DISTRIBUTION FREEDOM: THE EVOLUTION OF VERTICAL DISTRIBUTION PRACTICES UNDER THE *COMPETITION ACT*

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I. Introduction

The vertical distribution practices in sections 75 and 77 of the *Competition Act*[2]— refusal to deal, tied selling, exclusive dealing and market restriction — cover ubiquitous forms of business conduct that often serve to enliven rather than injure competition. While economists have long recognized the efficiency-enhancing potential of these practices, the Competition Tribunal (the "Tribunal") did not immediately appear to view refusals to supply through such a lens — opting, in the 1989 *Chrysler*[3] and 1990 *Xerox*[4] decisions, to leave efficiency considerations on the sidelines in favour of vindicating perceived injustices to complainant businesses.[5] However, since amendments in 2002, the Tribunal has embraced an economically literate approach to this practice which demands a rigorous analysis of alleged injuries to the marketplace. This is consistent with its approach to exclusive dealing and tied selling, and has occurred despite the introduction of a private right of action that could have shifted the focus to the protection of competitors or individual customers and encouraged unmeritorious litigation.[6]

This paper presents a survey of how the treatment of vertical distribution practices in Canada has evolved since they were introduced in 1976. Part II of this paper examines the role of these four vertical distribution practices in relation to customers and competitors, and canvasses the legal and economic principles relevant to each. Part III then considers the impact of the private right of action in respect of these practices.

II. The Role and Scope of the Vertical Distribution Practices

The vertical distribution practices were inserted into the former version of the statute, the *Combines Investigation Act*, in 1976.[7] They were part of a comprehensive set of reforms based largely on a 1969 report of the Economic Council of Canada recommending a "two-track" (part civil, part criminal) approach to competition policy.[8] As the first batch of civil provisions to be enacted, these "reviewable practices" relieved the Competition Bureau from having to satisfy a burdensome criminal-law standard. More importantly, they provided for a less draconian manner of dealing with practices that, depending on the circumstances, could have anti-competitive, neutral or pro-competitive effects. Indeed, as discussed below, the presumptive legality of such practices

(a reviewable practice is lawful unless and until prohibited by the Competition Tribunal) aligns the legal framework with the economic and business reality that such practices cover commonplace commercial activities that are only rarely socially harmful.

The practices of exclusive dealing and tied selling have significant legal and economic similarities which make it convenient to treat them together. While market restriction is also domiciled in section 77 of the *Act*, it is more concerned with customer interactions and can be assessed more effectively after examining the refusal to deal regime.

A. Exclusive Dealing and Tied Selling

Exclusive dealing and tied selling are both expressly concerned with harm to competitors that results in harm to customers. For example, an exclusive dealing arrangement may foreclose access by a supplier's competitors to downstream distribution channels, and this may lead to less choice and higher prices for end customers. Likewise, a firm that "ties" one product to another may effectively impede competition from other firms that are unable to offer both products, again potentially leading to higher prices or less choice for customers. However, exclusive dealing and tied selling often yield efficiencies, lower prices and more effective inter-brand competition so an outright prohibition is not warranted.

(i) Definitions of Exclusive Dealing and Tied Selling

Exclusive dealing is defined as a practice whereby the supplier of a product requires or induces its customers to "deal only or primarily" in its products or to "refrain from dealing" in certain other products.[9] Similarly, tied selling is defined as a practice whereby the supplier of a product requires or induces its customers to purchase a second product, or refrain from using another product, in conjunction with one of its products.[10]

Importantly, these definitions encompass both contractual requirements which eliminate the customer's flexibility, as well as incentives that may cause customers to choose to purchase exclusively from a supplier (*e.g.*, loyalty discounts) or to purchase a package of products (often described as "bundling"). While it is appropriate to have a definition that covers both possibilities, there is a potentially significant difference between situations where discounts provide customers with lower prices and effective choice, compared with situations where the supplier dictates the exclusivity or tied sale.[11] This can and should be taken into account in the "substantial lessening of competition" element of these practices.

(ii) Economics of Exclusive Dealing and Tied Selling

Exclusive dealing or tied selling are, appropriately, only subject to prohibition if they have material negative consequences — namely a "substantial lessening of competition." Like many other forms of "unilateral conduct," most instances of either practice will be pro-competitive or competitively-neutral.[12] Identifying the problematic situations can be fact-intensive and economics-intensive.[13]

Exclusive dealing commitments are common in contracts between manufacturers and resellers and help align their incentives. For example, economists have observed that if a retailer sells numerous competitors' brands, it will normally prefer to lower its prices rather than spend money on promoting any one brand, particularly when one or more of the manufacturers advertise its own brand to the potential benefit of all brands carried by the reseller. The result can be a free-rider effect and under-investment in brand promotion at the retail level. By linking the success of a retailer to the success of its manufacturer's brand, exclusive dealing can incentivize the vigorous provision of advertising and other informational services by retailers —a demand-priming, pro-competitive outcome.[14] This and other efficiency-based explanations of exclusive dealing[15] have led some commentators to endorse a *per se* legality rule for the practice.[16]

Nevertheless, most economists recognize that exclusive dealing has the potential to cut off current or potential competitors' access to vital downstream customers to the point of impeding them from competing effectively in the market — the "exclusionary," anti-competitive mischief at which section 77 is targeted.[17] Competition laws should continue to recognize this possibility, which has been borne out in two of the Tribunal's three litigated exclusive dealing cases.[18] However, it is also important to recognize that, in some industries, exclusive dealing represents less of a barrier to entry than a feature of the competitive arena itself, with many firms competing amongst each other for available exclusive contracts. [19]

Economists also debate whether and when tied selling can achieve anti-competitive results. Typically, tied selling concerns arise where a firm exercising market power in one area "ties" purchases of that product to the purchase of a second product which it sells into a market that may be more competitive. On one account, particularly where economies of scale or scope exist, tied selling may lead to a creep in market power and leave buyers with little option but to accept the second offering. However, many economists doubt the theory that market power can be so extended. [20] Rather, they note that forcing a customer to purchase two products together does not increase his or her willingness to

pay.[21] Instead, some economists explain tied selling as akin to a subtle form of price discrimination[22] having ambiguous, rather than negative, welfare effects.

There are also various pro-competitive explanations of tied selling, including the possibility that a bundle of two or more products may be supplied more efficiently and at lower prices. Tying may also allow manufacturers to address negative externalities. For example, customers of some types of products may be unable to discern whether their product's breakdown is the result of poor aftermarket service/parts or a poor product. Independent service organizations may have a perverse incentive to provide low-quality service which can result in a reputational spillover effect that damages the manufacturer. A manufacturer's tying of its product with aftermarket support can "correct" this negative externality and help to ensure high-quality service and lower break-down rates.[23]

(iii) Elements of Exclusive Dealing and Tied Selling

Exclusive dealing and tied selling are not *per se* illegal. They may only be prohibited by the Tribunal when it is established (on a balance of probabilities) that they:

(i) Amount to a "practice";

(ii) Are undertaken by a "major" supplier or are widespread in market;

(iii) Have exclusionary effects; and

(iv) Result in a "substantial lessening of competition" ("SLC").[24]

There are very limited defenses related to facilitation of new entry (exclusive dealing), tying that is based on a reasonable technological relationship between the products or to secure a loan (tied selling), or conduct involving affiliates (both).[25]

The term "practice" is not defined in the *Act*. However, the Tribunal has sensibly held that a practice can exist when more than "an isolated act or acts" occur and that different anti-competitive acts may, together, constitute a practice.[26] Thus the "practice" requirement is not difficult to establish in most cases where the supplier's activity involves a non-trivial duration and/or level of sales.

The requirement of a "major supplier" (again, a term undefined in the *Act*) has been described as follows by the Tribunal:

> A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells. Where available, a firm's market share is a good indication of its importance since its ability to gain market share summarizes

> its capabilities in a number of dimensions. Other characteristics of a supplier which might also be used in assessing its importance in an industry are its financial strength and its record as an innovator. However, the characteristics which are most relevant will vary from industry to industry.[27]

While this is not a precise test, the plain meaning of "major supplier" must impose a lower standard than the dominant firm[28] requirement used in the umbrella "abuse of dominance" provisions of the *Act*.[29]

The *Act* does not specify, and the Tribunal has never considered, when a practice will be found to be "widespread in a market." It appears to leave open the possibility that, where exclusive dealing or tied selling is a common industry practice, these provisions could be employed in respect of multiple firms at the same time.[30] However, it would be important to differentiate between situations where competition between industry participants occurs in part through exclusive dealing or tied selling, and those where competitors are impeded with the result that an SLC occurs.

Exclusionary effects on actual or potential competitors are a necessary — but not sufficient — pre-requisite for exclusive dealing or tied selling to be problematic. How severe the exclusion must be is not entirely clear. A literal reading of section 77(2) could imply that anything that "impedes" another firm or product, or has any other type and magnitude of exclusionary effect, could satisfy this element. However, it is generally recognized that a very significant level of foreclosure is needed for an impediment to be competitively significant.[31]

The exclusive dealing and tied-selling practices do not have an explicit "prevention of competition" branch. They only apply when competition is "lessened" substantially.[32] In contrast, the merger, abuse of dominance and competitor agreement reviewable practices all apply to situations where competition is "prevented."[33] The wording difference is surprising because prevention of entry by a new competitor is one of the main ways that exclusive dealing or tying could have negative effects on social welfare (and the exclusionary impact element appears to contemplate this possibility).[34]

(iv) Remedies

If all the elements of exclusive dealing or tied selling are made out, the primary remedy for the Bureau or a private litigant is an order prohibiting the conduct. Additional mandatory injunctive relief may be obtained where "necessary" either to "overcome the effects" of the practice or to "restore or stimulate competition."[35] The Tribunal has similar remedial powers in respect of

abuse of dominance;[36] but the section 77 version of this power has yet to be used on a standalone basis.[37]

Penalties and damages are expressly not available for these practices. This is consistent with the original concept of reviewable practices which were expected to be anticompetitive only in relatively rare circumstances.

(v) Case Law

Confirming the rarity of anti-competitive exclusive dealing and tied selling, only five such cases have been brought by the Competition Bureau since the provisions were introduced in 1976.[38] More recently, the three applications by private litigants to initiate such proceedings did not meet the threshold required to obtain leave to proceed from the Tribunal.[39] Attempts by private parties to use these provisions as the "illegal act" necessary to ground tort claims have generally been rejected by the courts on jurisdictional grounds and have not made a meaningful contribution to the substantive jurisprudence.[40]

The Bureau's first exclusive dealing case alleged that Bombardier had entered into exclusive dealing contracts with distributors of its Moto-Ski and Ski-Doo snowmobiles and that this practice was lessening competition substantially.[41] The RTPC found that Bombardier's control of a 30% share of North American snowmobile sales, together with its "historical position in the industry and a strong participation in innovation, in trail setting and in racing which are important in product development and brand image," qualified Bombardier as one of several "major suppliers" in the industry.[42] However, the RTPC was not convinced that Bombardier's dealer exclusivity arrangements resulted in a "substantial lessening of competition." In arriving at that finding, it noted that only about 10% of North American sales were affected by Bombardier's exclusive dealing policies.[43] It also observed that, despite those policies, Bombardier's competitors had been growing in market share and forcing Bombardier to actively recruit new dealers over the relevant period.[44]

A decade later, the Bureau brought a stronger case against the leading aspartame producer, The NutraSweet Company. The Bureau alleged that it had "locked up" the industry's small pool of major customers — including both Coke and Pepsi — by using exclusive supply provisions as well as logo discounts, meet-and-release and most-favoured-nation clauses which collectively had set up virtually insurmountable barriers to entry in the high-intensity sweeteners market. The Bureau alleged that this constituted both exclusive dealing and the abuse of a dominant position.[45] In stark contrast with *Bombardier*, NutraSweet had a 95% share of the Canadian market (undeniably qualifying it as both a "major supplier" and a dominant firm[46]) while its sole rival, Tosoh Canada, had

struggled to gain a foothold in the market.[47] The Tribunal accepted that most of the challenged practices were anti-competitive and ordered NutraSweet to cease engaging in them.[48]

More than a decade later, the Bureau brought an exclusive dealing and abuse of dominance application against Canada Pipe Co., whose Canadian subsidiary was the leading supplier of cast iron drain, waste and vent ("DWV") products to building, mechanical and plumbing contractors involved in construction and renovation projects.[49] The company had set up a "Stocking Distributor Program" which provided significant discounts for exclusive distributors of its plumbing products. After the Tribunal's initial dismissal of the application was overturned by the Federal Court of Appeal on the basis of legal errors related to the exclusionary and SLC elements of both provisions,[50] the Tribunal sided with the Bureau in a 2007 reconsideration decision.[51] Canada Pipe's market share was almost as high as NutraSweet's — in the 80-90 % range.[52] Further, it was the only market participant capable of providing a full line of cast iron DWV products. Among other things, the Tribunal found the program to "significantly decrease" the likelihood of customer switching by making it prohibitively costly for a customer to purchase a portion of its needs from competitors due to the removal of rebates and discounts if it purchased lower volumes of DWV products from Canada Pipe.[53]

The Bureau's first tied selling proceeding was *BBM Bureau of Measurement*.[54] The RTPC accepted the Bureau's position that a dominant ratings provider's practice of offering better terms to customers that purchased both radio and television audience data constituted tied selling by inducement, and that it was likely to impede a competitor and result in an SLC.[55]

Likewise, in the *Tele-Direct*[56] case a decade-and-a-half later, the Tribunal accepted the Bureau's argument that "Yellow Pages" owner Tele-Direct (which it found to have an overwhelming share (about 96% in Ontario and Québéc, and over 80% in the local markets where it faced the most competition[57]) of the market for telephone directory advertising space) had engaged in tied selling by discriminating against clients that chose to use independent consultants over Tele-Direct's in-house advertising department to develop their advertisement design and marketing strategies. In particular, Tele-Direct was found to have delayed or unduly rejected orders submitted by customers using consultants and to have unfairly disparaged consultants' services in a matter serving to lessen competition. [58]

In summary, the Bureau has brought an average of one exclusive dealing or tied selling case every seven years, and has succeeded in 80% of these five cases. The requirement that exclusive dealing and tied selling result in a substantial

negative impact on competition, in addition to materially impeding one or more competitors, means that as a practical matter relatively few instances of either practice will be eligible for a remedial order under the *Act*. Most suppliers lack the levels of market power seen in *NutraSweet*, *Tele-Direct* and *Canada Pipe*.

(vi) Relationship Between Sections 77(2) and 79

Some observers have argued that the exclusive dealing and tied selling provisions, as presently drafted, add little to the *Act*.[59] In all of the section 77 cases decided since section 79 was enacted in 1986 — namely, *NutraSweet*, *Tele-Direct* and *Canada Pipe* — the Bureau has brought parallel abuse of dominance proceedings. The Bureau also challenged exclusive customer contracts in the *Laidlaw*[60] and the *AC Nielsen*[61] cases. However, in both cases the exclusivity arrangements were only one of multiple practices of anti-competitive acts and the Bureau proceeded solely under the abuse of dominance provisions.

In *Canada Pipe*, the Federal Court of Appeal expressly recognized the substantial overlap between the two provisions, noting the functional similarity between the three key elements of each:[62]

Element	Exclusive Dealing and Tied Selling	Abuse of Dominant Position
Market Position of Supplier	Major Supplier (or "widespread")	Substantially or completely controlling a class or species of business (or two or more firms "jointly")
Impact on Competitor(s)	Practices having an "exclusionary effect"	Practice of anti-competitive acts (interpreted as requiring an exclusionary or predatory purpose)
Impact on Competition	Substantial lessening	Substantial lessening or prevention

While the Federal Court of Appeal recognized that an identical result could not be guaranteed in all situations, it found that "an overlapping analysis is to be expected."[63] However, there are differences in each area which may be highly relevant in particular cases:

- As noted above, the "major supplier" test appears to be a significantly lower threshold[64] and may not require pre-existing market power;
- The Tribunal and Federal Court of Appeal have interpreted the "practice of anti-competitive acts" requirement in section 79(1)(b) as requiring evidence that the supplier's practices were adopted with an "object"

or "purpose" that is exclusionary or predatory,[65] whereas the "exclusionary effect" element in section 77(2)(a)-(c) focuses on whether competitors are actually impacted negatively; and

- As discussed above, prevention of competition is covered in section 79(1)(c) but not in section 77(2).

There are also two important process differences between the exclusive dealing/tied selling and abuse of dominance sections: an application for a remedial order under section 77 (but not section 79) can be commenced by a private party (see Part III below); and the Bureau has the ability to seek significant "administrative monetary penalties" (AMPs") under section 79 (but not section 77).[66] The latter option is likely to incentivize the Bureau to continue to bring exclusive dealing and tied selling concerns before the Tribunal as parallel section 77 and 79 proceedings, or to focus solely on section 79 as the more powerful statutory provision. However, it is respectfully submitted that the separate reviewable practices in section 77 — which have both lower intervention thresholds and more limited remedies — should be used instead of abuse of dominance in cases where there are no other separate allegations of abusive activity. Inclusion of such an enforcement policy in Bureau guidelines[67] would remove the potential chilling effect that the $10-15 million AMPs under section 79 could have on these commonplace distribution practices.

B. Refusal to Deal

The focus of the refusal to deal provisions (as well as the market restriction practice which is considered separately below) is on customer-constraining, rather than competitor-constraining, activity. This may partly explain the relatively large number of private refusal to deal applications (20) generated since the private right of action was introduced in 2002. Terminated customers do not appear to have been much deterred by the concurrent addition of an "adverse effect on competition" requirement to the practice. Nevertheless, the Tribunal has confirmed that a remedial order will not be issued unless the effects of a supplier's refusal to deal with its customer have competitive significance in the downstream market in which the customer operates.[68]

(i) Definition of Refusal to Deal

The *Act* defines "supply" to include virtually any form of dealing in a "product."[69] This includes both goods ("articles") and services.[70] The concept of a refusal to deal is not specifically defined, but is framed as "inability to obtain adequate supplies of a product anywhere in a market on usual trade terms."[71]

The usual refusal to deal case involves the termination of a distributor,

retailer or other customer. However, nothing limits section 75 in this manner and it is therefore possible for a prospective customer to attempt to force the commencement of a supply relationship through a Tribunal order. In 1992, the former head of the Bureau indicated that this reviewable section would not be employed in such a manner.[72] However, five years later the Bureau attempted to do so in the *Warner*[73] case.

(ii) Economics of Refusal to Deal

There is a strong presumption in market economies that suppliers and customers may decide who they want to do business with. There are only rare situations where refusals to deal can be expected to have negative social welfare impacts. Despite finding its inspiration in the Economic Council of Canada's report, this provision does not necessarily promote economic efficiency and appears to have been oriented in part to one of the other purposes set out in the *Competition Act*[74]: protection of participation opportunities for small and medium sized enterprises.[75]

An upstream firm's refusal to supply a distributor or other types of customer can be an important source of commercial leverage. The threat of a refusal to deal can also be used to enforce other vertical restraints such as exclusive dealing, tied selling or market restriction,[76] and its economic effects may therefore overlap with those practices. For example, in a line of private refusal to deal applications brought by online pharmacies against pharmaceutical companies, the refusals to supply were based on alleged internet exports (grey marketing) of drugs in violation of restrictions in the manufacturers' terms of trade.[77]

Independently of other vertical restraints, refusals to supply often occur in the context of suppliers making changes to their network of resellers and/or moving to a vertically-integrated structure. Thus refusals to deal can play an important role in enabling companies to implement efficient distribution systems. For example, when the exclusive Canadian distributor of Dolby audio products made a business decision to eliminate its dealer relationships altogether to sell directly to end users, one of the terminated dealers initiated proceedings under the *Act*,[78] as did a future dealer terminated when La-Z-Boy established its own retailer outlets.[79] Such restructurings may result in cost savings or yield other efficiencies.[80]

Refusal to deal issues also frequently arise in the context of equipment aftermarkets, where the supplier may be reluctant to provide parts or services to independent resellers. The Bureau's first two section 75 cases involved parts aftermarkets.[81] The economic welfare effects of such refusals may be efficient, inefficient or ambiguous.[82]

(iii) Elements of Refusal to Deal

The reviewable practice of refusal to deal requires proof (on a balance of probabilities) of the following five elements:

(i) The person seeking supply is substantially affected in its business or is precluded from carrying on business;

(ii) The inability to obtain adequate supply results from insufficient competition among suppliers;

(iii) The person seeking supply is willing and able to meet the supplier's usual trade terms;

(iv) The product is in ample supply; and

(v) There is likely to be an adverse effect on competition.[83]

The Tribunal has held that a "substantial" effect is akin to an "important" effect, in accordance with its ordinary meaning.[84] The Tribunal has also interpreted the "substantially affected" language to mean that a practice must substantially affect or preclude the operations of the person's entire business — not just part of it.[85] This is a somewhat formalistic approach which ignores the possibility that a firm may have several distinct businesses. In other words, a firm which carries on multiple businesses within a single legal entity will have difficulty making use of section 75, even though a refusal to deal may substantially affect, or preclude it from carrying on, one particular business. It would be useful for the Tribunal or the Federal Court of Appeal to reconsider this approach and adopt an approach that focuses on the substance of what constitutes a separate business (as is done in the merger pre-notification context[86]).

The "insufficient competition" element has been held to "depend on the facts of the particular case" and the Tribunal has observed that "a market composed of numerous suppliers acting independently would not qualify."[87] The precise boundaries of the insufficient competition requirement have not been explored. However, in *Nadeau v. Westco*,[88] the Tribunal held that the supply-managed market for live chickens was not characterized by "insufficient competition" based on the number of producers in it and their independent conduct.[89]

The *Act* defines "trade terms" as "terms in respect of payment, units of purchase and reasonable technical and servicing requirements."[90] If there are other customers buying the product in the market, it should not be problematic to ascertain usual trade terms. The issue is less clear-cut when there is no such benchmark (*e.g.*, because the customer was an exclusive distributor or retailer), but the terms in place before supply was terminated are a potential point of reference if the parties have had a prior business relationship.[91]

The "ample supply" element is not usually in issue, unless the supplier has capacity or other constraints. For example, the application for interim supply after the granting of leave in *Quinlan's v. Deeley* was granted in part with respect to various parts and accessories, but refused in respect of new motorcycles for the upcoming model year that had already been allocated to other dealers.[92] Likewise in *Nadeau v. Westco* the Tribunal found that regulatory restrictions resulted in chickens not being in ample supply for a chicken processor in New Brunswick.[93]

The requirement that a refusal to deal is likely to have an "adverse effect on competition in a market"[94] was added with the 2002 amendments to the *Act*. The Tribunal has held that "adverse effect" signals a lower threshold than the "substantial lessening" language found in section 77 and elsewhere in the *Act*.[95] However, it also explicitly held that an adverse effect on competition requires there to be an ability to exercise some degree of market power in the downstream market by virtue of the upstream refusal to deal.[96] In other words, it is not sufficient that the former (or prospective) customer is unable to compete as a result of lack of supply; there must also be a negative effect on competition (*e.g.* higher prices to the level of trade that the customer would have sold to). This amendment and the Tribunal's interpretation of it are a welcome signal that refusals to supply — like the section 77 practices (and abuse of dominance) — require something more than purely private consequences.

(iv) Remedies

If the Commissioner or a private litigant is able to establish all five elements, the Tribunal may "order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms."[97] This is the only potential remedy; as with the vertical distribution practices in section 77, penalties and damages for private parties are not available.

In practice, customers who have been terminated are often considering all potential remedies that could be available to them. This may include an action under contract or the common law doctrine that imputes an obligation to provide reasonable notice before termination where the supplier did not act pursuant to an explicit written contractual right of termination.[98] Historically, it was also common to consider alleging that the termination occurred as a result of the customer's low pricing policy and thereby gave rise to a private right of action for damages under the *Competition Act*.[99] All of those causes of action were within the jurisdiction of the general courts, whereas the private action in respect of non-price refusals to deal can only be adjudicated by the Competition Tribunal. The decriminalization of price maintenance in the 2009

amendments has eliminated the starkly different treatment of price and non-price refusals to deal.[100] However, a terminated customer cannot bring its potential contractual / common law and competition claims in a single proceeding. This would be desirable and could be facilitated by amending the *Act* to empower general jurisdiction courts to hear private refusal to deal cases (at least where there is also a contractual / common law action in respect of the same matter). Such a parallel jurisdiction has already been established for the deceptive marketing practices in the *Act*.[101]

Unlike section 77, section 75 does not contain an explicit reference to refusals to deal being widespread in the market.[102] However, the Tribunal's powers clearly contemplate that a remedial order could be made against multiple suppliers.[103] To date there have been no such multi-supplier cases.

(v) Case Law

The Tribunal has rendered final decisions on the merits in five refusal to deal cases, three brought by the Bureau and two by private parties.[104] However, the Bureau has not commenced a refusal to deal proceeding since the private right of action was established in 2002.

The first Tribunal case was *Chrysler* in 1989.[105] The terminated customer, Brunet, ran a business exporting proprietary and non-proprietary Chrysler parts overseas. After nine years of dealing with Chrysler, Brunet was informed that his orders were to be put on hold and that he was not to export parts. The Tribunal held that the relevant product market was Chrysler parts, noting that Brunet's customers did not view other auto parts as effective substitutes.[106] The Tribunal ordered that Chrysler resume dealing with him on usual trade terms. In so doing, the Tribunal appeared to give weight to the manner of the Brunet's termination and short shrift to Chrysler's interest in operating an effective international distribution system.[107]

Likewise, in 1990 the Tribunal made an order in favour of Exdos Corporation, which provided maintenance services for Xerox photocopiers. Xerox's refusal stemmed from its U.S. parent's adoption of a policy to cease supplying such firms with new parts and to supply its own parts and maintenance / repair services to end users. As in *Chrysler*, the Tribunal looked to Exdos's customers to conclude that the relevant market was proprietary Xerox photocopiers, not photocopiers generally — a finding that was virtually conclusive of the "insufficient competition" requirement.[108] Again, it made an order to resume supply on usual trade terms.

The last refusal to deal case brought by the Commissioner involved Warner Music. It was dismissed on a motion to strike. The application was triggered

by Warner's refusal to provide a license to BMG (a music club) to reproduce and sell Warner's sound recordings. The Tribunal held that a license of intellectual property could not be a "product" for the purposes of section 75 of the *Act*, mainly because it perceived that a license of exclusive intellectual property rights could never be in "ample supply" or be provided on "usual trade terms."[109] The case was not appealed because the parties entered into a commercial settlement of their differences shortly after the decision was rendered. However, the reasoning seems suspect for several reasons:

- As noted above, a "product" is defined in the *Act* to include all types of articles and services, and "supply" is defined broadly to include any types of dealings related to rights or interests in articles (which include property rights) as well as the provision of services in any manner.[110]
- An owner of intellectual property may elect to license zero, one or multiple firms to use its intellectual property, just as a supplier of tangible goods or services may sell to zero, one or several firms.[111]
- Licenses are as capable as articles or services of having usual trade terms (*i.e.*, terms relating to payment, units of output (covered by the license) and technical or servicing requirements).[112]
- Unlike the abuse of dominance provisions,[113] there is nothing in section 75 which exempts intellectual property from the scope of this reviewable practice.[114] Subsequent to the *Warner* case, the Competition Bureau (after two rounds of extensive stakeholder consultations) issued *Intellectual Property Enforcement Guidelines* in 2000 which state that the Bureau will apply the general provisions of the *Competition Act* when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights.[115]

In 2005, leave was granted in respect of B-Filer's refusal to deal claim (but not its tied selling claim) against Scotiabank under section 103.1 of the *Act*.[116] B-Filer was the first company in Canada to provide a service allowing customers to pay for online purchases using their bank debit cards.[117] It opened numerous Scotiabank accounts and used the bank's e-mail money transfer services to act as an agent for its customers' purchases. Meanwhile, Canadian members of the Interac payment system network, Scotiabank included, decided to establish a more direct method of online debit payment through a service called Interac Online. When Scotiabank exercised its contractual right to terminate B-Filer's accounts on notice, B-Filer sought a supply order under section of the *Act*, arguing that 50% of its revenue depended on Scotiabank's banking services.

B-Filer noted that Scotiabank was one of only two banks in Canada supplying e-mail money transfers for non-bank operation business accounts. The other, Royal Bank of Canada, refused to accept more business from B-Filer (but was not made a respondent in the case).

In a 2006 decision, the Tribunal held that B-Filer had not made out the "substantially affected" requirement, as its 50% revenue impact claim could not be substantiated and B-Filer's financial health had recovered five months after the termination.[118] The Tribunal also found that Scotiabank had a series of "valid business reasons" for the refusal relating to confidentiality and compliance with anti-money-laundering requirements.[119] It also found that B-Filer's service and Interac Online were not in the same market, due to both B-Filer's online gambling-focused customer base and the fact that B-Filer's business required customers to disclose their online banking passwords to the company (impeding the likelihood it could functionally compete for Interac Online's more mainstream customers).[120]

The terminated customer was also unsuccessful in the other private refusal to deal case to reach a full Tribunal hearing, *Nadeau v. Westco.*[121] Nadeau was a chicken processor in Atlantic Canada that purchased from Westco roughly half of its chicken requirements. Westco sought to vertically integrate and unsuccessfully offered to purchase Nadeau prior to terminating it as a customer. Nadeau established the "substantially affected" and "usual trade terms" elements of refusal to deal. However, the fact that Westco and other potential upstream suppliers operated under supply-management quotas lead the Tribunal to conclude that chickens were not in "ample supply" and that the regulatory regime rather than "insufficient competition" was the reason that Nadeau was unable to obtain adequate supply.[122]

The most recent private refusal to deal application received leave from the Tribunal in September 2011.[123] The case concerns termination by the Insurance Bureau of Canada of the supply of vehicle insurance claim information that had been provided to the Used Car Dealers Association of Ontario for many years. An interim supply order was initially issued on consent in October 2011 and a motion by the defendant to rescind it was dismissed in March 2012.[124] Based on the pleadings, it appears that a decision on the merits may provide further clarity in respect of many of the elements of the refusal to deal provision.

(vi) Relationship Between Sections 75 and 79

Abuse of dominance and refusal to deal differ in respect of the threshold market position of the supplier firm (the former requires dominance, whereas in a refusal to deal proceeding the only requirement is that there be "insufficient

competition among suppliers of the product in the market") [125] and in the relevance of activity targeted at a competitor (the former requires a practice of anti-competitive acts, whereas the latter focuses on impacts on the supplier's customer(s) and its (their) downstream customers).[126] Nevertheless, there is a potential for overlap in limited circumstances.

While there is no mention of refusal to deal in the non-exhaustive list of potential anti-competitive acts in the *Act*,[127] the 2009 draft of the Bureau's abuse of dominance guidelines takes the position that refusal to deal can constitute an "anti-competitive act" under section 79(1)(b).[128] The most likely context where a refusal could meet the anti-competitor interpretation of section 79(1)(b) set out in the Federal Court of Appeal's *Canada Pipe* decision[129] would involve a vertically integrated dominant firm, which can be a supplier and a competitor at the same time.[130] It could also arise in dual distribution settings on the same basis.

The addition of an "adverse effect on competition" element in section 75(1)(e) of the *Act* narrowed the third major difference between refusal to deal and abuse of dominance. As noted above, refusal to deal is no longer only about the injury to the refused customer. There is a requirement of downstream market power and injury to customers generally that is somewhat similar to the market power requirement in the section 79(1)(c) SLC test — the difference is now merely about the magnitude of the market impact.

As with the section 77 practices, the available remedies differ importantly between refusal to deal and abuse of dominance. Private rights of action have been debated but not introduced for dominance cases, whereas private actions have become the focus in refusal cases. Conversely, the Bureau has expansive potential remedial orders as well as large AMPs available under section 79 whereas section 75 is tightly focused on orders to supply.[131] The two practices are therefore likely to be used in different ways and the refusal to deal practice appears to have retained its relevance in the scheme of the *Act* despite effectively being abandoned by the Bureau.

C. Market Restriction

Even though it is paired with exclusive dealing and tied selling in section 77 of the *Act*, market restriction (also known as territorial or customer restriction) is, like refusal to deal, primarily concerned with conduct that affects customers rather than competitors.

(i) Definition of Market Restriction

The *Act* defines market restriction as "any practice whereby a supplier of a

product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market."[132] Unlike exclusive dealing and tied selling, inducement alone cannot constitute a market restriction — there must be a requirement or penalty imposed on the customer. However, it is possible that the Tribunal might interpret a discount linked to staying within a defined market as the functional equivalent of a penalty for selling outside the market.[133]

(ii) Economics of Market Restriction

Exclusive territories (or channels, *etc.*) are commonplace in vertical distribution systems (and often go hand in hand with exclusive dealing provisions). A supplier may want to ensure that it has coverage in a particular market area with a reseller who is incentivized to market and sells its products vigorously. In the absence of market restriction agreements, various resellers may effectively be competing to sell the supplier's products to the same customer base. By shielding resellers from intrabrand competition, market restrictions can curb this "free-rider effect," better align reseller and supplier interests in product promotion, and focus their attention on interbrand competition. Absent significant market power, market restrictions would not be expected to have a negative effect on economic welfare, and even when used by a firm with substantial market power it is possible that they may reflect an efficient method of distribution rather than an enhancement of the supplier's market power.[134]

(iii) Elements of Market Restriction

Market restriction involves three elements (which must be established on a balance of probabilities): (i) a "practice;" (ii) a "major supplier" (or "widespread conduct"); and (iii) a "substantial lessening of competition."[135] It would be reasonable to expect that these terms would be interpreted and applied in the same manner as the comparable elements of the exclusive dealing and tied selling provisions.[136] However, there is no requirement of conduct that impedes or has an exclusionary effect on competitors.

The term "market" is used in section 77 but not defined. It is possible that the Tribunal may interpret the term as a product and geographic market defined in the same manner as a "relevant market" is employed as an analytical construct for many other provisions of Part VIII of the *Act*.[137] However, such an interpretation would make it easy for suppliers to argue that the restrictions they have placed on their customers are not subject to review under section 77(3) if they do not match the scope of the relevant market in economic terms (*e.g.*, the restriction might relate to Alberta, but the relevant geographic market might

be the Prairie provinces). A more likely and sensible interpretation is that the phrase "defined market" would, in this context, encompass the particular geographic territory and/or product range that the supplier has established for its customer. It is also possible that limitations related to distribution channels, customers (or types of customers) or end use applications could be characterized as restrictions in respect of a "defined market."

(iv) Remedies

As with exclusive dealing and tied selling, the primary anticipated remedy if market restriction is found to be anti-competitive is a prohibition order. The Tribunal also has the same broader power to make other orders but only if "necessary to restore or stimulate competition."[138] It is difficult to imagine situations where this pre-condition would be fulfilled.

(v) Case Law

The pro-competitive potential of territorial restrictions was expressly recognized by the U.S. Supreme Court in *GTE Sylvania*,[139] one year after Canada established its reviewable practices regime.[140] To date, the Competition Tribunal has not considered the practice. While market restriction was alleged by the leave applicant in the *Construx v. General Motors* case,[141] its elements were not analysed because the Tribunal found that the "substantially affected" leave threshold had not been established by the applicant.

In *Polaroid v. Continent-Wide Enterprises*, the Ontario Superior Court recognized that Polaroid's export pricing policy might fall within the definition of a "market restriction." However, it followed the line of authorities and reasoning which hold that the Competition Tribunal has exclusive jurisdiction to determine such matters, which are lawful unless and until prohibited by the Tribunal.[142]

(vi) Relationship Between Sections 77(3) and 79

Given the focus of market restriction on customers, versus the requirement of acts targeted against competitors in order to establish an abuse of dominance, these two provisions would rarely be expected to overlap. However, it is possible that a vertically integrated firm or a supplier that engages in dual distribution (*i.e.*, selling directly as well as through resellers) could come within both provisions if it imposed restrictions on the customers that it simultaneously sells to and competes against. If this were to occur, it is respectfully submitted that, in the absence of other broader anti-competitive conduct, the Bureau should focus any investigation and enforcement proceedings on the market restriction provisions.[143]

III. The Private Right of Action After a Decade

Between 1976 and 2001, the RTPC and the Tribunal heard only three refusal to deal cases, two exclusive dealing and two tied selling cases, and no cases concerning market restriction. The most obvious explanation was that these practices are typically innocuous and rarely raise competition concerns from the perspective of markets as a whole and aggregate economic welfare.[144] However, some perceived that the practices were suffering from under-enforcement due to the Competition Bureau's other priorities and/or that injured private parties should have remedies.[145] The concept of a private right of action therefore emerged as a potential policy response in the mid-to-late 1990s.

A. Development of the Private Right of Action

The limited private right of action now provided for in section 103.1 of the *Act* had its origins in a consultation paper issued by the Competition Bureau in 1995.[146] It suggested that a private right of action would help to overcome resource limitations that prevented the Bureau from more actively prosecuting the vertical distribution practices[147] (even though the Bureau had never identified such limitations in its annual reports). However, the 1996 report of a "Consultative Panel" struck by the Bureau revealed sharp differences over this proposal's merits by stakeholders, particularly with respect to its potential to encourage strategic and unmeritorious litigation.[148] The Panel concluded that improved Bureau funding was a better solution and that a move toward private actions should only follow a full cost-benefit study.[149] While the Bureau subsequently funded three studies relating to the proposed change — two of which were strongly in favour of it — none contained such an analysis.[150]

In 2000, the Bureau initiated a fresh consultation process on reforming the *Act* based on a discussion paper that again endorsed private actions (which by this time were also being brought to Parliament in various private members' bills).[151] The Bureau's new proposal contained four "safeguards" against the risk of strategic or frivolous litigation:

(i) The Tribunal would not be able to award damages;

(ii) Applicants would need to satisfy a "gatekeeper" leave requirement;

(iii) The Tribunal would have the power to award costs; and

(iv) Respondents would be able to avail themselves of summary judgment procedures.

After being debated at some length,[152] a limited private right of access was enacted in 2002.[153] In addition to the four proposed safeguards, valuable double jeopardy provisions were introduced to prevent private cases running in

parallel with Competition Bureau investigations or proceedings. [154] The refusal to deal practice was also amended to incorporate a competitive effects test.[155]

B. The Leave Requirement

The leave mechanism is the most visible of the safeguards against unmeritorious proceedings that may be commenced by disaffected former customers or by competitors. It is an unusual step at the initiation stage of legal proceedings. The *Act* requires that "any person" that wants to apply to the Tribunal for a remedial order under sections 75 (and now also 76) or 77 must obtain leave to make the application. It also sets out a series of procedural requirements in respect of such an application.

(i) Process and Timing

Leave applications are intended to be dealt with expeditiously using a relatively modest evidentiary base. The applicant must submit "an affidavit setting out the facts in support of the person's application."[156] The rules do not provide for cross-examination on the applicant's affidavit. The respondent(s) may within 15 days file "written representations" in response to the application and the applicant has 7 days in which to file any reply.[157]

Since oral hearings are normally not held, the Tribunal should be in a position to adjudicate a leave application after the 22 day period for the exchange of the parties' written materials. In practice, leave applications have taken almost twice as long as expected at the pleading stage and over a month for adjudication, resulting in an average time to completion of 77 days (excluding appeals):

Year	Cases (#)	Pleadings (Days)	Tribunal Reasons (Days)	Total (Days)
2002	1*	N/A	N/A	137
2003	2	33	39	72
2004	7	25	70	95
2005	2	93	44	137
2006	0	-	-	-
2007	4	30	23	53
2008	5	32	17	49
2009	0	-	-	-
2010	0	-	-	-
2011	2	34	24	58
Total/Average	23(22*)	42	35	77

* *National Capital News v. Speaker, infra* note 157 did not have a formal response from the Speaker of the House of Commons. While the total time from application to decision is presented, the case has not been included in the overall averages.

(ii) The Test for Obtaining Leave

The test governing leave for vertical distribution practices[158] has two components which were summarized in the first Tribunal decision as follows:

> In order to exercise its discretion to grant leave, the Tribunal must therefore be satisfied that it has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the *Act*; and (2) the alleged practice could be subject to an order under that section.[159]

This test has been the subject of a considerable amount of litigation, mainly in respect of section 75 but also in a few section 77 proceedings. In *Barcode v. Symbol*,[160] the Federal Court of Appeal held that the leave threshold "is not a difficult one to meet."[161] It only requires that the applicant provide "sufficient credible evidence" of what would give rise to a *bona fide* belief by the Tribunal that he or she has been directly and substantially affected by conduct that could be subject to a section 75 or 77 order. However, the Tribunal must address each element of the alleged section 75 or 77 practice "summarily" in coming to its conclusion about the evidence's sufficiency.[162]

(iii) Section 77 Leave Cases

Four leave applications have sought orders under section 77 since 2002. The Tribunal denied each of them for disclosing insufficient evidence or setting out legally untenable claims.

Two applications concerned exclusive dealing. B-Filer argued that Scotiabank engaged in this practice by terminating its account and plotting to be an exclusive purveyor of online debit payment services through Interac Online. The Tribunal dismissed the section 77 portion of the application, correctly noting that B-Filer had misunderstood the concept of exclusive dealing and had failed to properly plead its requisite elements.[163] In 2008, a former resident in an Ontario prison challenged the institution's policy of requiring inmates to purchase merchandise from Home Hardware. The Tribunal held that the purchasing arrangement was a "policy decision," not a commercial one subject to the *Act*.[164]

One leave application has alleged tied selling. In 2008, a self-represented party challenged the owner of the Ottawa Senators for offering multi-game ticket packages. Given that the applicant's affidavit contained only four sentences of text, the Tribunal easily found that the document did not provide a reasonable basis for believing that the applicant was "directly and substantially affected."[165]

Finally, in *Construx v. General Motors*, an exporter of vehicles alleged that General Motors had engaged in market restriction when it prevented its dealers from selling their vehicles to persons who resell or export them. Again, the applicant's evidence was insufficient to meet the "directly and substantially affected" test and leave was denied.[166]

On their face, all of these were weak cases. The leave mechanism served its purpose of avoiding the expenditure of significant resources by the respondents and the Tribunal — as well as the applicants — on unmeritorious cases that were destined to fail.

(iv) Section 75 Leave Cases

In contrast with section 77, the first decade of private rights of action yielded an average of two leave applications per year under section 75 of the *Act*. The table in Appendix A summarizes how these 20 cases were dealt with at the leave stage.

Seven of the 20 cases brought (35%) were granted leave by the Tribunal. Only two — *B-Filer v. Bank of Nova Scotia*[167] and *Nadeau v. Westco*[168] — proceeded to a full Tribunal hearing, with both being dismissed. Three others — *Allan Morgan v. La-Z-Boy*,[169] *Quinlan's v. Deeley*[170] and *Robinson Motorcycle v. Deeley*[171] — settled after leave was granted. The liquidation of the applicant in *Barcode v. Symbol*[172] resulted in the case being dismissed due to a "change in circumstances" under section 106 of the *Act*. The *UCDA v. IBC*[173] case is still ongoing.

Of the 13 cases in which the Tribunal refused leave, nine (about 70%) were dismissed due to the applicant not having met the "directly and substantially affected" threshold under subsection 103.1(7). In *Construx v. General Motors*,[174] the evidence proffered was piecemeal and generally insufficient to support the Tribunal's grant of leave. In *Sears*,[175] once the frame of reference was determined by the Tribunal to be the entire multi-product business of the entity, it was clear that a refusal to deal with an estimated $16 million impact on a $6 billion business would not qualify as substantial. In *Sono Pro v. Sonotechnique*,[176] the applicant suffered a 10% decline in sales. In *Paradise v. Novartis*,[177] the sales lost by the applicant pharmacy due to the refusal of a pharmaceutical company to supply its drugs amounted to a meagre $3,149, and in *Broadview v. Wyeth*,[178] they amounted to a mere 5% of total sales. The leave mechanism allowed the early screening out of these and other cases that would never have met the direct and substantial effect element of the refusal to deal provision.

Two of the 13 leave refusals involved the same effective parties and an unusual jurisdictional issue related to the ability of the Speaker of the House of Commons to control access to the Parliamentary press gallery.[179] Another featured a deponent who went on vacation and was unavailable to be reached

regarding the proceedings.[180] These appear to have been frivolous proceedings which were appropriately weeded out at the leave stage.

To date, only a single denial of leave has been based solely on the applicant's failure to address other required elements of section 75 necessary to fulfill the "could be subject to an order" branch of the leave test. In *Gray Internet Services v. CIRA*, the application did not provide evidence related to a possible adverse effect on competition (*i.e.* section 75(1)(e) of the *Act*).[181] Again, the leave test appeared to perform exactly the function it was intended to in this case.

In summary, the history of leave being refused in 65% of refusal to deal cases confirms that the concern about private actions opening the door to unmeritorious litigation was well-founded. The Tribunal appears to be performing its role as a case screener in an appropriate and balanced manner. This includes multiple cases going forward that appeared to be plausible, but which were subsequently denied on the merits or settled.

C. The Role of Interim Injunctions

The *Act* provides that the Tribunal may issue interim orders, "having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief."[182] This power has been used quite infrequently. However, since the private right of action was established, it has begun to play a more significant role in refusal to deal cases. Of the seven cases which received leave to proceed, interim supply has been granted in four[183] and refused in one.[184] An attempt to obtain interim relief on an urgent basis prior to adjudication of a leave application was also rejected.[185]

The Tribunal has confirmed that the standard three-part injunction test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*[186] is applicable for interim orders in *Competition Act* proceedings.[187]

(i) Serious Issue to be Tried

As both the Supreme Court and the Tribunal have held, the "serious issue to be tried threshold is a low one."[188] In practice, where the Tribunal has enabled a case to go forward by granting a leave application, it is difficult to envision the applicant not being able to succeed on the serious issue pre-requisite.

(ii) Irreparable Harm

The Supreme Court of Canada has described irreparable harm as the sort of damage:

> which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages

> from the other. Examples of the former include instances where one party will be put out of business by the court's decision [...]; [or] where one party will suffer permanent market loss or irrevocable damage to its business reputation.[189]

In some situations, a refusal to deal may affect the customer's ability to carry on its business. For example, in *Nadeau v. Westco*, the Tribunal accepted that irreparable harm will occur "where one party will be put out of business" if it does not obtain relief under section 104, and also went on to find that it could occur well before a business ceases to be viable to carry on.[190]

The Tribunal has also recognized that monetary damages are not available under the section 75 (or 77) private rights of action and that an applicant seeking interim relief under section 104 may suffer harm that is irreparable for this reason.[191] A customer may also be harmed irreparably for other reasons. For example, in *Quinlan's v. Deeley*, the Tribunal accepted that the loss of substantial sales and customer goodwill constitutes irreparable harm.[192]

(iii) Balance of Convenience

As set out in *RJR-MacDonald*, and confirmed by the Tribunal in *Nadeau*, "[i]n the balance of convenience test, the Tribunal must determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[193]

In *Deeley*, the Tribunal held that when a product is in ample supply, the balance of convenience generally favours the issuance of an interim order.[194] In considering whether an interim order would be a just and appropriate use of the Tribunal's powers, Simpson J. also stated that "in the context of an application under section 75, a mandatory order is not an extraordinary remedy. Rather, it is what the section is all about and it seems to me that, in this context, orders which preserve or resume supply should not be viewed as exceptional."[195] While these comments do not negate the requirement for the Tribunal to conduct a balancing analysis in each particular case, they do suggest some receptivity to favouring continuation of supply for customers that have demonstrated irreparable harm. As Phelan, J. said in doing so in *UDCA v. IBC*, "interim supply orders are relatively common in cases such as these to ensure that a Tribunal's final order is not rendered moot or ineffective."[196]

D. Assessing the Co-existence of Public and Private Enforcement

In parallel with private litigants' efforts to use the direct right of action before the Tribunal, there has been almost complete silence by the Bureau. Since 2002, it has commenced only one case involving any of the vertical distribution

practices. Moreover, the *Canada Pipe*[197] case was predominantly positioned as an abuse of dominance proceeding with the exclusive dealing claim being included on an overlapping basis.

Private enforcement has not materially increased the number of Tribunal remedies imposed under section 75 or 77 given the Bureau's lack of enforcement activity. However, there has been an increase in settlements when the private actions and Bureau settlements are aggregated, as the table below demonstrates.

Vertical Distribution Practice Enforcement Before and After the 2002 Private Right of Action

	1976-2001			2002-2012					
	Commenced by Bureau			Commenced by Bureau			Commenced by Private Parties*		
	Cases	Remedies	Settlements**	Cases	Remedies	Settlements	Cases	Remedies	Settlements
Refusal to Deal	3	2	1	0	0	1	20	0	3
Tied Selling	2	1	1	0	0	0	1	0	0
Exclusive Dealing	2	1	4	1	1	3	2	0	0
Market Restriction	0	0	1	0	0	0	1	0	0
TOTAL	7	4	7	1	1	4	24	0	3

* These numbers include leave applications (i.e., the count is not restricted to cases that proceeded to a final Tribunal hearing) and also cases settled without a Tribunal proceeding. They also include the UCDA v. IBC case which is still in progress.

** Includes settlements only during 1997-2002 due to data availability.

E. Cost of Proceedings

The cost of litigating Tribunal proceedings is potentially very high. Prior to the introduction of the private right of action, a 1998 survey by Deloitte & Touche reported an average cost of $5.5 million for respondents in Tribunal proceedings initiated by the Bureau.[198] A Bureau-commissioned report pegged the Bureau's average cost per case at $1 million.[199] Many markets in Canada are not large enough to justify the costs required to litigate disputes, resulting in

potential incentives to abandon or settle cases prematurely. Some of the cost is a function of the factual complexity of marketplace dynamics and conduct, but the highly court-like operation of the Competition Tribunal is also a contributing factor. In response to proposals[200] that the Tribunal fulfil its mandate to deal with proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit,"[201] the Tribunal has streamlined its rules somewhat.[202]

Cost estimates for fully litigated Bureau or private cases under the amended rules are not available. *B-Filer v. Bank of Nova* Scotia and *Nadeau v. Westco* appear to have been vigorously litigated by both sides and the legal costs were likely substantial.[203] Recent cases initiated by the Bureau under other reviewable practices provisions in Part VIII of the *Act* also appear to involve extensive litigation time and costs.[204] As the legislative history reveals, one of the objectives of the proponents of private actions was to allow more localized forms of anticompetitive conduct to be brought to account in the event the Bureau did not consider such matters to be a priority. However, the overall cost of such proceedings may be prohibitive for many applicants and the loser-pay cost rules will not provide full recovery for a successful party.[205]

Surprisingly, most of the leave applications have been initiated by relatively small businesses. No study of the costs involved in leave applications alone has yet been made. However, the Tribunal's cost decision in *Robinson Motorcycle v. Deeley*[206] sheds some light on the resources expended by parties during combined section 75 leave and interim supply proceedings. The applicant spent $25,687, while the respondent reported costs of $156,136 (which was a reduction from the time-docket value recorded by its counsel).[207]

The cost of Tribunal proceedings may encourage parties to settle, particularly when the partial cost indemnification risks are added to a losing party's own cost exposure. Settlement would seem most likely to occur in cases where leave (and possibly an interim supply order) has been granted. As noted above, settlements occurred in three of the five refusal to deal cases that were granted leave.

F. Guidance

The *2009 Draft Abuse Guidelines* discussed exclusive dealing, tied selling, market restriction and refusal to deal in the context of the "anti-competitive acts" element of the reviewable practice of abuse of dominant position.[208] Unfortunately, the Bureau has not released guidelines outlining its enforcement policies under sections 75 and 77, and is poised to rescind the 2009 guidance.[209] It would be desirable for the Bureau to provide updated and expanded guid-

ance in these areas. At a mere three pages, the 2005 *Information Bulletin on Private Access to the Competition Bureau*[210] would also benefit from revision and expansion in light of the experience with the leave mechanism and other aspects of the process over the past seven years. Guidelines would assist both smaller and more sophisticated applicants to understand the time and costs of such proceedings, as well as to make more efficient use of their own and Tribunal resources by better preparing their cases.

IV. Conclusions

The vertical distribution practices set out in sections 75 and 77 of the *Competition Act* provide for remedial orders to cure conduct that, while normally within the prerogative of private actors in a market economy, may occasionally undermine competition. The exclusive dealing, tied selling and market restriction provisions in section 77 have been sparsely litigated. On the other hand, the refusal to deal provision in section 75 has been used with increasing frequency over the past decade as private parties generate litigation in an area that, prior to 2002, saw a mere three Bureau cases.

Unfortunately (but not surprisingly), much of the private litigation has been unmeritorious, with the victim focusing on its own (often limited) harm but paying little attention to the overall competitive effects in the marketplace. As a result, the safeguards in the 2002 amendments have proven to be critically important. In particular, the Tribunal has been a capable case screener using the leave mechanism. In addition, the incorporation of a competitive effects test into the refusal to deal provision, and the Tribunal's market power interpretation of it, have helped to shift section 75 from a customer-protection provision to one in which overall economic welfare is relevant — thereby bringing it into greater harmony with the remainder of the reviewable practices regime in Part VIII of the *Act*.

Appendix A - Refusal to Deal: Leave Applications Filed Under Section 103.1 of the *Competition Act*

#	Year	Case Name	Leave?	Reasons for Refusal of Leave
1	2002	*National Capital News Canada v. Canada (Speaker of the House of Commons)*	No	Tribunal had no jurisdiction to make an order (subject of complaint a matter of parliamentary privilege).
2	2004	*Barcode Systems Inc. v. Symbol Technologies Canada ULC*	Yes	N/A
3		*Allan Morgan & Sons Ltd. v. La Z Boy Canada Ltd.*	Yes	N/A
4		*Mrs. O's Pharmacy v. Pfizer Canada Inc.*	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
5		*Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals*	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
6		*Broadview Pharmacy v. Wyeth Canada Inc.*	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
7		*Broadview Pharmacy v. Pfizer Canada Inc.*	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
8		*Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*	Yes	N/A
9		*Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd.*	Yes	N/A
10		*Construx Engineering Corp. v. General Motors of Canada Ltd.*	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
11	2005	*B-Filer Inc. v. Bank of Nova Scotia*	Yes	N/A

#	Year	Case Name	Leave?	Reasons for Refusal of Leave
12	2006	Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.	Yes	N/A
13	2007	Sears Canada Inc. v. Parfums Christian Dior Canada Inc.	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
14	2007	London Drugs Limited v. Parfums Givenchy Canada Ltd.	N/A	(This proposed application was withdrawn before a hearing on the matter.)
15	2007	Sono Pro Inc. v. Sonotechnique P.J.L. Inc.	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
16	2007	Gauthier v. Canada (Speaker of the House of Commons)	No	Relitigation of dismissed 2002 application, relying on an alleged change in the law. Tribunal finds no effect on prior jurisdictional ruling.
17	2008	Canadian Standard Travel Agent Registry v. International Air Transport Association	No	Failed to provide evidence sufficient to meet the "directly and substantially affected" requirement.
18	2008	Swenson Inc. v. Trader Corp.	No	Dismissed, without prejudice to a re-filing, due to applicant's deponent being on vacation and being unable to be reached regarding evidence.
19	2011	Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority	No	Applicant failed to provide evidence concerning whether the refusal was likely to have an adverse effect on competition.
20	2011	Used Car Dealers Association of Ontario v. Insurance Bureau of Canada	Yes	N/A

ENDNOTES

[1] Neil Campbell is a partner in the Competition Group in the Toronto office of McMillan LLP. The significant assistance of Simon Kupi, an articling student at McMillan, in the preparation of this article, and the comments provided by Casey Halladay, a partner at McMillan, are gratefully acknowledged.

[2] *Competition Act*, R.S.C. 1985, c. C-34 (the "*Act*").

[3] *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.) *[Chrysler]*, aff'd *Chrysler Canada Ltd. v. Canada (Director of Investigation and Research)* (1991), 38 C.P.R. (3d) 25 (F.C.A.).

[4] *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.) *[Xerox]*.

[5] See, *e.g.*, A. Neil Campbell and J. William Rowley, "Non-Price Vertical Restraints", in *Competition Law: Compliance in an Aggressive Marketplace* (Toronto: Insight Press, 1993); and J. William Rowley and A. Neil Campbell, "Refusal to Deal (With Economics): An Assessment of the Competition Tribunal's Decisions in *Chrysler* and *Xerox*" (Delivered at the Recent Developments in Canadian Competition Law Symposium at the University of Toronto, December 15, 1992) [unpublished].

[6] For a detailed discussion of the risks of excessive private litigation, see J. William Rowley and A. Neil Campbell, "Private Litigation Over Reviewable Practices: A Cost-Benefit Analysis", in Competition Policy Group, *Should Reviewable Practices Be Turned Into Competition Torts?* (2001).

[7An] *Act to Amend the Combines Investigation Act* and the *Bank Act* and to repeal an *Act to Amend the Combines Investigation Act and the Criminal Code*, S.C. 1974-75-76, c. 76. *[Stage One Amendments]*.

[8] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Information Canada, 1969).

[9] See *Competition Act*, s. 77(1):

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or

the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs ....

[10] See *ibid.*:

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the

supplier or the nominee, and
(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

[11] See Kenneth L. Glazer & Brian R. Henry, "Coercive vs. Incentivising Conduct: A Way out of the Section 2 Impase?" (2003) 23 *Antitrust* 45 at 45, 51.

[12] For a general discussion of the relative rarity of anti-competitive unilateral conduct, see A. Neil Campbell and J. William Rowley, "The Internationalization of Unilateral Conduct Laws — Conflict, Comity, Cooperation and/or Convergence?" (2008) 75 *Antitrust Law Journal* 267.

[13] For example, see Competition Bureau, Backgrounder — Inquiry into the Québéc Beer Market (29 April 2003), where the Bureau conducted a 2½ year investigation which included two sets of subpoenas to 10 breweries plus major grocery store chains to assess whether various business practices of Molson and Labatt constituted exclusive dealing or an abuse of dominant position over the period 1995-2001. The Bureau decided that Molson and Labatt had market power but that an application to the Tribunal was not warranted under either section 77 or 79.

[14] See, *e.g.*, Michael Trebilcock, Ralph A. Winter, Paul Collins and Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) *[Canadian Competition Policy]* at 461.

[15] Economists have developed numerous other pro-competitive explanations of exclusive dealing. For instance, exclusivity can help to ensure a stable source of supply for retailers and scale economies for manufacturers: see *e.g. Canadian Competition Policy*, *ibid.* at 458-461. Further, a manufacturer must often agree to a very low wholesale price in order to compensate a retailer for giving up the profits lost by altering its business model and ceasing to carry other manufacturers' products. This, in turn, may lead to a lower retail price. See Frank G. Mathewson & Ralph A. Winter, "The Competitive Effects of Vertical Agreements: Comment" (1987) 77(5) *American Economic Review* 1057. Exclusive dealing can also reduce monitoring and transaction costs for manufacturers by enabling them to focus their business development efforts on a select group of retailers: see Jonathan M. Jacobson & Abid Qureshi, "Did the *Per se* Rule on Tying Survive '*Microsoft*'?" (2001) *New York Law Journal* 1.

[16] Most notably, see Richard A. Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution: *Per Se* Legality" (1981) 48 *University of Chicago Law Review* 6.

[17] For a more detailed discussion of such arrangements, see, *e.g.*, Ilya R. Segal and Michael D. Whinston, "Naked Exclusion: A Comment" (2000) 90 *American Economic Review* 296.

[18] *Director of Investigation and Research v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 *[NutraSweet]*; and *Canada Pipe (FCA)*, *infra* note 33. See also part II(A)(v), below.

[19] That "[c]ompetition for dealers is an important form of rivalry among distributors" was acknowledged by the RTPC in *Bombardier*, *infra* note 26 at 57.

[20] For a summary of the economic debate, see *Canadian Competition Policy*, *supra* note 13 at 474.

[21] For example, if a customer values Good A at $10 and Good B at $5, a firm cannot

profit by bundling them together at $20. At best, it can sell them for $15 — in which case it will make no more profit than if it sold them separately for $10 and $5.

[22] Thus, to proceed further with the example at note 20, if a second customer values Good A at $5 and Good B at $10, a $15 bundle allows a supplier to make profitable sales to both customers without overt price discrimination (*i.e.*, selling Good A to the first and second customers at $10 and $5, respectively and Good B at $5 and $10, respectively).

[23] See the further discussion of aftermarkets *infra* note 75 and related text.

[24] See *Competition Act*, s. 77(2):

> Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
>
> (a) impede entry into or expansion of a firm in a market,
>
> (b) impede introduction of a product into or expansion of sales of a product in a market, or
>
> (c) have any other exclusionary effect in a market,
>
> with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

[25] *Competition Act*, s. 77(4). In practice, these defenses rarely come into play.

[26] *NutraSweet*, *supra* note 17 at para. 92.

[27] *Ibid.* at para. 165 (following the approach adopted by the Restrictive Trade Practices Commission (the "RTPC") in *Director of Investigation and Research v. Bombardier Ltd.* (1980), 53 C.P.R. (2d) 47 *[Bombardier]* at 55).

[28] See *Competition Act*, s. 79(1)(a): "one or more persons substantially or completely control … a class or species of business."

[29] In Canada *(Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) *[Laidlaw]*, the Tribunal noted that a market share threshold of under 50% does not give rise to a *prima facie* finding of dominance under Section 79(1)(a) of the *Act*. The Bureau is also of the view that a market share below 35% "will generally not prompt further investigation:" Competition Bureau, *Draft for Public Consultation — The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act*) (Ottawa: Competition Bureau, 2012), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01392.html> *[2012 Draft Abuse Guidelines]*, s. 2.3.1. However, in *Bombardier*, *supra* note 26, a market share of 30% was sufficient for the RTPC to find that Bombardier was a "major supplier." The relevant standard is that of an "appreciable or significant" market impact, not "substantial" (or "complete") control.

[30] This is akin to the scope for parallel but uncoordinated behaviour to be examined as a "joint" or "collective" abuse of dominant position. See *Competition Act*, s. 79(1) (referring to "one or more persons" being dominant (in s-s. 79(1)(a)) and "that person or those persons" being engaged in a practice of anti-competitive acts (in s-s. 79(1)

(b))). See also *2012 Draft Abuse Guidelines, supra* note 28, s. 2.5 (confirming that "section 79 explicitly contemplates that a group of firms may possess market power even if no single member of the group holds market power on its own").

[31] One reason for this is that the "substantial lessening of competition" requirement would not be met unless at least one competitor has been foreclosed to a considerable degree. See, *e.g.*, *Bombardier*, *supra* note 26, which linked those two elements of the exclusive dealing analysis.

[32] See *Competition Act*, s. 77(2), reproduced *supra* note 23.

[33] *Ibid*, ss. 79, 90.1 and 92.

[34] In *Canada (Commissioner of Competition) v. Canada Pipe Co.,* 2006 FCA 233 *[Canada Pipe (FCA)]* at 93-95 the Court noted that differences in wording with respect to the "substantial lessening" requirement might matter in a future case, but in the case at hand they did not alter the parallel analysis given the "strong" similarity of the elements.

[35] See *Competition Act*, R.S.C. 1985, c. C-34, s. 77(2), reproduced *supra*, note 23.

[36] *Ibid*. ss. 79(2) – (3).

[37] For a discussion of the use of the abuse of dominance provisions in respect of portfolios of conduct that include exclusivity and tying arrangements, see parts 11 (A)(v) and (vi) below.

[38] A few others have been dealt with by the Bureau through negotiated resolutions. See, for example, Director of Investigation and Research, News Release NR-10540/91-37, "Director Accepts Undertakings in Abuse of Dominant Position Case" (2 October 1991); Director of Investigation and Research, News Release NR-10862/92-31, "Director Receives Undertakings from Digital Equipment of Canada" (30 October 1992); and Bureau of Competition Policy, News Release, "Director of Investigation Receives Undertakings from Insurance Corporation of British Columbia" (13 July 1995); Competition Bureau, "Heinz Canada signs undertaking regarding jarred baby food and infant cereal" (1 August 2000), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00570.html>; Competition Bureau, "Annual Report of the Commissioner of Competition for the Year Ending March 31, 2010" (Ottawa: Competition Bureau, 2012), s. 4.1 (concerning Waste Management of Canada and Waste Services Inc.), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03426.html> (All of these matters involved exclusive dealing).

[39] See the cases discussed in part III below.

[40] The courts have consistently held that these and other reviewable practices are lawful until prohibited, which is a power exclusively assigned to the Competition Tribunal. As a result, they cannot be used to activate torts such as interference with economic relations, conspiracy to injure or restraint of trade: see, *e.g.*, *Harbord Insurance Services Ltd. v. Insurance Corporation of British Columbia* (1993), 9 B.L.R. (2d) 81; and the summary in Rowley and Campbell, "Reviewable Practices," *supra* note 5 at 105-106.

[41] *Bombardier, supra* note 26.

[42] *Ibid.* at 55.

[43] *Ibid.* at 56.

[44] *Ibid.* at 58-61.

[45] *NutraSweet, supra* note 17.

[46] *Ibid.* at para. 7.
[47] *Ibid.* at para. 10.
[48] *Ibid.* at para. 181.
[49] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2005 Comp. Trib. 3 *[Canada Pipe (Initial Decision)]*.
[50] *Canada Pipe* (*FCA*), *supra* note 33 at paras. 58 and 78**.**
[51] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2007 CarswellNat 3913 (WL) (Comp. Trib.) *[Canada Pipe (Reconsideration Decision)]*.
[52] *Ibid.* at para. 42; and *Canada Pipe (Initial Decision)*, *supra* note 48 at para. 140.
[53] *Ibid.* at paras. 172-175.
[54] *Director of Investigation and Research v. BBM Bureau of Measurement* (1981), 60 C.P.R. (2d) 26 (R.T.P.C.).
[55] *Ibid.* at paras. 34-37.
[56] *Canada (Director of Investigation and Research) v. Tele-Direct (Publications Inc.)* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.).
[57] *Ibid*. at paras. 228-231.
[58] *Ibid*. at paras. 761-765.
[59] See, *e.g.*, Michelle Lally, "Exclusive Dealing Arrangements: When are they Pro-Competitive; When are they Exclusionary?" (Paper prepared for the ABA teleseminar "Distribution Issues in the North Atlantic Triangle," 28 May 2010) at 12.
[60] *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 at 339-344 and 354-355.
[61] *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd. (A.C. Nielsen)* (1995), 64 C.P.R. (3d) 216 at 264-266 and 283-285.
[62] *Canada Pipe (FCA)*, *supra* note 33 at paras. 21-22.
[63] *Ibid*., at para. 22.
[64] See *supra* note 28 and accompanying text.
[65] *Canada Pipe (FCA)*, *supra* note 33 at paras. 66-68.
[66] *Competition Act*, ss. 79(3.1) – (3.3).
[67] Such guidance could be included in the *Abuse of Dominance Enforcement Guidelines* that the Bureau is currently revising. For example, the Bureau could indicate that: "The Commissioner normally will not pursue conduct falling within the definitions of exclusive dealing or tied selling as an abuse of a dominant position in the absence of broader anti-competitive conduct."
[68] See the cases discussed *infra* note 94 and related text.
[69] See *Competition Act*, s. 2:

"Supply" means
(*a*) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and
(*b*) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

[70] *Ibid*. These terms are further defined as follows:

"Article" means real and personal property of every description including
(*a*)money,
(*b*) deeds and instruments relating to or evidencing the title or right to property

or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,
(*c*) deeds and instruments giving a right to recover or receive property,
(*d*) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and
(*e*) energy, however generated.

"Service" means a service of any description whether industrial, trade, professional or otherwise.

[71] *Ibid*., s. 75(1)(a).

[72] See C. Goldman, commentary in a panel discussion reported in [1992] *Fordham Corporate Law Institute* at 309:

"… what if the purchaser just wants to become a new purchaser of a new supplier? I believe the Bureau has never applied — or would not consider applying, I hope — the refusal to deal section to that situation."

[73] *Canada (Director of Investigation & Research) v. Warner Music Canada* (1997), 78 C.P.R. (3d) 321 (Comp. Trib.) *[Warner]*.

[74] *Competition Act*, s. 1.1.

[75] See generally Economic Council, *Report on Competition Policy*, *supra* note 7; *Canadian Competition Policy*, *supra* note 13, ch. 6, part V; and Rowley and Campbell, "Refusal to Deal (with Economics)", *supra* note 1.

[76] Refusals to supply can also be used to achieve resale price maintenance. See *Canadian Competition Policy*, *supra* note 13, at 421. Price-related refusals historically were dealt with under the criminal offence of price maintenance (see s. 61(1)(b) of the *Competition Act* prior to its repeal in 2009) and are now covered as part of the decriminalized price maintenance reviewable practice in s. 76 of the *Act*.

[77] See *Mrs. O's Pharmacy v. Pfizer Canada Inc.* (2004), 35 C.P.R. (4th) 171 (Comp. Trib.) *[Mrs. O's v. Pfizer]*; *Paradise Pharmacy and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 *[Paradise v. Novartis]* (the author was counsel to Novartis in this case); *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22 *[Broadview v. Wyeth]*; and *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23 *[Broadview v. Pfizer]*.

[78] *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, 2007 Comp. Trib. 18 *[Sono Pro v. Sonotechnique]*.

[79] *Allan Morgan & Sons v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4.

[80] See generally *Canadian Competition Policy*, *supra* note 13 at 424.

[81] See the discussion in part II(B)(v) below of *Chrysler*, *supra* note 2; and *Xerox*, *supra* note 3.

[82] See *Canadian Competition Policy*, *supra* note 13 at 421-424, which draws heavily on Z. Chen, T. Ross and W. Stanbury, "Refusals to Deal and Aftermarkets" (1998) 13 *Review of Industrial Organization* 131.

[83] See *Competition Act*, s. 75(1):

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
(d) the product is in ample supply, and
(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

[84] *Chrysler*, *supra* note 2 at 23. See also *B-Filer v. Bank of Nova Scotia (Merits Decision)*, *infra* note 93 at para. 80.
[85] See, *e.g.*, *Sears Canada Inc. v. Parfums Christian Dior and Parfums Givenchy Canada Inc.*, 2007 Comp. Trib. 6 *[Sears v. Dior]* at paras. 16-21.
[86] See *Notifiable Transaction Regulations*, SOR/87-348, as amended, s. 16.
[87] *Xerox*, *supra* note 3 at 116. It noted that, if one supplier were to refuse to supply a customer in such a market, "another would be more than happy to earn the additional revenue."
[88] *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2009 Comp. Trib. 6 *[Nadeau v. Westco (Merits Decision)]*, aff'd 2011 FCA 188.
[89] *Ibid.* at para. 246.
[90] *Competition Act*, s. 75(3). The definition applies for the purposes of both s-ss. 75(1)(a) and (c).
[91] This approach was adopted by Simpson J. in *B-Filer v. Bank of Nova Scotia (Leave Decision)*, *infra* note 114 at paras. 5657.
[92] *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 *[Quinlan's v. Deeley]* at para. 21.
[93] *Nadeau v. Westco (Merits Decision)*, *supra* note 86.
[94] *Competition Act*, s. 75(1)(e).
[95] See *B-Filer Inc. v. Bank of Nova Scotia*, 2006 Comp. Trib. 42 *[B-Filer v. Bank of Nova Scotia (Merits Decision)]* at para. 211; and *Nadeau v. Westco (Merits Decision)*, *supra* note 86 at para. 369. The Tribunal also held that "likely to have" requires the probability, not merely the possibility, of such an adverse effect.
[96] *B-Filer v. Bank of Nova Scotia (Merits Decision)*, *supra* note 93 at paras. 206-210; *Nadeau v. Westco (Merits Decision)*, *supra* note 86 at para. 366.
[97] *Competition Act*, s. 75(1), reproduced *supra* note 81.
[98] See generally Rowley and Campbell, "Reviewable Practices," *supra* note 5 at 204205, and sources cited therein.
[99] *Competition Act*, ss. 61(1)(b) and 36.
[100] *Competition Act*, ss. 76(1)(a)(ii) and (8).
[101] *Ibid.* Part VII.1, particularly ss. 74.09 and 74.1, which give the Tribunal, the Federal Court and provincial superior courts overlapping jurisdiction.

[102] See *supra* note 29 and related text.
[103] See *Competition Act*, s. 75(1), reproduced *supra* note 81 (Para.75 (1)(c) also refers to "supplier or suppliers."
[104] Attempts by private parties to base tort claims on refusals to deal have been unsuccessful for the same jurisdictional reasons as in exclusive dealing and tied selling cases: see, *e.g., Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 61 C.P.R. (3d) 204 (Ont. Div. Ct.), rev'g (1994), 56 C.P.R. (3d) 251 (Ont. Gen. Div.); and the discussion *supra* note 39.
[105] *Chrysler, supra* note 2.
[106] *Ibid.* at para. 24.
[107] See Rowley and Campbell, "Refusal to Deal (With Economics)," *supra* note 1 at 21-22.
[108] *Xerox, supra* note 3 at paras. 71-72. See also Rowley and Campbell, "Refusal to Deal (with Economics)," *supra* note 1 at 6.
[109] *Warner supra* note 71 at para. 30.
[110] See the definitions in *Competition Act*, s. 2, reproduced *supra* notes 65 and 67.
[111] Indeed intellectual property is arguably more inherently in ample supply because it is not subject to the physical capacity constraints that may arise in respect of tangible products (such as the motorcycles at issue in *Quinlan's v. Deeley, supra* note 90).
[112] See *Competition Act*, s. 75(3); and the discussion in part II(B)(iii) above.
[113] See *Competition Act*, s. 79(4), which provides that the exercise of intellectual property rights cannot constitute a "practice of anti-competitive acts."
[114] In *Cinémas Guzzo Inc. v. Canada (Attorney General)* (2005), 47 C.P.R. (4th) 250 at para. 56 (F.C.), Rouleau J. distinguished *Warner* on the facts, but stated that "in my view, the term 'product' does, within the meaning of the *Act*, include licences, since to conclude otherwise would prevent the *Act* from having any application at all in the area of intellectual property." The Federal Court of Appeal ([2006] F.C.J. No. 721) characterized Rouleau J.'s statement in respect of *Warner* to be *obiter* since "no serious debate was undertaken concerning the correctness and the application of *Warner*" (para. 7).
[115] Competition Bureau, *Intellectual Property Enforcement Guidelines* (2000) *[IPEGs]*, at 7-8. This portion of the *IPEGs* has been supportively cited by the Federal Court of Appeal in *Eli Lilly and Co. v. Apotex Inc.*, 2005 FCA 361, [2006] 2 F.C.R. 478, at para. 34.
[116] *B-Filer Inc. v. Bank of Nova Scotia* (2005), 44 C.P.R. (4th) 214 (Comp. Trib.) *[B-Filer v. Bank of Nova Scotia (Leave Decision)]*. (The section 103.1 mechanism is described in greater detail at part III(B), below.)
[117] *Ibid.* at para. 15.
[118] *B-Filer Inc. v. Bank of Nova Scotia (Merits Decision), supra* note 93 at paras. 124 and 127.
[119] *Ibid.* at paras. 179-180. There is no specific defense related to a supplier's business reasons for the termination. However, such evidence can be relevant to determining whether the inability to obtain supply is the result of insufficient competition (s. 75(1)(b)) or some other reason. The Tribunal could also consider such factors when exercising its discretion as to whether or not to make a supply order (it "may" issue an order if all the elements in s. 75(1) are satisfied).

[120] *Ibid.* at paras. 218 and 229.
[121] *Nadeau v. Westco (Merits Decision), supra* note 86.
[122] *Ibid.* at para. 246. The Tribunal noted there were numerous suppliers and no evidence they were not acting independently.
[123] *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2011 Comp. Trib. 10 *[UCDA v. IBC (Leave Decision)]*. The author is counsel to the UCDA. The Tribunal declined to grant leave in respect of the separate application by UCDA under the price maintenance provision in s. 76 of the *Act*.
[124] *Used Car Dealers Association of Ontario v. Insurance Bureau of Canada*, 2012 Comp. Trib. 11 *[UCDA v. IBC (Interim Supply Decision)]*.
[125] *Cf. Competition Act*, ss. 79(1)(a) versus 75(1)(b).
[126] *Ibid.* ss. 79(1)(b) versus 75(1)(a) and (e).
[127] *Ibid.* s. 78.
[128] See Competition Bureau, *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (Ottawa: Industry Canada, 2009), online: < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html > *[2009 Draft Abuse Guidelines]*, s. 4.2. This reference has been removed from the *2012 Draft Abuse Guidelines*, *supra* note 28.
[129] *Canada Pipe (FCA), supra* note 33 at paras. 65-69.
[130] See *e.g.* Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* (Ottawa: Industry Canada, 2008), ss. 1.2 and 4.2 (discussing the unique characteristics of the telecommunications industry and the potential for triggering section 77 or 79 scrutiny if there is a foreclosure of access).
[131] *Cf. Competition Act*, ss. 79(3.1)-(3.3) versus 75(1).
[132] *Ibid.* s. 77(1).
[133] *Canadian Competition Policy*, *supra* note 13 at 416.
[134] *Ibid.* at 417-419.
[135] See *Competition Act*, s. 77(3):

> Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

[136] See part II(A)(iii) above.
[137] See, *e.g.*, Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: Competition Bureau, 2011), online: <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.htm>, s. 4; *2012 Draft Abuse Guidelines*, *supra* note 28, s. 2.1; and Competition Bureau, *Competitor Collaboration Guidelines* (Ottawa: Competition Bureau, 2009), online: <www.compeition bureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.htm>, s. 3.4.
[138] See *Competition Act*, s. 77(3), reproduced *supra* note 133.
[139] *Continental TV Inc. v. GTE Sylvania Inc.* (1977), 433 U.S. 36 at 54.

[140] See *Stage One Amendments*, *supra* note 6.
[141] *Construx Engineering Corp. v. General Motors of Canada Ltd,*. 2005 Comp. Trib. 21 *[Construx v. General Motors]*.
[142] *Polaroid Canada Inc. v. Continent-Wide Enterprises Ltd.* (1994), 59 C.P.R. (3d) 297 (Ont. Gen. Div.). See also the discussion of reviewable practices jurisprudence *supra* note 13.
[143] See the discussion in part II(A)(vi) above and the proposed addition to the Bureau's guidelines *supra* note 65.
[144] See, *e.g.*, Rowley and Campbell, "Reviewable Practices," *supra* note 5 and sources cited therein.
[145] See, *e.g.*, Kent Roach and Michael J. Trebilcock, Private Party Access to the Competition Tribunal (prepared for the Amendments Unit of the Competition Bureau, 7 May 1996) *[Roach/Trebilock Study]* and their subsequent published article, "Private Enforcement of Competition Laws" (1997) 34 *Osgoode Hall Law Journal* 461.
[146] Bureau of Competition Policy, "*Competition Act* Amendments" (Ottawa: Industry Canada, 1995) at 21-23.
[147] *Ibid*. at 21.
[148] "Report of the Consultative Panel on Amendments to the *Competition Act* to the Director of Investigation and Research, *Competition Act*, Mr. George N. Addy" (Ottawa: Industry Canada, 1996), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01272.html#app1>, at 32.
[149] *Ibid*. at 26.
[150] For an overview and assessment of the *Roach/Trebilock Study*, *supra* note 143, the cost study by the accounting firm Wise, Blackman (see *infra* note 195) and an international comparative legal analysis by Professor R. Jack Roberts, see Rowley and Campbell, "Reviewable Practices", *supra* note 5 at 26-29.
[151] Competition Bureau, "Amending the *Competition Act*: Discussion Paper on Meeting the Challenges of the Global Economy" (Ottawa: Industry Canada, 2000), online: < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01849.html>.
[152] House of Commons, Standing Committee on Industry, Science and Technology, 37th Parl., 1st Sess., Nos. 37, 38, 40, 41, 42, 48, 49, 50, 56 and 60 (4 October 2001 – 4 December 2001).
[153] Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2002, cl. 12 (assented to 4 June 2002), S.C. 2002, c. 16.
[154] *Competition Act*, ss. 103.1(2)-(5) and (10)-(12). The double jeopardy protection is embedded at the beginning of the leave process. The application must be served on the Bureau in addition to the respondent(s). To prevent overlap or conflict between a Bureau investigation or proceeding and the application of a private party, the Bureau must advise the Tribunal within 48 hours of receipt whether there are any ongoing inquiries or settlements related to the same matter. The Tribunal is precluded from proceeding in either situation. Moreover, if a private party is granted leave and moves forward with its application, the Bureau then is barred from commencing its own proceeding (but may participate in the private proceeding).
[155] See the discussion of the "adverse effect on competition" element of refusal to deal in part II(B)(iii) above.
[156] *Ibid.*, s. 103.1(1).

[157] *Competition Tribunal Rules*, SOR/2008-141, ss. 119-120.
[158] See *Competition Act*, s. 103.1(7):

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

[159] *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41 *[National Capital News v. Speaker]* at para. 8.
[160] *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 FCA 339.
[161] *Ibid.* at para. 17. The Court noted that the standard is below the "balance of probabilities" standard applicable to the decision on the merits.
[162] *Ibid.* at paras. 18-19. Thus, the Court overturned Lemieux J.'s holding in the Tribunal's leave decision (*infra* note 170 at para. 8) that an "adverse effect on competition" was not a relevant element of the section 103.1 analysis: *ibid.* at para. 23.
[163] *B-Filer v. Bank of Nova Scotia (Leave Decision)*, *supra* note 114, particularly at paras. 61-63 (denying leave under section 77, but granting it under section 75).
[164] *Olah v. Canada (Correctional Service)*, 2008 CarswellNat 5948 (WL) (Comp. Trib.) at para. 10.
[165] *Annable v. Capital Sports & Entertainment Inc.*, 2008 Comp. Trib. 5 at paras. 8-10.
[166] *Construx v. General Motors*, *supra* note 139 at paras. 8-9.
[167] *B-Filer v. Bank of Nova Scotia (Leave Decision)*, *supra* note 114; and *(Merits Decision)*, *supra* note 93.
[168] *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 7 [*Nadeau v. Westco (Leave Decision)*]; and *Nadeau v. Westco (Merits Decision)*, *supra* note 86.
[169] *Morgan v. La-Z-Boy*, *supra* note 77 (granting leave). For the applicant's notice of discontinuance, see online: <http://www.ct-tc.gc.ca/CMFiles/CT-2003-009_0025_45QIS-482005-6040.pdf>.
[170] *Quinlan's v. Deeley*, *supra* note 90. For the order dismissing the proceeding, see 2005 Comp. Trib. 20.
[171] *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 6 (granting leave). For the order dismissing the proceeding, see 2005 Comp. Trib. 39.
[172] *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1 (granting leave). For the rescission decision, see *Symbol Technologies Canada ULC v. Barcode Systems Inc. and PriceWaterhouse Coopers Inc. as Interim Receiver of Barcode Systems Inc.*, 2005 Comp. Trib. 32.
[173] *UCDA v. IBC (Leave Decision)*, *supra* note 121. In March 2012, the applicant successfully resisted the respondent's attempt to rescind the interim supply order: *UCDA v. IBC (Interim Supply Decision)*, *supra* note 122.
[174] *Construx v. General Motors*, *supra* note 139 (denying leave).
[175] *Sears. v. Dior*, *supra* note 83 (denying leave).
[176] *Sono Pro v. Sonotechnique*, *supra* note 76 (denying leave).
[177] *Paradise v. Novartis*, *supra* note 75 (denying leave).
[178] *Broadview v. Wyeth*, *supra* note 75 (denying leave).
[179] See *National Capital News v. Speaker*, *supra* note 157 (leave denied); and *National Capital News Canada v. Speaker of the House of Commons*, 2007 Comp. Trib. 23 (no

change in circumstances that would change the prior denial of leave).
[180] *Swenson Inc. v. Trader Corp.*, 2008 Comp. Trib. 20.
[181] *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority*, 2011 Comp. Trib. 1 particularly at para. 13.
[182] *Competition Act*, s. 104(1).
[183] *Nadeau v. Westco*; Quinlan's *v. Deeley*; *Morgan v. La-Z-Boy* and *UCDA v. IBC*.
[184] *B-Filer v. Bank of Nova Scotia*.
[185] *Canadian Standard Travel Agent Registry v. International Air Transport Association*, CT/2008-006, 30 May 2008.
[186] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 *[RJR-MacDonald]*.
[187] See *Nadeau Poultry Farm Limited v. Groupe Westco Inc et al.*, 2008 Comp. Trib. 16 *[Nadeau v. Westco (Interim Supply Decision)]* at para. 8; and *Quinlan's of Huntsville Inc. v. Fred Deeley Imports.*, 2004 Comp. Trib. 28 *[Quinlan's v. Deeley (Interim Supply Decision)]* at para. 5.
[188] *RJR-MacDonald*, *supra* note 183 at para. 54; *Nadeau v. Westco (Interim Supply Decision), supra* note 184 at 15; and *Quinlan's v. Deeley (Interim Supply Decision), supra* note 184 at para. 24.
[189] *RJR-MacDonald*, *supra* note 183 at para. 64.
[190] *Nadeau v. Westco (Interim Supply Decision), supra* note 184 at paras. 25 and 28.
[191] *Ibid.* at para. 29; and *ICDA v. IBC (Interim Supply Decision), supra* note 122 at para. 46. The same approach was adopted in *UCDA v. IBC (Interim Supply Decision), supra* note 122 at para 45.
[192] *Quinlan's v. Deeley (Interim Supply Decision), supra* note 184 at para. 26.
[193] *RJR-MacDonald Inc. v. Canada (Attorney General), supra* note 183, at 342; and *Nadeau v. Westco (Interim Supply Decision), supra* note 184 at para. 44.
[194] *Quinlan's v. Deeley (Interim Supply Decision), supra* note 184, at para. 27.
[195] *Ibid.*, at para. 24.
[196] *UCDA v. IBC (Interim Supply Decision), supra* note 122 at para. 48.
[197] *Canada Pipe (Reconsideration Decision), supra* note 50.
[198] Deloitte & Touche, "Assessing the Cost of Private Litigation of *Competition Act* Reviewable Practices" (2 November 1998), in Competition Policy Group, *Should Reviewable Practices Be Turned Into Competition Torts?* (2001).
[199] Wise, Blackman, "Study of the Historical Cost of Proceedings before the Competition Tribunal" (26 March 1999), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01313.html#4>.
[200] See, *e.g.*, A. Neil Campbell, Hudson J. Janisch and Michael J. Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) 76 *Canadian Bar Review* 297.
[201] As required by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended, s. 9(2).
[202] See *Competition Tribunal Rules*, SOR/208-141. The 2008 amendments replaced the 1994 version of the rules, which had been amended in 2002 in response to the changes in the *Act* that introduced private actions.
[203] A four-week hearing took place in *B-Filer v. Bank of Nova Scotia (Merits Decision), supra* note 93. There were 12 hearing days at the Tribunal in *Nadeau v. Westco (Merits Decision), supra* note 93.

[204] See the records of the following proceedings on the Competition Tribunal's website (online at: <www.ct-tc.gc.ca>): *Canada (Commissioner of Competition) v. CCS Corporation et al.*, CT #2011/002 (challenge of a completed merger under s. 92); *Canada (Commissioner of Competition v. VISA Canada Corporation and MasterCard International Incorporated et al.*, CT #2010/010 (alleging price maintenance under s. 76); *Canada (Commissioner of Competition) v. Air Canada and United Continental Holdings et al.*; CT #2011/004 (challenging competitor agreements under s. 90.1 and a proposed merger under s. 92); and *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, CT #2011/03 (alleging abuse of a dominant position under s. 79).

[205] *Competition Tribunal Act*, s. 8.1. Cost awards by the Tribunal are based on Tariff B of the *Federal Court Rules*, SOR/98-106, and in practice result in only partial indemnification.

[206] *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 40.

[207] *Ibid.* at para. 17.

[208] *2009 Draft Abuse Guidelines*, *supra* note 126, s. 2.2 and Appendices II and III.

[209] The Bureau's *2012 Draft Abuse Guidelines*, *supra* note 28, remove the appendices that contained the detailed analysis of these practices.

[210] Competition Bureau, *Information Bulletin on Private Access to the Competition Bureau* (Ottawa: Industry Canada, 2005), online: < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01392.html >.