COMMENT AND ANALYSIS

ABUSE OF DOMINANT POSITION

By: Bruce C. McDonald, Lang Michener
Lash Johnston, Toronto

Introduction

Effective June 19, 1986 the criminal offence of "monopoly" disappeared from Canadian competition law and was replaced by a civil review process under Sections 50 and 51 of the *Competition Act*. The previous need to prove "detriment"[1] is gone (apart from having to establish a substantial lessening of competition), and nothing about monopoly power or its exercise need any longer be proved to the criminal standard of proof. As a result, and in view of the relatively high degrees of market power found in many Canadian industries, it is expected that Sections 50 and 51 will receive considerably greater attention than the monopoly prohibition did in the past.[2]

Sections 50 and 51 appear in the *Act* under the heading "Abuse of Dominant Position". This language, which appears to have been adopted from Article 86 of the Treaty of Rome establishing the European Economic Community, also shows up in the marginal notes but not in the sections themselves.[3] Instead, the sections refer to persons who "substantially or completely control, throughout Canada or any area thereof, a class or species of business", engaging in 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 a market".

The purpose of this paper is to explore the scope and possible application of Sections 50 and 51. The discussion is organized according to the basic issues that arise in the analysis of an abuse case, namely:

1. Is there dominance?
2. Was there abuse?
3. Did the abuse substantially lessen competition or is it likely to do so?
4. If so, can a remedy be designed that is not worse than the mischief?

Each of these basic issues has its own subset of problems and challenges.

Substantial degrees of market power are also likely to be present in other proceedings under the *Act,* notably predatory pricing (Section 34(1)(c)), refusal to supply (Section 47), exclusive dealing, tied selling and market restriction (Section 49), but analysis of those other provisions requires separate treatment elsewhere.

A few preliminary observations about Sections 50 and 51 should be made before we look more closely at the language of the sections.

First, the more effectively that our law deals with exclusionary uses, misuses or "abuses", of market power, the more relaxed we can afford our merger law to be. It is widely recognized that mergers that increase market power significantly, particularly in countries like Canada with many relatively thin domestic markets, are frequently justified by the economies they permit. As Lawrence Skeoch would put it, "there is no system of international welfare payments", and we simply cannot afford to reject industry structures that permit the realization of significant economies. At the same time, and as is reflected in Sections 65 and 68, the process of merger evaluation involves a judgemental offsetting of the likely "gains in efficiency" against "the effects of any prevention or lessening of competition that will result or is likely to result from the merger". The effectiveness of controls on the abuse of significant market power may in this way have a bearing upon the types of chances that the Competition Tribunal will be willing to take with mergers.

It does not, of course, follow that ideal abuse of dominance provisions in the law would eliminate the need for a merger review process. Controls against abuses cannot be imposed without cost or instantaneously, and cannot totally eliminate the apprehensions and dampened initiatives that abuses can produce on the part of victims. Further, and more importantly, a law directed to the prevention of exclusionary conduct is no substitute for the comprehensive market pressures that genuine rivalry produces in the market. There is also a risk, as oligopoly tightens, that independent initiatives will be inhibited by a higher degree of competitive interdependence, particularly where the product is relatively homogeneous, or by tacit understandings that are more likely to arise. There is less chance of discord developing from different strategies among firms, or from imbalances in supply and demand within firms, as the number of market participants decreases. These, however, are factors to be weighed primarily in the course of merger evaluation.

It should also be noted that although American jurisprudence will no doubt be scrutinized very carefully by the Director and by the Competition Tribunal in thinking through the issues arising from the application of Sections 50 and 51, the sections are narrower in scope than Section 2 of the *Sherman Act.* Section 2 of the *Sherman Act* deals with "monopolization", which is roughly comparable to Canada's abuse provisions, but it also deals with attempts to monopolize and with combinations or conspiracy to monopolize. Attempts to monopolize involve attempts to obtain monopoly power, which is to say sufficient power to control prices or to exclude competition. Under the new Canadian provisions this type of significant market power is a precondition to the application of Section 51. (Previously, in Canada, the formation of monopoly power was part of the criminal prohibition of monopoly defined in Section 33 of the *Combines Investigation Act.*) Combinations or conspiracies to monopolize have always in Canada been subject to Section 32, although they previously could also have been the subject of proceedings under Section 33. They may also constitute a basis for a finding under the new abuse provisions that two or more persons are jointly holding and "abusing" a dominant position.

Sections 50 and 51 appear to represent a rejection of various no-fault monopoly proposals that have been advanced in recent years, particularly by the Federal Trade Commission in the United States. Such proposals would have justified sweeping relief on the basis of evidence of "persistent"

monopoly structure or performance, without evidence of any exclusionary acts at all. [4] Under both the old and the new Canadian law, of course, there has been and is nothing wrong at all with occupying a dominant position in a market. Remedial jurisdiction turns on the nature of the things done by persons holding such power.

Overall, the new abuse of dominance provisions represent an improved conceptual approach to the existence and exercise of substantial degrees of market power in Canada. The use of criminal law to address this type of situation had proven to be undesirable from almost every perspective. As for the prevailing jurisprudence, *Irving* [5] , although unobjectionable on its facts as a monopoly case because no anti-competitive acts appeared to have been involved, had left the law in an unfortunate state by requiring that some "detriment" be proved apart from the elimination of competition, despite there being no legislative guidance at all as to what might appropriately be considered to be detrimental to the public interest.

Dominance

Market Definition

The first step in the analysis prescribed by Section 51 is to identify the "area" and "class or species of business" with respect to which substantial or complete control is said to exist. It is a critical step, and many cases in antitrust litigation have, perhaps unfortunately, turned on the result of this definitional exercise.

An understanding of the relevant market or markets is essential in order to make an assessment of market power and the likely effects of practices or barriers. It is one thing to understand the market, however, and quite another to seek to define it with unrealistically precise geographical and product boundaries. In realistic terms, the best that can be done in many cases to understand the real nature of the market is to explore all the market-related elements including physical characteristics of the product, end uses of the product, cross-elasticities of demand, methods of production and the interchangeability of production machinery, relevant prices, time limits, integration of stages of manufacture and geographical considerations. No doubt the degree of confidence with which the Tribunal can define precise boundaries for the market will affect its judgement regarding the competitive effects of the practices in question or regarding the remedies to be imposed.

Market definition is a matter of learning about the business realities, rather than looking to policy or depending on economic or legal expertise or artifice. Essentially, a properly defined product market includes all reasonably interchangeable or substitutable products, considering their price and characteristics. Evidence of a variety of practical indicia will be relevant, including evidence of industry or buyer recognition of the product, the characteristics and uses of the product, the production facilities required to produce it, distinct customers, distinct prices, specialized suppliers, and the cross-elasticity of demand among various products when prices change.[6]

In geographical terms, the market for at least some purposes is the approximate area from which most of the customers come or can reasonably be attracted. Again, this will depend crucially on the facts of each particular case which may include the price of the product, transportation costs, transportation routes, perishability of the product and the scope of marketing efforts. Political boundaries might also be relevant for politically-imposed barriers such as customs clearance, tariffs,

quotas, tax rules and preferential purchasing practices. Indeed, many western countries are currently reassessing their competition laws to take account of the international markets in which their domestic enterprises must increasingly compete by virtue of diminishing tariff barriers to trade.

Legal questions will probably arise concerning the appropriate criteria for defining the "class or species of business" and the "area" relevant for the analysis in each case. Application of those criteria to the facts, however, and arriving at a market definition, is probably a pure question of fact and therefore not subject to appeal from the Tribunal without leave of the Federal Court of Appeal (*Competition Tribunal Act*, 1986, Section 13(2)). In view of the arbitrariness with which the market boundaries will in some cases have to be drawn, the need to draw such boundaries confers a certain flexibility on the Tribunal in the manner in which it chooses to handle cases before it. The more broadly the market is defined, the less likelihood there is that the requisite finding of control can be made, or that competition will be found to have been or be likely to be lessened substantially.[7]

Control

The question of "control" under Section 51 relates to a market and is therefore obviously a very different concept than "control" of a business for merger purposes under Section 63. It is a question of market power. "Monopoly" power or dominance has been defined or referred to in various ways, all of them perhaps unavoidably general, such as the following:

(i) 'Dominant' means the power to choose the rate of profits or share of the market to be enjoyed by the person or group of persons possessing the power, largely undeterred by any existing ability of rivals to compete away those profits or share of the market by offering more favourable terms to customers; [8]

(ii) [Monopoly power is] the power to raise prices without losing so much business that the price increase is unprofitable.[9]

(iii) The dominant position [referred to by Article 86 of the Treaty of Rome] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[10]

(iv) [A situation] whereby a certain entrepreneur or a group of entrepreneurs can, according to its own will, manipulate price, quality, quantity or other various conditions, thereby controlling the market.[11]

(v) When a group of companies engaged in the same business are alone in the field; when they work together as a unit; when they are free to supply the market or to withhold their product; when there is no restriction on the prices which they charge, save their own self-interest; when their freedom to exclude individuals as customers is restricted only by their interpretation of existing penal laws, then, by all normal standards, those companies are in control of the business in which they are engaged.[12]

An examination of the concentration or market share data relating to the market as defined is a useful first cut at getting a handle on the underlying question of market power. Although relatively high concentration does not by itself signify control, low concentration levels or declining concentration over time indicates an absence of control. If high concentration were found to exist, then further examination into the reasons for it would be required. Most importantly, how easy is entry and, even if the cost and time barriers to entry are high, are there potential competitors who could reasonably be expected to enter if the profit opportunities warranted entry, or existing competitors who could reasonably be expected to expand? Are the buyers small and fragmented, or not? Information of this nature may demonstrate that the concentration data in any particular case significantly overstates the real market power.

Nor does it necessarily follow that a market share figure below any magic threshold should insulate an enterprise from further examination. It has, for example, been held in the European Common Market that a firm with a 45% market share and a strongly advertised brand can be "dominant" within the meaning of Article 86.

Joint Dominance

Section 51(1)(a) deliberately repeats the portion of the previous monopoly offence that provided that the requisite control may be held and exercised by "one or more persons". This contemplation of what has also been referred to as "joint monopolization" or "shared monopoly" has been the focus of apprehensive and acrimonious policy debate over the last 15 years in Canada. Relatively tight oligopoly, frequently leading to a considerable degree of identity in pricing and in other aspects of marketing, is not uncommon in Canada. What should be required under the law before the state intervenes in order to direct industry practices or to restructure an industry? It is an important question.

The language of Section 51(1)(a) is substantially identical to the comparable provision in the previous monopoly offence, which had been held to mean that two or more unaffiliated persons can hold and exercise monopoly power jointly. In *Canadian General Electric* Pennell, J. stated as follows:[13]

> The accused argued that two or more persons cannot be said to jointly control a class or species of business unless some circumstance exists which results in a single unified authority or direction. It is conceded that such a unified direction might result from a contractual or proprietary relationship between participants. The accused submit, however, that the only possible instance where independent corporations could be responsible for a monopoly contrary to the *Act* would be pursuant to an agreement among them to operate their respective businesses in a co-ordinated way to the detriment of the public.
>
> . . .
>
> To me the wording of the section foresees a combination of circumstances whereby one or more persons, inclusive of independent corporations, through the co-ordination of their activities work together as a unit. For the sake of convenience, I will refer to this situation as a shared monopoly.
>
> . . .
>
> in my view, the accused worked together as a unit through the device of the sales plans, identical price lists and consignment system, the end result being an effective power to control the market.

In *Canadian General Electric* the sharing, or joint holding and exercise, of the control was found to exist by virtue of an agreement among the accused, although it was not at all clear that Mr. Justice Pennell would have found otherwise had the evidence not supported the finding of agreement.

Conscious parallelism, without more, does not constitute an illegal agreement.[14] It would be intolerable if it did, because intense competition among oligopolists, particularly where the product has a high degree of homogeneity, can very well lead to a substantial degree of identity in pricing and marketing practices. In the background papers to a prior version of Bill C-91 the Government denied an intent on its part to be attempting to reach "mere conscious parallelism" through Section 51.

Is there some sort of no-man's land between an illegal agreement and "mere conscious parallelism" that can form the basis for connecting two or more unaffiliated competitors so that they can be held to share market power jointly, at least in some respects or for some purposes? One is reminded of the definition of "arrangement" given in *British Basic Slag* by Willmer L. J. and Diplock L. J., respectively, as follows:

> ...when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An arrangement as so defined is therefore something 'whereby the parties to it accept mutual rights and obligations'.
>
> ...it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.[15]

Assuming that at least some communication between the parties with a view to co-ordinating activities must be established, even if it falls short of an agreement proved to a civil standard of proof on the basis of circumstantial evidence, what would be the evidentiary significance of significant degrees of common ownership between the companies, of interlocking boards of directors, or of certain types of joint trade association activities such as an information exchange?

In the recent Petroleum Industry Inquiry before the Restrictive Trade Practices Commission under Section 47 of the *Combines Investigation Act,* the Director did not allege conspiracy but he did allege joint monopolization. His Statement of Evidence was characterized by his own descriptive language such as "mutual forebearance", "interdependence", "linkages", "joint market power", "mutual objectives", "oligopoly discipline", "co-ordination", "network" and the like.[16] The Commission's finding that the evidentiary support for these characterizations was "extremely thin" may have influenced its decision against recommending that structural remedies be imposed upon the industry.

Substantial efforts were made by the Federal Trade Commission in the United States in the 1970's to explore the possibility of imposing structural remedies on the petroleum refining industry, and also on the ready-to-eat cereals manufacturing industry, on the basis of a shared monopoly theory. Neither effort was successful, largely because of the unfocussed nature of the complaints and the evident discomfort of the Commissioners over the thought of imposing severe structural remedies on the basis of an ambiguous and controversial rationale.[17] The cases arose under Section 5 of the *Federal Trade Commission Act* which declares unfair methods of competition and unfair acts or practices to be unlawful.

Despite these false starts the Federal Trade Commission continued to explore the capacity of Section 5 of its statute to deal with non-collusive oligopoly. In the *Antiknock Compound* case it determined that independent, parallel practices followed by four manufacturers of antiknock gasoline additives for legitimate business reasons constituted unfair methods of competition and, even in the absence of an agreement, that collectively they facilitated interdependent behaviour, restrained price competition, and kept prices at supracompetitive levels. The industry was highly concentrated, had high barriers to entry, had an inelastic demand for a homogeneous product, and was facing a sharply declining market. The practices involved clauses in sales contracts providing for lengthy advance notice of price changes, the giving of advance notice of price changes to the press and to others, the use of "most favoured customer" price clauses, and uniform delivered pricing. The F.T.C. decision and order was, however, set aside by the Circuit Court, which stated as follows:

> A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be "analogous" to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system.
>
> In the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of Section 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.[18]

Abuse

Anti-competitive Acts

(i) Classification

The second stage of analysis, after dominance has been found to exist, is to determine whether or not the controlling person or persons engaged or are engaging in a practice of "anti-competitive acts".

The *Act* contains no definition of "competition" or "anti-competitive" as such. Instead, Section 50 lists nine different examples of "anti-competitive acts" for the purpose of Section 51 and, importantly, does so *without restricting the generality of the term.*

Several questions arise from this manner of legislating. First, does the *ejusdem generis* principle apply despite the provision stating that the generality of the term "anti-competitive act" is not restricted by the illustrations? Second, and bearing in mind that the specified acts are not criminal offences, that they are not remediable unless engaged in by a dominant firm or unless also provided for elsewhere in the *Act,* and that they do not necessarily harm competition (and may even be desirable) even when engaged in by a dominant firm, what is the status under Section 51 of behaviour that is addressed elsewhere in the *Act* but is not referred to in Section 50? Third, is the question of superior performance, which by Section 51(4) is required to be considered at the third stage of the analysis (i.e. in determining whether or not the practice of anti-competitive acts is likely to lessen competition substantially), also relevant to the classification of acts as "anti-competitive" or otherwise? Strangely, section 51(4) implies that a practice of anti-competitive acts can be "a result of superior competitive performance". Compatability of the two would at least be easier to understand than a causal relationship.

In the *Dynamic Change* report Dr. Skeoch stated as follows with respect to the generality of the concept of "abuse":

> There is no way to define "abuse of market power" in such a way as to make the definition exhaustive of the category. Perhaps a very general definition would specify abuse by a monopolist as including all forms of competitive action not based on superior economic performance. In more detail, the National Markets Board would look for evidence of such behaviour as: preclusive acquisition or ownership of resources and facilities; deliberated exclusion; reinforcing a dominant position by exclusive dealing and tying arrangements, or by refusal to deal; predatory discrimination; a design to forestall competition and to hold its monopoly position by other than the achievement of real-cost economies; the use of reciprocal buying-selling advantages, and the like.[19]

Dr. Skeoch recommended statutory implementation of the concept along the following lines:

> 'misuse' means any form of competitive conduct that constitutes, or has the effect of creating or enhancing, a significant artificial restraint in a market, and which is not justified or offset by real-cost economies resulting from that conduct.[20]

Article 86 of the Treaty of Rome, which addresses the same problem, is as follows:

> Any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In various decisions implementing Article 86 the Commission of the European Community, and the Court of Justice, have found refusals to supply or reductions of supply that have no justification, price discrimination, restrictions on imports or exports, and the imposition of exclusive purchase obligations, to be abuses of dominant positions. A review of Canadian and, particularly, American jurisprudence reveals an almost endless list of particular types of conduct that on the facts have been found to be anti-competitive in the context of a high degree of market power, including industrial spying, the use of fighting brands, market loading practices, blacklisting, discriminatory pricing, predatory pricing, volume multiproduct rebate plans, insistence upon total requirements contracts, price squeezes and other forms of targeting, refusals to deal, unreasonable disparagement of a competitor or his product, bribes to purchasing officers, and sham litigation. The list could also include restrictive covenants and seeking to influence others not to deal with a particular person or class of persons.

In view of the practical inability to define with particularity in advance just what types of acts might be anti-competitive in unforeseeable factual settings, what is the point, and what are the implications, of listing nine particular acts in Section 50? Is it only to educate the business community and those involved in the enforcement process as to what an anti-competitive act is or might be? Is it an attempt to limit the type of thing that the Tribunal could, as a matter of law, conclude was an "anti-competitive" act? At a minimum it appears that if an act in question falls squarely within one of the nine illustrations, then as a matter of law it is "anti-competitive" for the purposes of the section, but how important is it that an act fall squarely within one of the illustrations? Classification of acts that do not fall within an illustration will inevitably be litigated in the appellate courts.

With respect to the relevance of other sections in the *Competition Act* it will be noted that Section 51(7) provides that no application may be made under Section 51 against a person against whom proceedings "have been commenced" for conspiracy under Section 32, or against whom an order is sought under the merger provisions, "on the basis of the same or substantially the same facts" as would be alleged in those other proceedings. Sections 32.01 and 70 provide the converse for the purposes of conspiracy and merger proceedings respectively. There is, however, no such similar protection relating to price discrimination (Section 34(1)(a)) predatory pricing (Section 34(1)(b) and (c)) price maintenance (Section 38) refusals to supply (Section 47), exclusive dealing, tied selling or market restriction (Section 49), or to delivered pricing (Sections 52 and 53). In fact, Section 79 expressly contemplates that evidence might well be relevant in two or more different types of proceedings. It appears, as a result, that in addition to any one or more of these types of behaviour possibly constituting anti-competitive acts for the purposes of Section 51 (subject to comments below regarding proof of exclusionary purpose and regarding refusals to deal or to otherwise co-operate with one's competitor), there could be a multiplicity of proceedings involving substantially the same facts. Further, of course, the statutory limitation on duplicative proceedings under Section 32 and Section 51 does not restrict any private right of action that a person might have under Section 31.1 based on an alleged offence having been committed under Section 32.

Ideally, competition tends to make participants in the market competitive with each other, with each striving to attract business that would otherwise go to someone else. They strive by working harder, by trying to be faster and smarter, by developing more appealing offerings and also, perhaps, by

trying to create various contractual and other barriers against the other person getting the business. It is relatively easy to agree on the broad principles of delimiting permissible activity, but not always nearly so easy to characterize specific acts as "anti-competitive" or otherwise. One can, for example, agree that the "survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry" [21] ought not be sanctioned for that superior performance, nor should a person be sanctioned who maintains dominance by virtue of "a superior product, business acumen, or historic accident".[22] It can also be agreed as a matter of general principle that the object of the exercise is to encourage the adoption of real-cost economies in production and distribution, or actions that facilitate entry, innovation or the introduction of new products or ideas with a view to the enhancement of one's profits, sales or market share.

There are many specific types of acts, however, that are difficult to characterize. Very large investment in advertising can be one example. Another is reflected in the statement of Commissioner Clanton of the Federal Trade Commission in putting a stop to the *Cereals* shared monopoly case which was based in part upon alleged anticompetitive effects of brand proliferation: It would be extremely difficult to distinguish between legitimate and illegitimate brand proliferation. Certainly, it would be quite inadvisable and impractical to attempt to limit advertising expenditures or new brand offerings.[23]

If United States jurisprudence is any indication [24], the anti-competitive act identified in Section 50(g) is a good illustration of the type of thing that will be difficult to categorize in many situations:

> (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.

United States courts have been ready to credit legitimate business justification for the way in which product changes are introduced, rather than finding that it was done for an exclusionary purpose despite exclusionary effects that might also have resulted:

> The successful competitor, having been urged to compete, must not be turned upon when he wins.[25]

A further question that arises in this connection is how far a dominant firm can go, in terms for example of pricing, to meet competition and to hold "its" market share. Assuming that there is nothing wrong with saying, like Macy's, that "we will not be undersold", are or should there be any restrictions on the extent of permissible price reductions that are not already reflected in the predatory pricing provisions of the *Act*?

(ii) Exclusionary Purpose

Each of the anti-competitive acts listed in Section 50 contains as part of its description, explicitly or implicitly, reference to an exclusionary purpose, object or design. Does this refer to some subjective intent, or instead to a balancing of legitimate business objectives against any exclusionary effects that may be assumed to have been anticipated?

The *Guide* published by the government when Bill C-91 was introduced clearly contemplates a *ejusdem generis* principle for Section 50. It states as follows at page 22 regarding the description of the anti-competitive acts:

> The list is non-exhaustive so that acts of like character can be held to be anti-competitive by the Tribunal. All of the listed acts include consideration of the purpose, object or design of the dominant firm to ensure that the censured conduct is not, in fact, reasonable competitive behaviour.

Remedial jurisdiction over exclusive dealing, market restriction and tied selling under Section 49 exists only where the practices are "engaged in by a major supplier ... or ... [are] widespread". This is not therefore necessarily a "dominance" provision, but it is nevertheless noteworthy that Section 49 does not contain any reference to the need for an exclusionary purpose.

It is of course notoriously difficult to distill a corporate intent from a variety of internal memoranda and other communications by employees expressing personal views in the course of the decision-making process within the corporation. Instances do occur where an expression of exclusionary purpose forms part of an authorized instruction to implement a particular action, but the question still remains as to whether the particular form of an instruction that incorporated a statement of exclusionary purpose really reflected the corporation's intent as opposed to simply motivating the employees. In any event, particularly in a civil context should significant remedial results really turn on careless expressions in memoranda of an altogether desirable wish to triumph over one's competitor?

As originally introduced in December, 1985, Bill C-91 had additionally required that it be proved that the object of the practice be to lessen competition, although this requirement was deleted prior to enactment of the Bill.

United States jurisprudence may again be instructive on the question of "purpose". In the recent case of *Olympia Equipment* v. *Western Union* the plaintiff alleged monopolization and, as evidence that the defendant engaged in conduct designed to maintain or enhance its market power improperly, the plaintiff relied in part on a Western Union document that referred to the plaintiff and others and urged that "these turkeys ... ought to be flushed". The Circuit Court, in a decision written by a very experienced antitrust judge, held such memoranda to be irrelevant to the issue of purpose: "If conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors is irrelevant". After noting that competition, which is always deliberate, has never been a tort, intentional or otherwise, and after referring to the "insoluble ambiguity about anticompetitive intent", the Court stated:

> Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.[26]

If there is a legitimate justification for an act such that, despite exclusionary effects, it ought not be the subject of remedy, then in practical terms it may not matter whether as a result it is found not to have been an anti-competitive act or instead, if it *is* held to have been anti-competitive by virtue of its purpose, it is nevertheless held not to lessen competition substantially.

An interesting comment about the proof of purpose was made by recently Mr. Justice McNair of the Federal Court, Trial Division, in a case dealing with allegations of abuse of process:

> The tort of abuse of process is not a reflection of one's intentions but instead depends on the existence of an improper or illegitimate purpose and a definite act or threat in furtherance thereof. A pleading of intention is usually regarded as immaterial and a litigant's private motives are not generally inquired into.[27]

It is in any event inevitable that subjective declarations of purpose or intent will be received into evidence. Indeed, an experienced antitrust commentator who is now a Circuit Court Judge in the United States has expressed the view that "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended".[28] As a result, it is advisable that the greatest care be taken in the use of language by corporate officers and employees, both orally and in writing, to avoid unnecessary expressions of antipathy towards one's competitors or to any wishes to exclude them from the market or limit their expansion.

(iii) Duty to Cooperate?

In the context of the general common law of negligence it may be largely an exercise in semantics to search for legal distinctions between misfeasance and nonfeasance. Where, however, a statute defines a type of duty by illustration, and all the illustrations involve positive acts, then at least it may be argued that inactivity cannot as a matter of law constitute the same type of act, which is to say an "anti-competitive" act on which remedial jurisdiction can be based. For example, can a refusal to supply constitute an anti-competitive act for the purpose of Sections 50 and 51?

In his capacity as Commissioner appointed to investigate certain allegations regarding commercial practices of the Canadian Dairy Commission, Mr. Justice Gibson of the Federal Court stated as follows:

> The common law imposed duties upon public utilities, who typically occupy monopoly position, to serve everyone who requests service on a non-discriminatory basis as to access and price, and to provide reasonable service at a reasonable price. These duties reflect what I understand to be the fundamental duty of a monopolist, namely, that he must not act in such a way as to exclude others, without reasonable justification, from the subject matter under his control or power. In this regard, the views expressed by Stark, J. in *R.* v. *Electric Reduction Co. of Canada Ltd.* (1970), 61 C.P.R. 235 at 236-237 are apposite:
>
> '...it must be clear to any businessman or business company which finds itself in a monopolistic situation that in that case especially strict standards of conduct are required and must be met by any such business, and they are not entitled to protect and preserve that monopolistic situation by unfair means...'.[29]

In its recent report on the Petroleum Industry Inquiry the Restrictive Trade Practices Commission directed its attention to the extent, if any, to which suppliers with significant degrees of unavoidable market power should be under a duty to supply others. The problem was that only a limited number of oil refineries can survive in Canada and, further, the Commission did not feel justified in recommending that the extensive forward vertical integration by refiners into marketing that has taken place be eliminated. The question, then, was that if it was not in the public interest to eliminate the structure that gave rise to the market power, how could independent marketers best be protected against possible abuses of the market power and from any fear of being victimized? The Commission, noting that "a denial of supply is the ultimate predatory weapon" and that fears of discriminatory supply might well be dampening the marketing initiatives of independent marketers, recommended as follows:

> Suppliers who hold high degrees of market power should not be entitled to refuse supply to others except to the extent that they can establish sufficient reason for refusing supply. Market power being a matter of degree, the greater a person's market power is over supply the less should be the need to prove that the refusal injured someone or that it substantially lessened competition, and the more the focus should be on the adequacy of the supplier's reasons for refusing supply.[30]

The Commission's report issued while Bill C-91 was under consideration by Parliament but no effect was given to its recommendation that C-91 be amended to provide for such a duty of supply.

American law in this respect was recently reviewed in the *Olympia* case, the facts of which were as follows. When Western Union unbundled its telex service from its telex terminals in order to be permitted to acquire TWX, it decided to get out of the terminal equipment business. To facilitate this process it gave lists of independent terminal vendors to its new subscribers, and the plaintiff entered the terminal selling business to take advantage of the opportunities thus created. After a few years Western Union decided that the process of liquidating its own inventory of terminals was taking too long. It offered its own salesmen enhanced commissions and discontinued distribution of the vendor list to subscribers. Olympia was caught with an inadequate sales force for this new world and, after a

vain attempt to solicit Western Union's installed customer base, went out of business. The question was: by withdrawing support in the form of the vendor list in full awareness of the effect that would have on Olympia, was Western Union abusing its monopoly power and therefore liable in damages for monopolization under Section 2 of the *Sherman Act?* The Circuit Court said no, and reversed a trial award to the plaintiff of $36,000,000 in trebled damages. In the course of an extensive review of the jurisprudence the Court expressed its views as follows:

> ...the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits...
>
> ...a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.
>
> There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.
>
> A monopolist has no duty to reduce its prices in order to help consumers and no duty to extend a helping hand to new entrants.
>
> ...a monopolist has no duty to disclose its plans to rivals in order to help the rivals compete with it.[31]

The Circuit Court did note two exceptions to this general rule in the United States. The first was the well-known "essential facilities" or "bottleneck" doctrine (not unlike the R.T.P.C. recommendation) which states that a firm that controls a facility essential to its competitors, and that cannot practically or reasonably be duplicated, may be guilty of monopolization if it refuses to allow them access to the facility.[32] The second was the principle applied in the recent United States Supreme Court decision in *Aspen Skiing* [33] which was described narrowly by the *Olympia* court as follows: "If [*Aspen Skiing*] stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." The limited duty to co-operate endorsed by *Aspen Skiing*, and its qualification of the right to refuse to deal, hinged on the facts of the case and on what the Supreme Court referred to as an absence of "valid" or "legitimate" business reasons or an "efficiency justification", for the refusal. This, in light of the market power, was the essence of the Court's characterization of the refusal as exclusionary.

The "Refusal to Deal" heading that appears above Section 47 in the *Competition Act* is somewhat misleading in that the section only covers refusal to supply. It does not apply to refusals to buy or to otherwise obtain supply. If such refusals arise from a situation of market power the only way to address them may be incidentally under Section 51 if the Tribunal has remedial jurisdiction on the basis of (other) anti-competitive acts. In other jurisdictions with less detailed legislation, including the Common Market, refusals by dominant firms to cooperate are capable of constituting anti-competitive acts.

Practice

Remedial jurisdiction depends upon there having been a practice of anti-competitive acts. Although the requirement of "practice" also exists under Sections 34(2) (price discrimination), 38(9) (loss leader selling and other defences to a charge of price maintenance), 48 (consignment selling), 49 (exclusive dealing, tied selling and market restriction) and 52 (delivered pricing), there is little jurisprudential assistance as to its meaning.

"Practice" would appear to refer to a systematic course of conduct over a period of time, as opposed to something more in the nature of a temporary expedient or isolated situation. It is not clear as to whether, or how, it differs from a "policy", which is referred to in the predatory pricing provisions of Section 34(1)(b), and (c).

Whether or not particular acts have the thread of continuity that collects them into a "practice" will depend upon the facts of each particular case.[34] Acts done repeatedly pursuant to long term contract obligations, catalogue commitments and so on will also probably have to be considered on the facts of each case.

A "practice" for the purposes of Section 51 could consist of a variety of different anti-competitive acts, each of which manifests the practice that together they constitute. Difficulties might arise applying the three year limitation period under Section 51(6) for applications to the Tribunal, which period runs from the date "the practice has ceased". Does this mean that each of the acts constituting the practice relied upon must have occurred within the three year period, or is it sufficient that any one of the acts have occurred within the three year period so long as there is not such a lapsed time between that act and the previous acts relied upon so as to mean that together they do not constitute the same practice?

Substantial Lessening of Competition

The third stage in the substantive analysis of an abuse case is to determine whether or not the practice of anti-competitive acts carried out by the persons or persons in control "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market." As noted above, in answering this question "the Tribunal shall consider whether the practice is a result of superior competitive performance" (section 51(4)).

The variety of objectives that are sought to be served in one way or another by the *Competition Act* is reflected in the fact that the test of "substantial lessening of competition" applies to some but not all criminal conduct, and to some but not all matters that are subject to civil review before the Competition Tribunal. It is, for example, the test for criminal liability for predatory pricing (Section 34 (1)(b)(c)), and yet is not relevant to civil review of refusals to supply (Section 47) consignment selling (Section 48) or delivered pricing (Section 53).

It is to be hoped that in exercising its judgment in connection with this bottom-line question the Tribunal will take a long term view based upon an understanding of the business realities and pressures that are peculiar to the industry involved in each case. The practical significance of a functional analysis that takes account of historical trends and changes in the characteristics of demand, in the development of technology and in market forces, as contrasted to a more static and structural analysis emphasizing refined statistical analyses of market shares, bare numbers of entries and exits and so on, is well illustrated by the impact of the *General Dynamics* decision [35] on United States merger law. The functional analysis adopted in that decision, and emulated in subsequent decisions, has been one of the most important developments in antitrust law and policy in the United States in the last twenty years, and has had a decisive impact on the outcome of administrative and judicial enforcement decisions. It goes a long way to keeping free the basic forces that can operate to alter the sizes and relative positions of firms, by permitting market participants to do things that appeal more to consumers. The basic freedoms to implement organizational or technological change, to adopt and promote new product offerings, to implement new promotional methods, and to experiment with any other aspect of production or distribution, must be left as unimpeded as reasonably possible by

government or private sector planning, supervision, direction, management, control or other obstruction, so that the long run economic function of the entrepreneur, the innovator and the risk-taker can be performed.

Enforcement and Remedies

The Director alone is entitled to apply to the Competition Tribunal for relief under Section 51. With the decriminalization of the monopoly law the only avenue of redress for a victim of abuse by one or more dominant firms is to complain to the Director.

Where the Tribunal finds market control, a practice of anti-competitive acts and a probable substantial lessening of competition as a result, then it "may", but need not, issue a prohibition order. This remedial discretion suggests that further types of evidence may be admissible on the question of the appropriate remedy, if any. Would evidence as to the degree of effectiveness of a proposed remedy be relevant? Evidence of a decision of net benefit to Canada under the *Investment Canada Act*? Evidence of regional economic need and benefit? Evidence of other public policies at the federal or provincial levels?

Where the Tribunal finds that a prohibition order is not likely to restore competition in the relevant market, it may make any additional or other order as is reasonable and necessary to overcome the effects of the practice in the market, including ordering the divestiture of assets or shares.

The unavoidable generality of the substantive standards and the breadth of the remedial power given to the Tribunal creates a significant potential for the Director's office to resolve matters in dispute by negotiating undertakings or consent orders, and it is anticipated that this process will play an inevitable part in the total enforcement programme. There is also a certain danger of over-reaching in the form of overly-detailed orders that unnecessarily constrain or inhibit initiatives or desireably aggressive conduct. In the context of the joint dominance question, for example, Dr. Skeoch has commented as follows:

> Little will be achieved - and a good deal may be lost - by the joint monopolization section if it obliges members of a small group to arrange to behave as if they were unintelligent enough to overlook the obvious fact that they are indeed members of a small group which may itself be the result of technological and/or organizational forces which are the essence of a dynamic and progressive economy.
>
> . . .
>
> So long as there is no mutual understanding to restrict investment, to limit technological change, or other dimensions of dynamic change, then the price parallelism is merely an intelligent response to the fact of fewness. The dynamic elements will drive costs to minimum long-run levels.
>
> If, on the other hand, the mutual understanding does extend to the dynamic elements just mentioned, the appropriate policy response would be to alter the environmental conditions such as easing entry or otherwise intensifying marketlike pressures and not to concentrate on self-defeating efforts to oblige oligopolists to behave as if they were not functioning in a small-numbers setting.[36]

The current Chairman of the Federal Trade Commission recently commented more generally as follows regarding the anti-competitive effects of some of the anti-trust enforcement initiatives in the United States in past years:

> Looking backwards, we should be appalled that antitrust doctrines have been so anticompetitive. Antitrust doctrines, frequently based on myths, have regularly been invoked to prevent competitive pricing, competitive distribution arrangements, competitive joint ventures, and competitive mergers. If a firm engaged in good, hard competitive pricing, it was liable to be sued for predatory pricing, or for violating the *Robinson-Patman Act*. If

> a manufacturer tried to implement an efficient distribution system, it could face challenge under *per se* rules against tie-ins, resale price maintenance, and non-price vertical restraints. If competitors formed joint ventures that affected pricing decisions and marketing areas, they were likely to be struck down as *per se* illegal, without regard to possible efficiencies. Procompetitive mergers were similarly foreclosed by antitrust enforcement. [37]

A legislated caution to the Tribunal along these lines is, oddly, the subject of Section 51(3) of the *Competition Act,* which requires the Tribunal to make its orders in such terms as will, in its opinion, interfere with the rights of persons "only to the extent necessary to achieve the purpose of the order". So long as the Tribunal directs its mind to this point, such decisions would not appear to be appealable.

There are, in short, a number of difficult questions to be resolved in the productive application of Section 51. The Director and the Competition Tribunal deserve and will no doubt welcome any assistance they might receive from the Bar in defining the key issues in each case and ensuring that the appropriate evidence is produced.

NOTES

1. *R.* v. *K.C. Irving, Limited,* [1978] 1 S.C.R. 408.

2. Decriminalization also means that the monopoly law can no longer be used as the basis for a private action, defence or counterclaim, but this enforcement avenue had not shown much promise in Canada during the 10 years it existed.

3. "Marginal notes...form no part of the enactment, but shall be deemed to have been inserted for convenience of reference only." *Interpretation Act, R.S.C.* 1970, c. I-23, Section 13.

4. See generally Handler and Steuer, "Attempts to Monopolize and No-Fault Monopolization", (1980) 129 U. Pa. L. Rev. 125.

5. *Supra,* note 1.

6. A leading example is *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) where cellophane was held not to be an appropriate product market, but only a part of a broader market for flexible packaging materials. The effect of the finding was to diminish critically the market power attributed by the Court to the defendant.

7. Neither the practice of anti-competitive acts nor the injured market appear to have to bear any necessary relationship to the control, or to the area and business over which the person or persons enjoy control, although the practice must cause the market injury or risk. It is probable, however, that a connection between the abuse and the dominance will be required to exist.

8. Skeoch, et al, *Dynamic Change and Accountability in a Canadian Market Economy* (1976), p. 156.

9. *Olympia Equipment Leasing Company et al* v. *Western Union Telegraph Company,* 797 F. 2d 370 at 373 (7th Cir., 1986), per Posner, Cir. J.

10. *United Brands Company* v. *E.C. Commission,* [1978] ECR 207, para. 65.

11. *Toho Co.* v. *F.T.C.* (Tokyo High Court, 1951). Cited in Iyori and Uesugi, *The Antimonopoly Laws of Japan* (1983), p. 46.

12. *Eddy Match Co. Ltd. et al* v. *R.* (1953), 109 C.C.C. 1 at 18 (Quebec Court of Appeal).

13. *R.* v. *Canadian General Electric Company Ltd. et al* (1976), 15 O.R. (2d) 360 at 406-08.

14. *Atlantic Sugar Refineries Co. Ltd. et al* v. *A.-G. Canada,* [1980] 2 S.C.R. 644. The rule in the United States is the same: *Theatre Enterprises Inc.* v. *Paramount Film Distributing Corp.,* 346 U.S. 537 (1954).

15. *British Basic Slag Ltd.* v. *Registrar of Restrictive Trading Agreements,* [1963] 1 W.L.R. 727 at 739, 747. See also *R.* v. *Armco Canada Ltd. et al* (1974), 6 O.R. (2d) 521 at 582-83 (Lerner, J.); (1976), 13 O.R. (2d) 32 at 41-43 (C.A.).

16. *The State of Competition in the Canadian Petroleum Industry* (7 vols., 1981).

17. See, e.g. Commissioners' Statements in *Re Kellogg Company et al*: (1982) 42 ATRR 182. As to the petroleum refining case see Porter, The Federal Trade Commission v. The Oil Industry: An Autopsy on the Commission's Shared Monopoly Case Against the Nation's Eight Largest Oil Companies", (1982) 27 Antitrust Bulletin 753.

18. *Ethyl Corporation* v. *F.T.C.*, 729 F. 2d 128 at 137, 140 (2nd Cir., 1984).

19. *Supra,* note 8 at pp. 150-151.

20. *Ibid.*, at p. 156.

21. *United States* v. *Aluminium Co. of America,* 148 F. 2d 416, 430 (2nd Cir., 1945).

22. *United States* v. *Grinnell,* 384 U.S. 563, 570-71 (1966).

23. *Supra,* note 17 at 186.

24. E.g. *Berkey Photo Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir., 1979), cert. denied 444 U.S. 1093 (1980); *California Computer Products Inc. et al* v. *I.B.M. Corp.* 613 F.2d 727 (9th Cir., 1979); *Transamerica Computer Co. Inc.* v. *I.B.M. Corp.*; 481 F. Supp. 965 (N.D. Cal. 1979), affirmed 698 F. 2d 1377 (9th Cir. 1982); *Northeastern Telephone Co.* v. *A.T.&T.*, 651 F. 2d 76 (2nd Cir., 1981).

25. *Supra.*, note 21 at p. 430

26. *Supra.*, note 9 at p. 379.

27. *Cat Productions Ltd.* v. *Macedo and Morell* (1985), 5 C.P.R. (3d) 71 at 77.

28. Bork, *The Antitrust Paradox* (1978), p. 160.

29. *Report of the Commission of Inquiry into Certain Allegations Concerning Commercial Practices of the Canadian Dairy Commission* (Government of Canada, 1981), p. 98.

30. *Competition in the Canadian Petroleum Industry* (Restrictive Trade Practices Commission, 1986) p. 471. See also the *Report Concerning the Manufacture, Distribution and Sale of Ammunition in Canada* (R.T.P.C. 1959), pp. 105-108.

31. *Supra.*, note 9 at p. 375.

32. *U.S. v. Terminal Railroad Assn.*, 224 U.S. 383 (1912); *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973); *MCI Communications Corp. v. A.T.&.T.*, 708 F. 2d 1081 (7th Cir. 1983), cert. denied, 104 S. Ct. 234 (1983).

33. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985).

34. In *R. v. Wm. E. Coutts Co. Ltd.* (1966), 52 C.P.R. 21 (Ont. High Ct.), sales of greeting cards in a particular way for one week was held to constitute a "practice". Affirmed (1968), 54 C.P.R. 60.

35. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). See also *United States v. Marine Bancorporation,* 418 U.S. 602 (1974); *Telex Corp. v. I.B.M. Corp.*, 510 F. 2d 894 (l0th Cir., 1975), cert. dismissed 423 U.S. 802 (1975).

36. Skeoch, "The Dynamic Change Report and the Proposed Competition Act", in Prichard et al, eds., *Canadian Competition Policy* (1979), pp. 91-92.

37. Speech by F.T.C. Chairman D. Oliver to the Antitrust Law Section of the A.B.A., August 12, 1986 (CCH Trade Regulation Reports #50,481).

NOTES

CANADIAN COMPETITION POLICY RECORD

HIGHLIGHTS

MERGER PRENOTIFICATION RULES IN FORCE

COMPETITION ACT CONSTITUTIONALITY CHALLENGED

SUPREME COURT UPHOLDS INQUIRY PROCEDURES

CANADA SAFEWAY/WOODWARDS MERGER AGREEMENT

FREIGHT FORWARDER INQUIRY STARTED

TRANSPORT DEREGULATION BILLS CLEAR HOUSE OF COMMONS

CRTC SPECIALTY CHANNELS HEARING: HOW MUCH COMPETITION?

FEDERAL FINANCIAL INSTITUTIONS LEGISLATION REVIEWED

RETROACTIVE APPLICATION OF ANTIDUMPING DUTIES

U.S. ANTITRUST DEVELOPMENTS

U.S. TRADE LAW PROPOSALS REVIEWED

FEATURE ARTICLE:

CANADIAN EXPERIENCE WITH COUNTERVAILING DUTIES ON AGRICULTURAL PRODUCTS

VOL. 8, NO. 2

JUNE, 1987

CANADIAN COMPETITION POLICY RECORD

Suite 1201-180 Elgin St.
Ottawa, Ontario, Canada
K2P 2K7

Published by Fraser & Beatty Legal Publications Inc.

Second Class Mail Registration Number 5150
Return Postage Guaranteed

The Canadian Competition Policy Record is published quarterly. It is intended to provide readers with information regarding developments in the areas of Competition Policy and Trade Policy. Readers are cautioned that the publisher and the editors are not, through this publication, engaged in giving legal or other professional advice. If legal advice or other professional services are required, the assistance of a qualified professional should be obtained.

Readers are invited to submit concise pieces for publication as well as to alert the Editors to matters of interest such as conferences, papers, speeches, and submissions. Views expressed by contributors are not necessarily those of the editors or the publisher.

ISSN 0228-1961

SUBSCRIPTION ORDER FORM

Canadian Competition Policy Record
Suite 1201-180 Elgin St.
Ottawa, Ontario, Canada
K2P 2K7

Phone: (613) 235-0690

Please enter my subscription for .....years.

Name.....Firm/Institution.....

Address.....City.....

Province/State.....Country.....Postal Code.....

Subscription Rates:
$200 per year (four issues)
$100 per year for academic institutions
$35 per year for academic persons

No. of Subscriptions .....
Total Amount .....
Cheque Enclosed ☐
Please Bill Me ☐