied to the theory that offensive passing on is not permitted. In view of my earlier finding that indirect purchaser actions are permitted, those arguments are no longer of consequence in this appeal.

[68] However, Microsoft also argues that the s. 36 cause of action is not properly pleaded before this Court because it was not included in Pro-Sys's statement of claim. It argues that any attempt to add it now would be barred by the two-year limitation period contained in s. 36(4) of the Act. However, Donald J.A., dissenting in the B.C.C.A., found Microsoft's contention to be a purely technical objection, and not one that would form a basis to dismiss the claim. I would agree. The Third Further Amended Statement of Claim alleges that the unlawful conduct was continuing, a fact that must be accepted as being true for the purposes of this appeal. As a result, it cannot be said that the action was not filed in a timely manner.

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture du produit, ou dans le prix d'assurances sur les personnes ou les biens;

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

52. (1) [Indications fausses ou trompeuses] Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

[67] Microsoft conteste l'existence d'une cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence* et fait essentiellement valoir que le transfert de la perte ne peut être allégué en demande. Vu ma conclusion que l'acheteur indirect peut ester en justice, cette prétention n'importe plus aux fins du pourvoi.

[68] Toutefois, Microsoft soutient par ailleurs que la cause d'action fondée sur l'art. 36 est irrégulièrement plaidée devant notre Cour car elle ne figure pas dans la déclaration de Pro-Sys. Selon elle, le délai de prescription de deux ans imparti au par. 36(4) de la Loi fait obstacle à l'ajout de cette cause d'action. Or, le juge Donald de la C.A.C.-B., dissident, conclut qu'il s'agit d'une prétention d'ordre purement technique et qu'elle ne permet pas de rejeter la demande. Je suis d'accord. Selon la troisième déclaration modifiée, le comportement illégal se poursuivait, ce qui doit être tenu pour avéré aux fins du pourvoi. On ne saurait donc dire que l'action n'a pas été déposée dans le délai prescrit.

[69] Moreover, the Third Further Amended Statement of Claim states specifically that "[t]he plaintiffs plead and rely upon . . . . Part VI of the *Competition Act*" (para. 109, A.R., vol. II, at p. 48) and seeks damages accordingly. Although the Third Further Amended Statement of Claim does not expressly refer to s. 36, recovery for breaches under Part VI of the *Competition Act* may only be sought by private individuals through a claim under s. 36. I agree with Donald J.A. that "the parties put their minds to s. 36 at the certification hearing and so no surprise or prejudice can be complained of" (B.C.C.A., at para. 59). For these reasons, I would not accede to Microsoft's argument that the claim should be barred by the limitation provision of the *Competition Act*.

[69] Par ailleurs, selon le libellé même de la troisième déclaration modifiée, [TRADUCTION] « [l]es demandeurs invoquent [. . .] la partie VI de la *Loi sur la concurrence* » (par. 109, d.a., vol. II, p. 48) et réclament des dommages-intérêts en conséquence. Bien que le document ne renvoie pas expressément à l'art. 36, le recouvrement pour violation de la partie VI de la *Loi sur la concurrence* ne peut être demandé par une personne privée que sur le fondement de cette disposition. Je conviens avec le juge Donald que [TRADUCTION] « les parties ont considéré l'art. 36 lors de l'audition de la demande de certification, de sorte que nulle allégation de surprise ou de préjudice ne saurait être retenue » (C.A.C.-B., par. 59). C'est pourquoi je ne fais pas droit à la prétention de Microsoft selon laquelle le délai de prescription imparti par la *Loi sur la concurrence* fait obstacle à la demande.

[70] Microsoft made other brief arguments objecting to the cause of action under s. 36. Before Tysoe J., it argued that the Competition Tribunal should have jurisdiction over the enforcement of the competition law. I agree that a number of provisions of the *Competition Act* assign jurisdiction to the Competition Tribunal rather than the courts. However, that is not the case with s. 36, which expressly provides that any person who suffered loss by virtue of a breach of Part VI of the Act may seek to recover that loss. The section expressly confers jurisdiction on the court to entertain such claims.

[70] Microsoft invoque d'autres motifs succincts à l'encontre de la reconnaissance d'une cause d'action fondée sur l'art. 36. Devant le juge Tysoe, elle a fait valoir qu'il devait incomber au Tribunal de la concurrence de faire respecter le droit de la concurrence. Je conviens que certaines dispositions de la *Loi sur la concurrence* confèrent compétence au Tribunal de la concurrence plutôt qu'à une cour de justice. Or, ce n'est pas le cas de l'art. 36, qui prévoit expressément que toute personne à qui une violation de la partie VI inflige une perte peut se pourvoir en recouvrement devant une cour de justice.

[71] For all these reasons, it is not plain and obvious that a claim under s. 36 of the *Competition Act* would be unsuccessful. For the purposes of s. 4(1)(a) of the *CPA*, it cannot be said that the pleadings do not disclose a cause of action under s. 36 of the *Competition Act*.

[71] Pour tous ces motifs, il n'est pas manifeste qu'une demande fondée sur l'art. 36 de la *Loi sur la concurrence* ne serait pas accueillie. Pour l'application de l'al. 4(1)(a) de la *CPA*, on ne saurait affirmer que les actes de procédure ne révèlent pas une cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence*.

(b) *Tort*

b) *Responsabilité délictuelle*

[72] Pro-Sys alleges that Microsoft combined with various parties to commit the economic torts of conspiracy (both predominant purpose conspiracy and unlawful means conspiracy) and unlawful interference with economic interests. A

[72] Pro-Sys soutient que Microsoft s'est associée à diverses personnes pour commettre les délits civils financiers que sont le complot (tant celui qui vise principalement à causer un préjudice que celui qui prévoit l'emploi de moyens illégaux) et l'atteinte

conspiracy arises when two or more parties agree "to do an unlawful act, or to do a lawful act by unlawful means" (*Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, at p. 317). Despite the fact that the tort of conspiracy traces its origins "to the Middle Ages, [it] is not now a well-settled tort in terms of its current utility or the scope of the remedy it affords" (*Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54, at para. 42).

[73] Nonetheless, in Canada, two types of actionable conspiracy remain available under tort law: predominant purpose conspiracy and unlawful means conspiracy. I first address the arguments related to predominant purpose conspiracy. I then turn to unlawful means conspiracy and unlawful interference with economic interests and deal with them together, as the arguments against these causes of action relate to the "unlawful means" requirement common to both torts.

(i) Predominant Purpose Conspiracy

[74] Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72).

[75] It is worth noting that in *Cement LaFarge*, Estey J. wrote that predominant purpose conspiracy is a "commercial anachronism" and that the approach to this tort should be to restrict its application:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful

illégale aux intérêts financiers. Il y a complot lorsqu'au moins deux personnes conviennent [TRADUCTION] « d'accomplir un acte illégal ou un acte légal par des moyens illégaux » (*Mulcahy c. The Queen* (1868), L.R. 3 H.L. 306, p. 317). Même si l'existence du délit civil de complot remonte [TRADUCTION] « au Moyen Âge, [il] ne s'agit pas aujourd'hui d'un délit civil bien établi quant à son utilité actuelle ou à la portée de la réparation qu'il permet » (*Golden Capital Securities Ltd. c. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54, par. 42).

[73] Il demeure que, au Canada, deux types de complot donnent ouverture à une action en droit de la responsabilité délictuelle : celui qui vise principalement à causer un préjudice et celui qui prévoit l'emploi de moyens illégaux. J'examine d'abord la thèse avancée relativement au complot qui vise principalement à causer un préjudice. Je me penche ensuite sur le complot qui prévoit le recours à des moyens illégaux et sur l'atteinte illégale aux intérêts financiers, que j'examine de pair puisque les motifs de contestation de ces causes d'action touchent à l'exigence, commune aux deux délits civils, du recours à des « moyens illégaux ».

(i) Complot visant principalement à causer un préjudice

[74] L'existence du complot visant principalement à causer un préjudice est établie lorsque le comportement du défendeur vise principalement à causer un préjudice au demandeur par des moyens légaux ou illégaux, et que le demandeur subit effectivement un préjudice à cause de ce comportement. Lorsque des moyens légaux sont employés à la même fin, les actes deviennent illégaux (*Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452, p. 471-472).

[75] Mentionnons que, dans *Ciments LaFarge*, le juge Estey opine que le complot visant principalement à causer un préjudice constitue un « anachronisme commercial » et qu'il y aurait lieu d'en limiter l'application :

> Le délit civil de complot en vue de nuire, même s'il n'est pas étendu de manière à comprendre un complot

acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho*, *supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise. [p. 473]

Notwithstanding these observations, whether predominant purpose conspiracy should be restricted so as not to apply to the facts of this case is not a matter that should be determined on an application to strike pleadings.

[76] At para. 91 of its Third Further Amended Statement of Claim, in a section discussing both predominant purpose and unlawful means conspiracy, Pro-Sys states that "[t]he defendants were motivated to conspire" and then lists the defendants' three "predominant purposes and predominant concerns": (1) to harm the plaintiffs by requiring them to purchase Microsoft products rather than competitors' products; (2) to harm the plaintiffs by requiring them to pay artificially high prices; and (3) to unlawfully increase their profits (A.R., vol. II, at p. 43).

[77] Microsoft argues that the tort of predominant purpose conspiracy is not made out because Pro-Sys's statement of claim fails to identify one true predominant purpose and instead lists several "overlapping purpose[s]" (R.F., at para. 93). Microsoft submits that by pleading that it was "motivated solely by economic considerations" (para. 94), Pro-Sys in effect concedes that the predominant purpose of Microsoft's alleged conduct could not have been to cause injury to the plaintiff as required under the law.

[78] There is disagreement between the parties as to what the pleadings mean. Microsoft says

en vue d'accomplir des actes illégaux lorsqu'il y a une intention implicite de causer un préjudice, a été la cible de nombreuses critiques partout dans le monde de la *common law*. Comme l'indique si bien lord Diplock dans l'arrêt *Lonrho*, précité, aux pp. 188 et 189, il s'agit réellement d'un anachronisme commercial. En fait, il est possible que dans le contexte commercial actuel cette action ait perdu en grande partie son utilité et qu'elle survive comme une anomalie dans notre droit. Quoi qu'il en soit, il est maintenant trop tard pour déraciner de la *common law* le délit civil de complot en vue de nuire. Sans aucun doute, les cours tenteront dans l'avenir, pour les mêmes motifs que certains invoquent actuellement à l'appui de sa suppression, de limiter l'application de ce délit civil. [p. 473]

Néanmoins, la question de savoir si ce délit civil devrait voir sa portée limitée de sorte que les faits de la présente espèce n'y soient pas assimilés ne doit pas être tranchée dans le cadre d'une demande de radiation.

[76] Au paragraphe 91 de sa troisième déclaration modifiée, sous une rubrique portant à la fois sur le complot qui vise principalement à causer un préjudice et celui qui prévoit l'emploi de moyens illégaux, Pro-Sys affirme que [TRADUCTION] « [l]es défenderesses entendaient comploter », puis elle énumère les trois « objectifs principaux » de celles-ci : (1) causer un préjudice aux demandeurs en exigeant qu'ils achètent les produits de Microsoft plutôt que ceux de concurrents, (2) causer un préjudice aux demandeurs en exigeant d'eux un prix majoré de façon artificielle et (3) accroître illégalement leurs profits (d.a., vol. II, p. 43).

[77] Microsoft soutient que le délit civil de complot visant principalement à causer un préjudice n'est pas étayé, car la déclaration de Pro-Sys ne révèle pas un véritable objet principal, mais en énumère plutôt [TRADUCTION] « plusieurs qui se chevauchent » (m.i., par. 93). À son avis, lorsque Pro-Sys allègue que Microsoft était « motivée uniquement par des considérations d'ordre financier » (par. 94), elle admet en fait que l'objet principal du comportement reproché ne pouvait être de lui causer un préjudice comme l'exige la loi.

[78] Il y a désaccord entre les parties sur la portée des allégations de Pro-Sys. Microsoft affirme

that Pro-Sys failed to identify injury to the plaintiffs as the one true predominant purpose. Pro-Sys argues that its pleadings state that Microsoft acted with the predominant purpose of injuring the class members which resulted in, among other things, increased profits. While the pleadings could have been drafted with a more precise focus, I would hesitate on a pleadings application to rule definitively that the predominant purpose conspiracy pleading is so flawed that no cause of action is disclosed. At this stage, I cannot rule out Pro-Sys's explanation that Microsoft's primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention. For this reason, I cannot say it is plain and obvious that Pro-Sys's claim in predominant purpose conspiracy cannot succeed.

qu'elles n'établissent pas que le véritable objet principal du complot était de causer un préjudice aux demandeurs. Pro-Sys fait valoir que, suivant ses allégations, les actes de Microsoft visaient principalement à causer un préjudice aux membres du groupe et qu'ils ont notamment eu pour effet d'accroître ses profits. Même si les actes de procédure auraient pu être rédigés de manière plus précise et directe, j'hésite à statuer définitivement, sur demande de radiation, que l'allégation d'un complot visant principalement à causer un préjudice est si lacunaire qu'aucune cause d'action n'est révélée. Pour l'heure, je ne peux écarter l'explication de Pro-Sys selon laquelle l'intention première de Microsoft était de causer un préjudice aux demandeurs et l'accroissement illégal de ses profits a résulté de cette intention. C'est pourquoi je ne saurais dire qu'il ne peut manifestement pas être fait droit à l'allégation de Pro-Sys selon laquelle il y a eu complot visant principalement à causer un préjudice.

[79] Microsoft also argues that this claim should be struck to the extent it applies as between corporate affiliates because "[p]arent and wholly-owned subsidiary corporations always act in combination" (R.F., at para. 95). Pro-Sys says that "[t]his is not true as a matter of law" (appellants' response factum, at para. 55). Both parties cite, among other cases, para. 19 of *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (C.A.), leave to appeal refused, [2006] 1 S.C.R. xii, which says that "there can be a conspiracy between a parent and a subsidiary corporation". In my view, this statement appears to leave open a cause of action in predominant purpose conspiracy even when the conspiracy is between affiliated corporations. Again, it would not be appropriate on a pleadings application to make a definitive ruling on this issue. In the circumstances, I cannot say it is plain and obvious that the predominant purpose conspiracy claim as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should be struck at this phase of the proceedings.

[79] Microsoft ajoute que l'allégation doit être radiée dans la mesure où elle vise des sociétés liées, car [TRADUCTION] « [s]ociétés mères et filiales à 100 p. 100 agissent toujours de concert » (m.i., par. 95). Pro-Sys rétorque que [TRADUCTION] « [l]a prétention est infondée en droit » (mémoire en réponse des appelants, par. 55). Les deux invoquent entre autres le par. 19 de l'arrêt *Smith c. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (C.A.), autorisation d'appel refusée, [2006] 1 R.C.S. xii, où la Cour d'appel dit [TRADUCTION] « qu'il peut y avoir complot entre une société mère et une filiale ». À mon sens, cet énoncé paraît permettre que le complot visant principalement à causer un préjudice puisse constituer une cause d'action même lorsque le complot serait le fait de sociétés liées. Là encore, il ne convient pas de statuer définitivement sur ce point au stade de la demande de radiation. Dans les circonstances, je ne peux conclure que l'allégation de complot entre une société mère et sa filiale visant principalement à causer un préjudice doit manifestement être radiée à ce stade de l'instance.

(ii) Unlawful Means Conspiracy and Intentional Interference With Economic Interests

[80] The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the plaintiff is likely to result, and that the injury to the plaintiff does in fact occur (*Cement LaFarge*, at pp. 471-72).

[81] The tort of intentional interference with economic interests aims to provide a remedy to victims of intentional commercial wrongdoing (*Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, at para. 98; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1). The three essential elements of this tort are (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result (see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 336).

[82] Microsoft argues that the claims for unlawful means conspiracy and intentional interference with economic interests should be struck because their common element requiring the use of "unlawful means" cannot be established.

[83] These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. Suffice it to say that at this point it is not plain and obvious that there is no cause of action in unlawful means conspiracy or in intentional interference with economic interests. I would therefore not strike these claims. Depending on the decision of this Court in *Bram*, it will

(ii) Complot prévoyant le recours à des moyens illégaux et atteinte intentionnelle aux intérêts financiers

[80] Pour le deuxième type de complot — celui « qui prévoit le recours à des moyens illégaux » —, point n'est besoin d'objet principal; il faut seulement que le comportement illégal soit dirigé contre le demandeur, que le défendeur doive savoir que le demandeur en subira vraisemblablement un préjudice et que le demandeur subisse effectivement un préjudice (*Ciments LaFarge*, p. 471-472).

[81] La raison d'être du délit civil d'atteinte intentionnelle aux intérêts financiers est l'indemnisation des victimes de pratiques commerciales délibérément préjudiciables (*Correia c. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, par. 98; *OBG Ltd. c. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1). Les trois éléments essentiels de ce délit civil sont (1) l'intention du défendeur de porter atteinte aux intérêts financiers du demandeur, (2) le recours à des moyens illégaux et (3) le préjudice consécutif subi par le demandeur (voir P. H. Osborne, *The Law of Torts* (4e éd. 2011), p. 336).

[82] Microsoft fait valoir que les allégations de complot prévoyant le recours à des moyens illégaux et d'atteinte intentionnelle aux intérêts financiers doivent être radiées vu l'impossibilité d'établir l'élément qui leur est commun, soit le recours à des « moyens illégaux ».

[83] Ces causes d'action alléguées doivent être examinées sommairement car, dans le dossier *Bram Enterprises Ltd. c. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 R.N.-B. (2e) 215, autorisation d'appel accordée, [2012] 3 R.C.S. v, actuellement en délibéré, notre Cour ne s'est pas encore prononcée sur l'approche qui s'impose à l'égard de cet élément commun aux deux délits civils. Il suffit de constater que, pour l'heure, l'inexistence d'une cause d'action fondée sur le complot prévoyant le recours à des moyens illégaux ou sur l'atteinte intentionnelle aux intérêts financiers n'est pas

be open to Microsoft to raise the matter in the B.C.S.C. should it consider it advisable to do so.

(c) *Restitution*

[84] Pro-Sys makes restitutionary claims alleging causes of action in unjust enrichment, constructive trust and waiver of tort.

(i) Unjust Enrichment

[85] The well-known elements required to establish an unjust enrichment are (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason (such as a contract) for the enrichment (see *Alberta Elders*, at para. 82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455; *Pettkus v. Becker*, [1980] 2 S.C.R. 834). Pro-Sys says that Microsoft was unjustly enriched by the overcharge to its direct purchasers that was passed through the chain of distribution to the class members.

[86] Microsoft argues that any enrichment it received came from the direct purchasers, and not from the class members, and that this lack of a direct connection between it and the class members forecloses the claim of unjust enrichment. Additionally, it says that the contracts between Microsoft and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers (the existence of which are undisputed) constitute a juristic reason for the enrichment.

[87] In support of its first argument, Microsoft cites *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762. In *Peel*, McLachlin J. (as she then was) held, at p. 797, that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred

manifeste. Je suis donc d'avis de ne pas radier les allégations. Selon l'issue du pourvoi dans *Bram*, Microsoft pourra demander à la Cour suprême de la Colombie-Britannique de statuer sur ce point si elle le juge opportun.

c) *Restitution*

[84] Pro-Sys demande restitution sur le fondement de l'enrichissement sans cause, de la fiducie par interprétation et de la renonciation au recours délictuel.

(i) Enrichissement sans cause

[85] Les éléments qui doivent être réunis pour qu'il y ait enrichissement sans cause sont bien connus : (1) l'enrichissement du défendeur, (2) l'appauvrissement corrélatif du demandeur et (3) l'absence d'une cause juridique de cet enrichissement (p. ex., un contrat) (voir *Alberta Elders*, par. 82; *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 30; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 455; *Pettkus c. Becker*, [1980] 2 R.C.S. 834). Selon Pro-Sys, Microsoft s'est injustement enrichie par la majoration du prix exigé de ses acheteurs directs, lesquels ont transféré cette majoration aux membres du groupe situés en aval dans la chaîne de distribution.

[86] Microsoft prétend que l'enrichissement, s'il en est, provient des acheteurs directs, et non des membres du groupe, et que son absence de lien direct avec ces derniers scelle le sort de l'allégation d'enrichissement sans cause. Elle ajoute que les contrats qu'elle a conclus avec les acheteurs directs et ceux intervenus entre les acheteurs directs et les acheteurs indirects (dont l'existence n'est pas contestée) constituent la cause juridique de l'enrichissement.

[87] À l'appui de sa première prétention, Microsoft invoque l'arrêt *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, où la juge McLachlin (maintenant Juge en chef) conclut à la p. 797 que « [l]es affaires dans lesquelles l'enrichissement sans cause a été établi concernent

directly and specifically on the defendant". A claim in unjust enrichment must be based on "more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice — once from the person who is the immediate beneficiary of the payment or benefit . . . , and again from the person who reaped an incidental benefit" (*Peel*, at p. 797). The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.

[88] With regard to Microsoft's juristic reason justification, Pro-Sys pleads that these contracts are "illegal and void" because they constitute a restraint of trade at common law, they violate U.S. antitrust law, they are prohibited by Microsoft's own corporate policies and they violate Part VI of the *Competition Act*. It submits that the contracts cannot therefore constitute a juristic reason for the enrichment. The question of whether the contracts are illegal and void should not be resolved at this stage of the proceedings. These are questions that must be left to the trial judge.

[89] I am thus unable to find that it is plain and obvious that the claim in unjust enrichment cannot succeed.

(ii) Constructive Trust

[90] As a remedy for the alleged unjust enrichment, Pro-Sys submits that an amount equal to the

généralement des avantages conférés directement et expressément au défendeur ». Pour fonder l'allégation d'enrichissement sans cause, l'avantage conféré ne doit pas revêtir qu'un « caractère purement incident. Un avantage secondaire et accessoire ne suffit pas. En effet, permettre qu'il y ait recouvrement à l'égard d'avantages accessoires et incidents reviendrait à admettre la possibilité d'un double recouvrement par le demandeur — d'abord, de la personne qui bénéficie immédiatement du paiement ou de l'avantage [. . .] et ensuite, de la personne qui en a tiré un avantage incident » (*Peel*, p. 797). Les mots employés dans cet arrêt paraissent écarter en eux-mêmes la possibilité d'un lien indirect entre le demandeur et le défendeur, mais la question n'est pas résolue pour autant. Premièrement, il n'est pas évident que l'avantage obtenu par Microsoft revêt un caractère « purement incident » ou qu'il est « accessoire ». Deuxièmement, Pro-Sys invoque l'arrêt *Alberta Elders*, selon lequel il peut y avoir enrichissement sans cause lorsque l'avantage conféré est indirect et qu'il a été transféré par un tiers. À ce stade, je ne peux conclure qu'il est manifeste que l'enrichissement sans cause ne sera établi que si le lien entre le demandeur et le défendeur est direct.

[88] En ce qui concerne la prétendue cause juridique de l'enrichissement de Microsoft, Pro-Sys fait valoir que les contrats en cause sont [TRADUCTION] « illégaux et nuls » en ce qu'ils portent atteinte à la liberté du commerce en common law, ils enfreignent les dispositions américaines antitrust, ils vont à l'encontre des politiques d'entreprise de Microsoft et ils contreviennent à la partie VI de la *Loi sur la concurrence*. Elle soutient qu'il ne s'agit donc pas d'une cause juridique de l'enrichissement. Il n'y a pas lieu, à ce stade de l'instance, de statuer sur la légalité et la validité des contrats. Il appartiendra au juge du procès de le faire.

[89] Je ne saurais donc conclure qu'il ne peut manifestement pas être fait droit à l'allégation d'enrichissement sans cause.

(ii) Fiducie par interprétation

[90] Pro-Sys soutient qu'en guise de réparation de l'enrichissement sans cause allégué, Microsoft

overcharge from the sales of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members. In other words, Pro-Sys is asking that Microsoft be constituted a constructive trustee in favour of Pro-Sys.

devrait détenir en fiducie pour le compte des membres du groupe une somme égale au montant de la majoration du prix de ses systèmes d'exploitation et de ses logiciels d'application vendus en Colombie-Britannique. En d'autres termes, elle demande que Microsoft soit constituée fiduciaire par interprétation à son bénéfice.

[91] *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, is the relevant controlling authority on constructive trusts. In *Kerr*, Justice Cromwell explains that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property:

> . . . the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). [para. 50]

[92] In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient" (*Kerr*, at para. 50). As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck.

[91] L'arrêt *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269, est décisif en matière de fiducies par interprétation. Le juge Cromwell y explique que pour faire la preuve d'une fiducie par interprétation, le demandeur doit pouvoir établir un lien ou un rapport de causalité entre sa contribution et l'acquisition du bien en cause :

> . . . la fiducie [par interprétation] est un outil général, souple et juste qui permet de déterminer le droit de propriété véritable (*Pettkus*, p. 843-844 et 847-848). Si le demandeur peut établir un lien ou un rapport de causalité entre ses contributions et l'acquisition, la conservation, l'entretien ou l'amélioration du bien en cause, une part proportionnelle à l'enrichissement sans cause peut faire l'objet d'une fiducie [par interprétation] en sa faveur (*Pettkus*, p. 852-853; *Sorochan*, p. 50). [par. 50]

[92] Nul bien n'est en cause en l'espèce; Pro-Sys réclame seulement une réparation pécuniaire. La fiducie par interprétation sert à « déterminer le droit de propriété véritable » lorsqu'« une réparation pécuniaire est inappropriée ou insuffisante » (*Kerr*, par. 50). Étant donné que Pro-Sys n'indique pas en quoi une réparation pécuniaire serait inappropriée ou insuffisante, et qu'elle n'établit pas de lien avec un bien en particulier, l'allégation ne satisfait pas aux conditions d'imposition d'une fiducie par interprétation. Au vu des actes de procédure, il est manifeste qu'on ne saurait faire droit à l'allégation de Pro-Sys selon laquelle Microsoft devrait conserver en fiducie pour le compte des membres du groupe une somme égale au montant de la majoration du prix de ses systèmes d'exploitation et de ses logiciels d'application vendus en Colombie-Britannique. Les éléments des actes de procédure qui concernent l'existence d'une fiducie par interprétation doivent être radiés.

(iii) Waiver of Tort

[93] As an alternative to the causes of action in tort, Pro-Sys waives the tort and seeks to recover the unjust enrichment accruing to Microsoft. Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, "thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct" (Maddaugh and McCamus (2013), at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), at p. 18). Waiver of tort is based on the theory that "in certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages" (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).

[94] Microsoft advances two arguments as to why this claim should be struck. First, it states that Pro-Sys has pleaded waiver of tort as a remedy and not a cause of action, and therefore proof of loss is an essential element. Second, if indeed waiver of tort is pleaded as a cause of action, the underlying tort must therefore be established, including the element of loss. In my view, neither argument provides a sufficient basis upon which to find that a claim in waiver of tort would plainly and obviously be unsuccessful.

[95] In *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (S.C.J. (Div. Ct.)), Epstein J. (as she then was) performed an extensive review

(iii) Renonciation au recours délictuel

[93] Subsidiairement à une cause d'action en responsabilité délictuelle, Pro-Sys invoque la renonciation au recours délictuel et demande à recouvrer une somme égale à l'enrichissement sans cause obtenu par Microsoft. Il y a renonciation au recours délictuel lorsque le demandeur renonce à son droit d'intenter une action en responsabilité délictuelle et choisit plutôt de se pourvoir en restitution et [TRADUCTION] « de recouvrer ainsi le bénéfice que le défendeur a tiré de la conduite délictueuse » (Maddaugh et McCamus (2013), p. 24-1). Les causes d'action en responsabilité délictuelle et en restitution ne s'excluent pas mutuellement, mais offrent plutôt des mesures de réparation qui peuvent être réclamées simultanément (*United Australia, Ltd. c. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), p. 18). La renonciation au recours délictuel a pour prémisse que, [TRADUCTION] « dans certains cas de délit civil, le demandeur peut avoir avantage à recouvrer l'enrichissement sans cause obtenu par le défendeur plutôt qu'à obtenir des dommages-intérêts dans le cadre d'une action en responsabilité délictuelle » (Maddaugh et McCamus, p. 24-1 et 24-2). D'aucuns considèrent que l'action fondée sur la renonciation au recours délictuel confère un avantage au demandeur en ce qu'elle peut le dispenser de prouver la perte au regard des règles de la responsabilité délictuelle ou même de quelque manière (Maddaugh et McCamus, p. 24-4).

[94] Microsoft fait valoir deux motifs de radier cette allégation. Premièrement, Pro-Sys invoque la renonciation au recours délictuel dans une optique de réparation, et non à titre de cause d'action, de sorte que la preuve de la perte est essentielle. Deuxièmement, si la renonciation au recours délictuel est effectivement invoquée comme cause d'action, il faut donc établir le délit civil sous-jacent, y compris la perte. À mon avis, aucun des deux motifs avancés ne permet de conclure que la demande fondée sur la renonciation au recours délictuel ne peut manifestement pas être accueillie.

[95] Dans *Serhan (Trustee of) c. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (C.S.J. (C. div.)), la juge Epstein (maintenant juge de la Cour d'appel

of the doctrine of waiver of tort. Her analysis found numerous authorities accepting the viability of waiver of tort as its own cause of action intended to disgorge a defendant's unjust enrichment gained through wrongdoing, as opposed to merely a remedy for unjust enrichment. These authorities differed, however, as to the question of whether the underlying tort needed to be established in order to sustain the action in waiver of tort.

[96] The U.S. and U.K. jurisprudence as well as the academic texts on the subject have largely rejected the requirement that the underlying tort must be established in order for a claim in waiver of tort to succeed (see *Serhan*, at paras. 51-68, citing Maddaugh and McCamus (2005), at p. 24-20; J. Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (1991); D. Friedmann, "Restitution for Wrongs: The Basis of Liability", in W. R. Cornish, et al., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998), 133; *National Trust Co. v. Gleason*, 77 N.Y. 400 (1879); *Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.*, 268 F. 575 (S.D.N.Y. 1920); *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374 (P.C.); *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, [1983] A.C. 366 (H.L.)). Another line of cases would find a cause of action in waiver of tort to be unavailable unless it can be established that the defendant has committed the underlying tort giving rise to the cause of action (see *United Australia*, at p. 18; *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (Ont. S.C.J.), at para. 14; *Reid v. Ford Motor Co.*, 2006 BCSC 712 (CanLII)). At least one of these cases (*Reid*) suggests that a reluctance to eliminate the requirement of proving loss as an element of the cause of action is part of the reason for requiring the establishment of the underlying tort (para. 17).

de l'Ontario) examine minutieusement la notion de renonciation au recours délictuel. Elle constate que de nombreux auteurs reconnaissent sa validité comme cause d'action pour la restitution par le défendeur de l'enrichissement sans cause obtenu par des moyens répréhensibles, et non seulement pour la réparation de cet enrichissement sans cause. Ces auteurs diffèrent cependant d'avis quant à savoir si le délit civil sous-jacent doit être prouvé ou non pour les besoins de l'action fondée sur la renonciation au recours délictuel.

[96] Les tribunaux américains et britanniques, ainsi que les auteurs de doctrine en la matière, écartent pour la plupart l'obligation du demandeur d'établir le délit civil sous-jacent pour qu'il puisse avoir gain de cause sur le fondement de la renonciation au recours délictuel (voir *Serhan*, par. 51-68, citant Maddaugh et McCamus (2005), p. 24-20; J. Beatson, *The Use and Abuse of Unjust Enrichment : Essays on the Law of Restitution* (1991); D. Friedmann, « Restitution for Wrongs : The Basis of Liability », dans W. R. Cornish et autres, dir., *Restitution : Past, Present and Future : Essays in Honour of Gareth Jones* (1998), 133; *National Trust Co. c. Gleason*, 77 N.Y. 400 (1879); *Federal Sugar Refining Co. c. United States Sugar Equalization Board, Inc.*, 268 F. 575 (S.D.N.Y. 1920); *Mahesan c. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374 (P.C.); *Universe Tankships Inc. of Monrovia c. International Transport Workers Federation*, [1983] A.C. 366 (H.L.)). Selon un autre courant jurisprudentiel, il ne peut y avoir de cause d'action fondée sur la renonciation au recours délictuel que s'il est établi que le défendeur a commis le délit civil y donnant ouverture (voir *United Australia*, p. 18; *Zidaric c. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (C.S.J. Ont.), par. 14; *Reid c. Ford Motor Co.*, 2006 BCSC 712 (CanLII)). Dans au moins une de ces affaires (*Reid*), le tribunal laisse entendre que la réticence à écarter l'obligation de prouver la perte comme élément de la cause d'action explique en partie qu'il faille prouver le délit civil sous-jacent (par. 17).

[97] Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, it cannot be said that an action based on waiver of tort is sure to fail" and that the questions "about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involv[e] matters of policy that should not be determined at the pleadings stage" (*Serhan*, at para. 68). I agree. In my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.

[97] La juge Epstein conclut au final que, vu l'état contradictoire du droit, [TRADUCTION] « [o]n ne saurait affirmer, de toute évidence, que le demandeur qui fonde son action sur la renonciation au recours délictuel sera assurément débouté »; elle ajoute que le débat « sur les conséquences de la reconnaissance de la renonciation au recours délictuel comme cause d'action indépendante dans des circonstances comme celles de l'espèce fait intervenir des principes sur lesquels il ne convient pas de prononcer à l'étape de l'examen des allégations » (*Serhan*, par. 68). Je suis d'accord. À mon avis, il ne convient pas de statuer plus avant, dans le cadre du pourvoi, sur le droit applicable en matière de renonciation au recours délictuel, ni sur le contexte particulier dans lequel on peut invoquer celle-ci. Je ne peux affirmer que le demandeur qui fonde son action sur la renonciation au recours délictuel sera manifestement débouté.

(3) The Remaining Certification Requirements

(3) Les autres conditions présidant à la certification

[98] The causes of action under s. 36 of the *Competition Act*, in tort and in restitution (except for constructive trust) have met the first certification requirement that the pleadings disclose a cause of action. I now turn to Microsoft's argument that the claims should nevertheless be rejected because they do not meet two of the remaining certification requirements: that the claims of the class members raise common issues and that a class action is the preferable procedure in this case.

[98] Les causes d'action que confère l'art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution (sauf sur le fondement de la fiducie par interprétation) remplissent la première condition de certification voulant que les actes de procédure révèlent une cause d'action. Je me penche maintenant sur la prétention de Microsoft selon laquelle les demandes des membres du groupe doivent néanmoins être rejetées parce qu'elles ne satisfont pas à deux des autres conditions, à savoir qu'une question commune soit soulevée et que le recours collectif constitue la meilleure procédure pour régler cette question.

(a) *Standard of Proof*

a) *Norme de preuve*

[99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a

[99] Le point de départ pour déterminer la norme de preuve applicable aux autres conditions de certification réside dans l'arrêt de principe *Hollick* où la juge en chef McLachlin énonce succinctement cette norme : « . . . le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions énumérées [dans] la Loi, autre que l'exigence que les actes de procédure révèlent une cause d'action » (par. 25 (je souligne)). La Juge

cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).

[100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).

[101] Microsoft, while accepting the "some basis in fact" standard, argues that "in order for the Plaintiffs to meet the standard of proof, the evidence must establish that the proposed class action raises common issues and is the preferable procedure *on a balance of probabilities*" (R.F., at para. 41 (emphasis in original)). Microsoft relies on the academic writings of Justice Cullity of the Ontario Superior Court of Justice. Cullity J. expressed the view that "[t]o the extent that some basis in fact reflects a concern that certification motions are procedural and should not be concerned with the merits of the claims asserted, there seems no justification for applying the lesser standard to essential preconditions for certification that will not be within the jurisdiction of the court at trial" ("Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 422). In other words, Cullity J. suggests that because certification requirements are procedural, they will not be revisited at a trial of the common issues. As such, there is no reason to assess them on a

en chef signale que « [l]a Loi écarte carrément un examen au fond à l'étape de la certification » (par. 16). Cette étape intéresse plutôt la forme et le caractère approprié de la poursuite par voie de recours collectif (voir *Hollick*, par. 16; *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (« *Infineon* »), par. 65; *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), par. 50).

[100] Suivant la norme de preuve issue de l'arrêt *Hollick*, la question n'est pas celle de savoir si la demande a un certain fondement factuel, mais plutôt si un certain fondement factuel établit chacune des conditions de certification. La juge en chef McLachlin signale cependant que la preuve importe aux fins de la certification. Elle fait remarquer que « le rapport [. . .] du comité consultatif du procureur général [sur la réforme du recours collectif] envisageait manifestement que le représentant du groupe serait tenu d'étayer sa demande de certification » (par. 25).

[101] Bien qu'elle souscrive à la norme fondée sur l'existence d'« un certain fondement factuel », Microsoft fait valoir que [TRADUCTION] « pour respecter la norme de preuve, les demandeurs doivent établir *selon la prépondérance des probabilités* que le recours collectif proposé soulève une question commune et qu'il constitue la meilleure procédure pour régler cette question » (m.i., par. 41 (en italique dans l'original)). Elle invoque à l'appui les propos du juge Cullity, de la Cour supérieure de justice de l'Ontario, selon lesquels, [TRADUCTION] « [d]ans la mesure où l'exigence d'un certain fondement factuel est liée au fait que la demande de certification revêt un caractère procédural et que son examen ne doit pas porter sur le fond des allégations, rien ne paraît justifier l'application d'une norme moins stricte aux conditions essentielles qui président à la certification et qui échapperont à la compétence du tribunal lors du procès » (« Certification in Class Proceedings — The Curious Requirement of "Some Basis in Fact" » (2011), 51 *Rev. can. dr. comm.* 407, p. 422). En d'autres termes, le juge Cullity indique qu'en

standard lower than the traditional civil standard of "balance of probabilities". Microsoft further submits that this Court should endorse the American approach of making factual determinations at the certification stage on a preponderance of the evidence and should require certification judges to weigh the evidence so as to resolve all factual or legal disputes at certification, even if those disputes overlap with the merits (see R.F., at para. 42, citing *In re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008), at p. 307, and R.F., at para. 43).

raison de leur nature procédurale, les conditions de certification ne feront pas l'objet d'un nouvel examen lors du procès. Il n'y a donc aucune raison de statuer sur le respect de ces conditions selon une norme moins stricte que celle de la « prépondérance des probabilités » généralement appliquée en matière civile. Microsoft ajoute que notre Cour devrait, à l'instar des tribunaux américains, tirer des conclusions de fait à l'étape de la certification selon la prépondérance de la preuve et exiger du juge saisi de la demande de certification qu'il évalue la preuve de façon à régler les différends d'ordre factuel ou juridique à cette étape, même lorsque ces différends touchent le fond du litige (voir m.i., par. 42, citant *In re : Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008), p. 307, et m.i., par. 43).

[102] I cannot agree with Microsoft's submissions on this issue. Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

[102] Je ne saurais souscrire aux observations de Microsoft sur ce point. Si la juge en chef McLachlin avait voulu que le respect des conditions de certification soit assujetti à la norme de la « prépondérance des probabilités », elle l'aurait précisé. Or, la règle établie est claire. Les tribunaux n'ont jamais considéré que l'arrêt *Hollick* exigeait une preuve selon la prépondérance des probabilités. En outre, en s'appuyant sur le droit américain, Microsoft adopte une approche nouvelle et rompt avec la norme de l'arrêt *Hollick*. La norme fondée sur l'existence d'« un certain fondement factuel » n'exige pas que le tribunal se prononce sur les éléments de fait et les éléments de preuve contradictoires à l'étape de la certification. Elle tient plutôt compte du fait que, à cette étape, [TRADUCTION] « le tribunal n'est pas en mesure de statuer sur les éléments contradictoires de la preuve non plus que de déterminer sa valeur probante à l'issue d'une analyse nuancée » (*Cloud*, par. 50; *Irving Paper Ltd. c. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (C.S.J.), par. 119, citant *Hague c. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (C.S.J. Ont.)). La procédure de certification ne comporte pas d'examen au fond de la demande et elle ne vise pas à déterminer le bien-fondé des allégations; [TRADUCTION] « elle intéresse plutôt la forme que revêt l'action pour déterminer s'il convient de procéder par recours collectif » (*Infineon*, par. 65).

[103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[105] Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

(b) *Do the Claims of the Class Members Raise Common Issues?*

[106] The commonality requirement has been described as "[t]he central notion of a class proceeding" (M. A. Eizenga et al., *Class Actions Law*

[103] De toute manière, plus d'une décennie s'est écoulée depuis *Hollick* et il convient de confirmer l'importance que revêt la procédure de certification comme mécanisme de filtrage efficace. La norme de preuve appliquée au stade de la certification n'emporte pas de [TRADUCTION] « conclusion sur le bien-fondé de l'instance » (*CPA*, par. 5(7)); elle ne donne pas lieu non plus à un examen du caractère suffisant de la preuve qui soit superficiel au point d'être strictement symbolique.

[104] Quoi qu'il en soit, j'estime en toute déférence qu'il serait peu utile de tenter de définir « un certain fondement factuel » dans l'abstrait. L'issue d'une affaire dépend des faits qui lui sont propres. Suffisamment de faits doivent permettre de convaincre le juge saisi des demandes que les conditions de certification sont réunies de telle sorte que l'instance puisse suivre son cours sous forme de recours collectif sans s'écrouler à l'étape de l'examen au fond à cause du non-respect des conditions prévues au par. 4(1) de la *CPA*.

[105] Enfin, je fais observer que les tribunaux canadiens ont refusé d'adopter l'approche américaine et de se livrer à une analyse rigoureuse sur le fond à l'étape de la certification. En conséquence, la certification du recours collectif ne garantit aucunement que les demandeurs auront gain de cause lors de l'examen des questions communes au procès. J'estime qu'il importe de souligner que l'approche canadienne à l'étape de la certification ne permet pas d'apprécier toutes les difficultés et tous les défis que le demandeur devra surmonter pour prouver ses allégations au procès. Une fois le recours certifié, de nouvelles données peuvent apparaître et remettre en question le respect des conditions du par. 4(1). C'est la raison pour laquelle la *CPA* consacre le pouvoir du tribunal de révoquer la certification du recours collectif à tout moment où il est établi que les conditions de certification ne sont plus réunies (par. 10(1)).

b) *Les demandes des membres du groupe soulèvent-elles des questions communes?*

[106] L'exigence d'une question commune a été qualifiée de [TRADUCTION] « [f]ondamentale au recours collectif » (M. A. Eizenga et autres, *Class*

and Practice (loose-leaf), at p. 3-34.6). It is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings" (*ibid.*).

[107] Section 4(1)(c) of the *CPA* states that the court must certify an action as a class proceeding if, among other requirements, "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members". Section 1 of the *CPA* defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

(1) The commonality question should be approached purposively.

(2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify

Actions Law and Practice (feuilles mobiles), p. 3-34.6). Elle repose sur l'idée que « les personnes qui soulèvent une question de droit "commune" doivent pouvoir obtenir le règlement de cette question commune dans le cadre d'une seule instance plutôt que d'instances multiples et répétitives confinant à l'inefficacité » (*ibid.*).

[107] L'alinéa 4(1)(c) de la *CPA* dispose que le tribunal certifie qu'il s'agit d'un recours collectif lorsque, notamment, [TRADUCTION] « les demandes des membres du groupe soulèvent une question commune, que celle-ci l'emporte ou non sur les questions qui touchent uniquement les membres individuels ». Selon l'article 1 de la *CPA*, « question commune » s'entend, selon le cas, « (a) d'une question de fait commune, mais pas nécessairement identique ou (b) d'une question de droit commune, mais pas nécessairement identique, qui découle de faits qui sont communs, mais pas nécessairement identiques ».

[108] Dans l'arrêt *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, notre Cour aborde la notion de communauté et conclut que « [l]a question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition dans l'appréciation des faits ou l'analyse juridique » (par. 39). J'énumère les autres paramètres établis par la juge en chef McLachlin et qui figurent aux par. 39-40 de l'arrêt :

(1) Il faut aborder le sujet de la communauté en fonction de l'objet.

(2) Une question n'est « commune » que lorsque son règlement est nécessaire au règlement des demandes de chacun des membres du groupe.

(3) Il n'est pas essentiel que les membres du groupe soient tous dans la même situation par rapport à la partie adverse.

(4) Il n'est pas nécessaire que les questions communes l'emportent sur les questions non communes. Les demandes des membres du groupe doivent toutefois partager

a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[109] Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.

[110] The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[111] Myers J. concluded that the claims raised common issues. I agree that their resolution is indeed necessary to the resolution of the claims of each class member. Their resolution would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis. Those findings are entitled to deference from an appellate court.

un élément commun important afin de justifier le recours collectif. Le tribunal évalue l'importance des questions communes par rapport aux questions individuelles.

(5) Le succès d'un membre du groupe emporte nécessairement celui de tous. Tous les membres du groupe doivent profiter du dénouement favorable de l'action, mais pas nécessairement dans la même proportion.

[109] Microsoft fait valoir que les différences entre les membres du groupe proposé sont trop importantes et ne permettent pas de satisfaire à l'exigence d'une question commune. Selon elle, les demandeurs allèguent avoir subi un préjudice à l'occasion de comportements fautifs distincts, que ces actes ont eu lieu sur une période de 24 ans, qu'ils ont visé 19 produits différents, que diverses personnes ont pris part au complot et que d'innombrables licences sont en cause. Elle ajoute que le transfert de la majoration aux membres du groupe en aval dans la chaîne de distribution rend impossible la preuve de la perte de chacun des membres du groupe aux fins d'établir l'existence d'une question commune.

[110] La multitude de variables que font intervenir les actions d'acheteurs indirects pourrait fort bien présenter un défi de taille à l'étape de l'examen au fond. Toutefois, plusieurs questions communes paraissent discernables. Établir la communauté des questions n'exige pas la preuve que les actes allégués ont effectivement eu lieu. À ce stade, il faut plutôt établir que les questions soulevées sont communes à tous les membres du groupe.

[111] Le juge Myers conclut que les demandes soulèvent des questions communes. Je conviens que leur règlement est en effet nécessaire à celui de la réclamation de chacun des membres du groupe. Il permettrait de faire progresser l'examen des allégations du groupe dans son ensemble et d'éviter la répétition dans l'analyse du droit et des faits. Une cour d'appel doit faire preuve de déférence à l'égard de ces conclusions.

[112] The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54).

[112] À mon sens, les différences invoquées par Microsoft ne permettent pas d'écarter la conclusion qu'il y a questions communes. L'arrêt *Dutton* confirme que même des différences assez importantes entre les membres du groupe n'empêchent pas de conclure à l'existence de questions communes. En tout état de cause, comme le fait remarquer la juge en chef McLachlin, « [s]i des différences importantes surviennent, le tribunal réglera la question le moment venu » (*Dutton*, par. 54).

[113] In addition to the common issues relating to scope and existence of the causes of action pleaded, the remaining common issues certified by Myers J. relate to the alleged loss suffered by the class members and as to whether damages can be calculated on an aggregate basis. The loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established. The standard upon which that evidence should be assessed is contested and I turn to it first below. A question was also raised regarding whether the aggregate damages provision can be used to establish liability. I also address this below.

[113] Outre celles liées à l'existence et à la portée des causes d'action invoquées, les autres questions communes certifiées par le juge Myers portent sur la perte qu'auraient subie les membres du groupe et sur la possibilité d'établir les dommages-intérêts de manière globale. Démontrer le caractère commun des questions liées à la perte — la perte subie par les membres peut-elle être circonscrite à l'échelle du groupe? — commande le recours à une preuve d'expert. La norme de preuve applicable à cette preuve est contestée, et je l'examine ci-après. On soulève par ailleurs la question de savoir si les dispositions sur l'octroi de dommages-intérêts globaux peuvent servir à fonder la responsabilité. J'examine ce point ensuite.

(i) Expert Evidence in Indirect Purchaser Class Actions

(i) Preuve d'expert dans le cadre d'actions d'acheteurs indirects

[114] One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.

[114] L'une des difficultés que pose le recours d'acheteurs indirects a trait à l'appréciation du caractère commun des questions liées au préjudice ou à la perte. Pour que ces questions puissent satisfaire à la norme d'« un certain fondement factuel », il doit être assez certain qu'elles peuvent faire l'objet d'un règlement commun. Dans le cadre d'actions intentées par des acheteurs indirects, les demandeurs tentent généralement de satisfaire à cette exigence en offrant une preuve d'expert qui revêt la forme de modèles et de méthodes économiques.

[115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31).

[115] La méthode proposée par l'expert vise à établir que la majoration a été transférée aux acheteurs indirects, ce qui rend la question commune au groupe dans son ensemble (voir *Chadha*,

The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

[116] The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis. The B.C.C.A. in *Infineon* called for the plaintiff to show "only a credible or plausible methodology" and held that "[i]t was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases" (para. 68). This was the standard adopted by Myers J. in the present case. Under this standard, he found the plaintiffs' methodologies to be adequate to satisfy the commonality requirement.

[117] Microsoft submits that the "credible or plausible methodology" standard adopted by Myers J. was too permissive and allowed for a claim to be founded on insufficient evidence. It argues that under s. 5(4) of the *CPA*, the parties are required to file affidavits containing all material facts upon which they intend to rely, and as such Myers J. was under an obligation to weigh

par. 31). À l'étape de la certification, la méthode n'a pas à déterminer le montant des dommages-intérêts, mais doit plutôt — et c'est là l'élément crucial — être susceptible de prouver « les conséquences communes », comme le conclut un tribunal américain dans une affaire antitrust, *In Re : Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). Les demandeurs doivent démontrer qu'une [TRADUCTION] « preuve permettra d'établir, lors du procès, les conséquences antitrust qui sont communes à tous les membres du groupe » (*ibid.*, p. 155). À l'étape de la certification, point n'est besoin que la méthode établisse la perte réellement subie par le groupe dans la mesure où le demandeur démontre qu'une méthode permet de le faire. Dans le cadre d'actions d'acheteurs indirects, la méthode doit donc pouvoir établir que la majoration a été transférée à l'acheteur indirect situé en aval dans la chaîne de distribution.

[116] La question la plus vivement débattue au chapitre de l'utilisation de la preuve d'expert est celle de savoir à quel point la preuve doit être concluante à l'étape de la certification pour convaincre le tribunal qu'une méthode permet d'établir les conséquences communes à l'échelle du groupe. Dans l'affaire *Infineon*, la C.A.C.-B. a invité la demanderesse à ne présenter [TRADUCTION] « qu'une méthode valable ou acceptable » pour ensuite conclure qu'« [i]l est bien établi que l'analyse de régression statistique offre en principe une estimation raisonnable du bénéfice ou du préjudice global et de l'étendue du transfert de la perte lorsqu'il y a eu fixation des prix » (par. 68). C'est le critère appliqué par le juge Myers en l'espèce, de sorte qu'il conclut que les méthodes employées par les parties demanderesses permettaient de satisfaire à l'exigence d'une question commune.

[117] Microsoft soutient que le critère de la « méthode valable ou acceptable » adopté par le juge Myers est trop laxiste et ouvre la voie à des demandes étayées par une preuve insuffisante. Elle fait valoir que le par. 5(4) de la *CPA* oblige les parties à déposer des affidavits qui énoncent tous les faits importants qu'elles entendent invoquer et que le juge Myers avait donc l'obligation de mettre

the evidence of both parties where a conflict arises. Microsoft alleges that despite this requirement, Myers J. failed to weigh Pro-Sys's expert evidence against Microsoft's expert evidence, merely concluding that Pro-Sys's expert evidence was "not implausible" and that assessing competing evidence was "not something that can and should be done in a certification application" (R.F., at para. 43, citing reasons of Myers J., at para. 144). Microsoft argues that this approach was in error and is inconsistent with the standard required at certification. Once again relying on U.S. case law, Microsoft urges this Court to weigh conflicting expert testimony at certification and to perform this review in a "robust" and "rigorous" manner (R.F., at paras. 45-48, citing *Hydrogen Peroxide*, at p. 323, and *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), at p. 2551).

en balance les éléments de preuve des deux parties en cas de conflit. Elle allègue que, au mépris de cette exigence, le juge Myers ne soupèse pas la preuve d'expert de Pro-Sys au regard de la sienne, mais conclut simplement que la preuve d'expert de Pro-Sys n'est [TRADUCTION] « pas inacceptable » et que l'appréciation des éléments de preuve contradictoires « ne peut et ne doit pas intervenir à l'étape de la certification » (m.i., par. 43, citant le par. 144 des motifs du juge Myers). Or, selon Microsoft, cette approche est erronée et incompatible avec la norme applicable à cette étape. Invoquant encore une fois la jurisprudence américaine, elle exhorte notre Cour à apprécier les témoignages d'expert contradictoires à l'étape de la certification, et ce, de manière [TRADUCTION] « stricte » et « rigoureuse » (m.i., par. 45-48, citant *Hydrogen Peroxide*, p. 323, et *Wal-Mart Stores, Inc. c. Dukes*, 131 S.Ct. 2541 (2011), p. 2551).

[118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[118] À mon avis, la méthode d'expert doit être suffisamment valable ou acceptable pour établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune. Elle doit donc offrir une possibilité réaliste d'établir la perte à l'échelle du groupe, de sorte que, si la majoration est établie à l'issue de l'examen des questions communes au procès, un moyen permette de démontrer qu'elle est commune aux membres du groupe (c.-à-d. que le transfert a eu lieu). Or, il ne peut s'agir d'une méthode purement théorique ou hypothétique; elle doit reposer sur les faits de l'affaire. L'existence des données auxquelles la méthode est censée s'appliquer doit être étayée par quelque preuve.

[119] To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage. In Canada, unlike the U.S., precertification discovery does not occur as a matter of right. Although document production may be ordered at the discretion of the applications judge, Microsoft objected and Myers J. acceded to Microsoft's position and refused to order it in this case (2007 BCSC 1663, 76 B.C.L.R. (4th) 171). Microsoft can hardly argue for rigorous and robust

[119] Il ne convient pas, à l'étape de la certification, de soumettre la méthode à la norme stricte ou rigoureuse que préconise Microsoft, notamment d'exiger du demandeur qu'il prouve le préjudice effectivement subi. Au Canada, contrairement à ce qui a cours aux États-Unis, il n'y a pas d'emblée un droit à la communication de documents avant la certification. Même si le juge saisi des demandes a le pouvoir discrétionnaire de l'ordonner, Microsoft s'y est opposée et le juge Myers a refusé de l'ordonner en l'espèce (2007 BCSC 1663, 76 B.C.L.R. (4th) 171). Microsoft peut difficilement plaider en

scrutiny when it objected to pre-certification discovery and was successful before the applications judge.

faveur d'un examen strict ou rigoureux, alors qu'elle s'est opposée à la communication de documents avant la certification et que le juge saisi des demandes a retenu son opposition.

[120] Here, the Pro-Sys expert evidence consists of methodologies proposed by two economists, Professor James Brander and Dr. Janet Netz. Professor Brander's affidavit identified him as the Asia-Pacific Professor of International Business in the Sauder School of Business at the University of British Columbia and senior consultant in the Delta Economics Group. Dr. Netz's affidavit described her as an economist, a founding partner of ApplEcon LLC, an economics consulting firm based in Ann Arbor, Michigan, a tenured Associate Professor of Economics at Purdue University and a Visiting Associate Professor at the University of Michigan. Dr. Netz acted as expert witness in several similar cases brought against Microsoft in the United States. Dr. Netz's testimony drew heavily from the evidence she had prepared in her role as expert in those U.S. cases.

[120] En l'espèce, la preuve d'expert de Pro-Sys est constituée de méthodes proposées par deux économistes, les professeurs James Brander et Janet Netz. Dans son affidavit, le professeur Brander déclare enseigner le commerce international pour la zone Asie-Pacifique à la Sauder School of Business de l'Université de la Colombie-Britannique et exercer la fonction de conseiller principal au sein du Delta Economics Group. Selon son affidavit, la professeure Netz est économiste et associée fondatrice d'ApplEcon LLC, un cabinet de services-conseils en économie établi à Ann Arbor, au Michigan, professeure agrégée permanente d'économie à l'Université Purdue, ainsi que professeure agrégée invitée à l'Université du Michigan. Elle a été témoin expert dans plusieurs instances semblables engagées contre Microsoft aux États-Unis. Son témoignage s'appuie en grande partie sur les éléments de preuve qu'elle a présentés à titre d'experte dans ces instances.

[121] It is Dr. Netz's evidence that the same methodology that applied in the U.S. would apply equally to the case at bar. She testified that the methodologies can demonstrate the initial overcharges by Microsoft to its direct purchasers as well as the pass-through to the indirect purchasers. Dr. Netz outlines three alternative methods by which harm and damages can be calculated. The first two methods, called the "rate of return method" and the "profit margin method", identify the overcharge at the first level of the distribution chain — that is, the overcharge in the sales made directly by Microsoft to its own customers. The first two models do not on their own establish that the overcharge was passed on but are intended to prove the total amount received by Microsoft as a result of the overcharge. The third methodology, the "price premium method", begins the analysis at the other end of the distribution chain, at the ultimate-purchaser level.

[121] La professeure Netz estime que les méthodes employées aux États-Unis peuvent également l'être en l'espèce. Selon elle, ces méthodes permettent d'établir la majoration que Microsoft a imposée initialement à ses acheteurs directs, ainsi que son transfert aux acheteurs indirects. Elle fait état de trois méthodes pour évaluer le préjudice subi et établir le montant des dommages-intérêts. Les deux premières méthodes, à savoir celle fondée sur le taux de rentabilité (« *rate of return method* ») et celle fondée sur la marge bénéficiaire (« *profit margin method* »), permettent de déterminer la majoration intervenue au sommet de la chaîne de distribution — soit la majoration directe par Microsoft lors de la vente à ses propres clients. Ces méthodes ne permettent pas à elles seules d'établir le transfert de la majoration, mais elles visent à déterminer la somme totale touchée par Microsoft par suite de la majoration. En ce qui concerne la troisième méthode, celle fondée sur l'augmentation du prix (« *price premium method* »), l'analyse commence à l'autre extrémité de la chaîne de distribution, là où se situe le consommateur final.

[122] Dr. Netz describes the price premium method as follows:

Under this method, one calculates the *retail* price premium that Microsoft products have relative to competing products for the products at issue and for a set of benchmark products where there have not been allegations of anticompetitive conduct. The overcharge equals the percentage decrease in the *retail* price of the products at issue such that Microsoft would still realize the same *retail* price premium as it does on the benchmark products (i.e., products in markets not affected by Microsoft's unlawful conduct). [Emphasis in original; 2010 BCSC 285, at para. 26.]

[123] Once the retail price overcharge is calculated, the total class member expenditure on the products should then be multiplied by the overcharge percentage in order to arrive at the quantum of damages.

[124] Dr. Netz testified that regression analysis could be employed to ascertain the extent of passing on in order to establish loss at the indirect-purchaser level. Relying on the successful application of the methods in the U.S., Dr. Netz testified that "[t]here is no theoretical reason, in my opinion, why the methods described above cannot be applied to the sales of Microsoft software in Canada" (Netz affidavit, at para. 49 (A.R., vol. II, at p. 177)). Implicit in this evidence is that the data necessary to apply the methodologies in Canada is available.

[125] Myers J. dealt with Microsoft's criticisms of Dr. Netz's testimony at paras. 131-64 of his reasons. Microsoft's criticisms pertained to her alleged failure to take Canadian context into account, the lack of an evidentiary basis for her findings, alleged flaws in the benchmark products she selected, and a lack of workability in her proposed methodology. Myers J. found that despite these criticisms, Dr. Netz had demonstrated a plausible methodology for proving class-wide loss. He therefore did not proceed to address Professor Brander's proposed methods (para. 164).

[122] La professeure Netz décrit comme suit la méthode fondée sur l'augmentation du prix :

[TRADUCTION] Cette méthode sert à calculer l'augmentation du prix au *détail* des produits de Microsoft par rapport à ceux de concurrents pour les produits en cause et pour un ensemble de produits de référence lorsqu'il n'y a pas eu d'allégations de comportement anticoncurrentiel. La majoration correspond au pourcentage de diminution du prix au *détail* des produits en question qui permettrait à Microsoft de toucher la même augmentation du prix au *détail* que pour les produits de référence (à savoir des produits offerts sur des marchés non touchés par le comportement illégal de Microsoft). [En italique dans l'original; 2010 BCSC 285, par. 26.]

[123] Une fois déterminée la majoration du prix au détail, on établit le montant des dommages-intérêts en multipliant par le pourcentage de majoration le total des dépenses faites par les membres du groupe pour les produits en question.

[124] Selon la professeure Netz, l'analyse de régression peut servir à déterminer l'étendue du transfert afin d'établir la perte subie par l'acheteur indirect. Faisant fond sur l'application concluante de ces méthodes aux États-Unis, elle précise que, [TRADUCTION] « [s]ur le plan théorique, rien ne s'oppose à ce que les méthodes s'appliquent à la vente des logiciels de Microsoft au Canada » (affidavit de la professeure Netz, par. 49 (d.a., vol. II, p. 177)). Il appert implicitement de son témoignage que les données nécessaires à l'application des méthodes existent au Canada.

[125] Aux paragraphes 131-164 de ses motifs, le juge Myers se penche sur les critiques formulées par Microsoft à l'égard du témoignage de la professeure Netz. Microsoft reproche au témoin de ne pas tenir compte du contexte canadien, de n'offrir aucune preuve à l'appui de ses conclusions, de ne pas bien choisir les produits de référence et de proposer des méthodes inapplicables. Le juge Myers conclut que la professeure Netz fait néanmoins état d'une méthode acceptable pour établir la perte infligée à l'échelle du groupe. Il n'examine donc pas les méthodes proposées par le professeur Brander (par. 164).

[126] It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be stronger and more credible than the evidence of Dr. Netz and Professor Brander. However, resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification (see *Infineon*, at para. 68; *Irving*, at para. 143). The trial judge will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology. For the purposes of certification and having regard to the deference due the applications judge on this issue, I would not interfere with the findings of Myers J. as to the commonality of the loss-related issues.

(ii) Aggregate Assessment of Damages

[127] The issue raised here is whether the question of aggregate assessment of damages is properly certified as a common issue. The aggregate damages provisions in the *CPA* provide for the quantification of the monetary award on a class-wide basis. Sections 29(1) and 29(2) of the *CPA* are relevant:

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can

[126] Il se peut effectivement que, au procès, le témoignage d'expert présenté par Microsoft se révèle plus convaincant et plus digne de foi que ceux de la professeure Netz et du professeur Brander. Or, trancher entre des preuves d'expert contradictoires relève du juge du procès et ne doit pas intervenir à l'étape de la certification (voir *Infineon*, par. 68; *Irving*, par. 143). Le juge du procès disposera d'un dossier complet qui lui permettra de se prononcer sur le caractère approprié de tout octroi de dommages-intérêts fondé sur la méthode proposée. Aux fins de la certification, et compte tenu de la déférence à laquelle a droit le juge saisi des demandes sur ce point, je suis d'avis de ne pas modifier les conclusions du juge Myers sur le caractère commun des questions touchant à la perte subie.

(ii) Détermination globale du montant des dommages-intérêts

[127] La question qui se pose en l'espèce est celle de savoir s'il y a lieu de certifier comme questions communes celles se rapportant à l'opportunité de dommages-intérêts globaux. Les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux prévoient l'établissement de la réparation pécuniaire à l'échelle du groupe. Voici le libellé des par. 29(1) et (2) de la *CPA* :

[TRADUCTION]

29 (1) Le tribunal peut fixer par ordonnance le montant global des dommages-intérêts quant à la totalité ou à une partie de la responsabilité pécuniaire d'un défendeur envers les membres du groupe, et rendre jugement en conséquence, si :

(a) une réparation pécuniaire est demandée au nom de tous les membres du groupe ou de certains d'entre eux;

(b) il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire afin de fixer le montant de la responsabilité pécuniaire du défendeur;

(c) la totalité ou une partie de la responsabilité du défendeur envers tous les membres du reasonably be determined without proof by individual class members.

(2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

(a) submissions that contest the merits or amount of an award under that subsection, and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[128] In this case, the common issues that were certified are whether damages can be determined on an aggregate basis and if so, in what amount. For the reasons below, I would not disturb the applications judge's decision to certify these common issues. However, while the aggregate damages common issues certified by Myers J. deal only with the assessment of damages and not proof of loss, there is some confusion in his reasons about whether the aggregate damages provisions of the *CPA* may be relied on to establish proof of loss where proof of loss is an essential element of proving liability. That question has been resolved differently by various courts in Ontario and British Columbia, where the aggregate damages provisions are sufficiently similar to allow comparison.

[129] In this case, Myers J. concluded that the aggregate damages provisions can be used to establish what I interpret to be the proof of loss element of proving liability. He stated that "the aggregate damages section of the *Class Proceedings Act* allow the harm to be shown in the aggregate to the class as a whole" (para. 126), and also that "the Court of Appeal must be taken to have accepted that for certification of the damage claims, a method of showing harm to all class members need not be demonstrated and, further, that the

groupe ou certains d'entre eux peut raisonnablement être établie sans que des membres n'aient à en faire la preuve individuellement.

(2) Avant de rendre l'ordonnance visée au paragraphe (1), le tribunal permet au défendeur de présenter des observations sur toute question qui touche l'ordonnance proposée, y compris sur ce qui suit :

(a) le bien-fondé de l'ordonnance rendue en application de ce paragraphe ou le montant des dommages-intérêts qui y sont accordés;

(b) la nécessité d'une preuve individuelle du droit à la réparation pécuniaire étant donné la nature individuelle de celle-ci.

[128] Dans la présente affaire, les questions communes qui ont été certifiées sont les suivantes : peut-on établir les dommages-intérêts de manière globale et, dans l'affirmative, à combien se montent-ils? Pour les motifs qui suivent, la décision du juge saisi des demandes de certifier ces questions ne doit pas être réformée. Toutefois, même si les questions que certifie le juge Myers relativement aux dommages-intérêts globaux n'ont trait qu'à la détermination de leur montant, et non à la preuve de la perte, ses motifs créent une certaine incertitude quant à savoir si les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux peuvent être invoquées pour prouver la perte lorsque la preuve de celle-ci est un élément essentiel de l'établissement de la responsabilité. Cette question a été tranchée différemment par les tribunaux de l'Ontario et de la Colombie-Britannique, deux provinces dont les dispositions pertinentes s'apparentent suffisamment entre elles pour qu'on puisse les comparer.

[129] Dans la présente affaire, le juge Myers conclut que ces dispositions peuvent être invoquées pour établir ce qui me paraît être la preuve de la perte qui permet d'établir la responsabilité. Il dit que [TRADUCTION] « les dispositions de la *Class Proceedings Act* sur l'octroi de dommages-intérêts globaux permettent de prouver le préjudice infligé globalement au groupe en entier » (par. 126) et aussi qu'« il faut considérer que, pour la Cour d'appel, la certification d'une demande d'indemnisation n'exige pas la démonstration qu'une méthode

aggregate damages sections can be used to establish liability" (B.C.S.C., at para. 125).

permet d'établir le préjudice infligé à tous les membres du groupe et, en outre, les dispositions sur l'octroi de dommages-intérêts globaux peuvent être invoquées pour établir la responsabilité » (C.S.C.-B., par. 125).

[130] In finding that the aggregate damages provisions of the *CPA* can be used to establish proof of loss to the class as a whole, Myers J. followed a line of jurisprudence of the British Columbia Court of Appeal. This reasoning appears in *Infineon*:

> In *Knight*, this Court affirmed the certification of an aggregate monetary award under the *CPA* as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct without an antecedent liability finding — rather, the aggregate assessment would establish concurrently both that the defendant benefited from its wrongful conduct and the extent of the benefit. [para. 39]

(See also *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389, at paras. 50-52.)

[130] Pour arriver à la conclusion que les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux peuvent être invoquées pour prouver la perte infligée au groupe dans son ensemble, le juge Myers s'appuie sur la jurisprudence de la Cour d'appel de la Colombie-Britannique. Son raisonnement figure dans *Infineon* :

> [TRADUCTION] Dans *Knight*, la Cour confirme la certification de la réparation pécuniaire globale fondée sur la *CPA* comme question commune dans une instance en restitution des profits tirés du comportement fautif sans détermination préalable de la responsabilité du défendeur — en fait, l'évaluation globale établirait à la fois le fait que le défendeur a tiré profit de son comportement fautif et l'étendue de ce profit. [par. 39]

(Voir également *Steele c. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389, par. 50-52.)

[131] With respect, I do not agree with this reasoning. The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

[131] Soit dit en tout respect, je n'adhère pas à ce raisonnement. Les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux ont trait à la réparation, sont de nature procédurale et ne peuvent permettre d'établir la responsabilité (*2038724 Ontario Ltd. c. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, par. 55). Le libellé de l'al. 29(1)(b) veut qu'il ne reste à trancher que des questions de fait ou de droit touchant à la détermination de la réparation pécuniaire pour qu'une réparation pécuniaire globale puisse être accordée. À mon sens, il faut une conclusion préalable de responsabilité avant d'appliquer les dispositions de la *CPA* sur l'octroi de dommages-intérêts globaux, ce qui comprend, lorsque l'exige une cause d'action comme celles prévues à l'art. 36 de la *Loi sur la concurrence*, une conclusion sur la preuve de la perte. Je ne vois pas comment une disposition visant à accorder des dommages-intérêts de manière globale pourrait être le fondement d'une conclusion sur quelque volet de la responsabilité.

[132] I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the B.C.S.C. in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (CanLII), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno's*, that "[t]he majority clearly recognized that s. 24 [of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6] is procedural and cannot be used in proving liability" (para. 55).

[132] Je souscris à la conclusion de la juge Feldman dans *Chadha*, à savoir que les dispositions sur l'octroi de dommages-intérêts globaux [TRADUCTION] « s'appliquent seulement une fois la responsabilité établie et offrent une méthode d'évaluation globale des dommages-intérêts, mais ne permettent pas d'établir le préjudice » (par. 49). Je conviens également avec le juge Masuhara de la Cour suprême de la Colombie-Britannique qu'[TRADUCTION] « établir la responsabilité exige de prouver que le transfert de la perte a atteint les membres du groupe. Il faut statuer sur ce point avant d'appliquer les dispositions sur l'évaluation globale des dommages-intérêts, lesquelles n'offrent qu'un moyen d'attribuer l'indemnité » (voir *Infineon*, 2008 BCSC 575 (CanLII), par. 176). Aussi, je partage l'avis de la Cour d'appel de l'Ontario dans *Quizno's* selon lequel [TRADUCTION] « [l]es juges majoritaires reconnaissent clairement que l'art. 24 [de la *Loi de 1992 sur les recours collectifs* de l'Ontario, L.O. 1992, ch. 6] est de nature procédurale et ne peut servir d'assise à l'établissement de la responsabilité » (par. 55).

[133] This reasoning reflects the intention of the Attorney General of British Columbia. When he introduced the *CPA* in the British Columbia legislature, he stated that the goal of the legislation was to allow individuals who have similar claims to come together and pursue those individual claims collectively: "In simple terms, all we are doing here is finding a way to enable the access that individuals have to the court to be an access that individuals combining together can have to the court" (Hon. c. Gabelmann, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, p. 15078). The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.

[133] Ce raisonnement traduit l'intention du procureur général de la Colombie-Britannique. Lorsque ce dernier a présenté la *CPA* à l'Assemblée législative de la province, il a précisé que la loi visait à permettre aux personnes ayant des réclamations apparentées de réunir leurs demandes individuelles et de poursuivre collectivement : [TRADUCTION] « En somme, le but est seulement de trouver un moyen de reconnaître aussi à un regroupement de personnes le droit d'ester en justice que l'on reconnaît à une personne individuelle » (l'hon. C. Gabelmann, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, n° 20, 4e sess., 35e lég., 6 juin 1995, p. 15078). La *CPA* ne visait pas à permettre à un groupe de personnes de prouver ce que nulle personne individuelle ne pouvait prouver. L'un de ses principaux objectifs était plutôt de faire en sorte que les personnes qui ont des réclamations individuelles prouvables puissent se regrouper et voir ainsi leurs démarches judiciaires facilitées.

[134] The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues

[134] La question de savoir si l'octroi de dommages-intérêts globaux constitue une réparation appropriée peut être certifiée comme question commune. Cependant, cette question commune ne

trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found.

[135] However, as stated above, the determination that the aggregate damages provisions cannot be used to establish proof of loss does not affect Myers J.'s decision to certify aggregate damages as a common issue. Despite his erroneous finding that aggregate damages provisions may be invoked to establish liability, he stated that invoking these provisions for that purpose was not necessary in this case (see paras. 119-20 and 127). The aggregate damages questions he certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount. Having not actually relied on the proposition that aggregate damages provisions can be used to determine liability, Myers J.'s decision to certify questions related to aggregate damages should not be disturbed.

(c) *Is a Class Action the Preferable Procedure?*

[136] The provision of the *CPA* relevant to the preferable procedure requirement is s. 4(2). It reads:

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

sera tranchée qu'au procès, une fois la responsabilité établie. La décision relative à l'applicabilité des dispositions de la *CPA* sur les dommages-intérêts globaux doit appartenir en fin de compte au juge du procès appelé à statuer sur les questions communes. En outre, l'omission de proposer ou de certifier à titre de question commune l'opportunité d'accorder des dommages-intérêts globaux ou une autre réparation n'empêche pas le juge de se fonder sur les dispositions s'il l'estime indiqué.

[135] Toutefois, rappelons que même si les dispositions sur les dommages-intérêts globaux ne sauraient servir à prouver la perte, la décision du juge Myers de certifier que leur application soulève une question commune demeure valable. Même s'il conclut à tort qu'elles peuvent être invoquées pour établir la responsabilité, il ajoute que point n'est besoin de les invoquer en l'espèce (voir par. 119-120 et 127). Les questions qui s'y rapportent et qu'il certifie consistent seulement à savoir si le montant des dommages-intérêts peut être arrêté globalement et, dans l'affirmative, quel est ce montant. Puisque le juge Myers ne s'appuie pas véritablement sur sa conclusion que les dispositions peuvent être invoquées pour prouver la responsabilité, sa décision de certifier des questions communes touchant à l'octroi de dommages-intérêts globaux n'a pas à être modifiée.

c) *Le recours collectif constitue-t-il la meilleure procédure pour régler les questions communes?*

[136] Le paragraphe 4(2) de la *CPA* prévoit que le recours collectif doit constituer la meilleure procédure pour régler une question commune :

[TRADUCTION]

(2) Pour déterminer si le recours collectif serait la meilleure procédure pour régler la question commune de manière juste et efficace, le tribunal tient compte des facteurs applicables et se demande notamment ce qui suit :

(a) la question de fait ou de droit qui est commune aux membres du groupe l'emporte-t-elle sur celle qui touche uniquement les membres individuels;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[137] In *Hollick*, this Court said that preferability must be examined in reference to the three principal aims of the class action regime: ". . . judicial economy, access to justice, and behaviour modification" (para. 27).

[138] Microsoft argues that the lack of commonality between the class members and the abundance of individual issues signifies that a class proceeding will not be a "fair, efficient and manageable method of advancing the claim" as required by *Hollick* (R.F., at para. 84, citing *Hollick*, at para. 28). It argues that the access to justice function of class actions will not be served by certifying the action because it will inevitably break down into numerous individual trials, subjecting the class members to delays. It also argues that the tendency of indirect purchaser action to result in *cy-près* awards — made where it would be impractical to distribute the award to the individual plaintiffs — further frustrates the access to justice aim. As to the objective of behaviour modification, Microsoft contends that it is more properly a concern for the Competition Commissioner and that the procedures that can be initiated by that body are the preferable forum in which to deal with the wrongs alleged in this case.

(b) un nombre important de membres du groupe ont-ils véritablement intérêt à poursuivre des instances séparées;

(c) le recours collectif comprend-il des demandes qui ont été ou qui font l'objet d'autres instances;

(d) les autres modes de règlement sont-ils moins pratiques ou efficaces;

(e) la gestion du recours collectif crée-t-elle de plus grandes difficultés que l'adoption d'un autre moyen?

[137] Dans l'arrêt *Hollick*, notre Cour confirme que le fait de constituer ou non la meilleure procédure pour régler les questions communes est fonction des trois principaux avantages du recours collectif : « . . . l'économie des ressources judiciaires, l'accès à la justice et la modification des comportements » (par. 27).

[138] Selon Microsoft, l'absence de caractéristiques communes aux membres du groupe et le grand nombre de questions individuelles font que le recours collectif n'est pas un moyen [TRADUCTION] « juste, efficace et pratique de faire progresser l'instance » comme l'exige l'arrêt *Hollick* (m.i., par. 84, citant *Hollick*, par. 28). Elle ajoute que la certification de l'action ne saurait remplir la fonction du recours collectif qui consiste à faciliter l'accès à la justice, car l'action se fragmenterait inévitablement en de nombreux procès individuels, ce qui causerait des retards au détriment des membres du groupe. Microsoft soutient en outre que les actions d'acheteurs indirects donnent généralement lieu à des versements selon le principe de l'aussi-près (en anglais, « *cy près doctrine* ») — lorsqu'il est irréaliste de distribuer la somme accordée aux demandeurs individuels —, ce qui n'est pas non plus de nature à favoriser l'accès à la justice. En ce qui concerne l'objectif de modifier les comportements, Microsoft soutient qu'il relève plutôt du commissaire de la concurrence et que les instances susceptibles d'être engagées par cet organisme offrent le meilleur moyen de statuer sur les actes fautifs allégués en l'espèce.

[139] I am unable to accept these arguments. In *Hollick*, McLachlin C.J. was of the view that the plaintiff had not satisfied the certification requirements on the grounds that a class proceeding was not the preferable procedure. In that case, she found that the question of whether or not the defendant had unlawfully emitted methane gas and other pollutants was common to all class members. However, as to whether loss could be established on a class-wide basis, she found too many differences among the class members to consider loss a common issue. In other words, while she found that there was a common issue related to the existence of the cause of action, she did not consider the loss-related issues to be common to all the class members. She dismissed the class action on the basis that "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action" (para. 32).

[140] In the present case, there are common issues related to the existence of the causes of action, but there are also common issues related to loss to the class members. Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of Myers J. that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. I would agree. In the circumstances, I would not interfere with his finding that the class action is the preferable procedure.

[139] Je ne puis faire droit à ces prétentions. Dans *Hollick*, la juge en chef McLachlin estime que le demandeur ne satisfait pas aux conditions de certification en ce que le recours collectif ne constitue pas la meilleure procédure. Selon elle, la question de savoir si la défenderesse a émis illégalement du méthane et d'autres polluants est commune à tous les membres du groupe. Sur la question de savoir si la perte peut être établie à l'échelle du groupe, elle conclut cependant que, en raison de différences trop nombreuses entre les membres du groupe, il n'y a pas lieu de voir dans la perte une question commune. En d'autres termes, bien qu'elle conclue que l'existence d'une cause d'action soulève une question commune, la Juge en chef estime que les questions liées à la perte ne sont pas communes à tous les membres du groupe. Elle refuse de certifier le recours collectif au motif que, « [u]ne fois la question commune considérée dans le contexte global de la demande, il devient difficile d'affirmer que le règlement de la question commune fera progresser substantiellement l'instance » (par. 32).

[140] Dans la présente affaire, non seulement l'existence de causes d'action, mais aussi la perte subie par les membres du groupe, constituent des questions communes. Contrairement à l'affaire *Hollick*, on peut dire en l'espèce que la perte constitue une question commune car il a été déterminé qu'une méthode proposée par un expert permettrait assez certainement d'établir la perte à l'échelle du groupe. Le règlement des questions communes devrait permettre de statuer sur la responsabilité de Microsoft et sur le transfert de la majoration aux acheteurs indirects. Puisqu'il est essentiel de statuer sur ces points afin que les membres du groupe puissent recouvrer le montant de la perte, on peut soutenir en l'espèce que le règlement des questions communes fera progresser substantiellement l'instance. Bien qu'il soit possible que des questions individuelles soient soulevées à l'audition des questions communes, le juge Myers indique implicitement dans ses motifs que, à l'étape de la certification, les questions communes l'emportent sur les questions qui ne touchent que des membres individuels. Je suis d'accord. Dans les circonstances, je suis d'avis de ne pas modifier sa conclusion portant que le recours collectif constituerait la meilleure procédure pour régler les questions communes.

[141] It is also premature to assume that the award in this case will result in *cy-près* distribution or that the objective of access to justice will be frustrated on this account. Further, while under the *Competition Act* the Competition Commissioner is the primary organ responsible for deterrence and behaviour modification, the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives.

[141] De plus, il est trop tôt pour présumer que la réparation accordée en l'espèce donnera lieu à des versements selon le principe de l'aussi-près ou que, le cas échéant, l'objectif de favoriser l'accès à la justice sera compromis. En outre, bien que, sous le régime de la *Loi sur la concurrence*, la dissuasion et la modification des comportements relèvent en premier lieu du commissaire de la concurrence, le Bureau de la concurrence a indiqué qu'il ne poursuivrait pas Microsoft dans le présent dossier. Par conséquent, si le recours collectif n'est par certifié, les objectifs de dissuasion et de modification des comportements ne feront l'objet d'aucune mesure. Non seulement le recours collectif constitue la meilleure procédure pour atteindre ces objectifs, mais il est le seul.

(4) Conclusion on the Certification of the Action

(4) Conclusion sur la certification du recours collectif

[142] I would restore the orders of the applications judges allowing for certification of this action as a class proceeding with the exception that the pleadings based on constructive trust be struck.

[142] Je suis d'avis de rétablir les ordonnances des juges saisis des demandes qui font droit à la demande de certification de l'action à titre de recours collectif, sous réserve de la radiation des allégations fondées sur la fiducie par interprétation.

V. Conclusion

V. Conclusion

[143] For the above reasons, I would allow the appeal with costs throughout.

[143] Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi avec dépens devant tous les cours.

Appendix: Common Issues Certified by Myers J.

Annexe : Questions communes certifiées par le juge Myers

[TRADUCTION]

Breach of *Competition Act*, R.S.C. 1985, c. C-34

(a) Did the Defendants, or either of them, engage in conduct which is contrary to s. 45 and or s. 52 of the *Competition Act*?

(b) Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?

Violation de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34

a) Les défenderesses ou l'une d'elles se sont-elles livrées à un comportement allant à l'encontre des art. 45 ou 52 de la *Loi sur la concurrence*?

b) Les membres du groupe ont-ils droit, suivant l'art. 36 de la *Loi sur la concurrence*, au recouvrement des pertes ou des dommages subis et, dans l'affirmative, à raison de quel montant?

(c) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Conspiracy

(d) Did the Defendants, or either [of] them, conspire to harm the Class Members?

(e) Did the Defendants, or either of them, act in furtherance of the conspiracy?

(f) Was the predominant purpose of the conspiracy to harm the Class Members?

(g) Did the conspiracy involve unlawful acts?

(h) Did the Defendants, or either of them, know that the conspiracy would likely cause injury to the Class Members?

(i) Did the Class Members suffer economic loss?

(j) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?

(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Tortious Interference with Economic Interests

(l) Did the Defendants, or either of them, intend to injure the Class Members?

(m) Did the Defendants, or either of them, interfere with the economic interests of the Class Members by unlawful or illegal means?

(n) Did the Class Members suffer economic loss as a result of the Defendants' interference?

(o) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?

(p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment, Waiver of Tort and Constructive Trust

(q) Have the Defendants, or either of them, been unjustly enriched by the receipt of an Overcharge? "Overcharge" means the difference

c) Le montant des dommages-intérêts peut-il être établi de manière globale et, dans l'affirmative, quel est-il?

Complot

d) Les défenderesses ou l'une d'elles ont-elles participé à un complot visant à causer un préjudice aux membres du groupe?

e) Les défenderesses ou l'une d'elles ont-elles agi en vue de la réalisation du complot?

f) Le complot visait-il principalement à causer un préjudice aux membres du groupe?

g) Les auteurs du complot ont-ils eu recours à des actes illégaux?

h) Les défenderesses ou l'une d'elles savaient-elles que le complot causerait vraisemblablement un préjudice aux membres du groupe?

i) Les membres du groupe ont-ils subi une perte financière?

j) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses ou l'une d'elles aux membres du groupe?

k) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?

Atteinte délictuelle aux intérêts financiers

l) Les défenderesses ou l'une d'elles ont-elles eu l'intention de nuire aux membres du groupe?

m) Les défenderesses ou l'une d'elles ont-elles porté atteinte aux intérêts financiers des membres du groupe par des moyens illégaux?

n) Les membres du groupe ont-ils subi une perte financière par suite de cette atteinte?

o) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses ou l'une d'elles aux membres du groupe?

p) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?

Enrichissement sans cause, renonciation au recours délictuel et fiducie par interprétation

q) Les défenderesses ou l'une d'elles se sont-elles enrichies sans cause par suite d'une majoration? « Majoration » s'entend de la différence entre between the prices the Defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the Defendants would have been able to charge in the absence of their wrongdoing.

(r) Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge?

(s) Is there a juridical reason why the Defendants, or either of them, should be entitled to retain the Overcharge?

(t) What restitution, if any, is payable by the Defendants, or either of them, to the Class Members based on unjust enrichment?

(u) Should the Defendants, or either of them, be constituted as constructive trustees in favour of the Class Members for the Overcharge?

(v) What is the quantum of the Overcharge, if any, that the Defendants, or either of them, hold in trust for the Class Members?

(w) What restitution, if any, is payable by the Defendants to the Class Members based on the doctrine of waiver of tort?

(x) Are the Defendants, or either of them, liable to account to the Class Members for the wrongful profits, if any, that they obtained on the sale of Microsoft Operating Systems or Microsoft Applications Software to the Class Members based on the doctrine of waiver of tort?

(y) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

Punitive Damages

(z) Are the Defendants, or either of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, in what amount and to whom?

Interest

(aa) What is the liability, if any, of the Defendants, or either of them, for court order interest?

les prix que les défenderesses ont effectivement exigés pour les systèmes d'exploitation et les logiciels d'application Microsoft sur le marché canadien des ordinateurs personnels et les prix qu'elles auraient pu exiger n'eût été leur comportement fautif.

r) Les membres du groupe se sont-ils appauvris d'un montant égal à celui de la majoration?

s) Une cause juridique justifie-t-elle les défenderesses ou l'une d'elles de conserver le fruit de la majoration?

t) Quelle somme les défenderesses ou l'une d'elles doivent-elles restituer aux membres du groupe, le cas échéant, sur le fondement de l'enrichissement sans cause?

u) Les défenderesses ou l'une d'elles doivent-elles être constituées fiduciaires par interprétation au bénéfice des membres du groupe quant au montant de la majoration?

v) À combien se monte la majoration, s'il en est, que les défenderesses ou l'une d'elles détiennent en fiducie pour les membres du groupe?

w) Quelle somme, s'il en est, les défenderesses doivent-elles restituer aux membres du groupe sur le fondement de la renonciation au recours délictuel?

x) Les défenderesses ou l'une d'elles sont-elles tenues de comptabiliser à l'intention des membres du groupe les profits illégitimes réalisés, le cas échéant, lorsqu'elles leur ont vendu des systèmes d'exploitation et des logiciels d'application Microsoft, sur le fondement de la renonciation au recours délictuel?

y) Le montant de la restitution peut-il être établi globalement et, dans l'affirmative, quel est-il?

Dommages-intérêts punitifs

z) Les défenderesses ou l'une d'elles sont-elles tenues de verser des dommages-intérêts punitifs ou exemplaires eu égard à la nature de leur comportement et, dans l'affirmative, quel est ce montant et qui sont les bénéficiaires?

Intérêt

aa) Quelle obligation, s'il en est, les défenderesses ou l'une d'elles ont-elles de verser l'intérêt dont le paiement est ordonné par la cour?

Distribution of Damages and/or Trust Funds

(bb) What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution? [A.R., vol. I, at pp. 167-69]

Appeal allowed with costs throughout.

Solicitors for the appellants: Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.

Solicitors for the respondents: McCarthy Tétrault, Toronto; Blake, Cassels & Graydon, Vancouver and Toronto.

Solicitor for the intervener: Attorney General of Canada, Ottawa.

Distribution des dommages-intérêts ou des fonds détenus en fiducie

bb) Quel est le bon mode de distribution aux membres du groupe des dommages-intérêts ou des fonds détenus en fiducie et de l'intérêt, et qui doit assumer le coût de cette distribution? [d.a., vol. I, p. 167-169]

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs des appelants : Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.

Procureurs des intimées : McCarthy Tétrault, Toronto; Blake, Cassels & Graydon, Vancouver et Toronto.

Procureur de l'intervenant : Procureur général du Canada, Ottawa.

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Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

No du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words “terminated by an employer” must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer’s bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l’historique législatif pour déterminer l’intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l’*Employment Standards Amendment Act, 1981*, étaient exemptés de l’obligation de verser des indemnités de cessation d’emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l’obligation de verser une indemnité de cessation d’emploi. Si tel n’était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l’ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l’employeur licencie» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. La cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d’examiner la question de l’applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d’avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*, *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. no 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur 1
maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes 2
Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «*LF*») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «*LNE*»). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite. 11

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic. 12

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA.* He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

En ce qui concerne le par. 7(5) de la *LNE*, le 15
juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

Le juge Austin a conclu que, comme la cessa- 16
tion d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Issues

4. Les questions en litige

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

Le présent pourvoi soulève une question: la ces- 17
sation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analysis

5. Analyse

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

L'obligation légale faite aux employeurs de ver- 18
ser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2^e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of ". . . the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables». 22

Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions. 23

Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que 24 certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

> Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

> [TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88). 27

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler 28 until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

32

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

33

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

34

This interpretation is also consistent with statements made by the Minister of Labour at the time

Cette interprétation est également compatible avec les déclarations faites par le ministre du he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi. 36

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi. 37

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in- 38 amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

19

PUBLIC VERSION

Reference: *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6
File No.: CT-2007-001
Registry Document No.: 0030

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

AND IN THE MATTER OF an application under section 103.1 of the *Competition Act* by Sears Canada Inc. for leave to make an application under section 75 of the *Competition Act*

B E T W E E N :

Sears Canada Inc.
(applicant)

and

Parfums Christian Dior Canada Inc. and
Parfums Givenchy Canada Ltd.
(respondents)

Date of hearing: 20070314
Presiding Judicial Member: Simpson J. (Chair)
Date of Reasons and Order: March 23, 2007
Reasons and Order signed by: Madam Justice S. Simpson

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE UNDER SECTION 103.1 OF THE ACT

INTRODUCTION

[1] Sears Canada Inc. has applied under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act) for leave to commence an application for a supply order based on the Respondents' refusal to supply the Prestige Fragrances and Cosmetics described in paragraph 5 below.

THE PARTIES

[2] Sears Canada Inc. (Sears) is incorporated pursuant to the laws of Canada and is a multi-channel, multi-product retailer with a network that includes 196 company-owned stores, 178 dealer stores, more than 1850 catalogue merchandise pick-up locations and internet shopping.

[3] Parfums Christian Dior Canada Inc. (Dior) is a Quebec corporation and Parfums Givenchy Canada Ltd. (Givenchy) is incorporated pursuant to the laws of Ontario. Both Dior and Givenchy are wholly-owned subsidiaries of LVMH Louis Vuitton Möet Hennessy.

THE EVIDENCE

[4] Sears' evidence is provided in an affidavit sworn by Carol Wheatley on February 22, 2007 (the Wheatley Affidavit). She describes her present position and experience as follows:

> I am the General Merchandise Manager, Cosmetics and Accessories, of the Applicant, Sears Canada Inc. ("Sears"). I have held this position since August 1, 2004. In my position, I am responsible for developing and managing Sears' Cosmetics and Accessories categories. Prior to this, I held the position of Shop Co-ordinator, Cosmetics at Sears from June 1999 to August 2004. Prior to this, I was a Buyer, Fragrances, at T. Eaton & Co. Ltd. from May 1998 to June 1999, and for the thirteen years prior to that, I held various positions at Quadrant Cosmetics, Sanofi Beaute / Parfums Stern, and Germaine Monteil / Revlon, all of which are cosmetics manufacturers or distributors.

THE SUPPLY

[5] For at least fourteen years, Dior has supplied Sears with Dior fragrances, make-up and skin care products (collectively the Dior Products). They are currently sold in 104 of Sears' 196 company-owed department stores. In the same period, Givenchy supplied Sears with Givenchy fragrances (the Givenchy Products) which are sold in 121 of Sears' 196 company stores.

[6] The Dior and Givenchy Products are included in an industry product category known as Prestige Fragrances and Cosmetics. Counsel for Sears indicated that Dior make-up and skin care products are one of the fifteen to twenty brands of Prestige Cosmetics sold in Sears stores. He derived this information from an analysis of the exhibits to the Wheatley Affidavit.

[7] The sale of the Dior and Givenchy Products generates revenues for Sears of approximately sixteen million dollars per annum. Sears' annual revenue from the sale of all its products exceeds six billion dollars.

THE REFUSAL TO SUPPLY

[8] In December 2006, Givenchy advised Sears that it could not supply the Givenchy Products because of "shipping" issues. Then on January 18, 2007, both Dior and Givenchy indicated that they would no longer be doing business with Sears. In a letter of January 24, 2007, counsel for the Respondents terminated the supply of the Dior and Givenchy Products to Sears effective March 24, 2007. However, by agreement during this proceeding, that date was extended to May 4, 2007.

[9] Sears speculates that the refusal to supply was prompted by the discounts it offered in December 2006 on all cosmetics products. The Dior and Givenchy Products were included.

FACTS NOT IN DISPUTE

[10] Revenues from the sale of the Dior and Givenchy Products represent an insignificant percentage **[CONFIDENTIAL]** % of Sears' overall sales and a modest percentage **[CONFIDENTIAL]** % of Sears total cosmetics business. The Dior and Givenchy Products with sales of $ **[CONFIDENTIAL]** and $ **[CONFIDENTIAL]** in 2006 ranked **[CONFIDENTIAL]** and **[CONFIDENTIAL]** respectively among cosmetic lines sold in Sears stores. The five top selling cosmetic lines had sales of **[CONFIDENTIAL]** in 2006.

[11] Sears has been losing market share to The Bay in Prestige Fragrances and Cosmetics over the past three years.

[12] In addition to Sears, London Drugs has also been refused supply of the Dior and Givenchy Products. This means that only The Bay, Holt Renfrew and Shoppers Drug Mart will continue to distribute the Dior and Givenchy Products in Canada. The status of Jean Coutu as a distributor is uncertain but it is probable that it has also been refused supply.

[13] The Dior and Givenchy Products have not traditionally competed on the basis of price with other brands of Prestige Fragrances and Cosmetics.

THE ISSUES

[14] The following are the issues:

1. What is Sears' business for the purpose of this application?
2. Is there reason to believe that Sears is directly and substantially affected in its business?
3. Is there reason to believe that an order could be made under subsection 75(1) of the Act?

Issue 1 – Sears' Business

[15] The relevant language in subsection 103.1(7) and paragraph 75(1)(*a*) and subsection 75(2) of the Act is highlighted below:

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

…

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

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

…

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

[my emphasis]

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

…

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

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

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

…

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

[je souligne]

The cases

[16] Sears says that this application for leave is significant because it raises for the first time the question of how the Tribunal will approach the issue of a substantial effect on a multi-product business when the refused items impact only one sector or segment of the overall business. However, this issue is not new. It has already been considered in five cases: Chrysler, three Pharmacy cases and Construx Engineering.

[17] In *Director of Investigation & Research v. Chrysler Canada Ltd.*, 27 C.P.R. (3d) 1, aff'd 38 C.P.R. (3d) 25 (F.C.A.), the Director of Investigation and Research applied for an order under section 75 of the Act. The Tribunal was required to consider the language of paragraph 75(1)(*a*) of the Act and determine whether Mr. Brunet had been substantially affected in his business by Chrysler's (the Respondent's) refusal to supply Chrysler auto parts. The Director argued that the business at issue was the sale of Chrysler auto parts. Chrysler said that Mr. Brunet's overall auto parts export business was the business at issue and not just the segment involving Chrysler parts and that this broader interpretation was mandated by the definition of "business" in subsection 2(1) of the Act.

[18] The Tribunal found that Chrysler's refusal to supply had caused losses of approximately $200,000 in sales and $30,000 in gross profits and that those losses were substantial for Mr. Brunet's small business. The Tribunal concluded as follows "A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used." The Tribunal then said that the question of whether the refused product accounted for a large percentage of the overall business was the first issue to be addressed. The Tribunal concluded that Mr. Brunet's overall business had been substantially affected by Chrysler's refusal to supply its auto parts.

[19] The three Pharmacy cases are *1177057 Ontario Inc. (c.o.b. as Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22, *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 and *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23. These cases involved applications for leave under subsection 103.1(7) of the Act. In each case, the Tribunal considered whether the withdrawal of certain brands of prescription drugs had had a direct and substantial effect on the applicants' businesses. In each case, the pharmacy sold products other than prescription drugs and, in each case, Blais J. considered the loss of the prescription drug sales in the context of the pharmacy's overall business.

[20] Finally, in *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21, the applicant for leave was a wholesale dealer and broker of transportation products including automobiles. GM had refused supply. The only evidence before the Tribunal was that in 2003, the sale of GM vehicles represented 67% of Construx' sales of new motor vehicles. Leave under subsection 103.1(7) of the Act was refused because there was no evidence to show the impact of GM's refusal to supply cars on the whole enterprise.

[21] Based on this review, I have concluded that the Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the entire business.

The parties' submissions

[22] Sears' written representations do not include a description of Sears' business for the purpose of this application for leave. However, in his oral submissions, counsel for Sears said that, for the purpose of this application, Sears' business is the sale of the Dior and Givenchy Products.

[23] The Respondents say that Sears' business is the operation of department stores.

[24] The Wheatley Affidavit provides the evidence which was referred to in support of Sears' position. Carol Wheatley says that:

- Consumers of Prestige Fragrances and Cosmetics are intensely brand loyal and, if their preferred product is not available at Sears, they will seek it elsewhere.
- The Dior and Givenchy Products are unique and are "not" or "often not" interchangeable with other brands of Prestige Fragrances and Cosmetics.
- The Dior and Givenchy Products are the subject of heavy investment in research and development which results in innovative and unique products.
- Dior Givenchy Products are advertised as status symbols in association with their brand names.
- Along with other brands of Prestige Fragrances and Cosmetics, the Dior and Givenchy Products are distributed on a selective basis.
- The Dior and Givenchy Products compete with other brands of Prestige Fragrances and Cosmetics on the basis of service and advertising with celebrity endorsements rather than on price.

[25] In my view, this evidence is not helpful. It might be apt if used to argue that the Dior and Givenchy Products are "products" as that term is used in paragraph 75(1)(*a*) of the Act but it does not assist in reaching a conclusion about the breadth of Sears' business for the purpose of subsection 103.1(7) of the Act.

The Language of the Act

[26] As shown in paragraph 15 above, subsection 75(2) of the Act refers to a person carrying on business in a class of articles. It is therefore my view that, if Parliament had intended the substantial effect in subsection 103.1(7) and paragraph 75(1)(*a*) of the Act to be on a business in a class of articles such as the Dior and Givenchy Products, it would have said so.

Conclusion - Issue 1

[27] In my view, both the Tribunal's earlier decisions and the plain language used in the subsection lead to the conclusion that Sears' entire business as a department store retailer is the business under consideration for the purposes of subsection 103.1(7) of the Act.

Issue 2 – Substantial Effect

[28] Sears suggested that the French version of paragraph 75(1)(*a*) which uses the phrase "sensiblement gênée dans son entreprise" indicates that a substantial effect need not be a very significant or important effect.

[29] In this regard, Sears relied on a Larousse French English Dictionary at page 834 to show that "sensiblement" means "appreciably", "noticeably" and "markedly" (*Grand Dictionnaire Larousse Chambers, Anglais-Français Français-Anglais*, s.v. "sensiblement"). Further, it noted that according to Collins Robert French-English Dictionary at page 328, "gêner" as a verb means to "bother", "disturb" or "be in the way" (*Collins Robert French-English English French Dictionary*, 2nd ed., s.v. "gêner").

[30] It is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of the provision. The Harrap French-English Dictionary defines "sensiblement" as "appreciable; perceptible; obviously; to a considerable extent" and the word is defined in Le Petit Robert as "d'une manière appreciable" (see *Grand Harrap Dictionnaire français-anglais et anglais-français*, s.v. "sensiblement" and *Le Petit Robert*, s.v. "sensiblement").

[31] In my view, there is nothing in the French language version of paragraph 75(1)(*a*) that detracts from the notion that substantial in the English carries meanings such as important and significant. This is the meaning shared by the two versions and is the one which has already been confirmed by this Tribunal in *Chrysler* where it said that "important" was an acceptable synonym for substantial.

[32] Sears says that the substantial effect on its business is the combined impact of the following:

(i) $16,000,000 in lost sales
(ii) Loss of cross-segment sales
(iii) A negative impact on Sears' ability to negotiate with and attract other brands of Prestige Fragrances and Cosmetics
(iv) A negative impact on Sears' ability to compete with The Bay
(v) A negative impact on Sears' marketing strategy and reputation in the marketplace

I will deal with each in turn.

(i) Lost Sales

[33] As described above, the Dior and Givenchy Products generate revenues of $16 million. However, some of the lost sales will be recouped when customers switch to other brands of Prestige Fragrances and Cosmetics at Sears, so the $16 million figure is slightly high. The Wheatley Affidavit acknowledges this in paragraph 61(a) which says:

> First, Sears will lose a significant portion of the $16 million in annual sales revenue from these products, because only a fraction of the customers will select an alternate brand. The remaining sales revenue will simply be lost as customers look for that product elsewhere.

In my view, whether the figure is $16 million or something less, it is insignificant when considered in the context of Sears' $6 billion overall business.

(ii) Cross-Segment Sales

[34] Sears says that the Dior and Givenchy Products generate $14 million in sales of other products at Sears. However, this figure is difficult to assess because it is not clear what portion of the sales were made to customers who were motivated to go to Sears to purchase a Dior or Givenchy Product and then purchased something else. Sales of that kind would be relevant as the Wheatley Affidavit acknowledges. However, sales to customers who went to Sears for other products and happened to purchase a Dior or Givenchy Product would not count as relevant cross-segment sales. Since the value of such sales is not in the evidence, the cross-segment sales figure of $14 million must be discounted by an unknown amount. Whatever that amount may be it will not, even when combined with lost sales, be substantial in the context of Sears' entire business.

(iii) Dealings with other Brands

[35] Sears says that it will suffer harm because the bargaining position and negotiating power of other brands of Prestige Fragrances and Cosmetics will be improved if Sears no longer carries the Dior and Givenchy Products. The Wheatley Affidavit states this as a fact but in my view it is mere speculation because there is no discussion that shows that it is based on the deponent's experience or on comments made by personnel who work for other brands. For this reason, I have given this assertion of alleged harm little weight.

(iv) Competition with The Bay

[36] The Wheatley Affidavit shows that Sears has lost market share in Prestige Fragrances and Cosmetics in the last three years. It decreased from 26.3% in 2004 to 23.5% in 2005 and to 23.0% in 2006. The concern is that the loss of the Dior and Givenchy Products will contribute to a continuation of the trend. As the loyal Dior and Givenchy customers are lost, Sears says they will be lost principally to The Bay and, while there is no evidence quantifying this effect, I accept Sears' submission.

(v) Sears Marketing

[37] Sears treats Prestige Fragrances and Cosmetics and Accessories as one of six destination categories in its department stores. The Wheatley Affidavit indicates that Sears must have the Dior and Givenchy Products to convey the message to the market that this destination is credible. Sears says that its reputation and market image will suffer if it does not carry a full range of Prestige Fragrances and Cosmetics. I accept that this could be true to some degree.

[38] Sears also uses Dior as the "central magnet" in its Toronto Eaton Centre and Vancouver Pacific Centre flagship stores. The evidence shows that Dior's display is one of the first things customers see when they use one of the ground floor entrances to the stores. As well, in the Calgary store and Rideau Centre store in Ottawa, Dior has branded displays in key locations. Sears estimates that it will cost $600,000 to remove and replace the Dior displays. However, the Respondents have said in paragraph 11 of their written representations that they are willing to cover reasonable costs associated with the removal or renovation of any related displays or shelving units.

Conclusion – Issue 2

[39] I have concluded that, when taken together, these submissions show that Sears will be directly affected by the Respondents' refusal to supply the Dior and Givenchy Products, but that the effect on Sears' department store business will not be substantial.

[40] Accordingly, applying the test for leave approved by the Federal Court of Appeal in *Symbol Technologies ULC v. Barcode Systems Inc.*, [2004] F.C.A. 339 at paragraph 16, I am not satisfied that Sears has provided sufficient credible evidence to give rise to a *bona fide* belief that it may have been directly and substantially affected in its business by the Respondents' refusal to supply the Dior and Givenchy Products.

Issue 3 – A section 75 order

[41] In view of the previous conclusion, it is not necessary to consider whether the Tribunal could make an order under paragraphs 75(1)(*a*-*e*) of the Act.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[42] The application for leave is hereby dismissed with costs.

DATED at Ottawa, this 23th day of March, 2007

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

Sears Canada Inc.:

John F. Rook, Q.C.
Derek J. Bell
Linda Visser

For the respondents:

Parfums Christian Dior Canada Inc.
Parfums Givenchy Canada Ltd.

James Orr
Jennifer Cantwell

20

A-39-04
2004 FCA 339

Symbol Technologies Canada ULC (*Appellant*) (*Respondent*)

v.

Barcode Systems Inc. (*Respondent*) (*Applicant*)

INDEXED AS: SYMBOL TECHNOLOGIES CANADA ULC v. BARCODE SYSTEMS INC. (F.C.A.)

Federal Court of Appeal, Richard C.J., Létourneau and Rothstein JJ.A.—Winnipeg, September 28; Ottawa, October 7, 2004.

Competition — Appeal from Competition Tribunal decision granting respondent leave to make Competition Act, s. 75 application for order requiring appellant to accept respondent as customer against appellant — Appellant, Canadian subsidiary of bar code equipment manufacturer, sells, distributes products in Canada — Respondent taking over distribution in Western Canada in about 1994 — Since 2003, appellant refusing to deal with respondent — Respondent bringing leave application pursuant to Act, s. 103.1(1), alleging appellant engaged in restrictive trade practice of "refusal to deal" within meaning of Act, s. 75 — Tribunal granting leave under Act, s. 103.1(7) — Appellant arguing Tribunal erred in granting leave because not taking into account all elements of refusal to deal set out in Act, s. 75(1) — As question of law not engaging particular expertise of Tribunal, correctness appropriate standard of review — Test for granting leave in s. 103.1(7) application set out in National Capital News Canada v. Canada (Speaker of the House of Commons) applied: whether sufficient credible evidence of what is alleged to give rise to bona fide belief by Tribunal that applicant directly, substantially affected in its business by reviewable restrictive trade practice that could be subject of Tribunal order under Act, s. 75 or 77 — That threshold for obtaining leave lower than balance of probabilities — All elements of reviewable practice of refusal to deal, set out in Act, s. 75(1), need to be addressed by Tribunal on leave application in order for it to reach conclusion as to whether practice alleged could be subject to order — Court resolving matter without remitting it to Tribunal — Evidence that respondent substantially affected in its business — Real controversy whether evidence refusal to deal likely to have adverse effect on competition in market (Act, s. 75(1)(e)) — Leave application not appropriate occasion to interpret Act, s. 75(1)(e) for first time — Benefit of any doubt working in favour of granting leave — Sufficient

A-39-04
2004 CAF 339

Symbol Technologies Canada ULC (*appelante*) (*défenderesse*)

c.

Barcode Systems Inc. (*intimée*) (*demanderesse*)

RÉPERTORIÉ: SYMBOL TECHNOLOGIES CANADA ULC c. BARCODE SYSTEMS INC. (C.A.F.)

Cour d'appel fédérale, juge en chef Richard, juges Létourneau et Rothstein, J.C.A.—Winnipeg, 28 septembre; Ottawa, 7 octobre 2004.

Concurrence — Appel d'une décision du Tribunal de la concurrence accordant à l'intimée la permission de présenter contre l'appelante une demande fondée sur l'art. 75 de la Loi sur la concurrence en vue d'obtenir une ordonnance enjoignant à celle-ci de l'accepter comme cliente — L'appelante, filiale canadienne d'un fabricant de lecteurs de codes à barres, vend et distribue des produits au Canada — Vers 1994, l'intimée a pris en charge la distribution dans l'Ouest canadien — Depuis 2003, l'appelante refuse de traiter avec l'intimée — L'intimée a présenté une demande de permission en vertu de l'art. 103.1(1) de la Loi, alléguant que l'appelante se livrait à une pratique restrictive du commerce, à savoir le refus de vendre au sens de l'art. 75 de la Loi — Le Tribunal a accordé la permission en vertu de l'art. 103.1(7) de la Loi — L'appelante soutient que le Tribunal a commis une erreur en accordant la permission parce qu'il n'a pas pris en considération tous les éléments du refus de vendre énoncés à l'art. 75(1) de la Loi — Comme les questions de droit ne font appel à aucune expertise particulière du Tribunal, la norme applicable est celle de la décision correcte — Le critère applicable pour faire droit à la demande de permission en vertu de l'art. 103.1(7), énoncé dans la décision National Capital News Canada c. Canada (Président de la Chambre des communes), s'appliquait: il faut se demander s'il existe suffisamment d'éléments de preuve crédibles établissant le bien-fondé des allégations pour que le Tribunal puisse croire de bonne foi que le demandeur a été directement et sensiblement gêné dans son entreprise à cause d'une pratique restrictive susceptible d'examen et que cette pratique pourrait faire l'objet d'une ordonnance du Tribunal en vertu des art. 75 ou 77 — Cette charge qui incombe à l'auteur de la demande de permission est moins lourde que celle imposée par la norme de la prépondérance de la preuve — Tous les éléments de la pratique susceptible d'examen que constitue le refus de vendre, énoncés à l'art. 75(1), doivent être considérés *evidence constituting reasonable grounds for believing refusal to deal could be subject to order under Act — Appeal dismissed.*

This was an appeal from a decision of the Competition Tribunal granting leave to the respondent to make an application against the appellant. The appellant is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US), the largest single manufacturer of bar code equipment in the world. The appellant sells and distributes Symbol US products in Canada. In or about 1994, the respondent took over the appellant's distribution in Western Canada. Since May 1, 2003, the appellant refused to deal with the respondent. The respondent's application for leave to apply for an order under *Competition Act* subsection 75(1) requiring Symbol to accept Barcode as a customer before the Tribunal (brought pursuant to subsection 103.1(1) of the Act) alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act. Leave was granted and the present appeal ensued. The appellant argued that the Tribunal member who granted leave erred in law by refusing to take into account all of the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and that the decision to grant leave should be quashed.

Held, the appeal should be dismissed.

Subsection 103.1(7) of the Act provides that to grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under section 75 or 77 of the Act. The decision to grant leave is a discretionary one. However, the question at issue here whether the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal was one of law. This question of statutory interpretation does not engage any particular expertise of the Tribunal. Thus, the standard of review was correctness.

par le Tribunal qui se penche sur une demande de permission pour que celui-ci puisse se prononcer sur la question de savoir si la pratique alléguée pourrait faire l'objet d'une ordonnance — La Cour a tranché l'affaire sans la renvoyer au Tribunal — Preuve a été faite que l'intimée est sensiblement gênée dans son entreprise — Le point véritablement controversé est de savoir s'il y a preuve que le refus de vendre aura vraisemblablement pour effet de nuire à la concurrence dans un marché (art. 75(1)e) de la Loi) — La demande de permission n'est pas l'occasion appropriée pour interpréter l'art. 75(1)e) de la Loi pour la première fois — Le bénéfice du doute devrait jouer en faveur de l'octroi de la permission — La preuve est suffisante pour fonder des motifs raisonnables de croire que le refus de vendre pourrait faire l'objet d'une ordonnance en vertu de la Loi — Appel rejeté.

Il s'agissait de l'appel d'une décision du Tribunal de la concurrence accordant à l'intimée la permission de présenter une demande à l'encontre de l'appelante. L'appelante est la filiale canadienne de Symbol Technologies Inc. (Symbol US), le principal fabricant de lecteurs de codes à barres au monde. L'appelante vend et distribue les produits Symbol US au Canada. Vers 1994, l'intimée a pris en charge le service de distribution de l'appelante dans l'Ouest canadien. Depuis le 1[er] mai 2003, l'appelante a refusé de traiter avec l'intimée. Dans sa demande présentée au Tribunal (en vertu du paragraphe 103.1(1) de la *Loi sur la concurrence*) en vue d'obtenir la permission de demander que soit prononcée, en vertu du paragraphe 75(1) de la Loi, une ordonnance enjoignant à Symbol de l'accepter comme cliente, l'intimée a allégué que Symbol se livrait à une pratique restrictive du commerce susceptible d'examen, à savoir le refus de vendre au sens de l'article 75 de la Loi. La permission a été accordée et le présent appel a été interjeté. L'appelante a soutenu que le membre du Tribunal qui a fait droit à la demande de permission a commis une erreur de droit en refusant de tenir compte de tous les éléments de la pratique susceptible d'examen que constitue le refus de vendre, énoncés au paragraphe 75(1) de la Loi, et que la décision d'accorder l'autorisation devrait être annulée.

Arrêt: l'appel doit être rejeté.

Le paragraphe 103.1(7) de la Loi prévoit que pour faire droit à la demande, le Tribunal doit avoir des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise par une pratique restrictive du commerce susceptible d'examen et pouvant faire l'objet d'une ordonnance en vertu des articles 75 ou 77 de la Loi. La décision de faire droit ou non à la demande de permission est discrétionnaire. Toutefois, la question en litige en l'espèce, qui consistait à savoir si, dans l'exercice de son pouvoir discrétionnaire, le Tribunal devait considérer tous les éléments de la pratique commerciale restrictive que constitue le refus de vendre, énoncés au paragraphe 75(1), en était une de droit.

The test for granting leave in an application under subsection 103.1(7) found in *National Capital News Canada v. Canada (Speaker of the House of Commons)* was adopted. The application must be supported by sufficient credible evidence to give rise to a *bona fide* belief by the Tribunal that the applicant may have been directly and substantially affected in its business by a reviewable practice, and that the practice in question could be subject to an order. This threshold is lower than proof on a balance of probabilities. That said, the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1) must all be shown and addressed by the Tribunal before it may make an order, not only the merits of the application, but also on an application for leave under subsection 103.1(7). As long as each element is considered, even summarily, the Tribunal's decision to grant or refuse leave will be treated with deference.

Use of essentially the same words in subsection 103.1(7) and paragraph 75(1)(*a*) "that the applicant is directly and substantially affected in the applicants' business", while there are no such similar words in paragraphs 75(1)(*b*) to (*e*) in subsection 103.1(7), does not imply that the statutory elements in paragraphs 75(1)(*b*) to (*e*) need not be considered on a leave application. To determine the leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach such a conclusion without considering all the elements of refusal to deal set out in that subsection. Also, the purpose of the Act is to maintain and encourage competition in Canada, and so at the leave stage, there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market (paragraph 75(1)(*e*) of Act).

It was deemed appropriate for the Court to resolve the matter instead of remitting the matter to the Tribunal for redetermination as leave applications were intended to be dealt with summarily. There was evidence that the respondent was substantially affected in its business due to its inability to obtain the appellant's products. The only real controversy was whether there was evidence that the appellant's refusal to deal was likely to have an adverse effect on competition in a

Cette question d'interprétation législative ne fait appel à aucune expertise particulière du Tribunal. La norme applicable était donc celle de la décision correcte.

Le critère applicable pour faire droit à la demande de permission en vertu du paragraphe 103.1(7), énoncé dans la décision *National Capital News Canada c. Canada (Président de la Chambre des communes)*, a été adopté. La demande doit être appuyée par des éléments de preuve crédibles suffisants pour que le Tribunal puisse croire de bonne foi que le demandeur a pu être directement et sensiblement gêné dans son entreprise à cause d'une pratique susceptible d'examen et que cette pratique pourrait faire l'objet d'une ordonnance. Cette norme de preuve est moins élevée que la norme de la prépondérance de la preuve. Cela dit, les éléments de la pratique commerciale susceptible d'examen que constitue le refus de vendre, énoncés au paragraphe 75(1), doivent tous être prouvés et considérés par le Tribunal pour que celui-ci puisse rendre une ordonnance et ce, non seulement lorsqu'il examine l'affaire au fond, mais aussi lorsqu'il se penche sur une demande de permission selon le paragraphe 103.1(7). Pourvu que chaque élément soit pris en considération, même brièvement, la décision du Tribunal de faire droit ou non à la demande de permission sera traitée avec déférence.

Le fait que les termes employés au paragraphe 103.1(7), à savoir «que l'auteur de la demande est directement et sensiblement gêné dans son entreprise», soient essentiellement les mêmes que ceux utilisés à l'alinéa 75(1)*a*), alors que ce paragraphe ne comporte pas de termes similaires à ceux employés aux alinéas 75(1)*b*) à *e*), ne signifie pas que les éléments énoncés aux alinéas 75(1)*b*) à *e*) n'ont pas à être considérés au stade de la demande de permission. Pour se prononcer sur la demande de permission, le Tribunal doit se demander si la pratique alléguée pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1); et il ne peut tirer pareille conclusion sans considérer tous les éléments du refus de vendre, énoncés à ce même paragraphe. De plus, comme l'objet fondamental de la Loi est de préserver et de favoriser la concurrence au Canada, l'auteur de la demande doit, au stade de la demande de permission, fournir certains éléments de preuve concernant l'effet du refus de vendre sur la concurrence dans un marché (alinéa 75(1)*e*) de la Loi), et le Tribunal doit prendre ces éléments en considération.

On a jugé qu'il était approprié pour la Cour de trancher l'affaire plutôt que de la renvoyer au Tribunal pour qu'il rende une nouvelle décision puisque les demandes de permission sont censées revêtir un caractère sommaire. Preuve a été faite que l'intimée a été sensiblement gênée dans son entreprise en raison de son incapacité à obtenir les produits de l'appelante. Le seul point véritablement controversé était de savoir s'il y avait preuve que le refus de vendre de l'appelante aurait market. The relevant provision, paragraph 75(1)(*e*), has not been interpreted by the Tribunal or this Court, and a leave application was not considered the appropriate occasion to do so. Therefore, if there were facts in the respondent's affidavit that might meet the requirements of paragraph 75(1)(*e*), the benefit of any doubt was to work in favour of granting leave. Here, there was sufficient evidence to constitute reasonable grounds to believe that the appellant's alleged refusal to deal could be the subject of an order under subsection 75(1): the respondent had somewhat of a presence in the Western Canadian market, and its difficult financial situation could be likely to impede its ability to be an effective competitor in that market.

vraisemblablement pour effet de nuire à la concurrence dans un marché. La disposition pertinente, l'alinéa 75(1)*e*), n'a jamais été interprétée par le Tribunal ou par la Cour, et une demande de permission n'était pas l'occasion appropriée pour le faire. Conséquemment, s'il y avait des faits énoncés dans la déclaration sous serment de l'intimée qui pouvaient satisfaire aux exigences de l'alinéa 75(1)*e*), le bénéfice du doute devait jouer en sa faveur. En l'espèce, la preuve était suffisante pour fonder des motifs raisonnables de croire que le refus de vendre allégué de l'appelante pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1): l'intimée avait une certaine présence dans le marché de l'Ouest canadien, et sa situation financière difficile pouvait vraisemblablement gêner sa capacité à se positionner comme un concurrent dynamique dans ce marché.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Competition Act, R.S.C., 1985, c. C-34, ss. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19), 1.1 (as enacted *idem*), 75 (as am. *idem*, s. 45; 2002, c. 16, s. 11.1), 77 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, s. 23; 2002, c. 16, ss. 11.2, 11.3), 103.1 (as enacted *idem*, s. 12).

Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, s. 13(1) (as am. by S.C. 2002, c. 8, s. 130), (2).

LOIS ET RÈGLEMENTS CITÉS

Loi sur la concurrence, L.R.C. (1985), ch. C-34, art. 1 (mod. par L.R.C. (1985) (2e suppl.), ch. 19, art. 19), 1.1 (édicté, *idem*), 75 (mod., *idem*, art. 45; 2002, ch. 16, art. 11.1), 77 (mod. par L.R.C. (1985) (2e suppl.), ch. 19, art. 45; L.C. 1999, ch. 2, art. 23; ch. 31, art. 52; 2002, ch. 16, art. 11.2, 11.3), 103.1 (édicté, *idem*, art. 12).

Loi sur le Tribunal de la concurrence, L.R.C. (1985) (2e suppl.), ch. 19, art. 13(1) (mod. par L.C. 2002, ch. 8, art. 130), (2).

CASES JUDICIALLY CONSIDERED

APPLIED:

National Capital News Canada v. Canada (Speaker of the House of Commons) (2002), 23 C.P.R. (4th) 77 (Comp. Trib.).

REFERRED TO:

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1.

JURISPRUDENCE CITÉE

DÉCISION APPLIQUÉE:

National Capital News Canada c. Canada (Président de la Chambre des communes) (2002), 23 C.P.R. (4th) 77 (Trib. conc.).

DÉCISION EXAMINÉE:

Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration), [2002] 1 R.C.S. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1.

APPEAL from a decision of the Competition Tribunal ([2004] C.C.T.D. No. 1 (Comp. Trib.) (QL)) granting leave to the respondent to make an application against the appellant. Appeal dismissed.

APPEL d'une décision du Tribunal de la concurrence ([2004] D.T.C.C. nº 1 (Trib. conc.) (QL)) accordant à l'intimée la permission de présenter une demande à l'encontre de l'appelante. Appel rejeté.

APPEARANCES:

Steven E. Field and *David G. Hill* for appellant (respondent).

Lindy J. R. Choy for respondent (applicant).

ONT COMPARU:

Steven E. Field et *David G. Hill* pour l'appelante (défenderesse).

Lindy J. R. Choy pour l'intimée (demanderesse).

SOLICITORS OF RECORD:

Hill Abra Dewar, Winnipeg, for appellant (respondent).
Thompson Dorfman Sweatman LLP, Winnipeg, for respondent (applicant).

The following are the reasons for judgment rendered in English by

ROTHSTEIN J.A.:

INTRODUCTION

[1] This is an appeal by Symbol Technològies Canada ULC (Symbol) from a decision of the Competition Tribunal [*Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] C.C.T.D. No. 1 (QL)] under subsection 103.1(7) [as enacted by S.C. 2002, c. 16, s. 12] of the *Competition Act*, R.S.C., 1985, c. C-34 [s. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19)] granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 [as am. *idem*, c. 19, s. 45; S.C. 2002, c. 16, s. 11.1] of the Act.

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

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

FACTS

[4] The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the

AVOCATS INSCRITS AU DOSSIER:

Hill Abra Dewar, Winnipeg, pour l'appelante (défenderesse).
Thompson Dorfman Sweatman LLP, Winnipeg, pour l'intimée (demanderesse).

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE ROTHSTEIN, J.C.A.:

INTRODUCTION

[1] Symbol Technologies Canada ULC (Symbol) interjette appel d'une décision du Tribunal de la concurrence [*Barcode Systems Inc. c. Symbol Technologies Canada ULC*, [2004] D.T.C.C. nº 1 (QL)] accordant à l'intimée Barcode Systems Inc. (Barcode), suivant le paragraphe 103.1(7) [édicté par L.C. 2002, ch. 16, art. 12] de la *Loi sur la concurrence*, L.R.C. (1985), ch. C-34 [art. 1 (mod. par L.R.C. (1985) (2e suppl.), ch. 19, art. 19)], la permission de présenter une demande au Tribunal à l'encontre de Symbol. Dans sa demande de permission, Barcode a allégué que Symbol se livrait à une pratique restrictive du commerce susceptible d'examen, à savoir le refus de vendre au sens de l'article 75 [mod. *idem*, ch. 19, art. 45; L.C. 2002, ch. 16, art. 11.1] de la Loi.

[2] Dans sa demande présentée au Tribunal, Barcode demandait que soit prononcée, en vertu du paragraphe 75(1) de la *Loi sur la concurrence*, une ordonnance enjoignant à Symbol de l'accepter comme cliente.

[3] Dans le présent appel, Symbol déclare que le membre du Tribunal qui a fait droit à la demande de permission a commis une erreur de droit en refusant de tenir compte des exigences de la loi, et que la décision d'accorder l'autorisation devrait être annulée par la Cour.

FAITS

[4] Les faits sont tirés de l'affidavit de David Sokolow, président de Barcode. Il n'y a pas eu de contre-interrogatoire relativement à cet affidavit. Symbol est la

Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

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

RELEVANT STATUTORY PROVISIONS

[6] Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the *Competition Act*, e.g. refusal to deal (section 75) and tied selling (section 77 [as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, s. 23; 2002, c. 16, ss. 11.2, 11.3]). By amendments to the *Competition Act*, S.C. 2002, c. 16, ss. 11.1 to 11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) [as enacted *idem*, s. 12] of the *Competition Act* provides:

> **103.1** (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

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

> **103.1** . . . .

filiale canadienne de Symbol Technologies Inc. (Symbol US). Symbol US est le principal fabricant de lecteurs de codes à barres au monde. Symbol vend et distribue les produits Symbol US au Canada. Vers 1994, Barcode a pris en charge le service de distribution de Symbol dans l'Ouest canadien.

[5] Vers janvier 2003, Symbol a informé Barcode qu'elle ne pourrait plus acheter les pièces destinées aux produits Symbol. En avril 2003, Symbol a informé Barcode qu'elle n'accepterait pas ses bons de commande. Barcode affirme que depuis le 1er mai 2003, Symbol a refusé de traiter avec elle.

DISPOSITIONS LÉGISLATIVES PERTINENTES

[6] Jusqu'en 2002, seul le Commissaire de la concurrence pouvait présenter une demande au Tribunal en ce qui concerne les pratiques restrictives du commerce susceptibles d'examen, définies à la Partie VIII de la *Loi sur la concurrence*, tels le refus de vendre (article 75) et les ventes liées (article 77 [mod. par L.R.C. (1985) (2e suppl.), ch. 19, art. 45; L.C. 1999, ch. 2, art. 23; ch. 31, art. 52; 2002 , ch. 16, art. 11.2, 11.3]). À la suite de modifications à la *Loi sur la concurrence*, L.C. 2002, ch. 16, art. 11.1 à 11.3, les particuliers se sont vus accorder la possibilité de présenter des demandes au Tribunal à condition d'en obtenir la permission. Le paragraphe 103.1(1) [édicté, *idem*, art. 12] de la *Loi sur la concurrence* dispose:

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

[7] Le paragraphe 103.1(7) énonce les éléments que le Tribunal doit prendre en considération pour se prononcer sur une demande de permission. Pour faire droit à la demande, le Tribunal doit avoir des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise par une pratique restrictive du commerce susceptible d'examen et pouvant faire l'objet d'une ordonnance en vertu des articles 75 ou 77 de la *Loi sur la concurrence*. Le paragraphe 103.1(7) prévoit:

> **103.1** [. . .]

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

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

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

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

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

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

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

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

THE ALLEGED ERROR OF LAW

[9] Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[8] La pratique commerciale restrictive d'examen sur laquelle se fonde Barcode est le refus de vendre. Le paragraphe 75(1) est ainsi rédigé:

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

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

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

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

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

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

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

L'ERREUR DE DROIT ALLÉGUÉE

[9] Symbol soutient que le membre du Tribunal qui a fait droit à la demande a refusé de prendre en considération tous les éléments du refus de vendre susceptible d'examen, énoncés au paragraphe 75(1), et

not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(*e*).

qu'il a donc commis une erreur de droit en ne tenant pas compte des exigences de la loi. Symbol soutient essentiellement que le membre a refusé de considérer la question de savoir si le refus de vendre reproché à Symbol aurait vraisemblablement pour effet de nuire à la concurrence dans un marché, comme l'exige l'alinéa 75(1)*e*).

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

> What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.
>
> . . .
>
> As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

[10] De fait, dans ses motifs, le membre conclut précisément que, saisi d'une demande de permission, le Tribunal n'a pas à considérer la question de savoir si le refus de vendre aura *vraisemblablement pour effet* de nuire à la concurrence dans un marché. Aux paragraphes 8 et 10, le membre affirme:

> Le Tribunal doit avoir des raisons de croire que Barcode est directement et sensiblement gênée dans son entreprise par le refus de vendre de Symbol. À ce stade, il n'est pas nécessaire que le Tribunal ait des raisons de croire que ce refus a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.
>
> [. . .]
>
> Selon mon interprétation de la Loi, il doit y avoir atteinte à la concurrence dans un marché pour que le Tribunal conclue à l'existence d'une contravention à l'article 75 et prononce l'ordonnance corrective prévue par cette disposition. Cette atteinte, toutefois n'est pas une exigence du critère appliqué par le Tribunal pour déterminer s'il accordera ou non une permission.

STANDARD OF REVIEW

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

NORME DE CONTRÔLE

[11] Le paragraphe 13(1) [mod. par L.C. 2002, ch. 8, art. 130] de la *Loi sur le Tribunal de la concurrence*, L.R.C. (1985) (2^e suppl.), ch. 19, prévoit que les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale. Le droit d'appel absolu (sauf en cas d'appels sur des questions de fait suivant le paragraphe 13(2)) est une indication que la norme de contrôle applicable est celle de la décision correcte.

[12] Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the

[12] La décision de faire droit ou non à la demande de permission en vertu du paragraphe 103.1(7) relève du

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

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

[14] The basic purpose of the *Competition Act* as described in section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

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

ANALYSIS

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

[16] In *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Comp. Trib.), Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test

pouvoir discrétionnaire du Tribunal. Toutefois, la question en litige en l'espèce est de savoir si, dans l'exercice de son pouvoir discrétionnaire, le Tribunal doit considérer tous les éléments de la pratique commerciale restrictive que constitue le refus de vendre, énoncés au paragraphe 75(1). Il s'agit là d'une question de droit, d'une question classique d'interprétation législative. Il appartient à la Cour de décider si le Tribunal a exercé son pouvoir discrétionnaire à l'intérieur des limites imposées par le législateur. Voir *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, au paragraphe 38.

[13] Cette question d'interprétation législative ne fait appel à aucune expertise particulière du Tribunal. Les considérations économiques et commerciales ne font pas partie de l'analyse quant à savoir si, s'agissant d'une demande de permission, tous les éléments énumérés au paragraphe 75(1) doivent être examinés. Qu'il ne soit pas nécessaire de faire appel à une expertise pour résoudre la question d'interprétation législative en litige en l'espèce indique que la norme applicable est celle de la décision correcte.

[14] L'objet fondamental de la *Loi sur la concurrence*, tel qu'il est défini à l'article 1.1 [édicté par L.R.C. (1985) (2e suppl.), ch. 19, art. 19], est «de préserver et de favoriser la concurrence au Canada», et l'objet de l'article 75 confirme cette intention. Lorsque des considérations économiques et commerciales entrent en jeu, la déférence peut être de mise. Mais tel n'est pas le cas en l'espèce.

[15] Après avoir soupesé ces considérations pragmatiques et fonctionnelles, je conclus que la norme de contrôle applicable au présent appel est celle de la décision correcte.

ANALYSE

Le critère juridique applicable à une demande suivant le paragraphe 103.1(7)

[16] Dans la décision *National Capital News Canada c. Canada (Président de la Chambre des communes)* (2002), 23 C.P.R. (4th) 77 (Trib. conc.), la juge Dawson, à titre de membre du Tribunal de la concurrence, a

for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

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

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

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

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

examiné le critère applicable à l'octroi d'une demande de permission en application du paragraphe 103.1(7). Après avoir cité des précédents portant sur l'interprétation de l'expression «motifs raisonnables de croire», elle a déclaré au paragraphe 14 de ses motifs:

> Par conséquent, me fondant sur le sens ordinaire des termes utilisés au paragraphe 103.1(7) de la Loi et sur la jurisprudence à laquelle je me suis reportée, je conclus que la norme appropriée en vertu du paragraphe 103.1(7) consiste à se demander si la demande de permission est appuyée par des éléments de preuve crédibles suffisants pour qu'on puisse croire de bonne foi que le demandeur a pu être directement et sensiblement gêné dans son entreprise à cause d'une pratique susceptible d'examen et que cette pratique pourrait faire l'objet d'une ordonnance.

Je suis du même avis que la juge Dawson, et j'endosse son analyse et sa conclusion quant au critère applicable pour faire droit à la demande de permission en vertu du paragraphe 103.1(7).

[17] La charge qui incombe à l'auteur de la demande de permission n'est pas très lourde. Il n'a qu'à fournir une preuve crédible suffisante de ce qui est allégué pour faire naître une croyance légitime dans l'esprit du Tribunal. Il s'agit là d'une norme de preuve moins élevée que la norme de la prépondérance de la preuve, laquelle s'appliquera à la décision sur le fond.

[18] Toutefois, il est important de ne pas confondre la norme de preuve peu élevée applicable à la demande de permission avec le type de preuve devant être présenté au Tribunal et considéré par lui pour trancher cette demande. Pour obtenir une ordonnance suivant le paragraphe 75(1), le refus de vendre n'est pas simplement le refus d'un fournisseur de vendre un produit à un client intéressé. Les éléments de la pratique commerciale susceptible d'examen que constitue le refus de vendre, éléments devant être prouvés pour que le Tribunal puisse rendre une ordonnance, sont ceux qui sont énoncés au paragraphe 75(1). Ces éléments se combinent et doivent tous être considérés par le Tribunal et ce, non seulement lorsqu'il examine l'affaire au fond, mais aussi lorsqu'il se penche sur une demande de permission selon le paragraphe 103.1(7). Cela s'explique du fait que, s'il ne considérait pas tous les éléments de la pratique énoncés au paragraphe 75(1) pour trancher la

order under subsection 75(1).

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

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

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

[22] I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is

demande de permission, le Tribunal ne pourrait conclure, comme le prescrit le paragraphe 103.1(7), qu'il existait des motifs de croire qu'une pratique alléguée pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1).

[19] Le Tribunal peut examiner chaque élément brièvement pour respecter la nature expéditive de la procédure de permission prévue à l'article 103.1. Pourvu que chaque élément paraisse être pris en considération, la décision discrétionnaire du Tribunal de faire droit ou non à la demande de permission sera traitée avec déférence par la Cour. Mais le pouvoir discrétionnaire du Tribunal n'est pas absolu. Il doit prendre en considération tous les éléments énoncés au paragraphe 75(1).

[20] Les termes utilisés au paragraphe 103.1(1) confortent cette interprétation des conditions prescrites au paragraphe 103.1(7). Le paragraphe 103.1(1) exige que la demande de permission soit accompagnée d'une déclaration sous serment faisant état des faits. Cette déclaration sous serment doit donc contenir les faits pertinents par rapport aux éléments de la pratique commerciale susceptible d'examen que constitue le refus de vendre, énoncés au paragraphe 75(1). C'est cette déclaration qu'examinera le Tribunal pour trancher une demande de permission en vertu du paragraphe 103.1(7). Bien que la norme de preuve soit moins élevée au stade de la demande de permission qu'à celui de l'examen au fond, il demeure que les mêmes considérations sont pertinentes et doivent être examinées aux deux stades.

[21] L'intimée affirme que les termes employés au paragraphe 103.1(7), à savoir «que l'auteur de la demande est directement et sensiblement gêné dans son entreprise», sont essentiellement les mêmes que ceux utilisés à l'alinéa 75(1)*a*), alors que ce paragraphe ne comporte pas de termes similaires à ceux employés aux alinéas 75(1)*b*) à *e*). Il s'ensuit, dit-il, que le législateur n'entendait pas obliger le Tribunal à prendre en considération chaque élément des alinéas 75(1)*b*) à *e*) au stade de la demande de permission.

[22] Je ne crois pas que cette affirmation soit juste. Étant donné que le paragraphe 103.1(1) dit que «[t]oute

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

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

Application of the test for leave to the facts

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

personne peut demander», il est théoriquement possible pour quelqu'un d'autre qu'une personne directement et sensiblement gêné de présenter une demande au Tribunal. Cependant, le législateur voulait clairement limiter les demandes des particuliers aux personnes qui sont elles-mêmes directement et sensiblement gênées dans leur entreprise par la pratique alléguée. Je crois que cela explique pourquoi les mots employés au paragraphe 103.1(7) sont substantiellement les mêmes que ceux choisis par le législateur à l'alinéa 75(1)*a*). Toutefois, l'emploi de ces termes ne signifie pas que les éléments énoncés aux alinéas 75(1)*b*) à *e*) n'ont pas à être considérés au stade de la demande de permission, parce qu'à ce stade, le Tribunal doit se demander si la pratique alléguée pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1); et il ne peut tirer pareille conclusion sans considérer tous les éléments du refus de vendre, énoncés à ce même paragraphe.

[23] L'avocat de Symbol a fait valoir que, selon une interprétation téléologique, il devrait être clair que pour trancher une demande de permission, le Tribunal doit considérer tous les éléments prévus au paragraphe 75(1). J'endosse ce point de vue. L'objet de la *Loi sur la concurrence* est de préserver et de favoriser la concurrence au Canada, et non d'offrir un recours pour régler un différend entre un fournisseur et un client qui n'a aucune incidence sur la préservation ou l'encouragement de la concurrence. C'est là l'objet manifeste de l'alinéa 75(1)*e*). La charge à ce stade est légère, mais l'auteur de la demande doit fournir certains éléments de preuve concernant l'effet du refus de vendre sur la concurrence dans un marché, et le Tribunal doit prendre ces éléments en considération.

Application du critère aux faits de l'espèce

[24] Ayant établi le critère juridique approprié à une demande de permission de présenter une demande d'ordonnance en vertu du paragraphe 75(1), il reste à se demander si cette affaire devrait être renvoyée au Tribunal pour qu'il rende une nouvelle décision, ou si la Cour devrait trancher elle-même le litige. Barcode fait valoir que la demande de permission se veut un processus sommaire d'examen préalable. Il n'y a pas de droit au contre-interrogatoire sur la déclaration déposée au soutien de la demande, aucune disposition ne permet

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

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

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

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

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

[29] From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are

à l'intimée de produire une preuve par affidavit et les délais prévus à l'article 103.1 sont courts, toutes choses qui tendent à confirmer le caractère sommaire de cette procédure. Pour ces motifs, j'estime qu'il conviendrait en l'espèce que la Cour tranche l'affaire sans délai.

[25] Y a-t-il une preuve crédible pour étayer la conclusion voulant qu'il y ait des motifs raisonnables de croire que le refus de Symbol d'approvisionner Barcode pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1)? Preuve a été faite que Barcode est sensiblement gênée dans son entreprise en raison de son incapacité à obtenir les produits de Symbol. La preuve de Barcode veut qu'elle ne puisse obtenir ces produits directement de Symbol ou par l'intermédiaire d'un de ses distributeurs. Barcode affirme vouloir se conformer aux conditions commerciales habituelles de Symbol et être en mesure de le faire, et dit que les produits de Symbol sont en quantité amplement suffisante.

[26] Le seul point véritablement controversé est de savoir s'il y a preuve que le refus de vendre de Symbol aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

[27] L'alinéa 75(1)*e*) n'a jamais été interprété sur ce point par le Tribunal ou par la Cour, et une demande de permission n'est pas l'occasion appropriée pour le faire. Conséquemment, s'il y a des faits énoncés dans la déclaration sous serment de Barcode qui pourraient satisfaire aux exigences de l'alinéa 75(1)*e*), le bénéfice du doute devrait jouer en sa faveur afin de ne pas lui interdire définitivement l'accès au Tribunal.

[28] La preuve de Barcode veut que, vers 1994, elle se soit chargée de la distribution de Symbol dans l'Ouest canadien, et qu'en 2002 ses profits dépassaient 20 millions de dollars. Symbol US est le plus grand fabricant au monde de lecteurs de codes à barres. Si Symbol continue à refuser de l'approvisionner, Barcode se verra acculée à la faillite, et, de fait, le membre du Tribunal a constaté que, le 19 décembre 2003, Barcode a été mise sous séquestre.

[29] En me fondant sur la preuve soumise par Barcode, je crois que l'on peut inférer, aux fins de la

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

CONCLUSION

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

RICHARD C.J.: I agree.

LÉTOURNEAU J.A.: I agree.

permission de présenter une demande, qu'il existe des motifs raisonnables de croire que Barcode avait une certaine présence dans le marché de l'Ouest canadien pour fournir et réparer les produits Symbol. Sa situation financière difficile, dont témoigne sa mise sous séquestre, pourrait vraisemblablement gêner sa capacité à se positionner comme un concurrent dynamique dans ce marché, ayant ainsi pour effet de nuire à la concurrence dans ce marché. La preuve n'est peut-être pas très forte, mais j'estime qu'elle est suffisante pour fonder des motifs raisonnables de croire que le refus de vendre allégué de Symbol pourrait faire l'objet d'une ordonnance en vertu du paragraphe 75(1).

CONCLUSION

[30] Pour ces motifs, je rejetterais l'appel avec dépens.

LE JUGE EN CHEF RICHARD: Je souscris aux présents motifs.

LE JUGE LÉTOURNEAU, J.C.A.: Je souscris aux présents motifs.

21

Competition Tribunal Tribunal de la Concurrence

Reference: *The Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10
File No.: CT-2011-06
Registry Document No.: 29

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

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario for an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76 of the *Competition Act*.

B E T W E E N:

Used Car Dealers Association of Ontario
(applicant)

and

Insurance Bureau of Canada
(respondent)

Decided on the basis of the written record
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: September 9, 2011
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER GRANTING THE APPLICANT LEAVE TO FILE AN APPLICATION PURSUANT TO SECTION 75 OF THE COMPETITION ACT

THE APPLICATION

[1] The Used Car Dealers Association of Ontario (the "UCDA") seeks leave from the Competition Tribunal (the "Tribunal") to commence an application pursuant to section 75 and subparagraph 76(1)(a)(ii) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). The proposed application names the Insurance Bureau of Canada as the respondent.

THE DECISION

[2] For the following reasons leave has been granted to commence an application under section 75 of the Act. However, leave to proceed under section 76 has been denied.

THE APPLICANT

[3] The UCDA was founded in 1984. It is a not-for-profit trade association which represents more than 4500 motor vehicle dealers in Ontario. The UCDA provides a variety of services to its members including one called Auto Check™ ("Auto Check"). It provides dealers who are selling used cars with information about the accident history of the vehicles they intend to sell. Using a vehicle's VIN number, a dealer who is a member of the UCDA pays a fee of $7.00 (before taxes) to conduct an Auto Check vehicle accident history search.

[4] The UCDA's evidence for this application is found in an affidavit sworn by Robert G. Beattie on June 29, 2011 (the "Beattie Affidavit"). Mr. Beattie is the UCDA's Executive Director.

THE RESPONDENT AND ITS DATABASES

[5] The Insurance Bureau of Canada (the "IBC") is a national not-for-profit industry association which represents home, vehicle and business insurers. The IBC is, according to the UCDA, the only source of integrated industry wide data collected from all insurers who sell auto insurance as well as from independent adjusters and investigators. The data are located on a database which IBC describes as its Web Claims Search Application. However, that database does not include information about the dollar value of claims made when vehicles are in accidents. Those values are found in information provided to IBC by its members and collected in a second IBC database called the Automotive Statistical Plan ("ASP Database").

THE BACKGROUND

[6] In 1998, the UCDA became an Associate Member of the IBC primarily to gain access to the information in IBC's Web Claims Search Application. That information is a critical input into UCDA's Auto Check business.

OTHER PROVIDERS OF VEHICLE ACCIDENT SEARCHES

[7] 3823202 Canada Inc., carrying on business as CarProof ("CarProof"), began to provide vehicle accident searches in 2005. It is now the market leader and its searches cost $34.95 (Cdn) before taxes.

[8] In 2008, CARFAX, Inc. ("Carfax"), an American based provider of vehicle accident histories, began to sell them in Ontario. It charges $34.99 (U.S.) before taxes.

[9] Both CarProof and Carfax purchase IBC's data for their accident history searches and, according to the Beattie Affidavit, they are both able to provide the dollar value of claims as part of their search results.

[10] The relationship between Auto Check and CarProof has, from the UCDA's perspective, been troubled. The UCDA took CarProof to court to prevent it from misrepresenting the services offered by Auto Check. In the end, a settlement achieved Auto Check's objective. CarProof has also twice (in 2009 & 2010) tried to persuade the UCDA to enter into a partnership in which the Auto Check service would be terminated and CarProof would supply vehicle accident histories to UCDA's members. The UCDA refused to entertain these proposals because it believes that its members place a high value on their ability to purchase inexpensive vehicle accident histories through Auto Check.

REGULATORY CHANGES

[11] On January 1, 2010, changes to the regulations under the Ontario *Motor Vehicle Dealers Act, 2002*, S.O. 2002, c. 30, Schedule B, required motor vehicle dealers to disclose to potential purchasers whether a used vehicle had ever suffered damage which cost more than $3000.00 to repair.

[12] To assist its members to meet this new obligation, the UCDA decided to try to obtain additional information from IBC about the dollar value of insurance claims. IBC has that information on its ASP Database. The Beattie Affidavit describes the UCDA's early efforts to secure this information in paragraphs 21 and 25-28:

> In early June 2009, in anticipation of these [Regulatory] changes, Robert Pierce, the UCDA's Director of Member Services, contacted Marti Pehar, Manager, Business Partnerships, of IBC by telephone and <u>requested that IBC expand the scope of the information it provided to Auto Check™ to include dollar value claims information</u>.
>
> I understand from Mr. Pierce that he met with Ms. Pehar on June 16, 2009 to discuss Auto Check™'s request for dollar value claims information. Although UCDA had indicated its willingness to compensate IBC for the provision of this additional information, on June 24, 2009, <u>Ms. Pehar informed Mr. Pierce that IBC</u>

> had refused UCDA's request. I understand and believe that at that time IBC provided, and presently continues to provide, similar information directly or indirectly to CarProof.
>
> On May 17, 2010 Warren Barnard, UCDA's Legal Services Director, and I met with Ralph Palumbo, IBC Vice-President - Ontario, and Randall Bundus, IBC Vice-President -Operations and General Counsel, and renewed Auto Check™'s request for dollar value claims information. Mr. Palumbo stated that he did not see any reason why IBC would not provide this information to UCDA. Mr. Bundus indicated that IBC would need to obtain authorization from its member insurers in order to provide the ASP information to UCDA.
>
> The requirement to obtain insurer consents in respect of dollar claims data came as a surprise to UCDA because this has never been an issue with the Web Claims Search application. Nevertheless, on May 20, 2010, I wrote to Mr. Palumbo and formally requested that IBC seek the requisite authorization from its member insurers to provide the ASP dollar value claims information to Auto Check™.
>
> In a letter dated May 26, 2010, Mr. Bundus wrote to me to state that IBC would not seek the authorization UCDA had requested to supply dollar claims data from its insurer members. Instead, Mr. Bundus indicated that UCDA should contact each insurer member of IBC in order to obtain individual consents for provision of dollar claims information.
>
> [The emphasis is mine]

THE TERMINATION OF THE UCDA'S ACCESS TO IBC's WEB CLAIMS SEARCH APPLICATION

[13] The Beattie Affidavit deals with this subject and the UDCA's ongoing efforts to secure consents in paragraphs 28-37. There he says:

> [In a letter dated May 26, 2010] …, without any prior warning, Mr. Bundus informed me that IBC was terminating UCDA's Associate Membership, thereby ending the 12-year relationship between the parties and Auto Check™'s ability to continue to obtain the claims data from the Web Claims Search application.
>
> On June 2, 2010, my colleague Warren Barnard wrote to Mr. Bundus expressing the UCDA's shock over the unexplained and unforeseen termination of its Associate Membership, and requesting that the IBC reconsider its decision. In the alternative, Mr. Barnard requested an extension of the termination notice period to six months (i.e., to November 26,2010) in order to (i) allow the UCDA a reasonable opportunity to contact the individual insurers whose authorization would be required for UCDA to obtain ASP information from IBC, and (ii) continue using the Web Claims Search application.

In the absence of a reply to Mr. Barnard's letter, on June 9, 2010, McMillan LLP, external counsel to UCDA, wrote to Mr. Bundus expressing UCDA's concerns that IBC's conduct raised issues under the *Competition Act* and reiterating UCDA's request that IBC reconsider the termination of UCDA's membership and its ability to source vehicle claims data (or, alternatively, extend the notice period to six months).

On June 23, 2010, McMillan LLP again wrote to Mr. Bundus, requesting that IBC grant the six-month extension and, in the meantime, provide UCDA with further particulars as to the form and content of the insurer authorizations required by IBC in order to supply the ASP information to Auto Check™. Mr. Bundus replied on June 28, 2010 providing information about the form of authorization required, but refusing to reconsider IBC's termination of UCDA's membership and provision of the Web Claims Search application, or UCDA's request for an extension of the notice period.

After further discussions and emails, IBC reinstated UCDA's Associate Membership and ability to use the Web Claims Search application until November 26, 2010. UCDA also began a process of contacting numerous insurers to obtain consent for IBC to provide ASP information to UCDA, something that has never been required to use the Web Claims Search application.

Between July 2010 and May 2011, UCDA obtained consents from insurers in respect of ASP information, and was also dealing with IBC on a range of contractual, technical and logistical issues related to ASP information. UCDA's Associate Membership has continued on a month to month basis as did its ability to use the Web Claims Search application.

On April 18, 2011, UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. UCDA was then in a position to seek consent from three insurers who had apparently withdrawn their earlier consents. However, UCDA was not made aware until May 30, in an email from James Fordham, Director of Customer Service at IBC, to Neil Elgar, UCDA's Manager of Administrative Services, that several other insurers had withdrawn their consents in the period from January to March, 2011. Mr. Fordham did not explain how the withdrawals occurred or why UCDA was not informed about them many months earlier when the withdrawals took place.

On June 7, 2011, Mr. Fordham informed Mr. Elgar by email that IBC would be terminating use of the Web Claims Search application. IBC gave notice that termination would take place on June 10, 2011, although after subsequent correspondence between Messrs. Elgar and Fordham, the date was extended to June 17, 2011. Mr. Fordham did not give a reason for the termination or for the briefness of the notice period.

> On June 9, 2011, Mr. Barnard communicated with Mr. Bundus and requested continuing provision of the Web Claims Search application, for which insurer consents had never been required, while UCDA pursued consents from insurers for supply of the ASP information. On June 16, 2011, McMillan LLP reiterated Mr. Barnard's request in voicemail and email messages to Mr. Bundus.
>
> On June 16, 2011, UCDA advised its members that the Auto Check™ searches would be suspended effective June 17, 2011 until further notice due to the inability to obtain supply of sufficient data to provide vehicle accident history searches. On June 17, 2011 at 5:00 pm IBC terminated supply of the Web Claims Search application to UCDA.
>
> [The emphasis is mine]

THE EFFECT OF THE TERMINATION

[14] The termination on June 17, 2011 (the "Termination") ended a 13 year arrangement which had cost the UCDA $65,000.00 in annual dues plus $16,000.00 which the UCDA provided to IBC in June of 2007 to help finance upgrades to IBC's database. As well, in 2010, IBC added a fee for the information supplied to the UCDA from the Web Claims Search Application. The UCDA has always paid IBC as required.

[15] The Termination also caused the UCDA to suspend its Auto Check business.

THE FUTURE OF AUTO CHECK

[16] The UCDA takes the position that its Auto Check service would again be viable if it had the data from the Web Claims Search Application. In other words, although it would have been helpful, the UCDA's members do not need the dollar value claims information from the ASP Database because, according to the Beattie Affidavit, approximately 2/3 of the searches show that vehicles have not been in accidents. Further, where accidents have occurred, the UCDA's member dealers are free to exercise judgment about whether the damage would have cost below or above $3000.00 to repair. In other words, dealers don't usually need the dollar value of the claims. However, the Beattie Affidavit concedes that, in the small number of situations in which a precise dollar value is needed, dealers can purchase the more costly searches from CarProof or Carfax which include the dollar amounts.

PART I – SECTION 75 – REFUSAL TO SUPPLY

[17] Subsection 103.1(7) sets out the test for granting leave under section 75 of the Act. It reads:

103.1 (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the	103.1 (7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la

applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[18] The law is clear that there must be sufficient credible evidence to give rise to a *bona fide* belief (i) that an applicant is directly and substantially affected by the refusal to supply and (ii) that an order could be made under subsection 75(1)(a-e) of the Act (*Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339, at paragraph 16, and *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, at paragraphs 14-15).

THE PRODUCT

[19] The UCDA says that the product is IBC's Web Claims Search Application and notes that it has the following distinguishing features:

- The data are available to the UCDA without the need to secure consents from the parties who provide the data.
- It includes integrated industry wide claims data.
- It is offered through IBC's web portal.
- It does not include information about the dollar value of claims.

[20] The UCDA says that the Web Claims Search Application is the product that has been refused, and that, for the reasons described above in paragraph 16, it is a viable product which meets the needs of the UCDA's members in almost all situations.

[21] The IBC takes a different view and says that the product at issue is the right to access IBC's Web Claims Search Application and that the product is therefore properly characterized as a license. IBC says that, because the Tribunal held in *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.*, 78 C.P.R. (3d) 321, that licenses are not products for the purpose of section 75 of the Act, an order could not be made.

[22] However, I have not been persuaded by this submission. There is no evidence to suggest that IBC ever characterized its arrangements with the UCDA as a license. The evidence is that access to the Web Claims Search Application data was incidental to the UCDA's Associate Membership in IBC.

[23] In the alternative, IBC submits that the proper product market is "vehicle insurance claims data" and that data of that kind is available in both IBC's Web Claims Search Application and in its ASP Database.

[24] Evidence about the contents and attributes of the ASP Database is sparse but it does appear that the UCDA could use the ASP data to operate Auto Check if it were available. In this regard, the Beattie Affidavit says at paragraph 40:

> The Web Claims Search application will remain critical to the Auto Check™ business unless and until UCDA is able to obtain consents from individual insurers to access sufficient ASP information to offer a viable vehicle accident history search service.

[25] As noted above, the Beattie Affidavit shows that the UCDA initially approached IBC asking only for the dollar values of claims on the ASP Database and IBC refused. However, UCDA's request appears to have changed over time into one for access to all the ASP data. This change may have been motivated by IBC's first decision to terminate UCDA's access to the Web Claims Search Application in May 2010. In any event, IBC subsequently agreed to give the UDCA access to the ASP Database but said that consents were required from the insurance companies whose data are found therein (the "Consent(s)"). IBC initially offered to secure the Consents from its members.

[26] However, IBC changed its mind and, instead of providing the Consents itself, required the UCDA to approach each insurance company for its Consent. The UCDA undertook this exercise and, over a period of almost one year, from July 2010 to May 2011 it secured many Consents. On April 18, 2011, the UCDA signed a Service Provider Agreement with IBC for the provision of ASP information from consenting insurers. When the agreement was signed, the UCDA knew that three insurers who had consented had withdrawn their earlier Consents. However, it was not until the end of May 2011 that IBC told the UCDA that several other Consents had also been withdrawn earlier in the year. No reasons were provided. Without those Consents, the UCDA does not have access to sufficient ASP data to make the ASP Database a viable alternative for the data on IBC's Web Claims Search Application.

[27] Given these facts, I find that the Tribunal could conclude that the fact that access to the ASP Database requires Consents, which are not readily available, means that it is not in the same product market as the Web Claims Search Application data for which no Consents are required.

[28] For this reason, I have decided that the Tribunal could conclude that the vehicle insurance claims data from IBC's Web Claims Search Application is the product at issue in this application.

[29] IBC also says that, even if the data on the Web Claims Search Application is the product, leave should be denied because the UCDA fails to consistently describe the product it says is at issue. IBC notes that the data the UCDA received before the Termination is variously described as:

- Web Search claims data.
- Vehicle Insurance claims data
- Supply from the IBC Web Claims Search Application
- Vehicle Insurance Claims data

[30] In my view, there is no lack of clarity. In spite of the various descriptions provided, it is clear that the UCDA is speaking of the data it has received since 1998 using IBC's Web Claims Search Application.

DIRECTLY AND SUBSTANTIALLY AFFECTED – SUBSECTION 103.1(7)

[31] The Beattie Affidavit shows that Auto Check's business accounted for more than 50% of the UCDA's net income in the year ended December 31, 2010. As well, Mr. Beattie says that Auto Check is a service which the UCDA's members consider to be "critical" and that it has been suspended as a consequence of the Termination. In my view, this evidence is sufficient to show that, as a result of the Termination, the UCDA is directly and substantially affected in its business. While it may be useful to consider earnings over time as the Tribunal suggested in *Nadeau Poultry Farm Ltd v. Groupe Westco Inc.*, 2009 Comp. Trib. 6, aff'd 2011 FCA 188, I do not accept IBC's submission that such data is required. Further, it is noteworthy that subsection 103.1(7) reads in the present tense and that the UCDA has provided current information.

THE MEANING OF "COULD"

[32] I now turn to the question of whether an order could be made under section 75 and I think it useful at this juncture to reflect on the meaning of the word "could". The context is important. The question of whether an order "could" be made is being considered in an application for leave which is not supported by a full evidentiary record. Parliament decreed that an applicant would file an affidavit and a respondent would file representations. This means that there will inevitably be incomplete information on some topics. As well, the process is to be expeditious and the burden of proof is lower than the ordinary civil burden which is "a balance of probabilities".

[33] In my view, the lower threshold means that the question is whether an order is "possible" and "could" is used in that sense.

[34] In deciding whether an order is possible the Tribunal must assess whether there is sufficient credible evidence to give rise to a *bona fide* belief that an order is possible. However, given the context described above, it is not reasonable to conclude that hard and fast evidence is required on every point. In my view, reasonable inferences may be drawn where the supporting grounds are given and circumstantial evidence may be considered.

THE UCDA'S INABILITY TO OBTAIN ADEQUATE SUPPLIES OF A PRODUCT ANYWHERE IN A MARKET ON USUAL TRADE TERMS 75(1)(a)

[35] The UCDA says that IBC is the only supplier of integrated insurance claims data. IBC disputes this saying that the UCDA could acquire the information it needs for its Auto Check business from CarProof and Carfax. However, in my view, the Tribunal could not conclude that the phrase "anywhere in a market" is intended to require the UCDA to purchase the data it needs from Auto Check's competitors.

[36] IBC also says that the UCDA has failed to define the geographic market. However, since the UCDA's members are in Ontario and, since the used vehicle accident histories are sought for their use, it is reasonable to conclude Ontario is the geographic market and that an order could therefore be made.

[37] Finally, with respect to usual trade terms, the evidence shows that the UCDA is willing to continue to pay IBC and since the Web Claims Search Application data is only available from IBC, this aspect of the test is met and an order could be made.

INSUFFICIENT COMPETITION AMONG SUPPLIERS – 75(1)(b)

[38] In my view, because IBC is the sole supplier, the Tribunal could conclude that the UCDA's inability to secure the data on IBC's Web Claims Search Application is due to insufficient competition.

THE PERSON REFERRED TO IN PARAGRAPH (A) IS WILLING AND ABLE TO MEET THE USUAL TRADE TERMS OF THE SUPPLIER OR SUPPLIERS OF THE PRODUCT – 75(1)(c)

[39] There is no question that the UCDA is prepared to continue to pay for the Web Claims Search Application data. In these circumstances, I find that the Tribunal could conclude that this test has been met.

THE PRODUCT IS IN AMPLE SUPPLY – 75(1)(d)

[40] The Beattie Affidavit shows that IBC was able to reinstate the UCDA's associate membership and its access to the Web Claims Search Application after the initial termination of the UCDA's membership on May 26, 2010. Thereafter, it continued supplying the data on a month to month basis until the Termination. Based on this evidence, the Tribunal could conclude that the product is in ample supply.

THE REFUSAL TO DEAL IS HAVING OR IS LIKE TO HAVE AN ADVERSE EFFECT ON COMPETITION IN A MARKET – 75(1)(e)

[41] In my view, the Tribunal could find that IBC's refusal to supply the Web Claims Search Application has caused Auto Check's exit from the market. Since Auto Check was the low cost provider of accident claims searches to approximately 4500 used car dealers and, since it is reasonable to conclude that these dealers will now be forced to purchase more expensive searches from CarProof or Carfax, the Tribunal could find that the test is met.

PART II – PRICE MAINTENANCE – 76(1)(a)(ii)

[42] The test for leave to bring applications under section 76 of the Act is found in subsection 103.1(7.1). It says that the Tribunal must have reason to believe that an applicant is directly affected by any conduct that could be the subject of an order.

[43] For the reasons given in paragraph 31 above, I have concluded that the UCDA is directly affected by the closure of its Auto Check business.

[44] The more difficult question is whether I can conclude that an order "could" be made under subparagraph 76(1)(a)(ii) in the absence of any direct evidence in the Beattie Affidavit showing that IBC's refusal to supply its Web Claims Search Application data to the UCDA is a result of Auto Check's low pricing. The only evidence before the Tribunal is circumstantial.

[45] Some of the circumstantial evidence described below relates to the actions and affiliations of two companies called CGI Group Inc. ("CGI") and i2iQ Inc. ("i2iQ")

[46] In its submissions the UCDA says at paragraph 25:

> UCDA is unable to establish definitively, without discovery pursuant to the Tribunal's rules, whether IBC's refusal to supply occurred because of concerns about Auto Check™'s low pricing policy. However, there is significant circumstantial evidence related to the large difference between Auto Check™ and CarProof prices, the actions of CarProof, connections between CarProof and i2iQ and communications between i2iQ and IBC, that provides reason to believe that IBC's refusal to supply occurred because of Auto Check™'s low pricing policy.

[47] Further in its reply submissions the UCDA said at paragraph 39:

> In this situation, the circumstantial evidence that IBC was acting to benefit CGI, with whom it has a preferred business relationship, and which in turn has a close business relationship with i2iQ and CarProof, is the only evidence on the record related to the reasons for IBC's refusal to supply. It is noteworthy that, as Mr. Beattie indicated in his affidavit, IBC did not provide reasons when it terminated supply to UCDA, and again in its Representations IBC has remained silent about any other reasons for the termination. UCDA submits that in such a situation an adverse inference should be drawn from IBC's silence and/or the "sufficient credible evidence" test should be applied in a manner which allows potentially viable claims to proceed and be tested on the merits rather than be frustrated by the Applicant's inability to access relevant evidence in the possession of the Respondent during the leave stage.

[48] While I accept that circumstantial evidence and reasonable inferences may be relied on, the question is whether the circumstantial evidence in this case meets the requirement that there be sufficient credible evidence to give rise to a *bona fide* belief that the conduct could be subject to an order.

[49] The UCDA relies on four pieces of circumstantial evidence to show that the Termination was because of UCDA's $7.00 price contrasted with CarProof's price of $34.95. I will deal with each in turn.

(i) The Price Difference

[50] The evidence shows that CarProof has twice approached the UCDA with a view to acquiring its dealers as its customers. These approaches failed because the UCDA believes that its members prefer Auto Check's low priced searches. Accordingly, CarProof's searches will only be attractive to the UCDA's members if Auto Check's low cost searches are no longer available.

[51] The evidence, which is said to suggest that the Termination was due to Auto Check's low price, is as follows:

- CarProof doesn't deal directly with IBC to obtain its ASP data. It deals through an intermediate company. Mr. Beattie speculates that that company is either i2iQ or CGI or perhaps both. CGI is contractually linked to IBC because CGI operates the ASP Database for IBC and provides other data services to IBC members. One service is called Auto Plus and it provides information to assist insurers when making decisions about coverages and premiums. Another service is Enhanced Auto Plus. It includes vehicle claim histories from CarProof.
- I2iQ's website also offers CarProof's vehicle claim history searches and says that i2iQ has a partnership or strategic alliances with CarProof and with a division of CGI called CGI Insurance Information Services. However, there is no evidence about whether i2iQ has a contractual relationship with IBC.

[52] If CGI is the intermediary between CarProof and IBC, the Tribunal is asked to speculate that, because CGI provides important data services to IBC, IBC will be inclined to do a favour for CGI by helping its customer, CarProof. This would be accomplished by refusing to supply data to its low cost competitor Auto Check.

[53] Regarding i2iQ, the evidence shows (i) that i2iQ's CEO is able to say to IBC that UCDA's dealers could purchase data from CarProof, (ii) that i2iQ and IBC were in prompt telephone contact about the UCDA's request for dollar claims information and (iii) that i2iQ has a partnership or strategic alliance with a division of CGI. This information suggests to me that i2iQ has a degree of control over CarProof and that i2iQ has a close relationship with IBC and may be the intermediary selling IBC's data to CarProof. If those facts were true, I must infer that IBC would be inclined to do a favour for i2iQ by, in turn, helping its customer CarProof. Again, this would involve refusing to supply the Web Claims Application Search data to Auto Check.

(ii) CarProof's Actions

[54] These are described in the following paragraphs taken from paragraphs 13-15 of the Beattie Affidavit:

> CarProof has grown substantially and is the market leader in the supply of vehicle accident history searches in Ontario. In 2004, CarProof began distributing false and misleading promotional materials to motor vehicle dealers in Canada, which misrepresented the nature and scope of UCDA's lien search and other services. Following written warnings from UCDA's legal counsel, CarProof abandoned this negative campaign. It again began distributing false and misleading promotional material in 2007 in connection with UCDA's services including its Auto Check™ service. I believe that this may have been motivated in whole or in

part by UCDA's position as the low-price supplier in the market. UCDA's efforts to resolve the situation out of court were unsuccessful, leading it to commence litigation against CarProof. That litigation was ultimately settled in 2009, with CarProof and UCDA issuing a joint statement in which CarProof acknowledged that UCDA provides accident claim information through its Auto Check™ service and undertook not to make misleading statements in the future.

In early 2009, representatives of CarProof approached UCDA and proposed that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members rather than doing so directly through the Auto Check™ business. Such a proposal, if adopted, would have meant the end of the Auto Check™ business. Bearing in mind CarProof's aggressive business tactics and the significantly higher prices at which it provides vehicle accident history searches, UCDA concluded that a relationship with CarProof was not in the best interests of its members and declined the CarProof proposal.

In early 2010, representatives of CarProof again approached UCDA and requested that UCDA partner with CarProof to provide CarProof vehicle accident histories to UCDA members, rather than doing so directly through the Auto Check™ business. UCDA's views on such a relationship had not changed, and we again rejected CarProof's overtures.

[55] In sum, the evidence indicates that CarProof appears to have misrepresented Auto Check's business and has suggested closing it down. However, these efforts have failed because of Auto Check's low price.

(iii) Connections Between CarProof and i2iQ

[56] This topic is dealt with above in paragraphs 51 and 53.

(iv) Communications Between i2iQ and IBC

[57] In June 2009, the UCDA contacted Ms. Pehar of IBC to ask for access to the dollar value claims information in the ASP Database. Shortly thereafter, the CEO of i2iQ spoke to Ms. Pehar and advised her that UCDA could purchase CarProof vehicle history reports and confirmed that he could be contacted if the UCDA wanted to pursue the idea. In the alternative, he suggested that the UCDA could speak directly to CarProof.

[58] The Beattie Affidavit speculates that IBC must have told i2iQ or CarProof of UCDA's request and that the only reason IBC, CarProof and i2iQ were in contact, after the UCDA asked for access to the dollar value claims information, was because they were concerned that, with this information, Auto Check would be a more effective low cost competitor.

CONCLUSIONS

[59] Against this background, it is clear that IBC has a close direct relationship with CGI (through its provision of services and maintenance of the ASP Database) and with i2iQ (it spoke to it about the UCDA's request for dollar value claims data). It is also clear that CGI and i2iQ have close ties to CarProof. Its searches are provided to IBC's members through CGI, and i2iQ appears to have some control over CarProof's operations and sells its searches through its website.

[60] Finally, it is reasonable to conclude based on its past conduct, that CarProof would like to see Auto Check's low cost business closed so that the UCDA's dealers could become potential customers for CarProof's searches.

[61] However, while I can conclude that it is possible that the Termination occurred as a result of IBC's wish to support CarProof's business objectives as a favour to either CGI or i2iQ, I cannot conclude that there is sufficient credible evidence to show the possibility that the Termination by IBC was due to Auto Check's low pricing policy. In these circumstances, an order could not be made.

ORDER

[62] The UCDA is hereby granted leave, pursuant to subsection 103.1(7) of the Act, to commence an application under section 75 of the Act. However, leave to apply under section 76 of the Act is denied.

[63] The UCDA is to have its costs fixed as a lump sum amount payable forthwith based on Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106. The UCDA is to prepare a bill of costs for review by IBC and, if an amount cannot be agreed, the Registry may be contacted and I will fix the amount once a procedure has been agreed.

DIRECTION

[64] The parties are to consult to see if they can agree about whether an interim supply order can be made and, if so, on what terms. Failing agreement, the Registry may be contacted to discuss arrangements for the hearing of the UCDA's application for interim relief.

DATED at Ottawa, this 9th day of September, 2011

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

Used Car Dealers Association of Ontario

A. Neil Campbell
Casey W. Halladay

For the respondent:

Insurance Bureau of Canada

Peter Glossop
Graham Reynolds
Geoffrey Grove

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First Session, Forty-fourth Parliament,
70-71 Elizabeth II, 2021-2022

STATUTES OF CANADA 2022

CHAPTER 10

An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures

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ASSENTED TO

JUNE 23, 2022

BILL C-19

Première session, quarante-quatrième législature,
70-71 Elizabeth II, 2021-2022

LOIS DU CANADA (2022)

CHAPITRE 10

Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d’autres mesures

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SANCTIONNÉE

LE 23 JUIN 2022

PROJET DE LOI C-19

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263 Subsection 90.1(2) of the Act is amended by striking out "and" after paragraph (g) and by adding the following after that paragraph:

(g.1) network effects within the market;

(g.2) whether the agreement or arrangement would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the agreement or arrangement on price or non-price competition, including quality, choice or consumer privacy; and

264 Section 93 of the Act is amended by striking out "and" after paragraph (g) and by adding the following after that paragraph:

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

265 Paragraph 100(1)(b) of the Act is replaced by the following:

(b) the Tribunal finds, on application by the Commissioner, that the completion of the proposed merger would result in a contravention of section 114.

266 (1) Subsections 103.1(1) and (2) of the Act are replaced by the following:

Leave to make application under section 75, 76, 77 or 79

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76, 77 or 79. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

(2) Paragraph 103.1(3)(b) of the Act is replaced by the following:

(b) was the subject of an inquiry that has been discontinued because of a settlement between the

263 Le paragraphe 90.1(2) de la même loi est modifié par adjonction, après l'alinéa g), de ce qui suit :

g.1) les effets de réseau dans le marché;

g.2) le fait que l'accord ou l'arrangement contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet de l'accord ou de l'arrangement sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

264 L'article 93 de la même loi est modifié par adjonction, après l'alinéa g), de ce qui suit :

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou proposé contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

265 L'alinéa 100(1)b) de la même loi est remplacé par ce qui suit :

b) à la demande du commissaire, il conclut que la réalisation du fusionnement proposé serait une contravention de l'article 114.

266 (1) Les paragraphes 103.1(1) et (2) de la même loi sont remplacés par ce qui suit :

Permission de présenter une demande : articles 75, 76, 77 ou 79

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75, 76, 77 ou 79. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

(2) L'alinéa 103.1(3)b) de la même loi est remplacé par ce qui suit :

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente intervenue entre le

Commissioner and the person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

(3) Subsection 103.1(4) of the Act is replaced by the following:

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76, 77 or 79.

(4) Subsection 103.1(7) of the Act is replaced by the following:

Granting leave

(7) The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

(5) Subsection 103.1(8) of the English version of the Act is replaced by the following:

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76, 77 or 79 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

(6) Subsection 103.1(10) of the Act is replaced by the following:

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76, 77 or 79.

267 Section 103.2 of the Act is replaced by the following:

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) or (7.1) makes an application under section 75,

commissaire et la personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

(3) Le paragraphe 103.1(4) de la même loi est remplacé par ce qui suit :

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)a) ou b) ou portant sur une question qui fait l'objet d'une demande que lui a présentée le commissaire en vertu des articles 75, 76, 77 ou 79.

(4) Le paragraphe 103.1(7) de la même loi est remplacé par ce qui suit :

Octroi de la demande

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77 ou 79 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

(5) Le paragraphe 103.1(8) de la version anglaise de la même loi est remplacé par ce qui suit :

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76, 77 or 79 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

(6) Le paragraphe 103.1(10) de la même loi est remplacé par ce qui suit :

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 76, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que ceux qui ont été allégués dans la demande de permission accordée en vertu des paragraphes (7) ou (7.1) si la personne à laquelle la permission a été accordée a déposé une demande en vertu des articles 75, 76, 77 ou 79.

267 L'article 103.2 de la même loi est remplacé par ce qui suit :

Intervention du commissaire

103.2 Le commissaire est autorisé à intervenir devant le Tribunal dans les cas où une personne autorisée en vertu

76, 77 or 79, the Commissioner may intervene in the proceedings.

268 Subsection 104(1) of the Act is replaced by the following:

Interim order

104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75, 76, 77 or 79, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

269 Subsection 106.1(1) of the Act is replaced by the following:

Consent agreement — parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75, 76, 77 or 79 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

270 Section 108 of the Act is amended by adding the following after subsection (2):

Computation of time

(3) In this Part, a time period is calculated in accordance with sections 26 to 30 of the *Interpretation Act* except that the following days are also considered to be a *holiday* as defined in subsection 35(1) of that Act:

- **(a)** Saturday;
- **(b)** if Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday; and
- **(c)** if another holiday falls on a Saturday or Sunday, the following Monday.

Submission after 5:00 p.m.

(4) For the purposes of this Part, anything submitted to the Commissioner after 5:00 p.m. (Eastern Time) is deemed to be received by the Commissioner on the next day that is not a holiday.

des paragraphes 103.1(7) ou (7.1) présente une demande en vertu des articles 75, 76, 77 ou 79.

268 Le paragraphe 104(1) de la même loi est remplacé par ce qui suit :

Ordonnance provisoire

104 (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75, 76, 77 ou 79, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.

269 Le paragraphe 106.1(1) de la même loi est remplacé par ce qui suit :

Consentement

106.1 (1) Lorsqu'une personne autorisée en vertu de l'article 103.1 présente une demande d'ordonnance au Tribunal en vertu des articles 75, 76, 77 ou 79, que cette personne et la personne à l'égard de laquelle l'ordonnance est demandée s'entendent sur son contenu et que l'entente est compatible avec les autres dispositions de la présente loi, un consentement peut être déposé auprès du Tribunal pour enregistrement.

270 L'article 108 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Calcul du temps

(3) Dans la présente partie, les périodes de temps sont calculées conformément aux articles 26 à 30 de la *Loi d'interprétation*. Toutefois, un *jour férié*, au sens du paragraphe 35(1) de cette loi, s'entend également des jours suivants :

- **a)** le samedi;
- **b)** si le jour de Noël tombe un samedi ou un dimanche, le lundi et le mardi suivants;
- **c)** si un autre jour férié tombe un samedi ou un dimanche, le lundi suivant.

Remise après dix-sept heures

(4) Pour l'application de la présente partie, tout objet remis au commissaire après dix-sept heures (heure de l'Est) un jour non férié est réputé avoir été reçu par lui le jour non férié suivant.

23

CANADA

CONSOLIDATION

Competition Act

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

Current to September 13, 2023

Last amended on June 23, 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

CODIFICATION

Loi sur la concurrence

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

À jour au 13 septembre 2023

Dernière modification le 23 juin 2023

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

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

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

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

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

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

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Titre abrégé

Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PARTIE I

Objet et définitions

Objet

Objet

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

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

Définitions

Définitions

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

article Biens meubles et immeubles de toute nature, y compris :

Punishment

(2) The court may punish any failure to comply with an order under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

R.S., c. C-23, s. 31.

Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Evidence of prior proceedings

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Limitation

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

Peine

(2) Le tribunal peut punir d’une amende fixée à sa discrétion ou d’un emprisonnement maximal de deux ans tout défaut d’obtempérer à une ordonnance rendue aux termes du présent article.

S.R., ch. C-23, art. 31.

Recouvrement de dommages-intérêts

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d’un comportement allant à l’encontre d’une disposition de la partie VI;

b) soit du défaut d’une personne d’obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n’a pas obtempéré à l’ordonnance une somme égale au montant de la perte ou des dommages qu’elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n’excède pas le coût total, pour elle, de toute enquête relativement à l’affaire et des procédures engagées en vertu du présent article.

Preuves de procédures antérieures

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d’une infraction visée à la partie VI ou l’a déclarée coupable du défaut d’obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l’a punie pour ce défaut, constituent, sauf preuve contraire, la preuve que la personne contre laquelle l’action est intentée a eu un comportement allant à l’encontre d’une disposition de la partie VI ou n’a pas obtempéré à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l’effet de ces actes ou omissions sur la personne qui intente l’action constitue une preuve de cet effet dans l’action.

Compétence de la Cour fédérale

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

Restriction

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l’encontre d’une disposition de la

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

R.S., 1985, c. C-34, s. 36; R.S., 1985, c. 1 (4th Supp.), s. 11.

partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,

(ii) soit la date où il est statué de façon définitive sur la poursuite;

b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,

(ii) soit la date où il est statué de façon définitive sur la poursuite.

L.R. (1985), ch. C-34, art. 36; L.R. (1985), ch. 1 (4e suppl.), art. 11.

PART V

[Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 29]

PARTIE V

[Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 29]

PART VI

Offences in Relation to Competition

PARTIE VI

Infractions relatives à la concurrence

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Conspiracies, agreements or arrangements regarding employment

(1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

Complot, accord ou arrangement en matière d'emploi

(1.1) Commet une infraction une personne qui est un employeur qui, avec un employeur qui ne lui est pas affilié, complote ou conclut un accord ou un arrangement :

PART VIII

Matters Reviewable by Tribunal

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75 (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

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

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

(d) the product is in ample supply, and

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

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

When article is a separate product

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

PARTIE VIII

Affaires que le Tribunal peut examiner

Pratiques restrictives du commerce

Refus de vendre

Compétence du Tribunal dans les cas de refus de vendre

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

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

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

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

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

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

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

Cas où l’article est un produit distinct

(2) Pour l’application du présent article, n’est pas un produit distinct sur un marché donné l’article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d’une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point business in that class of articles unless that person has access to the article so differentiated.

dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

Definition of *trade terms*

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

Définition de *conditions de commerce*

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

Inferences

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

R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1; 2014, c. 20, s. 366(E).

Application

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

L.R. (1985), ch. C-34, art. 75; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.1; 2014, ch. 20, art. 366(A).

Price Maintenance

Price maintenance

76 (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Maintien des prix

Maintien des prix

76 (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois :

a) que la personne visée au paragraphe (3), directement ou indirectement :

(i) soit, par entente, menace, promesse ou quelque autre moyen semblable, a fait monter ou empêché qu'on ne réduise le prix auquel son client ou toute personne qui le reçoit pour le revendre fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada,

(ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure discriminatoire à son endroit, en raison de son régime de bas prix;

b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

Order

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

Ordonnance

(2) Le Tribunal peut, par ordonnance, interdire à la personne visée au paragraphe (3) de continuer de se livrer au comportement visé à l'alinéa (1)a) ou exiger qu'elle accepte une autre personne comme client dans un délai déterminé aux conditions de commerce normales.

Persons subject to order

(3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

(b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(c) has the exclusive rights and privileges conferred by a patent, certificate of supplementary protection issued under the *Patent Act*, trademark, copyright, registered industrial design or registered integrated circuit topography.

When no order may be made

(4) No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph (1)(a)(i) or (ii) are

(a) principal and agent or mandator and mandatary;

(b) an entity and an individual who controls it or affiliated entities; or

(c) directors, agents, mandataries, officers or employees of the same entity or of entities that are affiliated.

Suggested retail price

(5) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price for the product, however arrived at, is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

Advertised price

(6) For the purposes of this section, the publication by a producer or supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is proof that the producer or supplier is influencing upward the selling price of any person to whom the

Personne visée par l'ordonnance

(3) Peut être visée par l'ordonnance prévue au paragraphe (2) la personne qui, selon le cas :

a) exploite une entreprise de production ou de fourniture d'un produit;

b) offre du crédit au moyen de cartes de crédit ou, d'une façon générale, exploite une entreprise dans le domaine des cartes de crédit;

c) détient les droits et privilèges exclusifs que confèrent un brevet, un certificat de protection supplémentaire délivré en vertu de la *Loi sur les brevets*, une marque de commerce, un droit d'auteur, un dessin industriel enregistré ou une topographie de circuit intégré enregistrée.

Cas où il ne peut être rendu d'ordonnance

(4) L'ordonnance prévue au paragraphe (2) ne peut être rendue lorsque la personne visée au paragraphe (3) et le client ou la personne visés aux sous-alinéas (1)a)(i) ou (ii) se trouvent dans l'une des situations suivantes :

a) ils ont entre eux des relations de mandant à mandataire;

b) il s'agit d'une entité et d'une personne physique qui la contrôle ou ils sont des entités affiliées;

c) ils sont des administrateurs, mandataires, dirigeants ou employés soit de la même entité, soit d'entités qui sont affiliées.

Prix de détail proposé

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

Prix annoncé

(6) Pour l'application du présent article, la publication, par le producteur ou le fournisseur d'un produit qui n'est pas détaillant, d'une réclame mentionnant un prix de revente pour ce produit constitue la preuve qu'il a fait monter le prix de vente demandé par toute personne qui le product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

reçoit pour le revendre, à moins que ce prix ne soit exprimé de façon à préciser à quiconque prend connaissance de la publicité que le produit peut être vendu à un prix inférieur.

Exception

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

Exception

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

Refusal to supply

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

Refus de fournir

(8) S'il conclut, à la suite d'une demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, qu'une personne, par entente, menace, promesse ou quelque autre moyen semblable, a persuadé un fournisseur, au Canada ou à l'étranger, en en faisant la condition de leurs relations commerciales, de refuser de fournir un produit à une personne donnée ou à une catégorie donnée de personnes en raison du régime de bas prix de cette personne ou catégorie et que la persuasion a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché, le Tribunal peut, par ordonnance, interdire à la personne de continuer à se comporter ainsi ou exiger qu'elle entretienne des relations commerciales avec le fournisseur en question aux conditions de commerce normales.

Where no order may be made

(9) No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(a)(ii) if the Tribunal is satisfied that the person or class of persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

- **(a)** was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;
- **(b)** was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;
- **(c)** was making a practice of engaging in misleading advertising; or
- **(d)** made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

Cas où il ne peut être rendu d'ordonnance

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

- **a)** de les sacrifier à des fins de publicité et non d'en tirer profit;
- **b)** de les vendre sans profit afin d'attirer les clients dans l'espoir de leur vendre d'autres produits;
- **c)** de faire de la publicité trompeuse;
- **d)** de ne pas assurer la qualité de service à laquelle leurs acheteurs pouvaient raisonnablement s'attendre.

Inferences

(10) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any

Application

(10) Le Tribunal, lorsqu'il est saisi d'une demande présentée par une personne à qui il a accordé la permission inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

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

(11) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

Definition of *trade terms*

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

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426; 2014, c. 20, s. 366(E); 2017, c. 6, s. 124; 2018, c. 8, s. 112.

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77 (1) For the purposes of this section,

exclusive dealing means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; (*exclusivité*)

de présenter une demande en vertu de l'article 103.1, ne peut tirer quelque conclusion que ce soit du fait que le commissaire a pris des mesures ou non à l'égard de l'objet de la demande.

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

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

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

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

Définition de *conditions de commerce*

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

L.R. (1985), ch. C-34, art. 76; L.R. (1985), ch. 19 (2[e] suppl.), art. 45; 1999, ch. 2, art. 37; 2009, ch. 2, art. 426; 2014, ch. 20, art. 366(A); 2017, ch. 6, art. 124; 2018, ch. 8, art. 112.

Exclusivité, ventes liées et limitation du marché

Définitions

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

exclusivité

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

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,

(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa a)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une

market restriction means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market; (*limitation du marché*)

tied selling means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the “tying” product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier’s nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs. (*ventes liées*)

condition énoncée à l’un ou l’autre de ces sous-alinéas. (*exclusive dealing*)

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

ventes liées

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

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

(ii) soit s’abstienne d’utiliser ou de distribuer, avec le produit clef, un autre produit qui n’est pas d’une marque ou fabrication indiquée par le fournisseur ou la personne qu’il désigne;

b) toute pratique par laquelle le fournisseur d’un produit incite un client à se conformer à une condition énoncée au sous-alinéa a)(i) ou (ii) en offrant de lui fournir le produit clef selon des modalités et conditions plus favorables s’il convient de se conformer à une condition énoncée à l’un ou l’autre de ces sous-alinéas. (*tied selling*)

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to

Exclusivité ou ventes liées

(2) Lorsque le Tribunal, à la suite d’une demande du commissaire ou d’une personne autorisée en vertu de l’article 103.1, conclut que l’exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d’un produit sur un marché ou très répandues sur un marché, auront vraisemblablement :

a) soit pour effet de faire obstacle à l’entrée ou au développement d’une firme sur un marché;

b) soit pour effet de faire obstacle au lancement d’un produit sur un marché ou à l’expansion des ventes d’un produit sur un marché;

c) soit sur un marché quelque autre effet tendant à exclure,

et qu’en conséquence la concurrence est ou sera vraisemblablement réduite sensiblement, le Tribunal peut, par ordonnance, interdire à l’ensemble ou à l’un quelconque des fournisseurs contre lesquels une ordonnance est overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

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

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

No order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among entities that are affiliated.

If entity affiliated

(5) For the purposes of subsection (4), in addition to the circumstances specified in paragraph 2(2)(a) or (b) under

demandée de pratiquer désormais l’exclusivité ou les ventes liées et prescrire toute autre mesure nécessaire, à son avis, pour supprimer les effets de ces activités sur le marché en question ou pour y rétablir ou y favoriser la concurrence.

Limitation du marché

(3) Lorsque le Tribunal, à la suite d’une demande du commissaire ou d’une personne autorisée en vertu de l’article 103.1, conclut que la limitation du marché, en étant pratiquée par un important fournisseur d’un produit ou très répandue à l’égard d’un produit, réduira vraisemblablement et sensiblement la concurrence à l’égard de ce produit, le Tribunal peut, par ordonnance, interdire à l’ensemble ou à l’un quelconque des fournisseurs contre lesquels une ordonnance est demandée de se livrer désormais à la limitation du marché et prescrire toute autre mesure nécessaire, à son avis, pour rétablir ou favoriser la concurrence à l’égard de ce produit.

Dommages-intérêts

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

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

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

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

b) les ventes liées qui sont pratiquées sont raisonnables compte tenu de la connexité technologique existant entre les produits qu’elles visent;

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

Aucune ordonnance rendue en vertu du présent article ne s’applique en ce qui concerne l’exclusivité, la limitation du marché ou les ventes liées entre des entités qui sont affiliées.

Affiliation d’entités

(5) Pour l’application du paragraphe (4), une entité est affiliée à une autre entité non seulement dans les cas which two entities are affiliated, an entity is affiliated with another entity in respect of any agreement between them in which one of them grants to the other the right to use a trademark or trade name to identify the business of the grantee, if

(a) the business is related to the sale or distribution, in accordance with a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers; and

(b) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the “first” person) supplies or causes to be supplied to another person (the “second” person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trademark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

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

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3; 2014, c. 20, s. 366(E); 2018, c. 8, s. 113.

Abuse of Dominant Position

Definition of *anti-competitive act*

78 (1) For the purposes of section 79, ***anti-competitive act*** means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and 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,

prévus aux alinéas 2(2)a) ou b), mais également en ce qui concerne tout accord entre elles par lequel l’une concède à l’autre le droit d’utiliser une marque de commerce ou un nom de commerce pour identifier les affaires du concessionnaire, à la condition :

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

b) qu’aucun produit ne soit primordial dans ces affaires.

Cas où les personnes sont réputées être affiliées

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

Application

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

L.R. (1985), ch. C-34, art. 77; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 23 et 37, ch. 31, art. 52(F); 2002, ch. 16, art. 11.2 et 11.3; 2014, ch. 20, art. 366(A); 2018, ch. 8, art. 113.

Abus de position dominante

Définition de *agissement anti-concurrentiel*

78 (1) Pour l’application de l’article 79, ***agissement anti-concurrentiel*** s’entend de tout agissement destiné à avoir un effet négatif visant l’exclusion, l’éviction ou la mise au pas d’un concurrent, ou à nuire à la concurrence, notamment les agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a pour but d’empêcher l’entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor; and

(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market.

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

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

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13; 2009, c. 2, s. 427; 2022, c. 10, s. 261.

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent;

j) la réponse sélective ou discriminatoire à un concurrent actuel ou potentiel, visant à entraver ou à empêcher l'entrée ou l'expansion d'un concurrent sur un marché ou à l'éliminer du marché.

k) [Abrogé, 2009, ch. 2, art. 427]

(2) [Abrogé, 2009, ch. 2, art. 427]

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2000, ch. 15, art. 13; 2009, ch. 2, art. 427; 2022, ch. 10, art. 261.

Prohibition if abuse of dominant position

79 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

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

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

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

Ordonnance d'interdiction : abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne à qui a été accordée en vertu de l'article 103.1 la permission de présenter une demande, il conclut à l'existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Ordonnance supplémentaire ou substitutive

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

Limitation

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

Restriction

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

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding the greater of

Sanction administrative pécuniaire

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale qui ne peut dépasser le plus élevé des montants suivants :

(a) $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Aggravating or mitigating factors

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

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

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

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

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

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

(f) any other relevant factor.

Purpose of order

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

Factors to be considered

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

(a) the effect of the practice on barriers to entry in the market, including network effects;

(b) the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;

(c) the nature and extent of change and innovation in a relevant market; and

a) 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, 15 000 000 $;

b) trois fois la valeur du bénéfice sur lequel la pratique a eu une incidence ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de cette personne.

Facteurs à prendre en compte

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

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

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

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

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

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

f) tout autre élément pertinent.

But de la sanction

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

Facteurs à considérer

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur et peut également tenir compte des facteurs suivants :

a) les entraves à l'accès au marché, y compris les effets de réseau;

b) tout effet de la pratique sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

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

(d) any other factor that is relevant to competition in the market that is or would be affected by the practice.

Exception

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

Limitation period

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

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

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

Inferences

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

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4; 2009, c. 2, s. 428; 2014, c. 20, s. 366(E); 2022, c. 10, s. 262.

Unpaid monetary penalty

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

2002, c. 16, s. 11.5; 2018, c. 8, s. 114(E).

d) tout autre facteur qui est relatif à la concurrence dans le marché et qui est ou serait touché par la pratique.

Exception

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

Prescription

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.

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

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

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

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

Application

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

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4; 2009, ch. 2, art. 428; 2014, ch. 20, art. 366(A); 2022, ch. 10, art. 262.

Sanctions administratives pécuniaires impayées

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

2002, ch. 16, art. 11.5; 2018, ch. 8, art. 114(A).

Delivered Pricing

Definition of *delivered pricing*

80 (1) For the purposes of section 81, ***delivered pricing*** means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

Definition of *trade terms*

(2) For the purposes of subsection (1), the expression ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

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

Delivered pricing

81 (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

Exception where trademark used

(3) No order shall be made against a supplier under this section in respect of a practice of refusing a customer delivery of an article that the customer sells in association with a trademark that the supplier owns or in respect of which the supplier is a registered user where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2014, c. 20, s. 366(E).

Prix à la livraison

Définition de *prix à la livraison*

80 (1) Aux fins de l'article 81, ***prix à la livraison*** s'entend de la pratique de refuser à un client, ou à une personne qui cherche à devenir un client, la livraison d'un article en un endroit où le fournisseur s'adonne à une pratique d'effectuer la livraison de cet article à l'un quelconque de ses autres clients aux conditions de commerce qui seraient accessibles au client qui fait l'objet du refus si son entreprise était située à cet endroit.

Définition de *conditions de commerce*

(2) Pour l'application du paragraphe (1), ***conditions de commerce*** s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

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

Prix à la livraison

81 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut que le prix à la livraison est appliqué par un fournisseur important d'un article dans un marché ou qu'il est très répandu dans un marché avec la conséquence qu'un client, ou une personne désirant devenir un client, se voit refuser un avantage qui lui serait autrement accessible dans ce marché, il peut rendre une ordonnance interdisant à l'ensemble ou à l'un quelconque de ces fournisseurs d'appliquer le prix à la livraison.

Exception : nécessité d'investissement en capital

(2) Le Tribunal ne rend pas d'ordonnance contre un fournisseur en application du présent article s'il conclut que ce fournisseur ne pouvait pas servir de clients supplémentaires en un lieu donné sans pour cela y engager un investissement en capital relativement important.

Exception à l'égard des marques de commerce

(3) Une ordonnance ne peut être rendue contre un fournisseur en application du présent article à l'égard d'une pratique qui consiste à refuser à un client la livraison d'un article que ce client vend en association avec une marque de commerce dont le fournisseur est propriétaire ou usager inscrit dans les cas où le Tribunal conclut que la pratique est nécessaire au maintien des normes de qualité qui se rapportent à cet article.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2014, ch. 20, art. 366(A).

Foreign Judgments and Laws

Foreign judgments, etc.

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

(a) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada, would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Tribunal may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs (b)(i) to (iv).

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

Foreign laws and directives

83 (1) Where, on application by the Commissioner, the Tribunal finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

(a) as a result of

(i) a law in force in a country other than Canada, or

Jugements et droit étrangers

Jugements étrangers, etc.

82 Lorsque, à la suite d’une demande du commissaire, il conclut :

a) d’une part, qu’un jugement, un décret, une ordonnance, une autre décision ou un autre bref d’un tribunal ou d’un autre organisme d’un pays étranger peut être exécuté, en totalité ou en partie, par des personnes se trouvant au Canada, par des personnes morales constituées aux termes ou en application d’une loi fédérale ou provinciale, ou par des mesures prises au Canada;

b) d’autre part, que l’exécution, en totalité ou en partie, du jugement, du décret, de l’ordonnance ou de l’autre décision ou de l’autre bref au Canada :

(i) nuirait à la concurrence au Canada,

(ii) nuirait à l’efficience du commerce ou de l’industrie au Canada sans engendrer ou accroître au Canada une concurrence qui rétablirait ou améliorerait cette efficience,

(iii) nuirait au commerce extérieur du Canada sans apporter d’avantages en compensation,

(iv) ferait autrement obstacle ou tort au commerce au Canada sans apporter d’avantages en compensation,

le Tribunal peut rendre une ordonnance interdisant :

c) de prendre au Canada des mesures d’exécution du jugement, du décret, de l’ordonnance de l’autre décision ou de l’autre bref;

d) de prendre au Canada des mesures d’exécution du jugement, du décret, de l’ordonnance de l’autre décision ou de l’autre bref, sauf selon ce que le Tribunal prescrit afin d’éviter l’une quelconque des conséquences mentionnées aux sous-alinéas b)(i) à (iv).

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

Législation et directives étrangères

83 (1) Lorsque à la suite d’une demande du commissaire, le Tribunal conclut qu’une décision a été ou est sur le point d’être prise par une personne qui se trouve au Canada ou par une personne morale constituée aux termes ou en application d’une loi fédérale ou provinciale :

a) par suite :

(ii) a directive, instruction, intimation of policy or other communication to that person or company or to any other person from

(A) the government of a country other than Canada or of any political subdivision thereof that is in a position to direct or influence the policies of that person or company, or

(B) a person in a country other than Canada who is in a position to direct or influence the policies of that person or company,

where the communication is for the purpose of giving effect to a law in force in a country other than Canada,

and that the decision, if implemented, would have or would be likely to have any of the effects mentioned in subparagraphs 82(b)(i) to (iv), or

(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45,

the Tribunal may, by order, direct that

(c) in a case described in paragraph (a) or (b), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or

(d) in a case described in paragraph (a), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs 82(b)(i) to (iv).

(i) soit d’une règle de droit en vigueur dans un pays étranger,

(ii) soit d’une directive, d’une instruction, d’un énoncé de politique ou d’une autre communication à cette personne, à cette personne morale ou à toute autre personne, provenant :

(A) soit du gouvernement d’un pays étranger ou d’une subdivision politique de ce pays qui est en mesure de diriger ou d’influencer les principes suivis par cette personne ou cette personne morale,

(B) soit d’une personne qui se trouve dans un pays étranger et qui est en mesure de diriger ou d’influencer les principes suivis par cette personne ou cette personne morale,

lorsque la communication a pour objet de donner effet à une règle de droit en vigueur dans un pays étranger,

et que la décision, si elle était appliquée, aurait ou aurait vraisemblablement l’un des effets mentionnés aux sous-alinéas 82b)(i) à (iv);

b) par suite d’une directive, d’une instruction, d’un énoncé de politique ou d’une autre communication à cette personne, à cette personne morale ou à toute autre personne, provenant d’une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d’influencer les principes suivis par cette personne ou cette personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d’intérêts, un accord ou un arrangement intervenu à l’extérieur du Canada qui, s’il était intervenu au Canada, aurait constitué une contravention à l’article 45,

le Tribunal peut rendre une ordonnance qui :

c) dans un cas visé à l’alinéa a) ou b), interdit à cette personne ou à cette personne morale de prendre au Canada des mesures d’application de la règle de droit, de la directive, de l’instruction, de l’énoncé de politique ou de l’autre communication;

d) dans un cas visé à l’alinéa a), interdit à cette personne ou à cette personne morale de prendre au Canada des mesures d’application de la règle de droit, de la directive, de l’instruction, de l’énoncé de politique ou de l’autre communication, sauf selon ce que le Tribunal prescrit pour que soit évitée l’une quelconque des conséquences visées aux sous-alinéas 82b)(i) à (iv).

Limitation

(2) No application may be made by the Commissioner for an order under this section against a particular company where proceedings have been commenced under section 46 against that company based on the same or substantially the same facts as would be alleged in the application.

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

Restriction

(2) Le commissaire ne peut demander que soit rendue, en vertu du présent article, une ordonnance contre une personne morale déterminée lorsque des procédures ont été entamées en vertu de l'article 46 contre cette personne morale et que ces procédures sont fondées sur les mêmes faits ou en substance les mêmes faits que ceux qui seraient exposés dans la demande.

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

Foreign Suppliers

Refusal to supply by foreign supplier

84 Where, on application by the Commissioner, the Tribunal finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the "first" person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Tribunal may order any person in Canada (the "second" person) by whom or on whose behalf or for whose benefit the buying power was exerted

> **(a)** to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or
>
> **(b)** not to deal or to cease to deal, in Canada, in that product of the supplier.

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

Fournisseurs étrangers

Refus par un fournisseur étranger

84 Si le Tribunal, à la suite d'une demande du commissaire, conclut qu'un fournisseur se trouvant à l'extérieur du Canada établit, à l'égard de la fourniture d'un produit à une personne se trouvant au Canada (la « première » personne), une distinction à l'encontre de cette personne notamment en refusant de lui fournir un produit, à cause de l'exercice par une autre personne d'un pouvoir d'achat à l'extérieur du Canada et à la demande de cette autre personne, il peut ordonner à toute personne se trouvant au Canada (la « seconde » personne) par qui, au nom de qui ou au profit de qui ce pouvoir d'achat a été exercé :

> **a)** de vendre à la première personne tout semblable produit du fournisseur que la seconde personne se procure ou s'est procuré, au coût de ce produit pour la seconde personne à l'arrivée du produit au Canada de même qu'aux modalités et conditions que la seconde personne obtient ou a obtenu du fournisseur;
>
> **b)** de ne pas faire ou de cesser de faire, au Canada, le commerce de ce produit du fournisseur.

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

Specialization Agreements

Definitions

85 For the purposes of this section and sections 86 to 90,

article includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced; (*article*)

registered means registered in the register maintained pursuant to section 89; (*inscrit*)

specialization agreement means an agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in

Accords de spécialisation

Définitions

85 Les définitions qui suivent s'appliquent au présent article et aux articles 86 à 90.

accord de spécialisation Accord en vertu duquel chacune des parties s'engage à abandonner la production d'un article ou d'un service qu'elle fabrique ou produit au moment de la conclusion de l'accord à la condition que chacune des autres parties à l'accord s'engage à abandonner la production d'un article ou d'un service qu'elle fabrique ou produit au moment de la conclusion de l'accord et s'entend également d'un semblable accord aux termes duquel les parties conviennent en outre d'acheter exclusivement des autres parties les articles et les services qui font l'objet de l'accord. (*specialization agreement*) producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement. (*accord de spécialisation*)

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

article S'entend également de toute variété de catégorie, de dimension, de poids ou de qualité, dans laquelle est produit un article au sens de l'article 2. (*article*)

inscrit Inscrit au registre tenu en application de l'article 89. (*registered*)

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

Order directing registration

86 (1) Where, on application by any person, and after affording the Commissioner a reasonable opportunity to be heard, the Tribunal finds that an agreement that the person who has made the application has entered into or is about to enter into is a specialization agreement and that

(a) the implementation of the agreement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement and the gains in efficiency would not likely be attained if the agreement were not implemented, and

(b) no attempt has been made by the persons who have entered or are about to enter into the agreement to coerce any person to become a party to the agreement,

the Tribunal may, subject to subsection (4), make an order directing that the agreement be registered for a period specified in the order.

Ordonnance portant inscription au registre

86 (1) Dans les cas où, sur demande de toute personne et après avoir donné au commissaire une chance raisonnable de se faire entendre, le Tribunal conclut que cette personne a conclu ou se propose de conclure un accord de spécialisation et que :

a) d'une part, la mise en œuvre de l'accord entraînera vraisemblablement des gains en efficience qui surpasseront et neutraliseront les effets de tout empêchement ou de toute diminution de la concurrence qui résulteront ou résulteront vraisemblablement de l'accord et que ces gains en efficience ne seraient vraisemblablement pas réalisés si l'accord n'était pas mis en œuvre;

b) d'autre part, les personnes qui ont conclu ou qui sont sur le point de conclure l'accord n'ont pas essayé de forcer quiconque à devenir partie à l'accord,

il peut, sous réserve du paragraphe (4), ordonner que l'accord soit inscrit pour la période fixée par l'ordonnance.

Factors to be considered

(2) In considering whether an agreement is likely to bring about gains in efficiency described in paragraph (1)(a), the Tribunal shall consider whether those gains will result in

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

(b) a significant substitution of domestic articles or services for imported articles or services.

Éléments à considérer

(2) Le Tribunal, pour apprécier si un accord entraînera vraisemblablement les gains en efficience visés à l'alinéa (1)a), doit estimer si ces gains entraîneront :

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

b) soit la substitution, pour une part relativement importante, d'articles et de services canadiens à des articles et services importés.

Redistribution of income does not result in gains in efficiency

(3) For the purposes of paragraph (1)(a), the Tribunal shall not find that an agreement is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Efficience et redistribution du revenu

(3) Pour l'application de l'alinéa (1)a), le Tribunal ne conclut pas qu'un accord entraînera vraisemblablement des gains en efficience en raison seulement d'une redistribution du revenu entre deux ou plus de deux personnes.

Conditional orders

(4) Where, on an application under subsection (1), the Tribunal finds that an agreement meets the conditions prescribed by paragraphs (a) and (b) of that subsection but also finds that, as a result of the implementation of the agreement, there is not likely to be substantial competition remaining in the market or markets to which the agreement relates, the Tribunal may provide, in an order made under subsection (1), that the order shall take effect only if, within a reasonable period of time specified in the order, there has occurred any of the following events, specified in the order:

(a) the divestiture of particular assets, specified in the order;

(b) a wider licensing of patents, certificates of supplementary protection issued under the *Patent Act* or registered integrated circuit topographies;

(c) a reduction in tariffs;

(d) the making of an order in council under section 23 of the *Financial Administration Act* effecting a remission or remissions specified in the order of the Tribunal of any customs duties on an article that is a subject of the agreement; or

(e) the removal of import quotas or import licensing requirements.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 32; 1999, c. 2, s. 37; 2017, c. 6, s. 125.

Autorisation conditionnelle

(4) Lorsque le Tribunal, saisi d'une demande en vertu du paragraphe (1), conclut que, même si un accord satisfait aux conditions prévues aux alinéas a) et b) de ce paragraphe, l'exécution de cet accord aura vraisemblablement pour effet de laisser le ou les marchés concernés par l'accord sans concurrence sensible, il peut, dans une ordonnance visée au paragraphe (1), prévoir que l'ordonnance ne prendra effet que si, dans un délai raisonnable fixé par l'ordonnance, l'une quelconque des conditions suivantes que mentionne l'ordonnance a été réalisée :

a) l'exécution de l'obligation de se départir d'éléments d'actif mentionnés dans l'ordonnance;

b) une augmentation du nombre des licences d'exploitation d'un brevet, d'un certificat de protection supplémentaire délivré en vertu de la *Loi sur les brevets* ou des topographies de circuits intégrés enregistrées;

c) une réduction des tarifs;

d) la prise, en vertu de l'article 23 de la *Loi sur la gestion des finances publiques*, d'un décret prévoyant une ou plusieurs remises, visées dans l'ordonnance du Tribunal, de droits de douane imposés à l'égard d'un article soumis à l'accord;

e) la suppression de contingentements en matière d'importation ou d'exigences en matière de licences d'importation.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1990, ch. 37, art. 32; 1999, ch. 2, art. 37; 2017, ch. 6, art. 125.

Registration of modifications

87 (1) On application by the parties to a specialization agreement that has been registered, and after affording the Commissioner a reasonable opportunity to be heard, the Tribunal may make an order directing that a modification of the agreement be registered.

Inscription des modifications

87 (1) Le Tribunal peut, par ordonnance, ordonner qu'une modification d'un accord de spécialisation inscrit soit elle-même inscrite lorsque les parties à l'accord en font la demande et après avoir, dans la mesure de ce qui est raisonnable, donné au commissaire la possibilité de se faire entendre.

Order to remove from register

(2) Where, on application by the Commissioner, the Tribunal finds that the agreement or a modification thereof that has been registered

(a) has ceased to meet the conditions prescribed by paragraph 86(1)(a) or (b), or

(b) is not being implemented,

the Tribunal may make an order directing that the agreement or modification thereof, and any order relating thereto, be removed from the register.

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

Radiation

(2) Le Tribunal peut, par ordonnance, exiger la radiation du registre d'un accord de spécialisation qui y a été inscrit, d'une modification de celui-ci elle-même inscrite ainsi que de toute ordonnance se rapportant à cet accord ou à cette modification, lorsque, sur demande du commissaire, il conclut que l'accord ou la modification en question :

a) ne respecte plus les conditions prévues à l'alinéa 86(1)a) ou b);

b) n'est pas exécuté.

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

Right of intervention

88 The attorney general of a province may intervene in any proceedings before the Tribunal under section 86 or 87 for the purpose of making representations on behalf of the province.

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

Droit d'intervention

88 Le procureur général d'une province peut intervenir dans toute procédure dont le Tribunal est saisi en vertu de l'article 86 ou 87 pour présenter des observations au nom de la province.

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

Register of specialization agreements

89 (1) The Tribunal shall cause to be maintained a register of specialization agreements, and any modifications of those agreements, that the Tribunal has directed be registered, and any such agreements and modifications shall be included in the register for the periods specified in the orders.

Registre des accords de spécialisation

89 (1) Le Tribunal voit à ce que soit maintenu un registre des accords de spécialisation et de leurs modifications, dont il a ordonné l'inscription; ces accords et leurs modifications y restent inscrits pour les périodes fixées par les ordonnances.

Public register

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

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

Registre public

(2) Le registre est accessible au public.

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

Non-application of sections 45, 77 and 90.1

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

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

Non-application des articles 45, 77 et 90.1

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

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

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

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

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

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

Factors to be considered

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

Accords ou arrangements empêchant ou diminuant sensiblement la concurrence

Ordonnance

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

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

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

Facteurs à considérer

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

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

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

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

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

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

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

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

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

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

(g.1) network effects within the market;

(g.2) whether the agreement or arrangement would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the agreement or arrangement on price or non-price competition, including quality, choice or consumer privacy; and

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

Evidence

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

Exception where gains in efficiency

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in

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

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

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

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

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès;

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

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

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

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

g.1) les effets de réseau dans le marché;

g.2) le fait que l’accord ou l’arrangement contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet de l’accord ou de l’arrangement sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

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

Preuve

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

Exception dans les cas de gains en efficience

(4) Le Tribunal ne rend pas l’ordonnance prévue au paragraphe (1) dans les cas où il conclut que l’accord ou l’arrangement a eu pour effet ou aura vraisemblablement efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the agreement or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

Restriction

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

Factors to be considered

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

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

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

Exception

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

Exception

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

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

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

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

Exception

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

pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement de l’accord ou de l’arrangement et que ces gains n’auraient pas été réalisés si l’ordonnance avait été rendue ou ne le seraient vraisemblablement pas si l’ordonnance était rendue.

Restriction

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

Facteurs pris en considération

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

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

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

Exception

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

Exception

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

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

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

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

Exception

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

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

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

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

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

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

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

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

(d) an agreement or arrangement that constitutes an existing or proposed *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked.

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

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

c) un accord ou un arrangement constituant une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard duquel le ministre des Transports certifie au commissaire le nom des parties;

d) un accord ou un arrangement constituant une *entente*, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, réalisée ou proposée, autorisée par le ministre des Transport en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée.

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

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

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

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

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

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

Definition of *competitor*

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

2009, c. 2, s. 429; 2018, c. 8, s. 115; 2018, c. 10, s. 87; 2022, c. 10, s. 263.

Mergers

Definition of *merger*

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

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

Order

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

(a) in a trade, industry or profession,

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

(c) among the outlets through which a trade, industry or profession disposes of a product, or

(d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

(e) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

Définition de *concurrent*

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

2009, ch. 2, art. 429; 2018, ch. 8, art. 115; 2018, ch. 10, art. 87; 2022, ch. 10, art. 263.

Fusionnements

Définition de *fusionnement*

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

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

Ordonnance en cas de diminution de la concurrence

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

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

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) de le dissoudre, conformément à ses directives,

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

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

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

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

Factors to be considered regarding prevention or lessening of competition

93 In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:

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

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

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

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

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

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2022, c. 10, s. 264.

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

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

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou proposé contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2022, ch. 10, art. 264.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan*

Exception

94 Le Tribunal ne rend pas une ordonnance en vertu de l'article 92 à l'égard :

a) d'un fusionnement en substance réalisé avant l'entrée en vigueur du présent article;

b) d'une fusion réalisée ou proposée aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés*

Companies Act in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest — or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

(c) a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* and in respect of which the Minister of Transport has certified to the Commissioner the names of the parties; or

(d) a merger or proposed merger that constitutes an existing or proposed ***arrangement***, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1991, c. 45, s. 549, c. 46, ss. 592, 593, c. 47, s. 716; 1999, c. 2, s. 37; 2000, c. 15, s. 14; 2001, c. 9, s. 579; 2007, c. 19, s. 62; 2018, c. 10, s. 88.

d'assurances ou de la *Loi sur les sociétés de fiducie et de prêt*, et à propos de laquelle le ministre des Finances certifie au commissaire le nom des parties et certifie que cette fusion est dans l'intérêt public ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) d'une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard de laquelle le ministre des Transports certifie au commissaire le nom des parties;

d) d'une fusion — réalisée ou proposée — constituant une ***entente***, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1991, ch. 45, art. 549, ch. 46, art. 592 et 593, ch. 47, art. 716; 1999, ch. 2, art. 37; 2000, ch. 15, art. 14; 2001, ch. 9, art. 579; 2007, ch. 19, art. 62; 2018, ch. 10, art. 88.

Exception for joint ventures

95 (1) The Tribunal shall not make an order under section 92 in respect of a combination formed or proposed to be formed, otherwise than through a corporation, to undertake a specific project or a program of research and development if

(a) a project or program of that nature

(i) would not have taken place or be likely to take place in the absence of the combination, or

(ii) would not reasonably have taken place or reasonably be likely to take place in the absence of the combination because of the risks involved in relation to the project or program and the business to which it relates;

(b) no change in control over any party to the combination resulted or would result from the combination;

(c) all the persons who formed the combination are parties to an agreement in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;

(d) the agreement referred to in paragraph (c) restricts the range of activities that may be carried on pursuant to the combination, and provides that the agreement terminates on the completion of the project or program; and

Exceptions pour les entreprises à risques partagés

95 (1) Le Tribunal ne rend pas d'ordonnance en application de l'article 92 à l'égard d'une association d'intérêts formée, ou dont la formation est proposée, autrement que par l'intermédiaire d'une personne morale, dans le but d'entreprendre un projet spécifique ou un programme de recherche et développement si les conditions suivantes sont réunies :

a) un projet ou programme de cette nature :

(i) soit n'aurait pas eu lieu ou n'aurait vraisemblablement pas lieu sans l'association d'intérêts,

(ii) soit n'aurait, en toute raison, pas eu lieu ou n'aurait vraisemblablement pas lieu sans l'association d'intérêts en raison des risques attachés à ce projet ou programme et de l'entreprise qu'il concerne;

b) aucun changement dans le contrôle d'une des parties à l'association d'intérêts n'a résulté ou ne résulterait de cette association;

c) toutes les parties qui ont formé l'association d'intérêts sont parties à une entente écrite qui impose à au moins l'une d'entre elles l'obligation de contribuer des éléments d'actif et qui régit une relation continue entre ces parties;

d) l'entente visée à l'alinéa c) limite l'éventail des activités qui peuvent être exercées conformément à l'association d'intérêts et prévoit sa propre expiration au terme du projet ou programme;

(e) the combination does not prevent or lessen or is not likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project or program.

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

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

Exception where gains in efficiency

96 (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

Factors to be considered

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

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

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

Restriction

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

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

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

e) l’association d’intérêts n’a pas, sauf dans la mesure de ce qui est raisonnablement nécessaire pour que le projet ou programme soit entrepris et complété, l’effet d’empêcher ou de diminuer la concurrence ou n’aura vraisemblablement pas cet effet.

Restriction

(2) Il est entendu que le présent article ne s’applique pas à l’égard de l’acquisition d’éléments d’actif d’une association d’intérêts.

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

Exception dans les cas de gains en efficience

96 (1) Le Tribunal ne rend pas l’ordonnance prévue à l’article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l’objet de la demande a eu pour effet ou aura vraisemblablement pour effet d’entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l’empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l’ordonnance était rendue.

Facteurs pris en considération

(2) Dans l’étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

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

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

Restriction

(3) Pour l’application du présent article, le Tribunal ne conclut pas, en raison seulement d’une redistribution de revenu entre plusieurs personnes, qu’un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

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

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l’article 92 à l’égard d’un fusionnement qui est essentiellement complété depuis plus d’un an.

L.R. (1985), ch. 19 (2^e suppl.), art. 45; 2009, ch. 2, art. 430.

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

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

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

98 Aucune demande à l'endroit d'une personne ne peut être présentée au titre de l'article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

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

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

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Conditional orders directing dissolution of a merger

99 (1) The Tribunal may provide, in an order made under section 92 directing a person to dissolve a merger or to dispose of assets or shares, that the order may be rescinded or varied if, within a reasonable period of time specified in the order,

(a) there has occurred

(i) a reduction, removal or remission, specified in the order, of any relevant customs duties, or

(ii) a reduction or removal, specified in the order, of prohibitions, controls or regulations imposed by or pursuant to any Act of Parliament on the importation into Canada of an article specified in the order, or

(b) that person or any other person has taken any action specified in the order

that will, in the opinion of the Tribunal, prevent the merger from preventing or lessening competition substantially.

Ordonnances conditionnelles de dissolution de fusionnements

99 (1) Le Tribunal peut déclarer, dans une ordonnance rendue en vertu de l'article 92 et enjoignant à une personne de dissoudre un fusionnement ou de se départir d'éléments d'actif ou d'actions, que l'ordonnance peut être annulée ou modifiée si, dans le délai raisonnable qui y est fixé :

a) soit il y a eu :

(i) ou bien réduction, suppression ou remise, indiquée dans l'ordonnance, de droits de douane pertinents,

(ii) ou bien réduction ou suppression, indiquée dans l'ordonnance, d'interdictions, de contrôles ou de réglementations imposés aux termes ou en vertu d'une loi fédérale et visant l'importation au Canada d'un article mentionné dans l'ordonnance;

b) soit la personne en question ou une autre personne a pris toute mesure indiquée à l'ordonnance,

et, qu'en conséquence, selon le Tribunal, le fusionnement n'aura pas pour effet d'empêcher ou de diminuer sensiblement la concurrence.

When conditional order may be rescinded or varied

(2) Where, on application by any person against whom an order under section 92 is directed, the Tribunal is satisfied that

(a) a reduction, removal or remission specified in the order pursuant to paragraph (1)(a) has occurred, or

(b) the action specified in the order pursuant to paragraph (1)(b) has been taken,

the Tribunal may rescind or vary the order accordingly.

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

Annulation ou modification de l'ordonnance

(2) À la demande d'une personne contre qui une ordonnance a été rendue aux termes de l'article 92, le Tribunal peut annuler ou modifier l'ordonnance en question s'il est convaincu que :

a) la réduction, la suppression ou la remise prévue à l'ordonnance conformément à l'alinéa (1)a) a eu lieu;

b) les mesures prévues à l'ordonnance conformément à l'alinéa (1)b) ont été exécutées.

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

Interim order where no application under section 92

100 (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where

(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse; or

(b) the Tribunal finds, on application by the Commissioner, that the completion of the proposed merger would result in a contravention of section 114.

Notice of application

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Commissioner to each person against whom the order is sought.

Ex parte application

(3) Where the Tribunal is satisfied, in respect of an application for an interim order under paragraph (1)(b), that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte*.

Terms of interim order

(4) An interim order issued under subsection (1)

(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and

Ordonnance provisoire en l'absence d'une demande en vertu de l'article 92

100 (1) Le Tribunal peut rendre une ordonnance provisoire interdisant à toute personne nommée dans la demande de poser tout geste qui, de l'avis du Tribunal, pourrait constituer la réalisation ou la mise en œuvre du fusionnement proposé, ou y tendre, relativement auquel il n'y a pas eu de demande aux termes de l'article 92 ou antérieurement aux termes du présent article, si :

a) à la demande du commissaire comportant une attestation de la tenue de l'enquête prévue à l'alinéa 10(1)b) et de la nécessité, selon celui-ci, d'un délai supplémentaire pour l'achever, il conclut qu'une personne, partie ou non au fusionnement proposé, posera vraisemblablement, en l'absence d'une ordonnance provisoire, des gestes qui, parce qu'ils seraient alors difficiles à contrer, auraient pour effet de réduire sensiblement l'aptitude du Tribunal à remédier à l'influence du fusionnement proposé sur la concurrence, si celui-ci devait éventuellement appliquer cet article à l'égard de ce fusionnement;

b) à la demande du commissaire, il conclut que la réalisation du fusionnement proposé serait une contravention de l'article 114.

Avis

(2) Sous réserve du paragraphe (3), le commissaire, ou une personne agissant au nom de celui-ci, donne à chaque personne à l'égard de laquelle il entend demander une ordonnance provisoire aux termes du paragraphe (1) un avis d'au moins quarante-huit heures relativement à cette demande.

Audition *ex parte*

(3) Si, lors d'une demande d'ordonnance provisoire présentée en vertu de l'alinéa (1)b), le Tribunal est convaincu :

a) qu'en toute raison, le paragraphe (2) ne peut pas être observé;

b) que la situation est à ce point urgente que la signification de l'avis aux termes du paragraphe (2) ne servirait pas l'intérêt public,

il peut entendre la demande *ex parte*.

Conditions d'une ordonnance provisoire

(4) Une ordonnance provisoire rendue aux termes du paragraphe (1) :

a) prévoit ce qui, de l'avis du Tribunal, est nécessaire et suffisant pour parer aux circonstances de l'affaire;

(b) subject to subsections (5) and (6), shall have effect for such period of time as is specified in it.

Duration of order: inquiry

(5) The duration of an interim order issued under paragraph (1)(a) shall not exceed thirty days.

Duration of order: failure to comply

(6) The duration of an interim order issued under paragraph (1)(b) shall not exceed

(a) ten days after section 114 is complied with, in the case of an interim order issued on *ex parte* application; or

(b) thirty days after section 114 is complied with, in any other case.

Extension of time

(7) Where the Tribunal finds, on application made by the Commissioner on forty-eight hours notice to each person to whom an interim order is directed, that the Commissioner is unable to complete an inquiry within the period specified in the order because of circumstances beyond the control of the Commissioner, the Tribunal may extend the duration of the order to a day not more than sixty days after the order takes effect.

Completion of inquiry

(8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 24, 37; 2022, c. 10, s. 265.

Right of intervention

101 The attorney general of a province may intervene in any proceedings before the Tribunal under section 92 for the purpose of making representations on behalf of the province.

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

Advance ruling certificates

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

b) sous réserve des paragraphes (5) et (6), a effet pour la période qui y est spécifiée.

Durée maximale de l’ordonnance provisoire

(5) La durée d’une ordonnance provisoire rendue en application de l’alinéa (1)a) ne peut dépasser trente jours.

Durée maximale de l’ordonnance provisoire

(6) La durée d’une ordonnance provisoire rendue en application de l’alinéa(1)b) ne peut dépasser :

a) dans le cas d’une ordonnance provisoire rendue dans le cadre d’une demande *ex parte*, dix jours à compter du moment où les exigences de l’article 114 ont été respectées;

b) dans les autres cas, trente jours à compter du moment où les exigences de l’article 114 ont été respectées.

Prorogation du délai

(7) Lorsque le Tribunal conclut, sur demande présentée par le commissaire après avoir donné un avis de quarante-huit heures à chaque personne visée par l’ordonnance provisoire, que celui-ci est incapable, à cause de circonstances indépendantes de sa volonté, d’achever une enquête dans le délai prévu par l’ordonnance, il peut la proroger; la durée d’application maximale de l’ordonnance ainsi prorogée est de soixante jours à compter de sa prise d’effet.

Achèvement de l’enquête

(8) Dans le cas où une ordonnance provisoire est rendue en vertu de l’alinéa (1)a), le commissaire est tenu d’achever l’enquête prévue à l’article 10 avec toute la diligence possible.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 24 et 37; 2022, ch. 10, art. 265.

Intervention

101 Le procureur général d’une province peut intervenir dans les procédures qui se déroulent devant le Tribunal en application de l’article 92 afin d’y faire des représentations pour le compte de la province.

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

Certificats de décision préalable

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

Duty of Commissioner

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

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

No application under section 92

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

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

General

Leave to make application under section 75, 76, 77 or 79

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76, 77 or 79. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a)

Obligation du commissaire

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

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

Nulle présentation de demande en vertu de l'article 92

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

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

Dispositions générales

Permission de présenter une demande : articles 75, 76, 77 ou 79

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75, 76, 77 ou 79. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

Certificat du commissaire

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

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

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente intervenue entre le commissaire et la personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)a) ou b) ou portant sur une question qui fait l'objet d'une demande que or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76, 77 or 79.

lui a présentée le commissaire en vertu des articles 75, 76, 77 ou 79.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Avis du Tribunal

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

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Observations

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

Granting leave

(7) The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

Octroi de la demande

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77 ou 79 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

Granting leave to make application under section 76

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

Octroi de la demande

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

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76, 77 or 79 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

Durée et conditions

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

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Décision

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

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 76, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76, 77 or 79.

ceux qui ont été allégués dans la demande de permission accordée en vertu des paragraphes (7) ou (7.1) si la personne à laquelle la permission a été accordée a déposé une demande en vertu des articles 75, 76, 77 ou 79.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Application

(11) Le Tribunal ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12; 2009, c. 2, s. 431; 2022, c. 10, s. 266.

Enquête du commissaire

(12) Dans le cas où il a déclaré dans le certificat visé au paragraphe (3) que les questions visées par la demande font l'objet d'une enquête et que, par la suite, l'enquête est discontinuée pour une raison autre que la conclusion d'une entente, le commissaire est tenu, dans les meilleurs délais, d'en informer l'auteur de la demande.

2002, ch. 16, art. 12; 2009, ch. 2, art. 431; 2022, ch. 10, art. 266.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) or (7.1) makes an application under section 75, 76, 77 or 79, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12; 2009, c. 2, s. 432; 2022, c. 10, s. 267.

Intervention du commissaire

103.2 Le commissaire est autorisé à intervenir devant le Tribunal dans les cas où une personne autorisée en vertu des paragraphes 103.1(7) ou (7.1) présente une demande en vertu des articles 75, 76, 77 ou 79.

2002, ch. 16, art. 12; 2009, ch. 2, art. 432; 2022, ch. 10, art. 267.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1; or

(b) to prevent the taking of measures under section 82 or 83.

Ordonnance provisoire

103.3 (1) Sous réserve du paragraphe (2), le Tribunal peut, sur demande *ex parte* du commissaire dans laquelle il atteste qu'une enquête est en cours en vertu de l'alinéa 10(1)b), rendre une ordonnance provisoire pour interdire :

a) soit la poursuite d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu des articles 75 à 77, 79, 81, 84 ou 90.1;

b) soit la prise de mesures visées aux articles 82 ou 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(b) a person is likely to be eliminated as a competitor; or

(c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

Restriction

(2) Le Tribunal peut rendre l'ordonnance s'il conclut que le comportement ou les mesures pourraient être du type visé aux alinéas (1)a) ou b) et qu'à défaut d'ordonnance, selon le cas :

a) la concurrence subira vraisemblablement un préjudice auquel le Tribunal ne pourra adéquatement remédier;

b) un compétiteur sera vraisemblablement éliminé;

c) une personne subira vraisemblablement une réduction importante de sa part de marché, une perte importante de revenu ou des dommages auxquels le Tribunal ne pourra adéquatement remédier.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act* or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

Consultation obligatoire

(3) Le commissaire consulte le ministre des Finances au sujet de la santé financière d'une entité constituée sous le régime de la *Loi sur les banques*, de la *Loi sur les sociétés de fiducie et de prêt*, de la *Loi sur les associations coopératives de crédit* ou de la *Loi sur les sociétés d'assurances* avant de présenter à l'égard de cette entité ou de l'une de ses filiales une demande d'interdiction de poursuite d'un comportement visé aux articles 75 à 77, 79, 81, 84 ou 90.1.

Duration

(4) Subject to subsections (5) and (6), an interim order has effect for 10 days, beginning on the day on which it is made.

Durée de l'ordonnance

(4) Sous réserve des paragraphes (5) et (6), l'ordonnance est en vigueur pendant dix jours à compter de celui où elle est rendue.

Extension or revocation of order

(5) The Tribunal may, on application by the Commissioner on 48 hours notice to each person against whom the interim order is directed,

(a) extend the interim order once or twice for additional periods of 35 days each; or

(b) rescind the order.

Prorogation de l'ordonnance

(5) Le Tribunal peut, à la demande du commissaire, après avoir donné un avis de quarante-huit heures à chaque personne visée par l'ordonnance :

a) soit proroger l'ordonnance à deux reprises pour une période supplémentaire de trente-cinq jours chaque fois;

b) soit l'annuler.

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 35-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the interim order.

Demande de prolongation présentée au Tribunal

(5.1) Le commissaire peut, avant l'expiration de la deuxième période supplémentaire visée au paragraphe (5) ou de la période que le Tribunal fixe en vertu du paragraphe (7), demander au Tribunal une nouvelle prorogation de l'ordonnance provisoire.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the interim order is made.

Avis

(5.2) Un préavis de la demande que le commissaire présente en vertu du paragraphe (5.1) doit être donné à la personne visée par l'ordonnance au moins quarante-huit heures avant l'audition.

Extension of interim order

(5.3) The Tribunal may order that the effective period of the interim order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

Prolongation de l'ordonnance provisoire

(5.3) Le Tribunal peut ordonner que la période de validité de l'ordonnance provisoire soit prorogée si les conditions suivantes sont réunies :

a) le commissaire démontre que les renseignements nécessaires à l'enquête n'ont pas encore été fournis ou qu'un délai supplémentaire est nécessaire pour les étudier;

(b) the information was requested during the initial period that the interim order had effect, within the first 35 days after an order extending the interim order under subsection (5) had effect, or within the first 35 days after an order extending the interim order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(c) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under any section referred to in paragraph (1)(a) or (b).

b) les renseignements ont été demandés au cours de la période initiale de validité de l'ordonnance provisoire, avant l'expiration de la première période supplémentaire visée au paragraphe (5) ou dans les trente-cinq premiers jours de validité d'une ordonnance de prolongation de l'ordonnance provisoire rendue en vertu du paragraphe (7) et que :

(i) soit le commissaire a reçu l'engagement écrit portant que les renseignements en question lui seraient fournis,

(ii) soit les renseignements doivent être fournis au titre d'une ordonnance rendue en vertu de l'article 11;

c) les renseignements sont raisonnablement nécessaires pour déterminer s'il existe des motifs suffisants justifiant la présentation par le commissaire d'une demande en vertu de l'un des articles visés aux alinéas (1)a) ou b).

Terms

(5.4) An order extending an interim order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Modalités

(5.4) L'ordonnance de prolongation visée au paragraphe (5.3) est en vigueur pendant la période que le Tribunal estime nécessaire pour permettre au commissaire de recevoir et étudier les renseignements visés à ce paragraphe.

Effect of application

(5.5) If an application is made under subsection (5.1), the interim order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

Conséquences

(5.5) Si une demande est présentée en vertu du paragraphe (5.1), l'ordonnance provisoire demeure en vigueur jusqu'à ce que le Tribunal décide d'accorder ou non une prolongation en vertu du paragraphe (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), an interim order has effect until the Tribunal makes an order under that subsection.

Durée de l'ordonnance en cas de contestation judiciaire

(6) En cas de présentation de la demande visée au paragraphe (7), l'ordonnance demeure en vigueur jusqu'à la date du prononcé de la décision du Tribunal.

Confirming or setting aside interim order

(7) A person against whom the Tribunal has made an interim order may apply to the Tribunal in the first 10 days during which the order has effect to have it varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the situations set out in paragraphs (2)(a) to (c) existed or are likely to exist, make an order confirming the interim order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fix the effective period of that order for a maximum of 70 days, beginning on the day on which the order confirming the interim order is made; and

Modification ou annulation de l'ordonnance

(7) Toute personne faisant l'objet de l'ordonnance peut en demander la modification ou l'annulation au Tribunal pendant les dix premiers jours de validité de l'ordonnance. Le Tribunal :

a) confirme l'ordonnance, avec, le cas échéant, les modifications qu'il estime indiquées en l'occurrence, pour une période maximale de soixante-dix jours à compter du prononcé de sa décision, s'il est convaincu qu'une des situations prévues aux alinéas (2)a) à c) s'est produite ou se produira vraisemblablement;

(b) if it is not satisfied that any of the situations set out in paragraphs (2)(a) to (c) existed or is likely to exist, make an order setting aside the interim order.

b) annule l'ordonnance s'il n'est pas convaincu qu'une des situations prévues aux alinéas (2)a) à c) s'est produite ou se produira vraisemblablement.

Notice

(8) A person who makes an application under subsection (7) shall give the Commissioner 48 hours written notice of the application.

Avis

(8) Dans les quarante-huit heures suivant le moment où il présente sa demande au titre du paragraphe (7), le demandeur en avise par écrit le commissaire.

Representations

(9) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

Possibilité de présenter des observations

(9) Dans le cadre de l'audition de la demande visée au paragraphe (7), le Tribunal accorde au demandeur, au commissaire et aux personnes directement touchées toute possibilité de présenter des éléments de preuve et des observations sur l'ordonnance attaquée avant de rendre sa décision.

Prohibition of extraordinary relief

(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).

Interdiction de recours extraordinaire

(10) Par dérogation à l'article 13 de la *Loi sur le Tribunal de la concurrence* mais sous réserve du paragraphe (7), l'ordonnance ne peut faire l'objet d'un appel ou d'une révision judiciaire.

Duty of Commissioner

(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

2002, c. 16, s. 12; 2017, c. 26, s. 13.

Obligations du commissaire

(11) Lorsqu'une ordonnance provisoire a force d'application, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête à l'égard du comportement qui fait l'objet de l'ordonnance.

2002, ch. 16, art. 12; 2017, ch. 26, art. 13.

Interim order

104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75, 76, 77 or 79, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Ordonnance provisoire

104 (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75, 76, 77 ou 79, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.

Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Conditions des ordonnances provisoires

(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to

Obligation du commissaire

(3) Si une ordonnance provisoire est rendue en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais possible pour terminer les procédures complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 13; 2015, c. 3, s. 39; 2022, c. 10, s. 268.

104.1 [Repealed, 2009, c. 2, s. 433]

Consent agreement

105 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14; 2009, c. 2, s. 434.

Rescission or variation of consent agreement or order

106 (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

qui, sous le régime de la présente partie, découlent du comportement qui fait l’objet de l’ordonnance.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 13; 2015, ch. 3, art. 39; 2022, ch. 10, art. 268.

104.1 [Abrogé, 2009, ch. 2, art. 433]

Consentement

105 (1) Le commissaire et la personne à l’égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l’ordonnance provisoire prévue à l’article 103.3 — peuvent signer un consentement.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l’enregistrer immédiatement.

Effet de l’enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu’une ordonnance du Tribunal, notamment quant à l’engagement des procédures.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14; 2009, ch. 2, art. 434.

Annulation ou modification du consentement ou de l’ordonnance

106 (1) Le Tribunal peut annuler ou modifier le consentement ou l’ordonnance visés à la présente partie, à l’exception de l’ordonnance rendue en vertu de l’article 103.3 et du consentement visé à l’article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l’égard de laquelle l’ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l’ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l’ordonnance n’aurait pas été signé ou rendue, ou n’aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l’égard de laquelle l’ordonnance a été rendue ont consenti à une autre ordonnance.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14; 2009, c. 2, s. 435.

Consent agreement — parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75, 76, 77 or 79 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

Notice to Commissioner

(2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.

Publication

(3) The consent agreement shall be published without delay in the *Canada Gazette*.

Registration

(4) The consent agreement shall be registered 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.

Effect of registration

(5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Commissioner may intervene

(6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

Personnes directement touchées

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14; 2009, ch. 2, art. 435.

Consentement

106.1 (1) Lorsqu'une personne autorisée en vertu de l'article 103.1 présente une demande d'ordonnance au Tribunal en vertu des articles 75, 76, 77 ou 79, que cette personne et la personne à l'égard de laquelle l'ordonnance est demandée s'entendent sur son contenu et que l'entente est compatible avec les autres dispositions de la présente loi, un consentement peut être déposé auprès du Tribunal pour enregistrement.

Signification au commissaire

(2) Les signataires du consentement en font signifier une copie sans délai au commissaire.

Publication

(3) Le consentement est publié sans délai dans la *Gazette du Canada*.

Enregistrement

(4) Le consentement est enregistré à l'expiration d'un délai de trente jours suivant sa publication, sauf si, avant l'expiration de ce délai, un tiers présente une demande au Tribunal en vue d'annuler le consentement ou de le remplacer par une ordonnance du Tribunal.

Effet de l'enregistrement

(5) Une fois enregistré, le consentement a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

Intervention du commissaire

(6) Le Tribunal peut, sur demande du commissaire, modifier ou annuler le consentement enregistré dans les cas où il conclut qu'il a ou aurait vraisemblablement des effets anti-concurrentiels.

Notice

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

2002, c. 16, s. 14; 2015, c. 3, s. 40; 2022, c. 10, s. 269.

Evidence

107 In determining whether or not to make an order under this Part, the Tribunal shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the Tribunal under this Act.

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

Préavis

(7) Le commissaire fait parvenir aux signataires du consentement un préavis de la demande qu'il présente en vertu du paragraphe (6).

2002, ch. 16, art. 14; 2015, ch. 3, art. 40; 2022, ch. 10, art. 269.

Preuve

107 Dans sa décision de rendre ou de ne pas rendre une ordonnance en application de la présente partie, le Tribunal ne peut refuser de prendre en considération un élément de preuve au seul motif que celui-ci pourrait constituer un élément de preuve à l'égard d'une infraction prévue à la présente loi ou qu'une autre ordonnance pourrait être rendue par le Tribunal en vertu de la présente loi à l'égard de cet élément de preuve.

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

PART IX

Notifiable Transactions

Interpretation

Definitions

108 (1) In this Part,

equity interest means

(a) in the case of a corporation, a share in the corporation; and

(b) in the case of an entity other than a corporation, an interest that entitles the holder of that interest to receive profits of that entity or assets of that entity on its dissolution; (*intérêt relatif à des capitaux propres*)

operating business means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work; (*entreprise en exploitation*)

person means an entity, an individual, a trustee, an executor, an administrator or a liquidator of the succession, an administrator of the property of others or a representative, but does not include a bare trustee or a trustee responsible exclusively for preserving and transferring the property of a person; (*personne*)

prescribed means prescribed by regulations made under section 124; (*réglementaire*)

PARTIE IX

Transactions devant faire l'objet d'un avis

Définitions

Définitions

108 (1) Les définitions qui suivent s'appliquent à la présente partie.

actions comportant droit de vote Actions comportant droit de vote en toutes circonstances, ou encore actions comportant droit de vote en raison d'un événement qui a eu lieu et dont les effets pertinents subsistent. (*voting share*)

entreprise en exploitation Entreprise au Canada à laquelle des employés affectés à son exploitation se rendent ordinairement pour les fins de leur travail. (*operating business*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale, toute action de celle-ci;

b) s'agissant d'une entité autre qu'une personne morale, tout titre de participation qui confère à son détenteur le droit de recevoir des bénéfices de cette entité ou des actifs de celle-ci à sa dissolution. (*equity interest*)

personne Entité, personne physique, fiduciaire, exécuteur testamentaire, administrateur successoral, liquidateur d'une succession, administrateur du bien d'autrui ou

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Competition Act

R.S.C. (Revised Statutes of Canada), 1985, c. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

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

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

Advance ruling certificates

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

Duty of Commissioner

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

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

No application under section 92

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

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

General

Leave to make application under section 75 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under section 75 or 77.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

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

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) makes an application under section 75 or 77, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84; or

(b) to prevent the taking of measures under section 82 or 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(b) a person is likely to be eliminated as a competitor; or

(c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act* or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

Duration

(4) Subject to subsections (5) and (6), an interim order has effect for 10 days, beginning on the day on which it is made.

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Competition Act

R.S.C. (Revised Statutes of Canada), 1985, c. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

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PART I

Purpose and Interpretation

Purpose

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

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

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

Completion of inquiry

(8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 24, 37.

Right of intervention

101 The attorney general of a province may intervene in any proceedings before the Tribunal under section 92 for the purpose of making representations on behalf of the province.

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

Advance ruling certificates

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

Duty of Commissioner

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

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

No application under section 92

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

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

General

Leave to make application under section 75, 76 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76 or 77, as the case may be, is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76 or 77, as the case may be, is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

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

Granting leave to make application under section 76

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76 or 77 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.
2002, c. 16, s. 12; 2009, c. 2, s. 431.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) or (7.1) makes an application under section 75, 76 or 77, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12; 2009, c. 2, s. 432.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81 or 84; or

(b) to prevent the taking of measures under section 82 or 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

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CANADA

CONSOLIDATION

CODIFICATION

Food and Drug Regulations

Règlement sur les aliments et drogues

C.R.C., c. 870

C.R.C., ch. 870

Current to September 13, 2023

Last amended on February 15, 2023

À jour au 13 septembre 2023

Dernière modification le 15 février 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

specifications means a detailed description of a new drug and of its ingredients and includes

(a) a statement of all properties and qualities of the ingredients that are relevant to the manufacture and use of the new drug, including the identity, potency and purity of the ingredients,

(b) a detailed description of the methods used for testing and examining the ingredients, and

(c) a statement of the tolerances associated with the properties and qualities of the ingredients. (*spécifications*)

SOR/95-411, s. 3; SOR/2011-88, s. 9; SOR/2021-45, s. 13.

biodisponibilité, par comparaison à une drogue visée à l'alinéa a). (*Canadian reference product*)

spécifications S'entend de la description détaillée d'une drogue nouvelle et de ses ingrédients, notamment :

a) la liste des propriétés et des qualités des ingrédients qui ont trait à la fabrication et à l'emploi de la drogue nouvelle, y compris leur identité, leur activité et leur pureté;

b) la description détaillée des méthodes d'analyse et d'examen des ingrédients;

c) la liste des tolérances relatives aux propriétés et aux qualités des ingrédients. (*specifications*)

DORS/95-411, art. 3; DORS/2011-88, art. 9; DORS/2021-45, art. 13.

C.08.002 (1) No person shall sell or advertise a new drug unless

(a) the manufacturer of the new drug has filed with the Minister a new drug submission, an extraordinary use new drug submission, an abbreviated new drug submission or an abbreviated extraordinary use new drug submission relating to the new drug that is satisfactory to the Minister;

(b) the Minister has issued, under section C.08.004 or C.08.004.01, a notice of compliance to the manufacturer of the new drug in respect of the submission; and

(c) the notice of compliance in respect of the submission has not been suspended under section C.08.006.

(d) [Repealed, SOR/2014-158, s. 10]

C.08.002 (1) Il est interdit de vendre ou d'annoncer une drogue nouvelle, à moins que les conditions suivantes ne soient réunies :

a) le fabricant de la drogue nouvelle a, relativement à celle-ci, déposé auprès du ministre une présentation de drogue nouvelle, une présentation de drogue nouvelle pour usage exceptionnel, une présentation abrégée de drogue nouvelle ou une présentation abrégée de drogue nouvelle pour usage exceptionnel que celui-ci juge acceptable;

b) le ministre a délivré au fabricant de la drogue nouvelle, en application des articles C.08.004 ou C.08.004.01, un avis de conformité relativement à la présentation;

c) l'avis de conformité relatif à la présentation n'a pas été suspendu en vertu de l'article C.08.006.

d) [Abrogé, DORS/2014-158, art. 10]

(2) A new drug submission shall contain sufficient information and material to enable the Minister to assess the safety and effectiveness of the new drug, including the following:

(a) a description of the new drug and a statement of its proper name or its common name if there is no proper name;

(b) a statement of the brand name of the new drug or the identifying name or code proposed for the new drug;

(c) a list of the ingredients of the new drug, stated quantitatively, and the specifications for each of those ingredients;

(2) La présentation de drogue nouvelle doit contenir suffisamment de renseignements et de matériel pour permettre au ministre d'évaluer l'innocuité et l'efficacité de la drogue nouvelle, notamment :

a) une description de la drogue nouvelle et une mention de son nom propre ou, à défaut, de son nom usuel;

b) une mention de la marque nominative de la drogue nouvelle ou du nom ou code d'identification projeté pour celle-ci;

c) la liste quantitative des ingrédients de la drogue nouvelle et les spécifications relatives à chaque ingrédient;

(d) a description of the plant and equipment to be used in the manufacture, preparation and packaging of the new drug;

(e) details of the method of manufacture and the controls to be used in the manufacture, preparation and packaging of the new drug;

(f) details of the tests to be applied to control the potency, purity, stability and safety of the new drug;

(g) detailed reports of the tests made to establish the safety of the new drug for the purpose and under the conditions of use recommended;

(h) substantial evidence of the clinical effectiveness of the new drug for the purpose and under the conditions of use recommended;

(i) a statement of the names and qualifications of all the investigators to whom the new drug has been sold;

(j) in the case of a new drug for veterinary use, a draft of every label to be used in connection with the new drug, including any package insert and any document that is provided on request and that sets out supplementary information on the use of the new drug;

(j.1) in the case of a new drug for human use, mock-ups of every label to be used in connection with the new drug — including any package insert and any document that is provided on request and that sets out supplementary information on the use of the new drug — and mock-ups of the new drug's packages;

(k) a statement of all the representations to be made for the promotion of the new drug respecting

(i) the recommended route of administration of the new drug,

(ii) the proposed dosage of the new drug,

(iii) the claims to be made for the new drug, and

(iv) the contra-indications and side effects of the new drug;

(l) a description of the dosage form in which it is proposed that the new drug be sold;

(m) evidence that all test batches of the new drug used in any studies conducted in connection with the submission were manufactured and controlled in a manner that is representative of market production;

d) la description des installations et de l'équipement à utiliser pour la fabrication, la préparation et l'emballage de la drogue nouvelle;

e) des précisions sur la méthode de fabrication et les mécanismes de contrôle à appliquer pour la fabrication, la préparation et l'emballage de la drogue nouvelle;

f) le détail des épreuves qui doivent être effectuées pour contrôler l'activité, la pureté, la stabilité et l'innocuité de la drogue nouvelle;

g) les rapports détaillés des épreuves effectuées en vue d'établir l'innocuité de la drogue nouvelle, aux fins et selon le mode d'emploi recommandés;

h) des preuves substantielles de l'efficacité clinique de la drogue nouvelle aux fins et selon le mode d'emploi recommandés;

i) la déclaration des noms et titres professionnels de tous les chercheurs à qui la drogue nouvelle a été vendue;

j) dans le cas d'une drogue nouvelle pour usage vétérinaire, une esquisse de toute étiquette à utiliser relativement à la drogue nouvelle, y compris toute notice d'accompagnement et toute documentation supplémentaire sur l'emploi de la drogue nouvelle qui est fournie sur demande;

j.1) dans le cas d'une drogue nouvelle pour usage humain, des maquettes de toute étiquette à utiliser relativement à la drogue nouvelle — y compris toute notice d'accompagnement et toute documentation supplémentaire sur l'emploi de la drogue nouvelle qui est fournie sur demande — ainsi que des maquettes des emballages de la drogue nouvelle;

k) la déclaration de toutes les recommandations qui doivent être faites dans la réclame pour la drogue nouvelle, au sujet

(i) de la voie d'administration recommandée pour la drogue nouvelle,

(ii) de la posologie proposée pour la drogue nouvelle,

(iii) des propriétés attribuées à la drogue nouvelle,

(iv) des contre-indications et les effets secondaires de la drogue nouvelle;

l) la description de la forme posologique proposée pour la vente de la drogue nouvelle;

(n) in the case of a new drug intended for administration to food-producing animals, the withdrawal period of the new drug; and

(o) in the case of a new drug for human use other than a designated COVID-19 drug, an assessment as to whether there is a likelihood that the new drug will be mistaken for another drug for which a drug identification number has been assigned due to a resemblance between the brand name that is proposed to be used in respect of the new drug and the brand name, common name or proper name of the other drug.

(2.1) A manufacturer may file, for a designated COVID-19 drug, a new drug submission that does not meet the requirements set out in paragraphs (2)(g) and (h) if the submission contains

(a) a statement that the submission contains evidence to establish that the requirement set out in paragraph (b) is met; and

(b) sufficient evidence to support the conclusion that the benefits associated with the designated COVID-19 drug outweigh the risks for the purpose and under the conditions of use recommended, with consideration given to the uncertainties relating to those benefits and risks as well as the public health need related to COVID-19.

(2.2) A manufacturer may file, for a designated COVID-19 drug for human use, a new drug submission that does not meet the requirements set out in paragraph (2)(j.1) if the submission contains a draft of every label to be used in connection with the designated COVID-19 drug, including any package insert and any document that is provided on request and that sets out supplementary information on the use of the designated COVID-19 drug.

(2.3) If, at the time a new drug submission is filed for a designated COVID-19 drug, the manufacturer is unable to provide the Minister with information or material referred to in any of paragraphs (2)(e) to (k), (m) and (n) or in paragraph (2.1)(b) or subsection (2.2) or that information or material is incomplete, the manufacturer shall

m) les éléments de preuve établissant que les lots d'essai de la drogue nouvelle ayant servi aux études menées dans le cadre de la présentation ont été fabriqués et contrôlés d'une manière représentative de la production destinée au commerce;

n) dans le cas d'une drogue nouvelle destinée à être administrée à des animaux producteurs de denrées alimentaires, le délai d'attente applicable;

o) dans le cas d'une drogue nouvelle pour usage humain autre qu'une drogue désignée contre la COVID-19, une appréciation de la question de savoir si la drogue nouvelle est susceptible d'être confondue avec une autre drogue à laquelle une identification numérique a été attribuée en raison de la ressemblance de la marque nominative dont l'utilisation est proposée pour cette drogue nouvelle avec la marque nominative, le nom usuel ou le nom propre de l'autre drogue.

(2.1) Le fabricant peut déposer, à l'égard d'une drogue désignée contre la COVID-19, une présentation de drogue nouvelle qui n'est pas conforme aux exigences prévues aux alinéas (2)g) et h) si la présentation contient à la fois :

a) une mention portant que la présentation contient des preuves visant à établir que l'exigence de l'alinéa b) est remplie;

b) des preuves suffisantes pour conclure que les avantages associés à la drogue désignée contre la COVID-19 l'emportent sur les risques associés à cette dernière en ce qui a trait aux fins et mode d'emploi recommandés, compte tenu des incertitudes à l'égard de ces avantages et de ces risques et du besoin en matière de santé publique relatif à la COVID-19.

(2.2) Le fabricant peut déposer, à l'égard d'une drogue désignée contre la COVID-19 pour usage humain, une présentation de drogue nouvelle qui n'est pas conforme aux exigences de l'alinéa (2)j.1) si la présentation contient une maquette de toute étiquette à utiliser relativement à la drogue désignée contre la COVID-19, y compris toute notice d'accompagnement et toute documentation supplémentaire sur l'emploi de la drogue désignée contre la COVID-19 qui est fournie sur demande.

(2.3) Si, au moment de déposer sa présentation de drogue nouvelle à l'égard d'une drogue désignée contre la COVID-19, le fabricant ne peut fournir au ministre les renseignements ou le matériel visés à l'un des alinéas (2)e) à k), m) et n) et à l'alinéa (2.1)b) ou au paragraphe (2.2) ou qu'il fournit ces renseignements ou ce matériel mais de façon incomplète, il fournit au ministre, au même moment, un plan précisant les modalités selon

27

CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d’interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

Current to September 19, 2023

Last amended on August 3, 2021

À jour au 19 septembre 2023

Dernière modification le 3 août 2021

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

Private Acts

Provisions in private Acts

9 No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

R.S., c. I-23, s. 9.

Lois d'intérêt privé

Effets

9 Les lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue.

S.R., ch. I-23, art. 9.

Law Always Speaking

Law always speaking

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

Permanence de la règle de droit

Principe général

10 La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10.

Imperative and Permissive Construction

"Shall" and "may"

11 The expression "shall" is to be construed as imperative and the expression "may" as permissive.

R.S., c. I-23, s. 28.

Obligation et pouvoirs

Expression des notions

11 L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

S.R., ch. I-23, art. 28.

Enactments Remedial

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

R.S., c. I-23, s. 11.

Solution de droit

Principe et interprétation

12 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

S.R., ch. I-23, art. 11.

Preambles and Marginal Notes

Preamble

13 The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

R.S., c. I-23, s. 12.

Préambules et notes marginales

Préambule

13 Le préambule fait partie du texte et en constitue l'exposé des motifs.

S.R., ch. I-23, art. 12.

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CT-2023-007

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by Apotex Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under section 79 of the Act;

AND IN THE MATTER OF an application by Apotex Inc. for an order pursuant to section 79 of the Act;

B E T W E E N:

APOTEX INC.

Applicant

- and -

PALADIN LABS INC., ENDO PHARMACEUTICALS INC., TAKEDA CANADA INC., and TAKEDA PHARMACEUTICALS U.S.A. INC.

Respondents

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