

ABUSE OF DOMINANCE IN CANADA: REFLECTIONS ON 25 YEARS OF SECTION 79 ENFORCEMENT

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1. Introduction

This issue is dedicated to reflecting on the so-called “modern” edition of Canadian competition law as enacted in the *Competition Act*² (the “Act”) in 1986. An important part of that modern law is the civil reviewable practice of abuse of dominant position, addressed in section 79 of the Act. In this article, we discuss the evolution of the substantive abuse of dominance provision into its modern form, the development of jurisprudence and enforcement guidance on section 79 during the “modern” period, stretching from 1986 to the late 2000s, and the key issues that remain for elaboration in future cases. We then identify a turning point, coinciding with significant amendments to the Act in 2009, that marks an arguable shift to an emerging “post-modern” approach to abuse of dominance in Canada. We address the changes taking place in the post-modern period and what these might mean for the philosophical integrity of the Act, the future interpretation and enforcement of section 79, and the potential for further reform of the abuse of dominance provisions and the non-merger reviewable practices in Part VIII more broadly. We identify a trend of increased uncertainty for firms seeking to comply with the abuse of dominance provisions and query whether section 79 is evolving in a direction that overreaches and undermines the objectives of the original abuse of dominance provisions.

2. History and Genesis of Section 79

2.1 *Combines Investigation Act*

The reviewable practice of abuse of dominance, currently under section 79 of the Act, replaced the previous offence of criminal monopolization under the *Combines Investigation Act*³ (the “CIA”). Section 33 of the CIA specified that to be “a party or privy to or knowingly assist in, or in the formation of, a merger or monopoly” was an indictable offence with a maximum two-year sentence.⁴ Under section 1 of the CIA, “monopoly” was defined as a situation where:

one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated that business or are likely to operate it to the detriment or against the interest of the public...⁵

As a criminal offence, the impugned monopoly had to be proven beyond a reasonable doubt. The “one or more persons” element provided for the possibility of joint control of a market. “Public detriment” was otherwise undefined in the CIA.

However, the criminalization of monopolies came to be regarded as largely ineffective. Only a single contested proceeding resulted in a conviction,⁶ and the Supreme Court of Canada’s decision in *R. v. K.C. Irving Ltd.*⁷ upheld the acquittal by the appellate court, holding that the provision required evidence of public detriment. The Court stated that it was incorrect to presume public detriment from the fact of control.⁸

2.2 The 1986 Act and Section 79

As part of broader reform proposals for Canadian antitrust law, various reports proposed alternative methods of addressing monopolies and mergers leading up to the 1986 amendments. The 1969 Economic Council of Canada report⁹ envisioned the ultimately-adopted two-track approach, recommending that criminal sanctions apply only to collusive arrangements, resale price maintenance and misleading advertising,¹⁰ and proposing the creation of a civil tribunal that would review whether mergers and certain trade practices were “on balance in the public interest.”¹¹ The Economic Council proposed that none of these trade practices would be treated as undesirable *per se*; rather, “the presumption would be that while the practices could well be harmless or even beneficial to the public in some circumstances, they could be harmful in others.”¹² It recommended that legislation identify a list of such trade practices and provide evaluative criteria for assessing whether the designated practices were detrimental to the public.¹³

Following the 1973 decision to tackle reform of Canada’s antitrust framework in two separate stages,¹⁴ the Minister of Consumer and Corporate Affairs requested a committee headed by Professor L.A. Skeoch to develop recommendations on the “Stage II” reforms, including those addressing monopolization and mergers. The 1976 Skeoch-McDonald report¹⁵ recommended against policies designed to dissolve or unwind entities currently possessing market power,¹⁶ and stated that “the basic concern of public policy in this area is to assure so far as possible that monopoly power is not used in such ways as to interfere with dynamic change and with the achievement of real-cost economies.”¹⁷ To this end, the report proposed that “dominant firms be prohibited from engaging in forms of conduct which constitute the abusive use of monopoly power.”¹⁸

This approach to anti-competitive conduct was embodied in draft legislation in several abortive attempts to reform the CIA during the 1970s. Following these

failures at reform, a 1981 discussion paper from the Bureau of Competition Policy¹⁹ again identified the demerits of a criminal sanction for monopolization,²⁰ and instead proposed to introduce a single monopolization provision that would address both unilateral and joint monopoly situations under civil procedures.²¹ The paper also proposed that “anticompetitive conduct employed to create, entrench or extend monopolies” be controlled. The discussion paper defined “anticompetitive conduct” as “conduct of a restrictive, exclusionary or predatory nature,” and set out a list of proposed examples of such conduct.²²

The 1986 amendments under Bill C-91, which created the Act, followed this general approach. Bill C-91 eliminated the criminal offence of monopoly under section 33 and instead introduced the reviewable practice of abuse of dominance. A government guide to the amendments²³ stated that replacing the criminal offence was warranted since the conduct in question “is not generally considered criminal in nature,” anti-competitive conduct, rather than “notions of monopoly and public detriment,” should be the focus of the inquiry, and criminal sanctions are not well-suited to remedying an abuse of market power.²⁴

The new Act reflected a restructured regime for enforcement of competition law such that various types of anti-competitive conduct were to be considered as civil reviewable practices with injunctive relief and other remedial measures available to restore competition in affected markets. As the guide to the amendments stated:

One of the long standing weaknesses in the basic structure of the [CIA] is the assessment of complex economic activity in a criminal law setting. ... Under the current criminal jurisdiction, although order making powers are available in extraordinary circumstances, the normal penal powers of fine and imprisonment are ill-suited to the [CIA's] objective of maintaining and restoring competition. The adjudication of civil matters by a specialized Competition Tribunal will permit more sophisticated judgment, a better understanding of the business reality, a more flexible process, and, above all, timely decision-making, which is consistent with the policy underlying the [CIA].²⁵

Along with abuse of dominance, other reviewable practices were included under Part VII (now Part VIII) of the Act, including refusal to deal (now section 75 of the Act) and exclusive dealing, tied selling and market restriction (now section 77 of the Act). These latter practices had been created in “Stage I” reforms of the CIA, and the then-existent Restrictive Trade Practices Commission (“RTPC”) had been vested with quasi-judicial authority to make orders to prevent such conduct. Notably, in addition to its adjudicative functions, the

RTPC had investigative functions, being able to gather evidence and direct further investigation. In *Hunter et al. v. Southam Inc.*,²⁶ however, the Supreme Court of Canada held that these investigative functions impaired the ability of the RTPC to function as an impartial adjudicative body.²⁷

To address these concerns, the 1986 amendments created the Competition Tribunal (the “Tribunal”), composed of judges from the Federal Court of Canada and lay persons, to adjudicate civil reviewable practices under the new Act. Sitting in each case as a panel of three members, the Tribunal is chaired by a judicial member, and questions of law are determined solely by the judicial members while questions of mixed fact and law are determined by all members of the panel.²⁸

A tribunal process, rather than a court process, was chosen because “it would provide greater potential for expertise in economics and business, and would permit more scope for response by the decision maker to social and economic change.”²⁹ Nonetheless, by including judges alongside lay members, the government favoured a “highly judicialized” tribunal to ensure impartiality, due process and certainty in the adjudication of the Act.³⁰

Following the 1986 amendments, abuse of dominance was created under section 51 (now section 79) of the Act, and, except for the recent addition of new remedies in 2009, the structure of the provision has remained effectively unchanged. Abuse of dominance involves three elements, each of which must be proved by the Commissioner of Competition (the “Commissioner”) before the Tribunal may issue a remedial order:

1. [O]ne or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
2. [T]hat person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and
3. [T]he practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.³¹

For the “substantially and completely control” element, “control” has been held to be synonymous with market power, which is defined as the ability to set prices above competitive levels for a considerable period of time.³² Establishing market power requires defining the relevant market and demonstrating that “one or more persons” possesses market power within it. “One or more persons” extends the reviewable practice to “joint dominance” situations where two or more unaffiliated firms jointly control a market.

“Anti-competitive acts” are enumerated non-exhaustively in section 78,³³

and broadly have been held to encompass conduct with an “intended negative effect on a competitor that is predatory, exclusionary or disciplinary.”³⁴ Only a “practice” of anti-competitive acts will trigger section 79, and the Tribunal has held that a practice may exist where there is more than an isolated act or acts and that different individual anti-competitive acts taken together may constitute a practice.³⁵

The “substantial lessening or prevention of competition” (the “SLC”) element requires evidence that the impugned anti-competitive acts preserve or enhance the respondent’s market power.³⁶ Subsection 79(4) requires that, when deciding whether conduct is likely to result in a SLC, the Tribunal shall consider whether the practice results from the respondent’s superior competitive performance.³⁷

Where abuse of dominance is established, the Tribunal may make an order prohibiting the impugned conduct and is also authorized, if an injunction is not likely to restore competition in the relevant market, to “make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.”³⁸

Breach of an order made by the Tribunal under the Act, including an order made under section 79, is a criminal offence.³⁹ Moreover, while private actions for injunctive relief or damages are not available in respect of conduct contrary to section 79, parties who have suffered loss or damage as a result of the failure of any person to comply with an order of the Tribunal may sue for damages resulting from the breach of the order.⁴⁰

Broadly, the abuse of dominance provision was intended to “ensure that dominant firms compete with other firms on merit, not through the abuse of their market power.”⁴¹ The guide to the amendments further noted that, by requiring “an anti-competitive object,” the provision “is structured to ensure that it does not create an impediment to aggressive, pro-competitive behaviour.”⁴²

The guide also noted that the rationale for including “one or more persons” in the first element of abuse of dominance was to “continue to allow the application of the law to behaviour engaged in by unaffiliated persons.”⁴³ The guide stated that retaining “joint dominance” in combination with a “substantial or complete control” test “would provide greater protection for small business and consumers.”⁴⁴

On remedies, the guide stated that “[t]he discretion available to the Tribunal in respect of abuse of dominance will be restricted to remedies sufficient to overcome the effects of the anti-competitive practices and restore competition in the marketplace.”⁴⁵

Finally, with regard to the superior competitive performance defence, the guide stated:

The consumer benefits when product innovation or improved distribution systems result in a firm outdistancing its rivals in the marketplace. If competitors fall from the market because a dominant competitor is more effective in meeting consumers needs [*sic*], this is not an abuse of market power, but rather a natural consequence of the competitive process.⁴⁶

3. Developments in the Modern Era

The “modern era” has been characterized by “a program of compliance” that stressed voluntary conformity with the Act, facilitating compliance in particular situations through communication and education, and responding to non-compliance through a variety of enforcement tools.⁴⁷ In general, over the two decades from 1986 to 2007, the Commissioner brought relatively few abuse of dominance cases to the Tribunal. These cases tended to be focused on exclusivity arrangements. The relatively thin case law was complemented by detailed guidance from the Competition Bureau (the “Bureau”) about how it viewed conduct in particular industries and circumstances. The approach emphasized voluntary corrective action, escalating to formal orders on consent and contested proceedings if the impugned conduct could not be resolved voluntarily.⁴⁸

3.1 Jurisprudence

During the first twenty years under the abuse of dominance provisions, the Commissioner initiated nine Tribunal proceedings under section 79, with six contested⁴⁹ and three brought as consent orders.⁵⁰ In other cases, the Commissioner has also resolved concerns under section 79 by accepting an enforceable undertaking.⁵¹ The Federal Court of Appeal (the “FCA”) has rendered a decision in only one appeal from a finding of the Tribunal in regard to section 79: *Canada Pipe*.

The Commissioner has been largely successful in the contested cases to date, with the Tribunal issuing remedial orders in four of five fully litigated cases: *Nutrasweet*, *Laidlaw*, *Nielsen* and *Tele-Direct*.⁵² In general, these earlier contested cases each involved some form of exclusive contracting that was found to have raised barriers to entry. Market definition and market power were generally assessed not on the basis of whether prices could be raised from their present level, but relative to a counterfactual in which competitive pricing prevailed (*i.e.*, absent the allegedly anti-competitive conduct). Broadly, in each case the relevant barriers to entry were found to lessen the competitive constraint

on pricing in the relevant market, securing the market power of the respondent and substantially lessening competition relative to the counterfactual.

In *Nutrasweet*, the Tribunal focused on the respondent's branded ingredient strategy, which involved discounts to customers of aspartame in return for exclusively displaying the respondent's brand logo on downstream products. The Tribunal held that these requirements and other contractual restrictions created substantial switching costs for aspartame customers that entrenched the respondent's market power.

In *Laidlaw*, the Tribunal found that long-term contracts for local waste disposal services, which included liquidated damage clauses and had termination dates that were staggered between customers, resulted in substantial switching costs and inhibited competitors from obtaining a minimum efficient scale. The Tribunal also rejected efficiency explanations that exclusivity was required to justify making customer-specific investments.

In *Nielsen*, the Tribunal found that long-term, exclusive contracts with upstream providers of retail scanner data and with downstream customers of aggregated scanner data reduced the volume of business available to a would-be entrant in the market for scanner-based tracking services, thereby diminishing the competitive constraint that would otherwise exist and securing the respondent's market power.

In *Tele-Direct*, the Tribunal considered allegations that a publisher of directory advertising had engaged in a range of anti-competitive conduct. The Tribunal held that discriminatory treatment of advertising space ordered through advertising consultants constituted anti-competitive acts that substantially lessened competition. Advertising consultants were compensated by their clients based on their ability to reduce advertising expenditures in directories while maintaining the overall effectiveness of client advertising. However, the Tribunal held that the respondent's refusal to deal with advertising consultants on behalf of advertisers was not anti-competitive, accepting the business justification that this would have required the respondent to incur additional costs. The Tribunal also found that the respondent's targeting of particular markets with price cuts and incentives for advertisers, and structuring commissions to encourage agencies to recommend advertising in the respondent's directories over other publications were not anti-competitive acts. The Tribunal also held that the respondent did not have market power in the market for advertising services, and therefore bundling of advertising services with advertising space did not constitute an abuse of dominance. However, the Tribunal also found pursuant to section 77 that the respondent's bundling of advertising services

with advertising space constituted tied selling, and ordered Tele-Direct to unbundle the products.

The Commissioner was unsuccessful at the Tribunal in *Canada Pipe*, with the Tribunal holding that a rebate program for exclusively purchasing certain plumbing products from the respondent did not provide grounds for an order. The Tribunal found that the challenged rebates did not raise switching costs so as to prevent customers from purchasing from competing suppliers, and found that the Commissioner had not proven that the conduct resulted in a SLC. However, on appeal, the FCA held that the Tribunal had applied the wrong legal tests for the “anti-competitive act” and SLC elements of section 79. After stating the appropriate tests, the FCA referred the matter back to the Tribunal for a re-determination. The Commissioner and respondent ultimately reached a consent agreement before the re-determination hearing.⁵³

3.1.1 The Tribunal’s Approach in Each Case

3.1.1 Market Power

“Market power” was found in *Nutrasweet* on the basis of high market share (*i.e.*, exclusive contracts for over 90% of the aspartame supplied in Canada), high barriers to entry (*e.g.* process patents, significant start-up costs and economies of scale in production) and the exclusive-use constraints in contracts with the largest customers.⁵⁴

In *Laidlaw*, the Tribunal found that entry barriers were generally not high (*i.e.*, the purchase of trucks and containers were not prohibitive sunk costs) but that the exclusive contracting by the respondent had created significant barriers to entry by inhibiting a competitor’s acquisition of a sufficient customer base within a reasonable period of time to allow its business to become profitable.⁵⁵

In *Nielsen*, the Tribunal found market power on the basis of high market share (holding that its 100% share of the relevant market warranted a *prima facie* determination of market power) and the inability of downstream purchasers to limit the sole supplier’s market power.⁵⁶

In *Tele-Direct*, the Tribunal found market power in the market for advertising space on the basis of “indirect” structural conditions, including market share (with the respondent holding an 80% share even where it faced the most significant competition) and high barriers to entry (despite evidence of entry by niche directories and some successful entry into broad directories, there were high sunk costs for entry and significant incumbent advantages).⁵⁷ The Tribunal also relied on “direct” indicators of market power, including evidence of economic rents (in the form of high price-to-average cost margins even after payments to

telecom companies to subsidize subscriber service) and the ability to maintain discriminatory pricing policies (in setting prices to obtain apparently higher margins for larger volume advertisers).⁵⁸ In the market for advertising services, however, the Tribunal found that competitors' significant market shares rebutted the respondent's alleged market power.⁵⁹

In *Canada Pipe (Trib)*, the Tribunal also found market power on the basis of both direct evidence (finding high margins and significant ability to vary prices across regions)⁶⁰ and indirect evidence (despite the continued viability of competing imported products and some successful entry following implementation of the respondent's rebate program, Canada Pipe maintained "significant market share" and wielded an advantage as a national distributor offering a full line of products).⁶¹ In *Canada Pipe (Cross-Appeal)*, a majority of the FCA upheld the Tribunal's findings on market power.

3.1.1.2 Practice of Anti-Competitive Acts

The Tribunal in *Nutrasweet* found that the respondent's various contractual exclusivity terms (including exclusive supply and use clauses, meet-or-release clauses, most-favoured-nation clauses and logo display allowances)⁶² and the use in Canada of the respondent's patent-protected monopoly position in the U.S. to obtain a competitive advantage⁶³ had an exclusionary purpose and therefore constituted anti-competitive conduct.

In *Laidlaw*, the Tribunal held that the acquisition of competitors and the use of contractual terms (including automatic rollover provisions, negative option clauses and liquidated damages clauses) operated and were intended to exclude competitors from the market, with the Tribunal rejecting the respondent's efficiency justifications for the conduct.⁶⁴

In *Nielsen*, the Tribunal found that the challenged long-term contracts were intended to exclude potential competitors and rejected the respondent's stated business justification for the conduct, holding that a self-interested defence to another firm's potential dominance was not a legitimate business justification. Proof of some business motive alone was insufficient to disprove an overriding exclusionary purpose.⁶⁵

In *Tele-Direct*, the Tribunal held that, despite cross-subsidization of prices in certain competitive geographic markets for advertising space, the alleged targeting of competitors by the respondent was not an anti-competitive act, since such targeting was a normal competitive reaction.⁶⁶ In regard to the incentives provided to agencies to recommend advertising in the respondent's directories, the Tribunal held that the Commissioner had not discharged the burden to prove the necessary exclusionary intent.⁶⁷ The Tribunal also held that the

lack of evidence of the respondent increasing its market share in advertising services contradicted the allegation that it was leveraging its market power for advertising space through bundling.⁶⁸ With regard to the respondent's refusal to deal with advertising consultants, the Tribunal rejected the respondent's argument that the practice was designed to counter the consultants' damaging impact on the respondent's business,⁶⁹ but accepted the respondent's business justification that, in order to deal with consultants on behalf of advertisers, the respondent would have to incur costs for a new interface.⁷⁰ However, the Tribunal found that the respondent had engaged in anti-competitive acts by discriminating against advertising orders placed directly by advertisers that had originated with consultants.⁷¹

In *Canada Pipe (Trib)*, the Tribunal held that limited acquisitions of competitors and associated non-compete covenants did not constitute anti-competitive acts, contrasting the facts with *Laidlaw* where there was a pattern of acquisitions and an apparent purpose to monopolize the market.⁷² As well, the Tribunal found that the rebate program, while an inducement to exclusivity, did not create substantial switching costs as it allowed customers to retain past discounts and provided rebates for exclusive purchases over a relatively short reference period. The Tribunal also accepted the business justification that the program allowed the respondent to invest in carrying a wider variety of products.⁷³ Most importantly, the Tribunal found that the actual entry of competitors contradicted the alleged anti-competitive effect of the impugned conduct.⁷⁴ As discussed below, the FCA in *Canada Pipe* held that the Tribunal should not have considered the broader competitive effects of Canada Pipe's rebate program in its "anti-competitive acts" analysis.

3.1.1.3 Substantial Lessening of Competition

The Tribunal found a SLC in *Nutrasweet* on the basis that the respondent's exclusive contracts impeded "toehold entry" into the market and thereby inhibited the expansion of competitors.⁷⁵ Moreover, the Tribunal held that past exclusivity had contributed to present switching costs, especially in the form of costs for removing the respondent's logo from customers' products.⁷⁶ The Tribunal rejected the respondent's arguments that exclusivity was necessary to justify making customer-specific investments and to prevent free-riding on its investment to develop a market for aspartame, holding that the respondent was not entitled to more protection than its patent had afforded.⁷⁷

In *Laidlaw*, the Tribunal found a SLC based on the barriers to entry created by the exclusive contracts and liquidated damages clauses, finding that the markets should have been highly competitive given the relatively low costs of

lift-onboard service but that exclusivity prevented competitors from establishing a customer base with sufficient rapidity to make entry attractive.⁷⁸

In *Nielsen*, the Tribunal found that, given the critical nature of the scanner data input, the upstream exclusivity contracts with data providers constituted a *prima facie* barrier to entry and that competition in the market for scanner-based market tracking services would exist only where exclusivity was not imposed.⁷⁹ The Tribunal also held that the respondent's long-term contracts with customers prevented competition by reducing the volume of downstream business available to a would-be entrant.⁸⁰ The challenged conduct had therefore lessened competition substantially.

In *Tele-Direct*, having found an anti-competitive act only in the discriminatory treatment of advertising orders that originated from advertising consultants, the Tribunal found that this particular conduct resulted in a SLC since consultants incurred higher costs as a result of being forced to defend themselves to advertisers.⁸¹ Moreover, the Tribunal found that the consultants had a positive impact on the respondent's levels of service to advertisers and that the respondent's conduct was intended to counteract these improvements.⁸² The Tribunal held that, in circumstances where a market was already less competitive, since the respondent wielded "overwhelming market power," even a small anti-competitive impact on the consultants' business must be considered substantial.⁸³

In *Canada Pipe (Trib)*, despite already finding that the impugned conduct did not constitute an anti-competitive act, the Tribunal considered the SLC element and held that the rebate program did not result in a SLC. The Tribunal found that, in the face of the rebate program, there was nonetheless significant evidence of competitive pricing in many of the relevant geographic markets, and the Tribunal further noted the emergence of a new manufacturer and a steady increase in competing imports.⁸⁴ In the Tribunal's view, these findings precluded a holding that the conduct resulted in a SLC in many of the relevant geographic markets, and the Tribunal held that, despite the lack of competition in other geographic markets, the Commissioner had not adduced evidence that the implementation of the rebate program had lessened competition from its prior state.⁸⁵ Finally, the Tribunal held that the respondent's nation-wide distribution network and broader product offerings represented advantages over its competitors and that these were consistent with the practice being the result of superior competitive performance.⁸⁶ As discussed below, the FCA in *Canada Pipe* held that the Tribunal had erred in its analysis of a SLC.

3.1.2 Unresolved Issues following Canada Pipe

The Tribunal decisions have refined the meaning of each element of abuse of

dominance in section 79, but the highest authority on section 79 comes from the decision of the FCA in *Canada Pipe*. While that decision has provided a legal framework for applying section 79, certain aspects of the FCA's analysis leave significant room for interpretation and elaboration in future cases. Indeed, the *Canada Pipe* decision has attracted significant criticism, including for its focus under paragraph 79(1)(b) on intended negative effects on *competitors* rather than on *competition*.⁸⁷ The decision is also notable for its strong emphasis on maintaining distinct analyses for each statutory element of section 79 despite acknowledging that, in competition matters, the same evidence will be relevant to proving more than one element.⁸⁸ We discuss below some of the important unresolved issues arising from the jurisprudence and particularly the FCA's decision in *Canada Pipe*.

3.1.2.1 Market Power

The approach to section 79(1)(a) is relatively settled in the case law. In the respondent's cross-appeal in *Canada Pipe (Cross-Appeal)*, the FCA upheld the Tribunal's equation of "substantially or completely control" with "market power" and affirmed that "[m]arket power is the ability to set prices above competitive levels for a considerable period."⁸⁹ Furthermore, the FCA held that market power is correctly assessed either: (i) directly, by showing that prices are set above the competitive level; or (ii) indirectly, by considering relevant indicators of market power such as market share, barriers to entry and countervailing customer power.⁹⁰ Notably, for the indirect approach, the FCA affirmed the *prima facie* presumption of market power from a large market share but endorsed the Tribunal's past statements that barriers to entry are a necessary condition for market power.⁹¹

Outstanding issues under paragraph 79(1)(a), at least in terms of unilateral market power, are few and relatively minor. There is some modest question around the significance, if any, of using "market power" *simpliciter* to describe the relevant threshold for dominance under paragraph 79(1)(b). The concept of dominance pursuant to most unilateral conduct laws is generally considered equivalent to the possession of a *substantial degree* of market power.⁹² However, the Tribunal's definition of "market power" appears to mirror that accepted elsewhere in relation to substantial market power. Indeed the statutory phrase "substantially or completely control" may imply "substantial" market power.⁹³ Future clarification by the Tribunal that the relevant concept is essentially a substantial degree of market power would helpfully put any possible confusion in this regard to rest.

Another issue that has not received detailed attention is how the Tribunal

should address the so-called cellophane fallacy, which counsels that the mere existence of substitutes at prevailing prices may still be consistent with the existence of market power, since the relevant issue is whether the respondent could raise its prices beyond competitive levels, and not whether it could raise prices above existing levels.⁹⁴ While the Tribunal has recognized this concern, it is not clear exactly how it would go about approximating what the benchmark competitive price level would be in an abuse of dominance case.

Also of note is the division at the FCA regarding the Tribunal's treatment of market power in *Canada Pipe*. The majority in *Canada Pipe (Cross-Appeal)* held that the Tribunal had made a reasonable determination that the respondent had market power in the relevant markets.⁹⁵ However, Justice Pelletier's dissent observed that, despite articulating the correct test, the Tribunal's findings of fact were inconsistent with "the ability to set prices above competitive levels for a considerable period." He pointed out that the Tribunal had found the respondent to have market power in several geographic markets in which prices had actually fallen in response to the emergence of new competitors.⁹⁶ Moreover, he noted that the very emergence of new suppliers and their impact on the respondent's prices disputed the efficacy of barriers to entry.⁹⁷ Trebilcock asserts that allowing this internal contradiction to stand has clouded the appropriate test for market power:

If a party against whom relief is sought under section 79 is able to demonstrate that prices in relevant product and geographic markets have fallen to competitive levels in response to entry, but yet still risks a determination that it possesses market power, the concept of market power becomes largely incoherent...⁹⁸

3.1.2.2 Practice of Anti-Competitive Acts

The requirement of an "anti-competitive act" follows from the approach of regulating *abuse* of dominance and not the existence of dominance itself.⁹⁹ Since the Tribunal has entertained pro-competitive explanations of ostensibly anti-competitive conduct in certain cases, this element appears to have had a "screening" role in focusing only on conduct that has a predatory, exclusionary or disciplinary purpose in the circumstances.¹⁰⁰

The meaning of an "anti-competitive act" was discussed extensively in the FCA's *Canada Pipe* decision. The FCA adopted the Tribunal's statement from *Nutrasweet* that, excepting section 78(1)(f), all other conduct enumerated as anti-competitive in section 78 has the purpose of "an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary."¹⁰¹ Consequently, the FCA held that this definition provided the requisite purpose by

reference to which an anti-competitive act is identified.¹⁰² The FCA emphasized that the determination of whether conduct is “anti-competitive” must focus on the impact on a competitor and not on economic efficiency or consumer welfare, stating:

The paragraph 79(1)(b) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(b), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that “anti-competitive” therefore has a restricted meaning within the context of paragraph 79(1)(b). While, for the Act as a whole, “competition” has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(b), “anti-competitive” refers to an act whose purpose is a negative effect on a competitor.¹⁰³ [emphasis in original]

This approach has been criticized as inappropriately centred on competitor welfare, since vigorous competition to win market share can (and often should) have negative impacts on less efficient competitors.¹⁰⁴

The FCA also recognized that a “valid business justification” might be given to explain ostensibly anti-competitive conduct:

In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the 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 as to why the impugned act was performed. To be relevant in the context of paragraph 79(1)(b), a 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.¹⁰⁵

Furthermore, the FCA held that (i) improved consumer welfare is, on its own, insufficient to establish a valid business justification and (ii) a posited justification cannot be mere “self-interest.” Rather a “requisite efficiency-related link” between the impugned conduct and the respondent is required.¹⁰⁶

Such an approach is curious since social surplus (reflecting economic efficiency) should be increased through self-interested conduct by a firm that

nonetheless improves consumer welfare.¹⁰⁷ As some commentators have noted, the decision did not provide examples of possible business justifications that would meet this threshold and therefore creates uncertainty as to whether a business justification could be successfully raised by a respondent to an abuse of dominance application.¹⁰⁸

3.1.2.3 Substantial Lessening of Competition

Prior to *Canada Pipe*, the Tribunal had set out its understanding of a SLC but had provided little in the way of guidance as to the methodology for assessing whether conduct resulted in a SLC. In *Nutrasweet*, the Tribunal interpreted this element as requiring a decision about “whether the anti-competitive acts engaged in by [the respondent] preserve or add to [the respondent’s] market power.”¹⁰⁹ In *Tele-Direct*, the Tribunal adopted a variable standard, noting that the magnitude of lessening sufficient to trigger an SLC may depend on the particular market:

Where a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being “substantial” than where the market situation was less uncompetitive to begin with.¹¹⁰

Canada Pipe provided some clarity by establishing a comparative and relative “but for” test, comparing the state of competition in the market in the presence of the anti-competitive acts relative to a counterfactual without the conduct. The test should examine:

[W]ould markets — in the past, present or future — be substantially more competitive but for the impugned practice? Or, in other words, but for the impugned practice, would markets be characterized by greater price competition, choice, service or innovation than exists in the presence of this practice?¹¹¹ [emphasis in original]

As well, the FCA proposed that the test could conceivably involve constructing a “hypothetical comparator model” and, in appropriate circumstances, examining the market across time, contrasting market conditions before and after the introduction of the impugned practice.¹¹² It further suggested relevant considerations for the proper determination of whether the market would be more competitive absent the impugned conduct:

[W]hether entry or expansion might be substantially faster, more frequent or more significant without the [impugned conduct]; whether switching between products and suppliers might be substantially

more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater.¹¹³

The FCA also implied that the “but for” test was sufficient to find abuse of dominance but that other tests might also suffice, stating:

[A]s the “but for” test describes an approach that corresponds to the requirements mandated by the statutory language of paragraph 79(1)(c), it is one that the Tribunal must consider in all cases—although it may in future cases choose to consider other appropriate tests as well.¹¹⁴

The FCA held that the Tribunal had failed to apply this approach, rejecting the view that the Tribunal had nonetheless implicitly undertaken such a comparison by considering the occurrence of entry and the resultant downward price effects.¹¹⁵

The FCA’s approach raises several issues: (i) the role of the Act’s purposes in section 1.1 for interpreting the “but for” test; (ii) whether a reduction in competitors necessarily implies that the remaining competition does not restrain market inefficiency; and (iii) the scope of acceptable methodologies for the “but for” test and uncertainty as to what other tests could establish a SLC.

The FCA’s prescription for a SLC is awkward in light of the FCA’s competitor-focused approach to what comprises an “anti-competitive act.”¹¹⁶ Specifically, while the FCA points to the purposes in section 1.1 of the Act as an interpretative guide,¹¹⁷ the FCA does not set out the standard for ascertaining “competitiveness” of a market. As section 1.1 identifies several disparate objectives that in many cases may be inconsistent with one another, it is not clear how the Tribunal should weigh the relative importance of these purposes in discerning a SLC.¹¹⁸ A “but for” analysis might be expected to examine whether market competition in the presence of the impugned conduct effectively restrained inefficient behaviour.¹¹⁹ That is, if the objectives are market efficiency and consumer welfare, the Tribunal should not be concerned that conduct has harmed competitors if the remaining competition preserves the check on the respondent’s behaviour.

Notably, the Tribunal’s “before and after” approach would appear consistent with the FCA’s reasoning that the Tribunal should adopt a methodology that appropriately compares competition “but for” the impugned conduct.¹²⁰ However, since the FCA rejected the Tribunal’s analysis, which considered the introduction of the rebate program and examined whether the subsequent degree of entry nonetheless promoted price competition, it appears that the FCA may have been concerned with structural conditions rather than with

market efficiency as the guiding objective. It is therefore unclear whether the sufficiency of competition to restrain inefficient behaviour, despite an otherwise “anti-competitive act,” provides a viable defence for future respondents.

Finally, the FCA stated that, despite the absence of an explicit “but for” test in prior Tribunal decisions, the substance of such a test had been applied by the Tribunal previously and the wording appeared in the Bureau’s guidelines on abuse of dominance, providing “ample notice” to the respondent of the approach.¹²¹ Notably, Nicholson & Ermak observe that, despite the FCA’s reference to a “but for” test in the Bureau’s guidelines, the test in these guidelines is not fully consistent with the FCA’s “but for” approach.¹²² Specifically, rather than examining whether there would be more competitors absent the impugned conduct, the “but for” test in the Bureau’s 2001 general enforcement guidelines on abuse of dominance relates to whether barriers to entry preclude competitive conditions:

If it can be demonstrated that, but for the anticompetitive acts, an effective competitor or group of competitors would emerge within a reasonable period of time to challenge the dominance of the firm(s), the Bureau will conclude that the acts in question constitute a substantial lessening or prevention of competition.¹²³

3.2 Bureau Guidance

In light of the relative paucity of case law, in order to provide some certainty about the Commissioner’s intended approach to enforcing section 79, the Bureau published general enforcement guidelines on abuse of dominance in 2001,¹²⁴ as well as sector-specific guidelines and bulletins for the grocery sector,¹²⁵ the telecommunications industry,¹²⁶ and (in a draft for consultation) the airline industry.¹²⁷

The 2001 general enforcement guidelines described the Bureau’s broad approach to enforcement, providing its interpretation of the relevant case law, and setting out the methodologies and indicia that the Bureau employs when defining markets, identifying market power, and determining whether conduct is anti-competitive and substantially lessens competition. In 2008, the Bureau published enforcement guidelines outlining in considerable detail its approach to predatory pricing under section 79 and also under the former criminal provisions in section 50 of the Act relating to predatory pricing.¹²⁸

The sectoral publications provided detailed guidance in regard to industry-specific practices, market issues, and methodologies for assessing conduct. For instance, the draft guidelines for the airline industry set out assessment methodologies and cost categories relevant to conduct specific to the airline

industry that was previously listed (although now repealed) as anti-competitive acts under section 78. For the grocery industry, the Bureau's guidelines provided examples of exclusive arrangements among grocers and suppliers, described how "slotting allowances" (payments for shelf space) would be evaluated and identified examples of facilitating practices. For the telecommunications industry, the bulletin addressed some of the unique aspects of market power and anti-competitive strategies that apply in a network industry.

While targeted to particular industries, the sectoral guidelines provided useful guidance on how the Bureau views the policies behind the provisions and will interpret the elements of abuse of dominance in different circumstances. As such, the guidelines manifested the earlier "program of compliance," in which the Bureau promoted conformity with its preferred interpretation by providing detailed guidance to market participants.¹²⁹

4. Emergence of a "Post-Modern Era" of Abuse of Dominance Enforcement

Until the late 2000s, the general structure and scope of the modern Act had remained relatively static. This was certainly the case for the reviewable practice of abuse of dominant position. However, events initiated at the end of the last decade give rise to a legitimate question of whether the Act, and abuse of dominance enforcement, have entered a new and distinct phase. Indeed, some have questioned whether the abuse of dominance provisions have been re-cast as a quasi-criminal offence. The key events contributing to this shift consist of the seminal amendments to the Act contained in Bill C-10¹³⁰ (the "*2009 Amendments*"), an increasingly strategic use of the Commissioner's enforcement tools, a significantly reinvigorated enforcement agenda and a revised approach to published enforcement guidance that serves the Commissioner's apparent objective of maximum flexibility in litigating abuse of dominance cases.

4.1 Legislative Reforms and Re-organization of the Act

Initiatives to update the Act culminated in the *2009 Amendments*. Specifically, the major reforms had been broadly recommended in the 1999 VanDuzer report,¹³¹ which was endorsed in a 2002 House committee report,¹³² and in turn echoed in the 2008 Competition Policy Review Panel (the "CPRP") report.¹³³

The centrepiece of the *2009 Amendments* was their reform of the conspiracy provisions in section 45 in order to provide a clearer delineation between criminal and civil horizontal conduct. The previous competition threshold for criminal conspiracy under section 45(1), which required proof that the particular conduct was likely to lessen competition "unduly" was eliminated. This was

replaced with *per se* cartel offences complemented by an “ancillary restraints defence” under section 45(4), which allows a defence where a defendant proves that the impugned agreement was reasonably necessary to give effect to a broader and lawful agreement.¹³⁴

In parallel, a new civil competitor collaboration provision was introduced as section 90.1, which allowed the Tribunal to issue remedial cease-and-desist orders in respect to agreements or arrangements between competitors that are likely to lessen or prevent competition substantially.¹³⁵ This civil track for competitor collaboration agreements had been recommended in the 2002 House committee report,¹³⁶ and the CPRP adopted this approach, stating “criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the “hardcore” cartel category.”¹³⁷

The *2009 Amendments* also repealed the *per se* prohibition on resale price maintenance,¹³⁸ creating a new civil provision, in section 76 of the Act, with an “adverse effect on competition” test to address vertical price maintenance.¹³⁹ Decriminalization of price maintenance reflected the view that criminal sanctions were not appropriate for such pricing activities, particularly given potential efficiency explanations for the conduct (such as maintaining minimum service levels).¹⁴⁰ Similarly, the criminal provisions for predatory pricing and price discrimination were also repealed with such conduct to be addressed under the civil abuse of dominance provisions in section 79 in certain circumstances. In recommending this latter amendment, the CPRP expressed its view that:

[T]he criminal law, with its attendant sanctions including fines and imprisonment, should be reserved for conduct that is unambiguously harmful to competition and where clear standards can be applied that are understandable to the business community. This is not the case with the price discrimination, promotional allowances and predatory pricing provisions.¹⁴¹

In regard to abuse of dominance, the enumerated airline-specific anti-competitive acts were repealed in order to restore equal treatment of all sectors under section 79.¹⁴²

Finally, the *2009 Amendments* introduced new powers and remedies. Specific to abuse of dominance, the amendments created an administrative monetary penalty (“AMP”).¹⁴³ Under the new subsection 79(3.2), upon a finding of abuse of dominance, the Tribunal may impose an AMP to a maximum of \$10 million for a first order and \$15 million for each subsequent order, with the precise quantum of the AMP to be determined having regard to a set of enumerated factors. The stated purpose of AMPs under subsection 79(3.3) is to promote

compliance with the Act. The CPRP had recommended AMPs as an appropriate deterrent for anti-competitive conduct:

With further decriminalization of the pricing provisions of the Act and a consequent greater reliance on civil remedies, adequate penalties should be put in place to address violations of the law and prevent the repetition of anti-competitive conduct.¹⁴⁴

There was little discussion, however, in the CPRP report about any perceived inadequacy of existing remedies for abuse of dominance.

Two key aspects of the *2009 Amendments* are particularly instructive for abuse of dominance in the post-modern era. First, de-criminalization of various trade practices has confirmed section 79 as a core enforcement tool for addressing vertical restraints of trade. To an extent, this merely re-enforced the Bureau's long-standing practice of addressing practices like predatory pricing under section 79. However, the availability of AMPs for abuse of dominance does suggest an expectation that section 79 will be responsible for some "heavy lifting" and should be bolstered in some way to meet the challenge. Second, and somewhat in tension with the observation just made, the introduction of two new civil provisions (sections 76 and 90.1) potentially fragments the civil enforcement approach to anti-competitive exercises of market power and introduces new enforcement discretions in regard to such conduct.

4.2 Enforcement Tools: Consent Agreements

The last decade has also witnessed an increasing use of consent agreements, following from the 2002 amendment to the Act that introduced the streamlined registration and administration process for consent agreements contained in sections 105 and 106.¹⁴⁵ Prior to this amendment, the Tribunal reviewed negotiated settlements between the Commissioner and parties in order to determine whether to grant an order on consent. This involved a formal application process, including the filing of evidence, and often involved hearings. The Tribunal would evaluate whether the given agreement's proposed terms would address the competitive concerns regarding the impugned conduct. Three abuse of dominance consent orders were granted prior to 2002.¹⁴⁶

Following the Tribunal's refusal to endorse a draft consent order in *Canada (Commissioner of Competition) v. Ultramar Ltd*, a merger case, on the grounds that the remedies in the proposed order were not sufficiently clear to meet the objectives of the Act, the Commissioner recommended changes to the consent order regime. Following the *2002 Amendments*, section 105 provided for the direct filing with the Tribunal of an agreement negotiated between the Commissioner and a relevant party. Upon filing, the agreement has the same force

and effect as if it were an order of the Tribunal. Notably, subsection 106(2) was also added by the *2002 Amendments* and permits “[a] person directly affected by a consent agreement” to apply to the Tribunal within 60 days of filing to have the agreement’s terms rescinded or varied in certain circumstances.

At the time of these amendments, commentators anticipated that the potential for challenges to consent agreements under subsection 106(2) would bring increased uncertainty and discourage negotiated agreements.¹⁴⁷ These concerns have not materialized; there has only been one challenge to a consent agreement, and it was not successful.¹⁴⁸ Instead, the Tribunal has clarified that the threshold for challenging consent agreements is relatively high, and the Commissioner has made regular and increasing use of consent agreements to resolve her concerns. It has been remarked that the use of consent agreements, and the near total lack of Tribunal oversight, has conferred on the Commissioner a substantial degree of bargaining leverage over parties who wish to avoid the unpredictability and delay inherent in litigation. Indeed, some have viewed the consent agreement process as conferring on the Commissioner a *de facto* administrative decision-making power,¹⁴⁹ and the former Chair of the Tribunal, Madam Justice Simpson, had openly called for the review and approval of consent agreements by judicial members of the Tribunal “to ensure that the Commissioner has a defensible theory of harm to support his or her settlements.”¹⁵⁰

Consent agreements have been more prevalent in merger and deceptive practices cases than in abuse of dominance matters. Until 2009, there had not been a single consent agreement in an abuse of dominance case. However, as discussed further below, the Commissioner has recently registered two consent agreements relating to concerns raised under section 79 of the Act. Perhaps more importantly, however, the Commissioner has indicated in draft enforcement guidelines, also discussed below, that she will expect parties proposing voluntary revisions to their conduct to address the Commissioner’s concerns in section 79 investigations to enshrine such proposals in a formal consent agreement.¹⁵¹

It should be noted that the only express statutory limit on the scope of consent agreements is that they must “be based on terms that could be the subject of an order of the Tribunal.” Thus, in the context of section 79, a consent agreement registered with the Tribunal can contain sweeping injunctive relief, including the taking of positive steps such as the divestiture of shares or assets, and the payment of AMPs. The Commissioner has registered numerous consent agreements involving the payment of AMPs under Part VII.1 of the Act relating to civil deceptive marketing practices. The most notable of these is the 2011

consent agreement pursuant to which Bell Canada agreed to pay \$10 million, the maximum monetary penalty provided for in Part VII.1.¹⁵²

4.3 Ramped-up Enforcement

In recent years, the Commissioner¹⁵³ has adopted an express policy of an increased focus on enforcement and the use of contested proceedings to ensure compliance and develop jurisprudence. In her first public appearance as Interim Commissioner, Melanie Aitken emphasized the Bureau's willingness to enforce the law for which there was "no substitute...as a deterrent to individuals and companies to refrain from anti-competitive conduct."¹⁵⁴ The Commissioner has also identified the importance of conveying to businesses who comply with the law that the Bureau is on-hand to enforce the law against those who do not comply. As the Commissioner put it, "Honest enterprise needs to know we are 'on the beat' and will act if we need to."¹⁵⁵ This apparently extends to the Act's civil provisions, in regard to which the Commissioner has demonstrated a commitment to reinvigorated enforcement through, among other things, the pursuit of more abuse of dominance cases.¹⁵⁶

Early in her tenure, Ms. Aitken pointed to the *2009 Amendments*, described above, as a springboard for a more vigorous enforcement agenda. Indeed, the Commissioner saw "a clear set of marching orders to the Bureau to enforce these newly amended laws for the benefit of all Canadians"¹⁵⁷ and identified "the opportunity the amendments have given us, including breathing new life into the interest among our stakeholders beyond the Bar"¹⁵⁸ as a factor supporting more active engagement in the Bureau's enforcement role.

While the link between heightened enforcement and the amendments is perhaps most obvious in relation to the new civil and criminal conspiracy provisions, the Commissioner perhaps offered a window onto her thinking in terms of why abuse of dominance should also be the subject of invigorated enforcement. In an address to a Senate committee considering the *2009 Amendments*, the Commissioner commented that the prior enforcement consequences for abuse of dominant position were inadequate. She said:

Similarly, the Act did not effectively deter anti-competitive conduct in the area of abuse of dominance, where the Tribunal was generally limited to requiring the offending company to discontinue the activity going forward. In other words, the company got to keep any money it made breaking the law, having excluded healthy competition through anti-competitive conduct that was designed to eliminate competition. What is key is that these amendments introduce material incentives to comply with the law.¹⁵⁹

In addition to emphasizing the Bureau's willingness to bring contested cases to the Tribunal and courts, the Commissioner has also signaled an increased formality in the way the Bureau will seek to resolve its concerns in non-litigated matters. As noted above, the Commissioner has stated in recent draft enforcement guidelines that she expects targets of section 79 investigations who wish to resolve such investigations by modifications to their behaviour to do so by way of formal consent agreement.

The Commissioner's commitment to increased enforcement action has been carried through in the abuse of dominance area. Since assuming the leadership of the Bureau in January 2009, Ms. Aitken has launched two contested applications under section 79, both in relation to the real estate industry. One of these ultimately led to a settlement that was enshrined in a consent agreement. The other is ongoing. In a third case in June 2009, the Commissioner resolved by way of consent agreement an investigation into the conduct of two separate commercial waste disposal firms operating in the same markets on Vancouver Island in British Columbia.

By historical Bureau standards, three abuse of dominance cases in the span of roughly two years is a busy docket. By way of contrast, prior to these recent enforcement actions the last time the Commissioner filed a contested application – or for that matter a consent agreement¹⁶⁰ – under section 79 was in 2002.¹⁶¹ While this recent enforcement activism may appear rather striking in itself, it does not take into account the Commissioner's civil price maintenance application filed in 2010 against Visa and MasterCard in relation to their respective credit card rules. Broadly speaking, that application is also concerned with an alleged unilateral exercise of market power.

Aside from noting the uptick in enforcement activity under section 79, it is also interesting to consider what types of cases the Commissioner has brought and what they might reveal about the Bureau's substantive priorities and concerns in this area.

In the June 2009 commercial waste case,¹⁶² the Bureau alleged that two independent firms collectively held a market share exceeding 80% and engaged in joint abuse of dominance by using similar long-term contracts and restrictive terms to lock-in customers and exclude competitors. The materials on the public record did not indicate or allege that there was any agreement, understanding or coordination between the parties. The consent agreement prohibited the two firms from entering into long-term contracts with customers and from incorporating into their contracts meet-or-release clauses or liquidated damages beyond specified thresholds.

In February 2010, the Commissioner filed an application with the Tribunal under section 79 alleging that certain restrictions imposed by the Canadian Real Estate Association (“CREA”) on the use of its Multiple Listing Service (“MLS”) and related trademarks prevented fee-for-service real estate brokerage models that would offer consumers the option of a reduced set of services such as “mere postings” or “MLS-only listings.”¹⁶³ The Commissioner alleged that this conduct had lessened competition in the market for real estate brokerage services, raising the cost of those services and reducing consumer choice. Although CREA initially contested the application, the proceeding was later resolved by way of consent agreement whereby CREA agreed to refrain from adopting certain types of rules that would prevent member brokers from offering “mere posting” services to sellers of residential real estate.¹⁶⁴

In May 2011,¹⁶⁵ the Commissioner filed an application with the Tribunal alleging that the Toronto Real Estate Board (“TREB”) abused its dominant position in the market for the supply of residential real estate brokerage services to home buyers and sellers in the Greater Toronto Area by preventing its member brokers from giving consumers direct access, through vehicles like virtual office websites (“VOWs”), to certain online data from its MLS. TREB’s rules restrict the re-publication of information from the TREB MLS on a VOW, and the Commissioner alleges that these restrictions are intended to discipline and exclude innovative brokers who would otherwise compete with traditional “bricks and mortar” brokers. In response, TREB argues that balancing demand on both sides of its two-sided platform requires its rules to provide incentives for brokers to provide complementary services that enhance the overall value of the platform and to prevent free-riding by buy-side brokers on the existing stock of listings.¹⁶⁶

4.4 Proposed Withdrawal of Guidance and Novel Interpretations

The Commissioner’s preparedness to streamline and withdraw published guidance in the area of abuse of dominance enforcement is a notable development in the post-modern era. (In contrast, the Bureau has recently developed further guidance around competitor collaborations and merger review.) For example, the Commissioner’s revised draft guidelines on the abuse of dominance provisions, released for public comment in March 2012,¹⁶⁷ cut back dramatically on prior discussion contained in the 2009 draft guidelines while suggesting new and sometimes controversial and aggressive interpretations of significant aspects of section 79, including aspects that appear to be settled by the case law. In parallel, the Commissioner intends to withdraw a number of existing related guidelines encompassing the Bureau’s detailed approach to predatory pricing and the approach it would take to section 79 as applied to certain industries.¹⁶⁸

The decision to significantly streamline and withdraw published guidance in relation to abuse of dominance is incongruous with the Bureau's past approach of encouraging voluntary compliance through a variety of instruments, including published guidance, and the current Commissioner's stated commitment to transparency and the development of guidance.¹⁶⁹ Reducing published guidance does, however, have the effect of supporting an enforcement agenda focused on contested cases by reducing the risk of Bureau guidance prejudicing enforcement proceedings.

However, quite apart from the retreat in published guidance, the discussion that remains in the current draft guidelines adopts expansive interpretations and questions settled case law in important respects. The relevant points are set out in detail in public comments submitted to the Bureau,¹⁷⁰ but the key issues are summarized briefly below.

4.4.1 Joint Dominance

First, the draft guidelines depart materially from the Bureau's prior approach to joint dominance as described in the 2001 guidelines and introduce new concepts for guiding the Bureau's analysis. In particular, although indicating that parallel conduct between firms will not by itself be sufficient to found joint dominance, the 2012 draft guidelines take the position that evidence of coordinated behaviour is "not strictly necessary" to establishing that firms hold a jointly dominant position.¹⁷¹ The draft guidelines suggest a new approach in which the Bureau will focus on aggregated market shares and evidence of a lack of competition between firms as a screen for joint dominance. Although the draft guidelines refer to possible examples of evidence that could indicate significant levels of competition within a group of firms, they contain no discussion of the factors the Bureau will consider to be evidence of the requisite lack of competition sufficient to raise joint dominance concerns.

4.4.2 Anticipated Dominance

Second, the draft guidelines suggest that the Bureau will be prepared to investigate and pursue enforcement action in respect of firms that, although not currently dominant, are likely to obtain market power in the future. Thus, according to the draft guidelines, "[i]f a firm does not have market power, *or is not expected to obtain market power through the alleged anti-competitive conduct within a reasonable period of time*, the Bureau will generally not pursue allegations of abuse of dominance related to that conduct."¹⁷² [emphasis added] Similarly, the draft guidelines note that, in cases where a firm's market share is below 50%, the Bureau will be "concerned with allegations of abuse of dominance that appear likely to create market power within a reasonable period of

time.”¹⁷³ This position is at odds with the basic statutory requirement in paragraph 79(1)(a) that “one or more persons substantially or completely control [...] a class or species of business.” This requirement, which is drafted in the present tense, suggests that the Commissioner must establish actual control, or market power, as part of an abuse of dominance application. Unlike paragraph 79(1)(c), paragraph 79(1)(a) is not drafted in a way that invites or permits analysis of what might occur in future.

4.4.3 Anti-Competitive Acts

Third, the 2012 draft guidelines depart from the Bureau’s prior position – taken in the 2001 guidelines and argued strenuously by the Commissioner before the FCA in the *Canada Pipe* case – that a practice of anti-competitive acts must have an intended negative effect on a competitor. The draft guidelines now assert the possibility of numerous exceptions to this approach, although no explicit examples are provided. This new position, which would broaden the scope of conduct that could attract the application of section 79,¹⁷⁴ is not easily reconciled with the decision of the FCA in *Canada Pipe*. The FCA held that each limb of section 79 involves a distinct legal test, and that paragraph 79(1)(b)’s focus on competitors is what keeps it separate from paragraph 79(1)(c), which focuses on the effects of impugned conduct on competition more broadly.¹⁷⁵ Contrary to the Bureau’s position in the 2012 draft guidelines that the Tribunal and the FCA have recognized exceptions to the requirement of an intended negative effect on a competitor, it appears that the FCA in fact viewed paragraph 78(1)(f)¹⁷⁶ as the only exception, and that the mandated test draws its constituent elements from the essential characteristics shared by all of the other anti-competitive acts listed in section 78.¹⁷⁷

Replacing the existing abuse of dominance publications with a slimmed-down general guideline that is punctuated by novel and expansive interpretations of the law will likely result in speculation about the status of prior guidance that has been withdrawn but not replaced with new guidance. More broadly, in contrast to the impetus behind the 2009 reforms to the criminal conspiracy provisions to reduce uncertainty surrounding their scope and enforcement, adopting an aggressive enforcement policy combined with the withdrawal of substantive guidance risks creating significant uncertainty in an area that was previously relatively well understood.

In addition, as currently written, the 2012 draft guidelines offer no guidance on how the Bureau will exercise its discretion to seek AMPs in section 79 cases or on the factors the Bureau will take into account in deciding whether to address conduct under section 79 or other applicable civil reviewable provisions, especially the competitor agreements provisions in section 90.1. This

is a surprising omission given the importance of the introduction of AMPs for abuse of dominance in the *2009 Amendments* and the emphasis the Commissioner has placed on those amendments.

5. Implications of Developments in the Post-Modern Era

5.1 Have Section 79 and Part VIII Fundamentally Changed?

5.1.1 Monetary Penalties and Reviewable Practices

As mentioned earlier, the very concept of a “reviewable practice” was a long time in the making before it was incorporated in the 1986 Act. The special category of reviewable practices was created in recognition of the fact that such practices were not wrongful or illegal *per se*. Quite the opposite: reviewable conduct was presumptively legal. Concerns to avoid chilling aggressive pro-competitive conduct were at the heart of the requirement that reviewable conduct be permitted unless and until the conduct was found by an expert Tribunal to result in anti-competitive effects. Moreover, the limited range of injunctive relief initially provided for in Part VIII reflected an emphasis on curing competition concerns on a going forward basis rather than seeking redress for the past consequences of reviewable conduct. Thus, fines and private rights of action for damages were reserved for conduct breaching the Act’s criminal provisions in Part VI (or for breaching orders issued by the Tribunal pursuant to a challenge by the Commissioner).

While some of these guiding principles remain, the introduction of AMPs as an available remedy for abuse of dominant position is a clear departure from the original framework and philosophy of Part VIII. Although the deterrence objective of AMPs is stated to be forward looking, there is no escaping the fact that the imposition of an AMP will in every case involve a retrospective analysis that requires evaluation of the kinds of aggravating and mitigating factors that would be expected in the prosecution of a criminal, regulatory or other type of offence. Further, the magnitude of AMPs now available under section 79 raises serious questions about whether “true penal consequences” may flow from conduct contrary to section 79 so as to require commensurate constitutional protections in the form of a criminal standard of proof, full disclosure by the Bureau and clear legislative proscriptions.¹⁷⁸ Private plaintiffs have also noticed the apparent shift away from the original presumed legality of abuse of dominance and have, since the *2009 Amendments*, instituted proceedings in tort relying on allegations that conduct in breach of section 79 is inherently unlawful, although without success to date.¹⁷⁹

But whatever the constitutional or policy merits of AMPs for abuse of

dominance – and it must be acknowledged that monetary penalties for abuse of dominance are and have long been available in a variety of comparable jurisdictions including Europe, the United Kingdom, Australia and New Zealand – the availability of significant AMPs under section 79 is a marked departure from the Canadian philosophy of reviewable practices under Part VIII. Even the basic concept of deterrence is somewhat foreign in the context of Part VIII, whose presumptive legality for reviewable conduct was historically geared to ensuring that Canadians benefit from firms pushing the proverbial envelope in terms of aggressive competition. Indeed, particularly given Canada's distinctive position as a relatively small economy adjacent to one of the world's largest, it should not be assumed that antitrust policy choices in other jurisdictions are necessarily the best choices for Canada. For example, the consequences of chilling efficient or pro-competitive conduct through excessive deterrence in a small economy with only one competitor having minimum efficient scale in an industry may be more deleterious than for a larger economy in which the same industry may have several competitors with minimum efficient scale (and therefore no one of which may be considered "dominant").¹⁸⁰

Given the limited enforcement record under section 79, it may be questioned why deterrence through AMPs was seen as a necessary innovation, especially in light of the apparent view that it would be inappropriate to extend private rights of action to abuse of dominant position, even though the availability of such rights in relation to refusals to deal and exclusive dealing has not demonstrated a flood of unmeritorious litigation under those provisions. The relative lack of consultation and debate on the *2009 Amendments* has obscured the policy imperatives associated with the AMP-specific amendments.

In any event, it may fairly be asked whether section 79 is now a subspecies of reviewable practice or a different species altogether. Whatever its categorization, firms are now to be deterred from engaging in reviewable practices to which section 79 applies, not only by the risk of an extensive and costly investigation and possible Tribunal proceedings for conduct that raises issues under section 79, and the prospect of a remedial Tribunal order, breach of which is an offence and grounds for private actions,¹⁸¹ but also the risk of a sizeable AMP. For reasons discussed above, the deterrence provided by significant AMPs is increased further to the extent that the Commissioner may, in effect, impose AMPs directly on parties, without Tribunal oversight, through the negotiation and registration of consent agreements. In some circumstances, a firm may be prepared to enter into such a consent agreement because the alternative of litigation and business uncertainty is less attractive. In this context, potentially dominant firms will often want to avoid conduct that could risk even the

prospect of an investigation or a consent agreement in order to avoid either investigation or litigation or the possible imposition of AMPs and injunctive limitations on their business autonomy, as well as the administration costs and future enforcement risks associated with monitoring compliance with consent agreements.

5.1.2 Enforcement Discretion and the Scope of Section 79

The *2009 Amendments* to the Act, and particularly the addition of the civil agreements provision in section 90.1, expanded the Commissioner's civil enforcement options and therefore her enforcement discretion where conduct may fall for consideration under more than one provision. This is most apparent in cases involving coordination between competitors, which may, for example, be framed as a potential joint abuse of dominance under section 79 or a potential anticompetitive arrangement between competitors under section 90.1. Adding to the factors that may influence enforcement discretion in such cases are the remedies available under sections 79 and 90.1. The key difference in this regard is the availability of AMPs under section 79. This creates a regulatory incentive for the Bureau to prefer the use of section 79 and test the outer boundaries of that provision.

Interestingly, it is precisely in the new area of overlap identified above, between sections 90.1 and 79, that the Commissioner has chosen to depart from prior Bureau guidance and offer an expansionary view of section 79. As noted above, the Bureau has proposed to resile from its more limited prior guidelines that required some evidence of coordination between firms before "joint dominance" would be found. In addition, the Bureau has sought to minimize recent jurisprudence of the FCA that limits the scope of anticompetitive acts to those with an intended negative effect on a competitor. Were the FCA's position to prevail, it could limit the types of joint dominance cases that could be brought under section 79 as it would appear to exclude from the section's purview practices engaged in by jointly dominant competitors that, for example, had the objective of facilitating coordination between them to their mutual benefit rather than detriment.

It is possible that the introduction of section 90.1 has influenced the Bureau's new approach to joint dominance under section 79. Prior to the *2009 Amendments*, the only potential alternative to a joint dominance case under section 79 was to pursue the alleged jointly dominant firms under the criminal conspiracy provisions in the previous incarnation of section 45. That alternative had significant disadvantages, including a criminal burden of proof. The availability of joint dominance under section 79 was therefore a potentially useful way to address collaboration between competitors that raised issues of market power

but did not rise to the level of conduct that might attract criminal censure.¹⁸² Prior to the *2009 Amendments*, the prevailing view based on case law¹⁸³ and the Bureau's own guidelines¹⁸⁴ was that joint dominance did indeed require a finding of some coordination beyond mere conscious parallelism.¹⁸⁵

However, the arrival of a civil agreements provision in section 90.1 has arguably changed the dynamic. Now, the natural alternative to dealing with collaboration between competitors under section 45 is to address such conduct under section 90.1.¹⁸⁶ In fact, it might be argued that, apart from a broader range of remedies, joint dominance under section 79 is of limited, if any, utility given that section 90.1 extends to any type of agreements and arrangements and contains no requirement to prove dominance in addition to a substantial lessening or prevention of competition.¹⁸⁷ In the circumstances, it is perhaps not surprising that the Bureau might seek to stake a new and distinctive space for joint dominance, even if that means aggressively pushing the bounds of section 79. The availability of AMPs under section 79 could also be expected to reinforce the Bureau's incentives to expand the scope of joint dominance.¹⁸⁸ In any event, substantial revisions to the Act such as occurred through the *2009 Amendments* can have an impact on how pre-existing provisions are deployed and interpreted in future. This may already be happening in regard to joint dominance under section 79.

5.2 Patchwork Enforcement Framework for Reviewable Practices

The potential de-coupling of section 79 from the original philosophy of reviewable practices in Part VIII appears to be part of a larger and more gradual fragmentation of the reviewable practices provisions since 2002. Following the *2002 Amendments*, private parties were given the right to apply to the Tribunal under section 103.1 for leave to commence applications for injunctive relief (but not damages) in respect of alleged refusals to deal and exclusive dealing under sections 75 and 77 of the Act.¹⁸⁹ Exclusive jurisdiction to enforce the Act's merger and abuse of dominance provisions remained with the Commissioner. The first AMPs for abuse of dominance, restricted to air services, were introduced in the same package of amendments. It appears that now with the *2009 Amendments* making AMPs available in any case of abuse of dominance and extending private actions (with leave) to civil price maintenance under section 76, the divergence in enforcement regimes for different sections of Part VIII is becoming further entrenched and the unity of purpose underlying the reviewable practices provisions is being cast further into doubt.

The disparate enforcement mechanisms within Part VIII are accompanied by differences in the competitive threshold applied across the relevant provisions.

Thus, sections 77, 79, 90.1, and 92 require a likely substantial prevention or lessening of competition before a remedy may issue, whereas sections 75 and 76 make issuance of a remedial order conditional upon, among other things, proof of a likely “adverse effect on competition,” which is a lower threshold.¹⁹⁰

While there may be reasons for the different remedies and threshold tests in the reviewable practices provisions, these do not appear to express or reflect a coherent vision for Part VIII. The differences are all the more difficult to explain when section 79 in many cases can be used to pursue conduct to which sections 75, 76 and 77 may also apply. Indeed, the Commissioner has brought several applications in which the same conduct has been alleged to contravene both sections 77 and 79.¹⁹¹

5.3 Aggressive Enforcement and Less Guidance Renew Concerns about “Chill” and Perverse Incentives

While the Commissioner has instituted three abuse of dominance cases in a relatively short time by Bureau standards, they provide relatively limited practical guidance to Canadian businesses. Two of these cases relate to particular association rules in the real estate industry, which has been a focus of Bureau investigations and proceedings in the past.¹⁹² These cases raise important issues, but are likely less relevant to conduct by single firms that may be considered dominant. The third intervention relates to the Bureau’s evolving and more expansive view of joint dominance under section 79. As noted previously, the consent agreement in the *WSI* case did not disclose facts or allegations indicating that the parties’ respective contracting practices were the result of coordination between them. If indeed there was no coordination, the Commissioner’s enforcement action would be consistent with the Bureau’s recent indications in its 2012 draft guidelines that evidence of coordination between alleged jointly dominant firms will not strictly be necessary for a finding of joint abuse of dominance.

In none of these cases did the Commissioner seek an AMP. In the absence of guidance from the Commissioner, it is difficult to determine why that was the case (e.g., the challenged conduct or some of it preceded the *2009 Amendments*), or what that means for future section 79 applications.

It is in the area of joint dominance more than any other that the Bureau’s aggressive enforcement agenda risks undermining the original concern behind the design of the reviewable practices provisions that aggressive pro-competitive conduct not be chilled. As discussed above, the recent availability of AMPs now expressly deters potentially dominant firms from engaging in conduct that may be considered anti-competitive. With the Bureau’s new interpretation

of joint dominance, however, the situation has evolved to one in which clearly non-dominant firms may be subject to enforcement action by the Bureau, including the imposition of AMPs, if their conduct is similar to that of their competitors, and the Bureau considers that there is insufficient competition in the market. This would involve a new level of deterrence that appears rather far removed from the original purpose of section 79. The Bureau is also pushing the frontiers of section 79 in more basic ways, including by propounding the view in its draft guidelines that market power itself need not currently be manifest in order for the Bureau to take enforcement action against a firm for unilateral abuse of dominance.

Beyond the ambitious nature of these interpretive positions, their communication in scaled-back published guidelines and in consent agreements that provide limited factual background and are free from Tribunal oversight, erodes the few relatively stable litmus tests (chief among which is market share / dominance) that firms tend to rely on in complying with section 79. As noted above, the erosion of guidance in this area combined with expanding assertions of jurisdiction is a cause for concern in a relatively small economy like Canada, in which many markets can support only a few firms of sufficient scale to compete efficiently. Firms are left with the choice of either costlier compliance and pulled competitive punches or (particularly in the case of joint dominance enforcement) simply taking the risk of enforcement action and getting on with their business. Further, to the extent that Canadian firms “pull their punches” and compete less aggressively to avoid the risk of enforcement action under stated Bureau policies, they may become less efficient and more vulnerable to other less risk-averse competitors. Perversely, if one firm in an oligopolistic market refrains from some exclusionary conduct that is followed by two other leading competitors who split the remainder of the market, thereby losing significant sales, that decision and loss of sales could insulate the remaining two competitors from a joint dominance proceeding. Thus, the firm seeking conservatively to comply with Bureau guidance could both lose sales and insulate its competitors from challenge for engaging in the same conduct from which it refrained.

5.3.1 Decline of the “Conformity Continuum” Impacts Settlement Calculus

In addition to the potential inefficiencies that arise from firms diverting resources and competing less aggressively to ensure compliance with new and expansive positions taken in abuse of dominance enforcement guidelines, the Commissioner’s strong emphasis on consent agreements as the mode of effecting consensual resolution of her concerns in section 79 matters risks amplifying the costs of enforcement and compliance in this area. It is not clear

why the Commissioner would espouse in the Bureau's recent draft guidelines a general policy of requiring negotiated resolutions, and even voluntary steps taken by a respondent, to be contained in consent agreements.

The Bureau's emphasis on formal means of resolving concerns under section 79 is consistent with the current Commissioner's move away from reliance on the broad spectrum of education, compliance and enforcement instruments set out in the Bureau's *Conformity Continuum Bulletin* published in 2000.¹⁹³ In addition to consent orders, the bulletin identifies a variety of instruments for achieving consensual resolution, including conformity meetings, warning letters, undertakings and negotiated settlements. According to that Bulletin, "[n]o individual part of the continuum is more important than another; no part stands alone; and no part can be effective in isolation."¹⁹⁴ The key assumption underlying the conformity continuum is that "most businesses and their managers prefer to comply with the law rather than to become involved in enforcement proceedings under the legislation."¹⁹⁵ It is not obvious why this assumption would not apply in the context of abuse of dominance enforcement.

Indeed, reliance on less formal investigations and remedies (in addition to registered consent agreements) is less resource intensive for the Bureau itself, and such an approach facilitates timely modifications to the marketplace by the party in order to comply with the Act. In contrast, the Bureau's current policy raises the stakes and may have the perverse result that respondents more often "dig in," or at least protract settlement discussions, in order to avoid a restrictive consent agreement.

In many cases, the costs and delay associated with negotiating consent agreements and the potentially significant adverse consequences to signatories that flow from them make this enforcement avenue disproportionate to the conduct at issue. In particular, the generally long duration of consent agreements, the formal process requirements for varying them, and the risk that inadvertent breach could lead to private actions and possible criminal process, make such agreements a relatively rigid method of settlement for firms wishing to propose voluntary changes to their conduct, especially where they seek to do so very early on in a Bureau investigation. In some cases, the result may actually be a delay in effective remedies while parties weigh the risks and costs of entering into a consent agreement. Indeed, pushing parties into a consent agreement calculus may ultimately tip otherwise consensual matters into a contested proceeding. Either way, both the Commissioner and relevant parties would be expected to incur higher costs and diversion of resources in an environment where consent agreements are the rule.

5.4 Limited Enforcement Record – Contextualizing Abuse of Dominance in Canada

Notwithstanding the recent enforcement rhetoric and policies proposed by the Commissioner, the fact remains that, despite active review by the Bureau's Civil Matters Branch, the Commissioner has brought relatively few abuse of dominance cases in Canada since the enactment of section 79 in 1986. Twenty-six years on, it may be appropriate to question why that is. One might begin with an institutional focus to the question, positing a variety of possible explanations, including: a lack of appropriate enforcement tools; a lack of consistent enforcement focus on section 79; and a loss of faith in the Tribunal process.¹⁹⁶ However, on further scrutiny none of these appear to offer a satisfactory explanation for the relatively sparse enforcement record under section 79.

It cannot be said that the Commissioner lacks the enforcement tools to pursue abuse of dominance cases. The most active period of abuse of dominance enforcement in Canada, between 1989 and 1997,¹⁹⁷ occurred under the Commissioner's original enforcement powers. During that period, the Commissioner did not have the benefit of the *ex parte* interim order provisions in section 103.3 of the Act, which were enacted in 2002.¹⁹⁸ The Commissioner's information gathering powers have not substantially altered in respect of abuse of dominance since the introduction of the 1986 Act. Nor is there reason to believe that potential abuses of dominance are otherwise difficult to detect; the overt nature of unilateral conduct and the number of potentially affected parties, including competitors and customers, suggest that significant issues under section 79 would typically come to the attention of the Bureau, which has exclusive enforcement authority in the area. As has been discussed, the Commissioner now does have additional enforcement tools in the form of a very flexible consent agreement registration process and the remedial leverage of significant AMPs.

Similarly, the shortage of section 79 cases cannot be linked to a flagging enforcement focus on abuse of dominance or a loss of confidence in the Tribunal. The Bureau has consistently prioritized abuse of dominance enforcement and has been relatively active in investigating such matters.¹⁹⁹ If there has ever been an area where the Bureau has had success in the Tribunal, it is in abuse of dominance cases where the Bureau has enjoyed a success rate in excess of 80%.

Rather, the basis for limited enforcement activity in the area of abuse of dominance is likely more nuanced and reflective of larger features of the Canadian and global economies. For example, the industries in which abuse of dominance enforcement would be expected to be relatively high, for example certain

network or utility industries, have tended for the most part to be regulated in Canada and therefore largely immune from Bureau enforcement to the extent of that regulation.²⁰⁰ Thus, the Bureau's focus on exclusive dealing cases under section 79 stands in relative contrast to cases in other less regulated jurisdictions where competition agencies have brought access to infrastructure and price squeeze cases common in telecommunications and other historically concentrated network-type industries.

Beyond regulated sectors, it is also possible that abuse of dominance is not highly prevalent in Canada, whether because of domestic or foreign market pressures (particularly with increasing free trade agreements), the risk of Bureau enforcement or other factors.

Another possible explanation for the relatively few cases under section 79, at least in more recent times, is the internationalization of commerce and the emergence of network firms, particularly in the high technology sector, that maintain high global market shares and influence markets across a variety of jurisdictions. To the extent that such firms have raised abuse of dominance concerns, these concerns have tended to be addressed in the jurisdictions where such firms are based. It is often the case that remedies obtained in those jurisdictions adequately address any possible concerns about the impact of behaviour in Canadian markets, and the Commissioner has (appropriately in our view) indicated a willingness to rely on effective remedies in other jurisdictions as an efficient alternative to separate enforcement action in Canada.²⁰¹

It should also be noted that, at least where enforcement agencies are concerned, enforcement of single firm conduct has generally been characterized by a degree of restraint consistent with concerns to avoid chilling aggressive competitive conduct. For example, public enforcement activity in this area has not been especially high in the United States over the past decade.²⁰² Thus, the relatively few cases in Canada may be roughly proportionate to enforcement activity in other comparable jurisdictions. Certainly the lack of a private right of action in respect of abuse of dominance in Canada, and in particular the lack of a right to recover damages for loss resulting from conduct contrary to section 79, means that Bureau enforcement efforts are not supplemented by private suits. It is difficult to know whether private actions, if permitted, would unearth further meritorious claims under section 79, especially as one rationale for not granting private rights of action in this area is a concern about unmeritorious actions being taken by disgruntled competitors and customers.²⁰³

5.5 The Next Frontier of Abuse of Dominance Enforcement

The discussion above has suggested the emergence of a new era in competi-

tion law enforcement following in particular from the *2009 Amendments*. Some of the themes identified already are likely to feature in abuse of dominance enforcement activity as this new era unfolds. If the Bureau follows through with current initiatives, there will be relatively less published enforcement guidance than in the past, relatively more abuse of dominance cases brought by the Commissioner, and relatively greater reliance placed on securing voluntary remedies through formal consent agreements without active Tribunal involvement.

What kinds of cases will the Commissioner be bringing? The Commissioner's draft enforcement guidelines strongly suggest a focus on testing grey areas at the margins of section 79. In particular, the Bureau's stated approach to joint dominance indicates a strong possibility that a section 79 application against several competitors in a market will be a feature of future enforcement action. The Bureau's recent relaxed interpretation of what is required for joint dominance, if accepted by the Tribunal, would certainly open up new areas for enforcement under section 79 given the prevalence in Canada of "thin" oligopolistic markets, which underpinned the "presumptively legal" approach initially adopted for reviewable practices in Part VIII. Litigation of a joint dominance case might also generate guidance from the Tribunal on the relationship between sections 79 and 90.1. In terms of industries that could be the subject of scrutiny, the increasing prevalence and importance of the technology sector in the everyday lives of consumers suggests that the Bureau will be closely watching developments in that industry for signs of anti-competitive conduct.²⁰⁴ That said, given the dearth of cases in the past, the Commissioner may not have the luxury of choice, and experience shows that the Bureau tends to focus on industries in which it has acquired experience through prior investigation or enforcement.

In terms of developing the law, whatever cases may be brought in the future could usefully test those aspects of the FCA's *Canada Pipe* decision that are especially unclear. Chief among these are (i) the Court's discussion of what properly qualifies as a pro-competitive business justification that may assist in identifying the overriding purpose of an alleged practice of anti-competitive acts under paragraph 79(1)(b), and (ii) the Court's indication that there may be alternative approaches to applying the "but for" test required under paragraph 79(1)(c) for determining whether a dominant firm's conduct is likely to result in a substantial prevention or lessening of competition. Also of significant importance will be any guidance the Tribunal can provide as to when and in what manner it will be appropriate to impose AMPs under section 79.

Beyond prognosticating about future jurisprudence, the continuing evolution

of the Act since 1986 suggests that further legislative amendments are likely. In relation to abuse of dominance, it seems likely that proposals in relation to remedies and process issues will re-surface. For instance, it is possible that concerns about marginalization of the Tribunal and the gradual concentration of administrative powers in the Commissioner's office (and the potential for such powers to influence the negotiation of consent agreements) will lead to reforms to the consent agreement process that would restore Tribunal oversight where the Commissioner seeks to enshrine the terms of a settlement in an order of the Tribunal.

In addition, and as discussed above, remedies and enforcement mechanisms are uneven across the reviewable practices provisions and indicate an experimental and *ad hoc* approach. There is certainly the potential for developing a more coherent enforcement framework in the future. Among the possible options in this regard would be extending the existing private enforcement regime applicable to conduct under sections 75-77 of the Act to abuse of dominance under section 79, introducing the right to recover damages for loss resulting from conduct contrary to these provisions, and/or making the imposition of AMPs available as a remedy to the Commissioner under sections 75-77 of the Act – or reverting to the prior model of enforcement only by the Commissioner.

A further and perhaps simpler alternative that would bring a more coherent approach to the non-merger provisions in Part VIII would be to repeal some or all of sections 75, 76 and 77. While section 76 is new to Part VIII, sections 75 and 77 have received limited attention and priority from the Bureau in the past and have generated relatively modest private litigation since 2002.²⁰⁵ As discussed above, the differing competition thresholds in these sections²⁰⁶ compared to those applicable under section 79 have not been adequately explained or understood except as artifacts of a possibly waning political desire to specifically protect small business interests through the Act. A uniform threshold would arguably be easier for businesses to understand and comply with, and be more consistent with the efficiency objective and goal of enhanced welfare for businesses and consumers (whether obtained directly or indirectly) from competitive markets and the process of competition. Eliminating these provisions would not create obvious legislative gaps since conduct appropriately targeted by those sections might also be addressed under section 79. It is possible therefore that Parliament may in the future choose to align itself with many other developed competition regimes by limiting its core enforcement provisions to mergers, abuse of dominance and competitor agreements. Under the Act, these areas would be addressed by sections 92, 79 and 90.1/45. Among other things,

such an adjustment could result in a renewed focus on section 79 and allow more resources to be devoted to developing a coherent enforcement approach to abuse of dominance.

6. Conclusion

After more than 25 years of experience with the modern abuse of dominance provisions in section 79 of the Act, it is instructive to reflect on the principal developments in this important area of competition law and enforcement. As would be expected, certain aspects of section 79 have not been fully explored or would benefit from additional clarification, ideally by the Tribunal and courts. However, the Tribunal and the FCA have staked out a generally workable framework for enforcing and complying with section 79, and the Bureau has until recently supplemented the jurisprudence with rather detailed general and sector-specific guidance.

Notably, recent changes to the legislative framework of Part VIII, the remedies available for abuse of dominance, and the Commissioner's enforcement policy in respect of section 79 suggest that administration of the abuse of dominance provisions is evolving into a new and distinct phase. In particular, we appear to be entering a new era of contested cases, in which the rescission of guidance forms part of a wider strategy to accommodate an active litigation agenda. This approach may result in medium term resolution of a number of outstanding legal and interpretive issues hanging over section 79. More ominous, however, is the prospect that such issues will remain unresolved in the Tribunal or the courts due to the resolution of novel or marginal cases by consent agreement. Also of concern is the possibility of the loss or "chill" of pro-competitive aggressive market conduct flowing from aggressive enforcement combined with less guidance from the Bureau. Uncertainty flowing from declining predictability may not be the optimal outcome in an increasingly aggressive global marketplace. That said, an emerging focus on enforcement at the outer edges of section 79 does not necessarily suggest that the Commissioner would refrain from challenging more conventional cases of abuse of dominance occurring in the marketplace.

The patchwork of non-merger reviewable practices provisions, and the varying remedial frameworks applicable to them, suggest a loss of clear philosophical direction for Part VIII and a departure from the so-called "modern" Act as it was conceived in 1986. The limited track record of enforcement – both public and private – under specialized provisions like sections 75 and 77, together with the recent introduction of a civil reviewable competitor agreements provision, suggests that there is scope for further "right-sizing" of Part VIII's non-merger provisions, either by shedding marginal provisions in favour

of greater reliance on section 79 or by making the legal tests, available remedies and standing to make an application more consistent across the provisions of Part VIII.

ENDNOTES

¹The authors would like to acknowledge the assistance of Grant Bishop, summer student at Davies Ward Phillips & Vineberg LLP, in preparing this article.

²RSC 1985, c C-34 [Act].

³RSC 1970, c C-23 [CIA].

⁴*Ibid*, s 33. As defined in section 1 of the CIA, “merger” meant an acquisition that lessened or would likely lessen competition “to the detriment or against the interest of the public, whether consumers, producers or others.”

⁵*Ibid*, s 1 “monopoly.” This definition of “monopoly” also created a carve-out for an exercise of statutory rights, stating: “a situation shall not be deemed a monopoly within the meaning of this definition by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act or any other Act of Parliament.”

⁶*R v Eddy Match Co Ltd* (1953), 20 CPR 107 (Que CA).

⁷[1978] 1 SCR 408.

⁸*Ibid* at 424-25.

⁹Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen’s Printer, 1969).

¹⁰*Ibid* at 102.

¹¹*Ibid* at 109-13.

¹²*Ibid* at 120.

¹³*Ibid* at 121-22. The Economic Council’s suggested list of trade practices referable to the tribunal included: refusals to deal; basing-point pricing and other horizontal arrangements (excepting those prohibited as collusive arrangements); exclusive-dealing and tying arrangements; market-access restrictions; predatory practices; price discrimination; and consignment selling (*ibid* at 122).

¹⁴The “Stage I” amendments were focused on enacting consumer protection provisions in the CIA, prohibiting bid-rigging and protecting small business. (See: Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada: First Stage, Bill C-227, November 1972*, 2d ed. (Ottawa: Information Canada, 1973))

¹⁵Lawrence A Skeoch with Bruce C McDonald in consultation with Michel Bélanger, Reuben M Bromstein & William O Twaits, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for a Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Ottawa: Minister of Supply and Services Canada, 1976).

¹⁶*Ibid* at 148-49.

¹⁷*Ibid* at 148.

¹⁸*Ibid* at 150.

¹⁹Minister of Consumer and Corporate Affairs, *Proposals for Amending the Combines Investigation Act: A Framework for Discussion* (Ottawa: Bureau of Competition Policy, 1981).

²⁰*Ibid* at para 25. The discussion paper observed the following problems with section

33 of the CIA: the difficulty of meeting the criminal burden of proof; the uncertainty in jurisprudence about what activities by dominant firms are acceptable; and the disappointing development of jurisprudence on the section.

²¹ *Ibid* at para 27.

²² *Ibid* at para 31.

²³ Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (Ottawa: Supply and Services Canada, 1985).

²⁴ *Ibid* at 21.

²⁵ *Ibid* at 3.

²⁶ [1984] 2 SCR 145.

²⁷ *Ibid* at 164.

²⁸ *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 10-12.

²⁹ *Guide to Amendments*, *supra* note 22 at 10-11.

³⁰ *Ibid* at 11.

³¹ *Act*, *supra* note 1, s 79(1).

³² *Canada (Director of Investigation & Research) v Nutrasweet Co* (4 October 1990), CT-89/2, online: Competition Tribunal < <http://www.ct-tc.gc.ca> > at 47, CPR (3d) 1 (Comp Trib) [*Nutrasweet*].

³³ *Act*, *supra* note 1, s 78.

³⁴ *Nutrasweet*, *supra* note 31 at 57.

³⁵ *Ibid* at 59.

³⁶ *Ibid* at 81.

³⁷ *Act*, *supra* note 1, s 79(4).

³⁸ *Ibid*, s 79(2).

³⁹ *Ibid*, s 66.

⁴⁰ *Ibid*, s 36(1).

⁴¹ *Guide to Amendments*, *supra* note 22 at 21.

⁴² *Ibid* at 22.

⁴³ *Ibid* at 22.

⁴⁴ *Ibid* at 22.

⁴⁵ *Ibid* at 23.

⁴⁶ *Ibid* at 22-23.

⁴⁷ Competition Bureau, "Program of Compliance" (March 1993), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01644.html>>.

⁴⁸ *Ibid*.

⁴⁹ *Nutrasweet*, *supra* note 31; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), CT-91/02, online: Competition Tribunal < <http://www.ct-tc.gc.ca> >, 40 CPR (3d) 289 (Comp Trib) [*Laidlaw*]; *Canada (Director of Investigation and Research) v D&B Companies of Canada Ltd* (1996), CT-1994-001, online: Competition Tribunal < <http://www.ct-tc.gc.ca> >, 64 CPR (3d) 216 (Comp Trib) [*Nielsen*]; *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997), CT-1994-003, online: Competition Tribunal < <http://www.ct-tc.gc.ca> >, 73 CPR (3d) 1 (Comp Trib) [*Tele-Direct*]; and *Canada (Commissioner of Competition) v Canada Pipe Co* (2005), CT-2002-006, online: Competition Tribunal < <http://www.ct-tc.gc.ca> >, 40 CPR (4th) 453 (Comp Trib) [*Canada Pipe (Trib)*], rev'd by 2006 FCA 233 [*Canada Pipe*] and 2006 FCA 236 [*Canada Pipe (Cross-Appeal)*], leave to appeal refused 2007 CarswellNat

1107 (SCC). The contested application against Air Canada in *Canada (Commissioner of Competition) v Air Canada* (2003), 26 CPR (4th) 476 (Comp Trib) [*Air Canada*] was discontinued upon the respondent's filing for restructuring.

⁵⁰ *Canada (Director of Investigation & Research) v Bank of Montreal* (1996), 68 CPR (3d) 527 (Comp Trib) [*Interac*]; *Canada (Director of Investigation & Research) v AGT Directory Ltd* (1994), 1994 CarswellNat 3198, [1994] CCTD No 24 (Comp Trib); and *Canada (Commissioner of Competition) v Enbridge Services Inc*, 2002 Comp Trib 09.

⁵¹ These undertakings involved the following parties: Yuk-Yuk's et al. (Letter to Director of Investigation and Research, Department of Consumer and Corporate Affairs, from Clayton Ruby and Mark Breslin (on behalf of himself and Yuk Yuk's Inc et al) (4 September 1991)); New Brunswick Telephone Company (N.B. Tel) (Director Investigation and Research, *Competition Act, Annual Report for the year ended March 31, 1995* (Ottawa: Industry Canada, 1995) at 14); Insurance Company of B.C. (Competition Bureau, News Release, "The Insurance Company of British Columbia (ICBC) Removes Restrictive Provision from Agreements with Repair Shops" (2 November 1999)); H.J. Heinz Company of Canada Ltd. (*Canada (Commissioner of Competition) v H J Heinz Company of Canada Ltd*, (1 August 2000) Undertaking); and IKO Industries Ltd. (Competition Bureau, News Release, "IKO Industries Ltd. Modifies its Loyalty Program Following Competition Bureau Investigation" (31 March 2003)).

⁵² The Commissioner was also successful at the stage one hearing in *Air Canada*, which dealt with the question of whether Air Canada was pricing certain routes below its avoidable costs so as to be engaging in a practice of anti-competitive acts.

⁵³ *Canada (Commissioner of Competition) v Canada Pipe Co* (19 December 2007), CT-2002-006, online: Competition Tribunal <<http://www.ct-tc.gc.ca>>.

⁵⁴ *Nutrasweet*, *supra* note 31 at 52.

⁵⁵ *Laidlaw*, *supra* note 48 at 74.

⁵⁶ *Nielsen*, *supra* note 48 at 57-58.

⁵⁷ *Tele-Direct*, *supra* note 48 at 130.

⁵⁸ *Ibid* at 145.

⁵⁹ *Ibid* at 311-12.

⁶⁰ *Canada Pipe (Trib)*, *supra* note 48 at para 137.

⁶¹ *Ibid* at para 161.

⁶² *Nutrasweet*, *supra* note 31 at 73.

⁶³ *Ibid* at 80.

⁶⁴ *Laidlaw*, *supra* note 48 at 93-96.

⁶⁵ *Nielsen*, *supra* note 48 at 74-76.

⁶⁶ *Tele-Direct*, *supra* note 48 at 282.

⁶⁷ *Ibid* at 277.

⁶⁸ *Ibid* at 316-17.

⁶⁹ *Ibid* at 348-49.

⁷⁰ *Ibid* at 350-51.

⁷¹ *Ibid* at 353-54.

⁷² *Canada Pipe (Trib)*, *supra* note 48 at paras 193-99.

⁷³ *Ibid* at paras 256-60.

⁷⁴ *Ibid* at para 261.

⁷⁵ *Nutrasweet*, *supra* note 31 at 84.

⁷⁶ *Ibid* at 88.

⁷⁷ *Ibid* at 90-91.

⁷⁸ *Laidlaw*, *supra* note 48 at 104-105.

⁷⁹ *Nielsen*, *supra* note 48 at 78 and 93.

⁸⁰ *Ibid* at 94.

⁸¹ *Tele-Direct*, *supra* note 48 at 360.

⁸² *Ibid* at 361.

⁸³ *Ibid* at 361-62.

⁸⁴ *Canada Pipe (Trib)*, *supra* note 48 at para 265.

⁸⁵ *Ibid* at para 266.

⁸⁶ *Ibid* at para 268.

⁸⁷ See, e.g., Michael Trebilcock, "Abuse of Dominance: A Critique of *Canada Pipe*" [2007] Can Comp Rec 1 at 7; and Ralph A Winter, "Presidential Address: Antitrust restrictions on single-firm strategies" (2009) 42 Can J of Econ 1207 at 1237.

⁸⁸ *Canada Pipe*, *supra* note 48 at 28. This approach has been criticized. See, e.g., George N Addy et al, "Competition Tribunal to Re-consider Loyalty Rebate Case" (28 June 2006) online: Davies Ward Phillips & Vineberg LLP <<http://www.dwpv.com/~media/Files/PDF/CompetitionTribunaltoReconsiderLoyaltyRebateCasesJune282006.ashx>>.

⁸⁹ *Canada Pipe (Cross-Appeal)*, *supra* note 48 at para 23, citing *Canada Pipe (Trib)*, *supra* note 48 at para 122.

⁹⁰ *Ibid*.

⁹¹ *Canada Pipe (Cross-Appeal)*, *supra* note 48 at para 24, citing *Canada Pipe (Trib)*, *supra* note 48 at para 138.

⁹² International Competition Network Unilateral Conduct Working Group, "Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws" (2008), online: ICN <<http://internationalcompetitionnetwork.org/uploads/library/doc317.pdf>>.

⁹³ See also *R v Nova Scotia Pharmaceutical*, [1992] 2 SCR 606, where Gonthier J. stated: "For instance, s. 51 of the Act (now s. 79), prohibiting abuses of dominant position, contemplates at subs. (1)(a) that the holders of the dominant position "substantially or completely control, throughout Canada or any area thereof, a class or species of business." The required degree of market power under s. 51 of the Act comprises "control," and not simply the ability to behave independently of the market."

⁹⁴ *Laidlaw*, *supra* note 48 at 56. Consistent with its approach to market power as the ability to raise price above competitive levels, the Tribunal in *Laidlaw* approached market definition on the basis of whether a small but significant, non-transitory increase in price ("SSNIP") from the competitive level would induce switching so as to make the increase unprofitable.

⁹⁵ *Canada Pipe (Cross-Appeal)*, *supra* note 48 at para 44.

⁹⁶ *Canada Pipe (Cross-Appeal)*, *supra* note 48 at para 114, Pelletier JA, dissenting.

⁹⁷ *Ibid* at 117.

⁹⁸ Trebilcock, *supra* note 86 at 10.

⁹⁹ Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 524.

¹⁰⁰ *Ibid* at 526.

¹⁰¹ *Canada Pipe*, *supra* note 48 at para 64, citing *Nutrasweet*, *supra* note 31 at 34.

¹⁰² *Canada Pipe*, *supra* note 48 at para 66.

¹⁰³ *Ibid* at para 68.

¹⁰⁴ Trebilcock, *supra* note 86 at 7.

¹⁰⁵ *Canada Pipe*, *supra* note 48 at 73.

¹⁰⁶ *Ibid* at 90.

¹⁰⁷ Trebilcock, *supra* note 86 at 8; Mark J Nicholson & Yana Ermak, "The High Price of Loyalty: Abuse of Dominance after *Canada Pipe*" (2007) Cassels Brock & Blackwell, online: University of Victoria <<http://web.uvic.ca/~amehlen/teaching/310B/NicholsonErmakCanadaPipe2007.pdf>> at 11.

¹⁰⁸ Addy et al, *supra* note 87; Yves Comtois, Taline Sahakian & Dominic Thérien, "Federal Court of Appeal Discusses Abuse of Dominance for the First Time" (14 September 2006) online: McCarthy-Tetraault <http://www.mccarthy.ca/article_detail.aspx?id=3272>; Bruce M Graham, Ian Macdonald & Leila Burden Nixon, "Federal Court of Appeal Orders Competition Tribunal to Reconsider Legal Tests for Abuse of Dominance and Exclusive Dealing in Context of Loyalty Rebate Case" (28 August 2006) online: ZSA <http://www.zsa.ca/zsa.php?fuseaction=main.featured_articles_item&id=355>.

¹⁰⁹ *Nutrasweet*, *supra* note 31 at 47.

¹¹⁰ *Tele-Direct*, *supra* note 48 at 290.

¹¹¹ *Canada Pipe*, *supra* note 48 at paras 30 and 38.

¹¹² *Ibid* at para 46.

¹¹³ *Ibid* at para 58.

¹¹⁴ *Ibid* at para 44.

¹¹⁵ *Ibid* at paras 53-57.

¹¹⁶ Trebilcock, *supra* note 86 at 3-4.

¹¹⁷ *Canada Pipe*, *supra* note 48 at para 48.

¹¹⁸ Addy et al, *supra* note 87; and Nicholson & Ermak, *supra* note 106 at 14-15.

¹¹⁹ Andrew Roman & Andrew Valentine, "Measuring Competition Relatively: The Federal Court's Decision in *Canada Pipe*" (2006) online: Miller Thomson LLP <http://www.millertomson.com/assets/files/article_attachments/Canada%20Pipe%20Article%20V4.pdf> at 12; and Trebilcock, *supra* note 86 at 4, noting: "If there is effective competition remaining in a market, then the deadweight losses and other social harms associated with market power cannot, by definition, exist."

¹²⁰ Addy et al, *supra* note 87.

¹²¹ *Ibid* at para 33.

¹²² Nicholson & Ermak, *supra* note 106 at 13.

¹²³ Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (July 2001), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01251.html>> at 19 [*Abuse Guidelines*].

¹²⁴ *Ibid*.

¹²⁵ Competition Bureau, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector* (November 2002), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01642.html>> [*Grocery Sector Bulletin*].

¹²⁶ Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions*

as Applied to the Telecommunications Industry (6 June 2008), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html>> [Telecommunications Bulletin].

¹²⁷ Competition Bureau, *Draft – Enforcement Guidelines on the Abuse of Dominance in the Airline Industry* (February 2001), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01239.html>>.

¹²⁸ Competition Bureau, *Predatory Pricing Guidelines* (July 2008), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02713.html>>.

¹²⁹ Calvin S Goldman, “Approach to Enforcement and Administration of the Competition Act,” Address delivered to the Quebec Bar Association, Montreal (12 December 1988) at 5.

¹³⁰ Act, *supra* note 1, as amended by *Budget Implementation Act*, SC 2009, c 2 [2009 Amendments].

¹³¹ J. Anthony VanDuzer & Gilles Paquet, “Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice” (22 October 1999), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01770.html>>.

¹³² House of Commons, Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada’s Competition Regime* (Ottawa: Public Works and Government Services Canada, 2002).

¹³³ Competition Policy Review Panel, *Compete to Win: Final Report* (Ottawa: Public Works and Government Services Canada, June 2008).

¹³⁴ 2009 Amendments, *supra* note 129, s 410.

¹³⁵ *Ibid*, s 429.

¹³⁶ House Committee on Industry, Science and Technology, *supra* note 131 at 61.

¹³⁷ CPRP, *supra* note 132 at 59.

¹³⁸ 2009 Amendments, *supra* note 129, s 417, repealing Act, *supra* note 1, s 61.

¹³⁹ *Ibid*, s 426.

¹⁴⁰ VanDuzer & Paquet, *supra* note 130 at 130; House Committee on Industry, Science and Technology, *supra* note 131 at 75; CPRP, *supra* note 132 at 58.

¹⁴¹ CPRP, *supra* note 132 at 58. See also VanDuzer & Paquet, *supra* note 130 at 72 and 75, cited by House Committee on Industry, Science and Technology, *supra* note 131 at 71-72 and 79.

¹⁴² 2009 Amendments, *supra* note 129, s 427; for rationale see: Competition Bureau, “A Guide to Amendments to the Competition Act” (22 April 2009), online: Industry Canada <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>>.

¹⁴³ 2009 Amendments, *supra* note 129, s 428.

¹⁴⁴ CPRP, *supra* note 132 at 59.

¹⁴⁵ Act, *supra* note 1, as amended by *An Act to Amend the Competition Act and the Competition Tribunal Act*, SC 2002, c 16, s 14 [2002 Amendments].

¹⁴⁶ See: *supra* note 49.

¹⁴⁷ John Bodrug & Christopher Margison, “The Consent Order Process: Post-Ultramar and Looking Ahead” [2002] Can Comp Rec 59 at 67-69.

¹⁴⁸ See *Burns Lake Native Development Corporation et al v. Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.*, 2006 Comp Trib 16, *aff’d Burns Lake Native Development Corp. v Canada (Commissioner of Competition)* (2006), 47 CPR (4th) 343 (FCA), in which the third party applicant failed

to demonstrate that it was directly affected by the consent agreement such as to have standing to seek its rescission or variation.

¹⁴⁹ See C.S. Goldman, Q.C. and N. Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner" (2010) 41 *Loyola U Chicago L J* 535 at 546, 559.

¹⁵⁰ Justice Sandra J. Simpson, "The Competition Tribunal 2003-2011 and Beyond" (2011) *Can.Comp L Rev* 49.

¹⁵¹ Competition Bureau, *The Abuse of Dominance Provisions (Section 78 and 79 of the Competition Act), Draft for Consultation* (March 22, 2012) at 3, online: < <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03445.html>> [2012 *Draft Guidelines*].

¹⁵² *Commissioner of Competition v. Bell Canada, Bell Mobility Inc. and Bell Expressvu Limited Partnership* (28 June 2011), CT-2011-005, online: <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=349>>.

¹⁵³ The current Commissioner at the time of writing was Melanie Aitken. On June 28, 2012, Ms. Aitken announced her resignation effective September 21, 2012. At the time of writing, the next Commissioner had not been announced.

¹⁵⁴ *Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition, Competition Bureau, to the Northwinds Professional Institute 2009 Competition Law and Policy Forum, Cambridge, Ontario* (12 February 2009), online: < <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02994.html>>.

¹⁵⁵ *Speaking Notes for Melanie L. Aitken, Commissioner of Competition, to the Canadian Bar Association, Competition Law Section Annual Conference, Gatineau, Québec* (25 September 2009), online: < <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03138.html>>.

¹⁵⁶ *Remarks by Melanie L. Aitken, Commissioner of Competition, to the CBA Fall Competition Law Conference, Gatineau, Quebec* (30 September 2010), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03306.html>>.

¹⁵⁷ *Remarks by Melanie L. Aitken, Commissioner of Competition to the Economic Club of Canada, Toronto, Ontario* (4 May 2010), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03246.html>>. The Commissioner has also described the amendments as "an enhanced mandate handed to [the Bureau] by Parliament." See *Remarks by Melanie L. Aitken, Commissioner of Competition, to the 2011 Competition Law and Policy Forum, Northwinds Professional Institute, Cambridge, Ontario* (24 February 2011), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03377.html>>.

¹⁵⁸ *Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition, to the Canadian Bar Association, Competition Law Section, 2009 Spring Forum, Toronto, Ontario* (12 May 2009), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03066.html>>.

¹⁵⁹ *Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition, to the Senate Banking, Trade and Commerce Committee Hearings Regarding Competition Act Amendments, Ottawa, Ontario* (May 13, 2009), online: < <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03065.html>>. In our view, the Commissioner's views are not broadly shared in the business or legal communities.

¹⁶⁰ This excludes a number of variations to the consent order in *Interac*, *supra* note 47, first made in 1995.

¹⁶¹ It should be acknowledged that two significant investigations, which were ultimately closed, were the subject of technical backgrounders issued by the Bureau. See "Competition Bureau Concludes Examination into ICBC Policies" (August 19, 2008), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02722.html>>; and "Competition Bureau Concludes Examination into National Hockey League Franchise Ownership Transfer and Relocation Policies" (March 31, 2008), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html>>.

¹⁶² *Canada (Commissioner of Competition) v Waste Services (CA) Inc and Waste Management of Canada Corporation* (16 June 2009) CT-2009-003, online: Competition Tribunal <<http://www.ct-tc.gc.ca>> (Consent Agreement) [WS].

¹⁶³ *The Commissioner of Competition v Canadian Real Estate Board* (8 February 2010), CT-2010-002, online: Competition Tribunal <<http://www.ct-tc.gc.ca>> (Notice of Application) [CREA].

¹⁶⁴ *The Commissioner of Competition v Canadian Real Estate Board* (25 October 2010), CT-2010-002, online: Competition Tribunal <<http://www.ct-tc.gc.ca>> (Consent Agreement).

¹⁶⁵ *The Commissioner of Competition v The Toronto Real Estate Board* (27 May 2011), CT-2011-003, online: Competition Tribunal <<http://www.ct-tc.gc.ca>> (Notice of Application) [TREB].

¹⁶⁶ *The Commissioner of Competition v The Toronto Real Estate Board* (19 August 2011), CT-2011-003, online: Competition Tribunal <<http://www.ct-tc.gc.ca>> (Response of the Toronto Real Estate Board)

¹⁶⁷ *Competition Bureau, The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act), Draft for Consultation* (22 March 2012), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03445.html>> [2012 Draft Guidelines].

¹⁶⁸ The 2012 Draft Guidelines are intended to replace the Bureau's 2001 Abuse Guidelines, *supra* note 122, the Bureau's sector-specific abuse of dominance guidelines, *supra* notes 124 - 126, and the Bureau's guidelines on predatory pricing, *supra* note 127.

¹⁶⁹ It is also striking in light of the considerable effort and resources that went into the 2009 draft abuse of dominance guidelines and the 2008 predatory pricing guidelines both of which contained, according to the Commissioner, "the most current thinking and best practices, informed by what jurisprudence there is." See Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition, Competition Bureau, to the Northwinds Professional Institute 2009 Competition Law and Policy Forum, *supra* note 153.

¹⁷⁰ See in particular the comments of the Canadian Bar Association's Competition Law Section, "Comments on Enforcement Guidelines: Abuse of Dominance (Competition Act sections 78 and 79)" (May 2012), online: Industry Canada <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CBA-Comments-Abuse-Dominance-2012-05-23.pdf/\\$file/CBA-Comments-Abuse-Dominance-2012-05-23.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CBA-Comments-Abuse-Dominance-2012-05-23.pdf/$file/CBA-Comments-Abuse-Dominance-2012-05-23.pdf)>. See also the joint comments of the American Bar Association's Section of Antitrust Law and Section of International Law, "Comments on Enforcement Guidelines: Abuse of Dominance (Competition Act sections 78 and 79)" (22 May 2012), online: <

Letter-Comments-Abuse-Dominance-2012-05-23.pdf>

¹⁷¹ 2012 Draft Guidelines, *supra* note 166 at footnote 23.

¹⁷² *Ibid* at 7.

¹⁷³ *Ibid* at 9. The one example provided in the draft guidelines of a circumstance in which this acquisition of market power might occur is where a new entrant in a market pursues a predatory pricing strategy that has a high likelihood of creating market power within a reasonable period of time. See 2012 Draft Guidelines, *ibid.*, at footnote 21.

¹⁷⁴ One example of the type of conduct that might be brought within the purview of the Bureau's proposed broader test under paragraph 79(1)(b) is that of a facilitating practice designed to enhance coordinated conduct between competitors to enable them all to benefit from reduced competition.

¹⁷⁵ *Canada Pipe*, *supra* note 48 at para 68: "The paragraph 79(1)(b) inquiry is thus focused upon the intended effects of the act on a competitor. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(b), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(b). While, for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(b), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor."

¹⁷⁶ Paragraph 78(1)(f) refers to the "buying up of products to prevent the erosion of existing price levels."

¹⁷⁷ *Canada Pipe*, *supra* note 48 at para 65.

¹⁷⁸ See *R v Wigglesworth*, [1987] 2 SCR 541. The constitutionality of AMPs of identical magnitude available under section 74.01(c) of the Act for deceptive marketing practices is being tested in ongoing proceedings: see *Commissioner of Competition v. Rogers Communications Inc*, OSCJ File No CV-10-8993-00 CL. The Tribunal dismissed a similar challenge in regard to the much lower AMPs (i.e., a maximum of \$100,000 for a corporation in the case of a first order) available in the pre-2009 version of section 74.01(c): see *Commissioner of Competition v. Gestion Lebski Inc*, 2006 Comp Trib 32. Similarly, courts have recently dismissed challenges to other civil regulatory AMPs regimes, but these again have involved much smaller potential AMPs than those available under section 79: see, e.g., *Rowan v Ontario Securities Commission*, 2012 ONCA 208; *U.S. Steel Corp et al v The Attorney General of Canada*, 2011 FCA 176; and *Lavallee v Alberta Securities Commission*, 2010 ABCA 48.

¹⁷⁹ See *Novus Entertainment Inc v Shaw Cablesystems Ltd*, 2010 BCSC 1030, where Greyll J determined that the recent availability of AMPs for past conduct under section 79 did not render such conduct unlawful when it occurs so as to found a claim in damages for economic torts; rather, conduct falling within section 79 remains lawful until and unless an order of the Tribunal determines otherwise.

¹⁸⁰ Michal S. Gal, *Competition Policy for Small Market Economies* (Cambridge, Mass.: Harvard University Press, 2003) at 96-97.

¹⁸¹ Act, *supra* note 1, s 36, 66.

¹⁸² See, e.g., *Interac*, *supra* note 49.

¹⁸³ See *R v Canadian General Electric Company Ltd* (1976), 15 OR (2d) 360 (HC) at

370, where Pennell J discussed the definition of “monopoly” in the Combines Act, which used the same relevant wording now contained in paragraph 79(1)(a), *i.e.*, “a situation where one or more persons either substantially or completely control throughout Canada or any area thereof ...” Although expressing doubt about the defendants’ submission that “one or more persons” should be read to be in a proprietary or contractual relationship, Pennell J noted that “[t]o 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 shared monopoly. But monopoly control is something more than a number of persons, each acting for himself, controlling a large part or all of the business of a particular commodity.” [emphasis added]

¹⁸⁴ See *Abuse Guidelines*, *supra* note 122 at 17; *Grocery Sector Bulletin*, *supra* note 125 at 5.2.3 “in markets where a small number of competitors account for a significant proportion of the market and barriers to entry make it difficult for other competitors to enter or expand in the market, there is increased concern that incumbent firms could create market dominance through co-ordinated activities.” [emphasis added]; and Competition Bureau, *Report on the Saskatchewan Gasoline Industry* (November 15, 1999), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01613.html>>: “... a Tribunal finding that one or more parties jointly control a market would likely require evidence of some communication between the parties as well as some coordinated conduct beyond conscious parallelism resulting in a lack of competition between the parties.”

¹⁸⁵ See: *e.g.*, J Bodrug, “Joint Dominance,” Atlas Information (Canada) Conference, Competition Issues in Difficult Times (12 November 2002).

¹⁸⁶ Indeed, it is the section 45 / section 90.1 axis that is the very basis of the Bureau’s *Competitor Collaboration Guidelines* (23 December 2009), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>>.

¹⁸⁷ It should be acknowledged that the “one or more persons” formulation in section 79 was retained when section 90.1 was added to the Act as part of the 2009 *Amendments*. This might be a basis for supposing that the legislators viewed some residual application of joint dominance that might not be covered by section 90.1. Such a supposition would, however, be highly speculative in the face of the very limited debate preceding the 2009 *Amendments*.

¹⁸⁸ Speculation about the influence of AMPs on enforcement incentives is perhaps premature so soon after the 2009 *Amendments*. Also, some may view the Commissioner’s decision to proceed against Visa and MasterCard under the civil price maintenance provisions as indicating that AMPs are not in fact motivating the choice of provision under which to proceed. However, the Commissioner might have encountered difficulties pursuing Visa and MasterCard’s conduct under section 79, including because of the FCA’s holding that a practice of anti-competitive acts must be motivated by an intended negative effect on a competitor. Having said that, the Bureau is now challenging the FCA’s position in this regard in its recent draft guidelines.

¹⁸⁹ 2002 *Amendments*, *supra* note 144, s 12.

¹⁹⁰ See: *Nadeau Ferme Avicole Ltee v Groupe Westco Inc*, 2009 Comp Trib 6 at paras

365-369, aff'd *Nadeau Ferme Avicole Ltee/Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2011 FCA 188; *B-Filer Inc v Bank of Nova Scotia*, 2006 Comp Trib 42 at para 211.

¹⁹¹ See: *Nutrasweet*, *supra* note 31; *Tele-Direct*, *supra* note 48; and *Canada Pipe*, *supra* note 48.

¹⁹² In September 1988, the Federal Court issued a prohibition order on consent addressing Bureau concerns about conduct in the real estate industry. The prohibition order is outlined in Harry Chandler, Deputy Director of Investigation and Research (Criminal Matters), Competition Bureau, "Closing the Deal: Ten Years after the Real Estate Prohibition Order," Remarks to the Competition Law Session, 1998 Annual Conference and Trade Show, Canadian Real Estate Association, Windsor, Ontario (27 September 1998), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00914.html>>.

¹⁹³ Competition Bureau, *Conformity Continuum Bulletin* (18 June 2000), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01750.html>>.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ For a recent view on the efficacy of Canadian competition enforcement institutions, and in particular the Tribunal, see Edward Iacobucci and Michael Trebilcock, "Critical Reflections on the Institutional Design of Canadian Competition Policy," 2011 Can.Comp.L.Rev. 39.

¹⁹⁷ Four of the six contested cases under section 79 were adjudicated in this period.

¹⁹⁸ *2002 Amendments*, *supra* note 144, s 12.

¹⁹⁹ The Bureau's annual reports record the Bureau's activities in relation abuse of dominance. For the years ended 31 March, 2009 and 31 March 2010, it is recorded that the Bureau had between 6 and 9 full-fledged inquiries and between 15 and 16 examinations underway during the period. See online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00169.html>.

²⁰⁰ This is as a result of the regulated conduct exception to the Act. See Competition Bureau, *Regulated Conduct* (September 27, 2010): online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>>. See also, e.g., Competition Bureau, *CRTC/Competition Bureau Interface* (2001), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01598.html>> and the *Telecommunications Bulletin*, *supra* note 123. The Commissioner is also limited by subsection 79(5) from applying the abuse of dominance provisions to circumstances involving the mere exercise of certain intellectual property rights.

²⁰¹ The Commissioner has indicated this willingness most particularly in the area of merger enforcement. See, e.g., *Remarks by Melanie L. Aitken, Commissioner of Competition to the 2010 Competition Law and Policy Conference, Cambridge, Ontario* (3 February 2010) online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03205.html>>.

²⁰² During the Bush and Obama administrations, only one monopolization case has been brought (resolved by consent decree) under section 2 of the *Sherman Act*. See *U.S. v United Regional Health Care System*, (29 September 2011), U.S. District Court for the Northern District of Texas, Case No 7:11-cv-00030-0, online: <<http://www.justice.gov/atr/cases/f276000/276027.pdf>>.

²⁰³ See: CPRP, *supra* note 129 at 59.

²⁰⁴ Indeed, it may be possible to discern a relatively consistent scrutiny over technological platforms that intermediate transactions and that may involve two-sided markets. See: *e.g.*, *Interac*, *Visa/MasterCard*, *CREA*, *TREB*.

²⁰⁵ There have been 21 applications for leave to file applications under section 75, 76 or 77 of the Act. Of those, leave has been granted in whole or in part in seven cases. None of these seven cases has produced a successful application on the merits. Only two applications have been heard on the merits and were dismissed by the Tribunal. In the other five cases in which leave to file applications was granted, one proceeding was withdrawn, another was terminated by rescinding the order granting leave following the business failure of the plaintiff, in two cases interim supply orders were made (and the applications were subsequently withdrawn), and one case is ongoing.

²⁰⁶ *i.e.*, the “adverse effect on competition” standard in sections 75 and 76 and the lower threshold requirement in section 77 (as compared to section 79) that exclusive dealing, tied selling or market restriction be engaged in by a “major supplier” or is “widespread in a market.”