CHAPTER 9
ABUSE OF DOMINANCE

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I. Introduction

"Abuse of dominant market position", or "abuse of dominance" as it is more generally called, is one of the cornerstone provisions of the *Competition Act*, together with merger review and the prohibition against criminal conspiracies. The goal of the abuse of dominance provisions is to restrict the types of conduct that dominant firms may engage in where such conduct prevents or lessens competition substantially. Accordingly, dominance in and of itself is not prohibited, only the abuse of such dominance resulting in the requisite anti-competitive effect.

The abuse of dominance provisions are set out in sections 78 and 79 of the *Competition Act*. These provisions were enacted in 1986 to replace what had been a criminal prohibition against the formation of "monopolies" which operated "to the detriment or against the interest of the public". Over time, it became widely recognized that this criminal prohibition was ineffective in preventing anti-competitive conduct by "monopolies" because (i) it required a criminal standard of proof ("beyond a reasonable doubt") which was difficult for prosecutors to meet and (ii) the "public detriment" standard was unsatisfactorily vague. The criminal law was also considered to be an inappropriate vehicle for dealing with the type of behaviour at issue, because of its retrospective focus on punishing conduct rather than dealing prospectively with the need to remedy economic effects.

The 1986 amendments addressed these issues by replacing the criminal monopolization provision with an administratively reviewable, civil provision designed to create a review of dominant firm conduct that was both more relevant and more economically

sophisticated. The vague public detriment standard was supplanted with an economic approach requiring three elements: (i) a dominant position (single or joint); (ii) a practice of anticompetitive acts; and (iii) a substantial lessening or prevention of competition. The new provisions also put the remedial focus on restoring competition going forward rather than simply punishing parties for past conduct.

II. Enforcement

Alleged abuses of dominance are investigated by the Commissioner of Competition. The Commissioner may apply for relief to the Competition Tribunal if satisfied that an abuse of dominance has occurred.[1] Unlike certain other of the *Competition Act*'s reviewable practices provisions (for example, refusal to deal, price maintenance, exclusive dealing, tied selling and market restriction), private parties are not entitled to bring their own abuse of dominance applications before the Tribunal. The right to initiate abuse of dominance applications is limited to the Commissioner.

The Commissioner has brought 13 abuse of dominance applications since 1986; ten of these were initiated as contested proceedings[2] and three were brought as consent proceedings (when that type of proceeding was available).[3] Several abuse of dominance

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1 See section IV below for a more detailed discussion of remedies.

2 *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); *Canada (Commissioner of Competition) v. Air Canada* (2003), 26 C.P.R. (4th) 476 (Comp. Trib.) (completed in part and then discontinued); *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.) (eventually settled by consent agreement); *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, 2010 Comp. Trib. 12 (eventually settled by consent agreement); *Canada (Commissioner of Competition) v. Direct Energy Marketing Limited* (2012), CT-2012-003 (Comp. Trib.); *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership* (2012), CT-2012-002 (Comp. Trib.) (eventually settled by consent agreement); *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2013 Comp. Trib. 9, reversed 2014 FCA 29, leave to appeal refused 2014 CarswellNat 2755 (S.C.C.).

3 *Canada (Director of Investigation & Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.); *Canada (Director of Investigation & Research) v. AGT*

inquiries also have been resolved by way of consent agreement[4] or through "alternative resolutions", such as parties providing the Commissioner with voluntary but binding undertakings to modify their conduct.[5]

The Bureau also has published several guidelines/bulletins over the years describing its enforcement approach to abuse of dominance, the current version of which are the 2012 *Enforcement Guidelines on the Abuse of Dominance Provisions* ("Abuse Guidelines").[6] Although the Abuse Guidelines can be of some assistance in predicting the Bureau's likely enforcement approach on certain issues, their utility is limited by the substantially reduced level of detail in comparison to prior versions. It also must be noted as a general proposition that Bureau guidelines and bulletins are not binding on the Tribunal (or even on the Bureau itself for that matter).[7]

Directory Ltd., 1994 CarswellNat 3198, [1994] C.C.T.D. No. 24 (Comp. Trib.); *Canada (Commissioner of Competition) v. Enbridge Services Inc.*, 2002 Comp. Trib. 9.

4 *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc. and Waste Management of Canada Corporation* (2009), CT-2009-003, *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.); *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, 2010 Comp. Trib. 12; *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership* (2012), CT-2012-002 (Comp. Trib.).

5 See, for example, *Commissioner of Competition v. H J Heinz Company of Canada Ltd*, Undertaking, August 1, 2000; Competition Bureau, News Release, "Competition Bureau Cracks Down on Joint Abuse of Dominance by Waste Companies" (June 16, 2009), online: <www.competitionbureau.gc.ca>; Competition Bureau, News Release, "IKO Industries Ltd. Modifies its Loyalty Program Following Competition Bureau Investigation" (March 31, 2003). Note, however, that the Bureau's enforcement guidelines on abuse of dominance indicate that the Bureau will now generally seek to embody settlements in formal consent agreements that are registered with the Tribunal rather than accept informal undertakings, see Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012), online: <www.competitionbureau.gc.ca>.

6 Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012), online: <www.competitionbureau.gc.ca>. The *Abuse Guidelines* replaced a prior draft version of the Bureau's guidelines on abuse of dominance dating from 2009, and also superseded previously issued guidelines on abuse of dominance in the telecom and grocery sectors.

7 See, e.g., *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29 at para. 21 where the Federal Court of Appeal stated that the *Abuse*

III. Elements

The Tribunal may issue relief in respect of an alleged abuse of dominance where the Commissioner is able to establish the following three elements required by section 79(1) of the *Competition Act*:

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

Each of these elements must be proved by the Commissioner on a balance of probabilities (the applicable standard of proof for Tribunal proceedings). Although the evidence used to establish the different elements of section 79 may overlap, in the sense that a particular piece of supporting evidence may be relevant to more than one element, each of the three elements must remain conceptually distinct and discrete.[8]

A. Control

The "control" element of section 79 requires that a person be able to exercise "market power" in a properly defined competition market. For these purposes, "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 the expansion of existing firms. A real price increase of five percent sustained for a period of one year is often used as the relevant

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Guidelines indicate at most the Commissioner's understanding of subsection 79(1) as it has changed over time. The Court further stated that the *Abuse Guidelines* provide "no useful guidance" in interpreting the scope of conduct covered by the Act's abuse of dominance provisions. See Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012), online: <www.competitionbureau.gc.ca>.

[8] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233. In this decision, the Federal Court of Appeal held that the Tribunal had erred, among other things, by failing to properly recognize or maintain the important conceptual distinction between the second (anti-competitive acts) and third (substantial prevention or lessening of competition) elements of section 79.

benchmark. Market power also may be measured in terms of a reduction in other elements of competition, such as service, quality, choice, advertising and innovation.[9]

The initial step of the "control" inquiry, therefore, is to define both the relevant product market (or, in the words of section 79, the relevant "class or species of business") and the relevant geographic market (referred to in section 79 as "throughout Canada or any area thereof"). Key factors in determining the relevant product market include the availability of close substitutes; consumer switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviour; functional interchangeability (end use); physical and technical characteristics of the product; and price relationships. The views, strategies, behaviour and identity of buyers and other trade participants will also be assessed in determining the relevant geographic market, as will additional factors such as switching costs, transportation costs, price relationships, shipment patterns and foreign competition.[10]

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[9] See, for example, *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.). See also Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 2.3, online: <www.competitionbureau.gc.ca>.

[10] See, for example, *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.). See also Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012), online: <www.competitionbureau.gc.ca> at s. 2.2. In *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 CarswellNat 1762 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.), the Commissioner argued that the "direct evidence" of the respondent's market power (in the form of "high" margins and "supra-competitive prices") obviated the need to define the relevant market. However, the Tribunal followed the approach taken in all of its prior cases by beginning with a standard market definition analysis before proceeding to consider the market power question. This approach was confirmed by the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.).

Once the relevant market is defined, it is necessary to determine whether the allegedly dominant party in fact exercises "control", that is, possesses market power. A "direct" or "indirect" approach can be adopted in making this determination. The "direct" approach involves showing that the dominant firm has already exercised its market power. For example, very large accounting profits may be considered a direct indication of market power.[11] Where there is no direct evidence of market power, an "indirect" approach involves considering indicia such as market shares, barriers to entry, the extent of technological change and innovation, excess capacity and customer countervailing power.[12]

Although not definitive, market shares are an important consideration in determining whether a party has market power and therefore "control" of a class or species of business. As set out in the *Abuse Guidelines*, the Bureau will generally not pursue allegations of abuse of dominance against a party with a market share of less than 35 percent, while a market share of greater than 50 percent will generally justify further analysis of any such allegations. In the case of a party with a market share of between 35 percent and 50 percent, the Bureau will generally pursue an investigation further if it appears that the impugned conduct is likely to allow the party to increase its share within a "reasonable" period of time. The Bureau does not provide further guidance on what it considers to be a "reasonable" period of time.[13]

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[11] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.). However, in *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.), the Tribunal also acknowledged the "well known concerns about trying to convert accounting to economic profit".

[12] *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.). See also Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 2.3, online: <www.competitionbureau.gc.ca>.

[13] Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 2.3.1, online: <www.competitionbureau.gc.ca>. According to the *Abuse Guidelines*, a

This position is generally consistent with the Tribunal's decisions on abuse of dominance. The Tribunal has stated, for example, that no prima facie finding of dominance should arise with respect to a firm that has a market share of less than 50 percent. Although the Tribunal did not accompany this observation with the corollary statement that a market share above 50 percent necessarily gives rise to a prima facie finding of dominance, it did observe that it is more likely than not that an entity with a very large market share will be found to have market power.[14] In practice, contested abuse of dominance cases before the Tribunal have involved parties with market shares in excess of 80 percent.[15]

Even a substantial market share, however, will not necessarily lead to a finding that a firm is dominant. The other indicia identified above will have to be considered. In particular, the absence of barriers to entry will usually mean that a firm does not have market power, notwithstanding a high market share.[16]

The abuse of dominance provisions are applied most frequently in the context of conduct by a single allegedly dominant firm. However, these provisions also govern situations where two or more firms jointly "control" the relevant market. Generally speaking, the Bureau will only investigate allegations of joint abuse of dominance where the

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firm's ability to sustain prices above competitive levels increases as its own market share increases and also as the disparity increases between its own market share and the shares of its competitors.

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

[15] However, in a recent case decided under the *Competition Act* price maintenance provision, the Tribunal stated that although the Bureau's general position is that a market share under 35% will not normally raise unilateral market power concerns, it "does not mean that it can never do so" when other factors such as margins or very high barriers to entry are taken into account. In that case, the Tribunal found that one of the respondent parties in question possessed market power even though it only had a 30% share of the relevant market. See *Canada (Commissioner of Competition) v. Visa Canada Corporation and MasterCard International Incorporated et al.* (2013), CT-2010-010 (Comp. Trib.).

[16] See, for example, *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 2.3.2, online: < www.competitionbureau.gc.ca >.

parties in question have a combined market share exceeding 65 percent.[17]

A key issue that has not yet been determined is what degree of co-ordination between parties is necessary to establish joint control or dominance. The *Abuse Guidelines* state that evidence of coordination is not strictly necessary for a finding of joint dominance, but do not elaborate further on how and when joint dominance will be found even in the absence of coordination.[18] Given the dearth of jurisprudence on topic, this issue remains to be clarified.[19]

B. Practice of Anti-Competitive Acts

The second element of section 79 requires that there be a "practice" of "anti-competitive acts".

The term "practice" generally connotes more than an isolated or single act, although a single act may constitute a "practice" if it is sustained and systematic, and has had a lasting impact on competition. In addition, different individual acts taken together also may constitute a "practice".[20]

As to what may constitute "anti-competitive acts", the *Competition Act* does not provide an express definition. Instead, section 78 provides a list of illustrative examples of the types of conduct that may qualify as anti-competitive for these purposes, including:

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[17] Canada, Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 2.3.1, online: <www.competitionbureau.gc.ca>.

[18] *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 2.4, online: <www.competition-bureau.gc.ca>.

[19] In the only contested abuse of dominance case to date involving joint dominance (where the parties individually could not be considered dominant), there was no issue about coordination because there was an express agreement between the parties. See *Canada (Director of Investigation & Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (Comp. Trib.). In another case that was resolved by way of consent agreement, the Bureau alleged that the parties were jointly dominant and had engaged in similar conduct but was silent on whether this conduct had been coordinated. See Canada, Competition Bureau, News Release, "Competition Bureau Cracks Down on Joint Abuse of Dominance by Waste Companies" (June 2009).

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

- the squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier;
- the acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or the acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer;
- freight equalization on the plant of a competitor;
- the use of "fighting brands" introduced selectively on a temporary basis;
- the 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;
- the purchase of products to prevent the erosion of existing price levels;
- the adoption of product specifications that are incompatible with products produced by any other person;
- the requirement or inducement of a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor; and
- the sale of articles at a price lower than the acquisition cost.[21]

The list of anti-competitive acts in section 78 is not exhaustive and has been expanded by the case law to encompass essentially any act carried out by a dominant party for an anti-competitive purpose,[22] for example,, incorporating various types of restrictive conditions in contracts (for example, exclusivity, "meet or release" and "most favoured nation" clauses);[23] requiring customers to reveal quotes or

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[21] Prior to 2009, sections 78(1)(j) and (k) listed anti-competitive acts that were specific to Canada's domestic airline carriers. However, these provisions were repealed as part of amendments to the *Competition Act* enacted that year.

[22] The *Abuse Guidelines* group possible anti-competitive acts into two types of conduct: (i) "exclusionary" conduct, for example, margin squeezing of a downstream competitor by a vertically integrated supplier; and (ii) "predatory" conduct, for example, selling at a price below some measure of cost in order to harm a competitor. See *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at ss. 3.2.1-3.2.2, online: < www.competitionbureau.gc.ca >.

bids provided by competitors;[24] exclusionary policies that create artificial barriers to entry;[25] threatening customers with spurious litigation to prevent them from switching to competing suppliers;[26] extension of patent and trade mark rights;[27] the acquisition of competitors;[28] and denying competitors access to a facility controlled by the dominant entity.[29]

In establishing the requisite anti-competitive purpose, direct evidence of subjective intent is not mandatory, although certainly probative if available. The intended negative purpose also can be established indirectly by inference based on the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission.[30]

Also relevant to this inquiry is whether the dominant party can establish that it had a valid business justification for the impugned conduct. In appropriate circumstances, proof of a valid business justification can overcome the deemed intention arising from the

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23 See, for example, *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 FCA 233 (F.C.A.). At the time of writing, the Bureau had commenced an inquiry into the potential anti-competitive effects of a major Canadian grocery retailer's contractual provisions requiring suppliers to compensate the retailer if the retailer had to match competitors' pricing for the suppliers' products. See *Commissioner of Competition v. S C Johnson and Son, Limited* (November 12, 2014), Ottawa, FCC T-2342-14 (motion record).

24 See, for example, *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

25 See, for example, *Canada (Commissioner of Competition) v. Reliance Comfort Limited Partnership* (2012), CT-2012-002 (Comp. Trib.) and *Canada (Commissioner of Competition) v. Direct Energy Marketing Limited* (2012), CT-2012-003 (Comp. Trib.).

26 See, for example, *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

27 See, for example, *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.).

28 See, for example, *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

29 See, for example, *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2013 Comp. Trib. 9, reversed 2014 FCA 29, leave to appeal refused 2014 CarswellNat 2755 (S.C.C.); *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, 2010 Comp. Trib. 12.

30 *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233.

actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation of why the impugned act was performed.[31]

In an important decision in the *Toronto Real Estate Board* case, the Federal Court of Appeal held that a dominant firm's conduct need *not* be intended to harm competitors in order to qualify as an anti-competitive act for these purposes. Indeed, the Court held that the abuse of dominance provisions could potentially apply even if the dominant entity does not compete at all in the market where its conduct has allegedly had anti-competitive effects.[32] Although the Court stated otherwise, this ruling runs contrary to the Court's 2006

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[31] The issue of what constitutes a valid business justification for these purposes was canvassed extensively in the *Canada Pipe* case, which analyzed the impact of a "loyalty program" established by *Canada Pipe* pursuant to which distributors of its products were provided discounts based on exclusivity of purchasing. At first instance, the Tribunal held that there was a valid justification for Canada Pipe's loyalty program, namely that it was necessary to achieve the scale efficiencies required to maintain a full line of products, which benefited both distributors and end-users alike. This holding was overturned by the Federal Court of Appeal. The Court held that a valid business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts in question. In this instance, the Court held that the Tribunal had erred by relying solely upon consumer welfare benefits to establish Canada Pipe's purported business justification, thus failing to demonstrate the required efficiency-related link to Canada Pipe itself. See *Canada (Commissioner of Competition) v. Canada Pipe Co*. (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.).

[32] *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29, leave to appeal refused 2014 CarswellNat 2755 (S.C.C.). The Commissioner alleged that the Toronto Real Estate Board ("TREB") had abused its dominant position by restricting the information that its members could provide to customers over the Internet through innovative password protected websites known as VOWs. The Tribunal dismissed the Commissioner's application on the grounds that, among other things, TREB's conduct was not "anti-competitive" because it was not directed at competitors; as a trade association of realtors, TREB does not compete in the market for residential real estate brokerage services and thus does not have any competitors. The FCA overturned the Tribunal's decision on appeal, holding that there is no requirement under this element of section 79 that the conduct in question be intended to have a negative effect on a competitor of the dominant party. The Supreme Court of Canada refused to grant TREB leave to appeal and the matter was remanded to the Tribunal for redetermination as ordered by the Federal Court of Appeal. The Tribunal's decision on redetermination was still pending at the time of writing.

decision in *Canada Pipe*, where a different panel of the Court held that anti-competitive acts *must* have predatory, exclusionary or disciplinary effects on a competitor.[33]

Finally, alleged anti-competitive acts may overlap in some cases with conduct covered by other provisions of the *Competition Act*, for example, refusal to deal (section 75) and exclusive dealing and tied selling (section 77). This explains why abuse of dominance applications are often coupled with applications brought under these other provisions based on substantially the same facts.[34]

C. Substantial Prevention or Lessening of Competition

The fact that a dominant firm has engaged in a practice of "anti-competitive acts" does not, in and of itself, contravene the abuse of dominance provisions. The Commissioner has the explicit burden under section 79 of proving that anti-competitive conduct by a dominant firm has had, is having or is likely to have the effect of preventing or lessening competition substantially. In other words, there must be an inquiry into the actual economic effects of the dominant firm's impugned conduct, and, specifically, into whether that conduct preserves, entrenches or enhances the market power of the dominant firm, for example, by creating or heightening barriers to entry or expansion.[35]

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[33] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233. In this decision, the Federal Court of Appeal held that the Tribunal had erred when it decided that Canada Pipe's loyalty program was not an anti-competitive act because there was insufficient evidence to conclude that the loyalty program had exercised a detrimental effect on competition in the market or on consumer welfare. According to the Court, the Tribunal should have focused its analysis on whether the loyalty program had the requisite exclusionary purpose with respect to Canada Pipe's *competitors* rather than on the impact of this program on the general state of *competition* in the market.

[34] This was the case, for example, in *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.).

[35] *Canada (Director of Investigation & Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.). See also *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) Enforcement Guidelines* (20 September 2012) at s. 4, online: <www.competitionbureau.gc.ca>. In *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*

In assessing the impact of a practice of anti-competitive acts, it is necessary to compare the competitiveness of the relevant market in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the prevention or lessening of competition, if any, is "substantial". This comparison must be done with reference to actual past and present effects, as well as likely future effects. In short, the question that must be asked is would the relevant markets — in the past, present or future — be substantially more competitive *but for* the impugned practice of anti-competitive acts.[36]

Finally, the Tribunal is specifically directed to consider at this stage of inquiry whether any lessening of competition is "a result of [the] superior competitive performance" of the dominant firm. For example, it may be legitimate for a firm to exploit its advantage over rivals in terms of lower costs, better distribution/production techniques or a broader array of product offerings, even if this leads to the elimination of inferior competitors.[37]

(1997), 73 C.P.R. (3d) 1 (Comp. Trib.), the Tribunal held that where a firm has a high degree of market power in a market that is uncompetitive to begin with, even a small impact on competition may be considered substantial.

[36] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233. Application of the "but for" test could involve the construction of a hypothetical comparator model in which the impugned conduct is removed, or the use of comparisons across time (that is an assessment of the competitiveness of markets before and after the introduction of the impugned conduct). Interestingly, while the Federal Court of Appeal stated that the "but for" test is one that the Tribunal "must consider in all cases", it expressly left open the possibility that the Tribunal might devise additional tests as well. Reference also must be had to the different objectives of the *Competition Act*, as set out in section 1.1 thereof. In the *Canada Pipe* case specifically, the Court held that the Tribunal had erred by failing to explicitly consider the "but for" test and particularly whether the relevant markets would have been substantially more competitive in the absence of Canada Pipe's loyalty program. The Court stated that while the Tribunal had noted that there had been significant competitive entry even following the introduction of this loyalty program, it had not considered whether there would have been significantly more competitive entry had the loyalty program never been implemented. The Court referred the matter back to the Tribunal for redetermination on the basis of this proper test, with a view to considering questions such as whether, without Canada Pipe's loyalty program, entry or expansion might be substantially more frequent or more significant; switching between products and suppliers substantially more frequent; prices substantially lower; and the quality of products substantially greater. However, the case was settled before the Tribunal's redetermination hearing was held. See Canada, Competition Bureau, News Release, "Competition Bureau Reaches Agreement with Canada Pipe Company Ltd." (20 December 2007).

IV. Remedies

Where an abuse of dominance is established, the Tribunal may issue an order prohibiting the party from engaging further in the anti-competitive conduct at issue.[38] In addition, or as an alternative, the Tribunal may issue an order directing any or all persons against whom the order is sought to take such actions as are reasonable and necessary to overcome the effects of the anti-competitive practice, including the divestiture of assets or shares. This gives the Tribunal broad scope for relief, and may result in orders that affect not only the parties concerned, but also third parties.[39]

The Tribunal also has the authority to impose administrative monetary penalties ("AMPs") for contraventions of the abuse of dominance provisions.[40] The maximum AMP that can be imposed is $10 million for a first order and $15 million for any subsequent orders. Relevant factors in determining the quantum of an AMP include the effect of the impugned practice on competition, the gross revenues from sales affected by the practice, and the financial position of the respondent.[41] The Tribunal has yet to order AMPs in a contested abuse of dominance application, but one case has been settled on the basis of the party under inquiry agreeing, among other things, to pay

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[37] Subsection 79(4). This provision can be contrasted with section 96 of the *Competition Act*, which prohibits the Tribunal from issuing an order to prohibit or dissolve a merger if the efficiencies generated by that merger outweigh its anti-competitive effects. Subsection 79(4) does not establish a similar type of defence; rather, "superior competitive performance" is only one factor to be considered by the Tribunal in assessing the impact of the dominant firm's impugned conduct.

[38] As noted by the Tribunal in *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.): "Both subsections (1) and (2) [of section 79] provide that the Tribunal "may" make an order. The word "may" allows the Tribunal some residual discretion to refuse to issue an order despite its findings . . ."

[39] See subsection 79(2). See also, for example, *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.). The Tribunal has imposed far-reaching remedies pursuant to its authority under the abuse of dominance provisions, including prohibiting, nullifying and/or modifying various types of contractual provisions, trade terms and business practices. Subsection 79(2) specifies, however, that the Tribunal's orders may 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.

[40] The Tribunal was given this authority pursuant to amendments to the *Competition Act* in 2009. Bill C-10, *Budget Implementation Act, 2009*, S.C. 2009, c. 2 at §428.

[41] *Competition Act*, R.S.C. 1985, c. C-34, s. 79 (3.2).

an AMP of $5 million plus $500,000 towards the Bureau's investigative costs.[42]

The Tribunal is also authorized, on ex parte application by the Commissioner, to issue interim orders to prevent the continuation of conduct that could be the subject of a final order under section 79.[43] The threshold for interim relief of this nature is low; the Tribunal can issue an order if it finds that, in the absence of such an order: (i) injury to competition that cannot be adequately remedied by the Tribunal is likely to occur; (ii) a competitor is likely to be eliminated; or (iii) a person is likely to suffer significant loss of market share, revenue or other harm that cannot adequately be remedied by the Tribunal. The initial term of the order is ten days, although the Commissioner may apply for up to two extensions of 35 days each, on 48 hours' notice to each person against whom the interim order is directed.[44]

V. Defences and Exemptions

Section 79 also sets out specific circumstances in which the Tribunal is not entitled to make an order.[45] These include where proceedings based on the same or substantially the same facts have already been commenced under the *Competition Act*'s merger or conspiracy provisions;[46] where the act in question is engaged in pursuant only to the exercise of an intellectual property right;[47] and

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[42] Competition Bureau, News Release, "Competition Bureau Strengthens Competition in Ontario's Water Heater Industry" (6 November 2014), online: < www.competitionbureau.gc.ca >.

[43] Section 103.3.

[44] The Tribunal has not granted any interim orders pursuant to this section to date. Prior to the 2009 amendments to the *Competition Act* referred to above, section 104.1 permitted the Commissioner to issue a temporary order prohibiting a domestic airline carrier from engaging in any anti-competitive act or requiring the carrier to take steps necessary to prevent injury to competition if the Commissioner had commenced an abuse of dominance inquiry. This provision was repealed as part of the 2009 amendments.

[45] See *Competition Act*, R.S.C. 1985, c. C-34, ss. 79(5), (6), (7).

[46] Mirror exemptions exist in both the *Competition Act*'s conspiracy and merger provisions. See ss. 45.1, 98.

[47] In *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.), the Tribunal commented that, generally speaking, "the selective refusal to license a trade-mark is not an anti-competitive act" and that "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

where the impugned conduct occurred more than three years prior to the filing of the Commissioner's application. The latter defence was applied in *Canada Pipe*, where the Commissioner had argued that *Canada Pipe*'s practice of acquiring competitors was part of an anticompetitive strategy to eliminate competition. The Tribunal dismissed this aspect of the Commissioner's case on the grounds that all of the acquisitions in question had been completed more than three years prior to the filing of the Commissioner's application.[48]

As discussed in more detail in Chapter 16, the common law "regulated conduct defence" also may be relevant in abuse of dominance cases. When applicable, the regulated conduct defence provides a form of immunity from enforcement action under the *Competition Act* to persons engaged in conduct that is directed or authorized by other validly enacted legislation. In the *Law Society of Upper Canada* case, it was accepted that the regulated conduct defence could apply to the *Competition Act*'s reviewable matters provisions, including abuse of dominance.[49] However, the Bureau has made it clear that it will generally not be receptive to the invocation of this defence and will litigate the issue in an appropriate case.[50]

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trade-mark". See also Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (18 September 2014), online: <www.competitionbureau.gc.ca>.

48 *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 40 C.P.R. (4th) 453 (Comp. Trib.), reversed 2006 FCA 236 (F.C.A.), leave to appeal refused 2007 CarswellNat 1107 (S.C.C.), reversed 2006 CarswellNat 4554 (F.C.A.).

49 *Law Society of Upper Canada v. Canada (Attorney General)* (1996), 28 O.R. (3d) 460 (Ont. Gen. Div.).

50 Canada, Competition Bureau, *"Regulated Conduct"* (2010) at 5. One of the Bureau's concerns is that an overly broad application of the regulated conduct defence could inappropriately insulate regulated sectors of the Canadian economy from competition. See Remarks by John Pecman, Commissioner of Competition (April 5, 2013), at CD Howe Institute, Toronto, Ontario, online: <www.competitionbureau.gc.ca>.