THE CHARACTERIZATION OF THE CONCEPT OF ABUSE IN THE REGULATION OF THE DOMINANT POSITION OF COMPANIES*

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The author shows that the characterization of the concept of abuse of dominant position depends on two separate and cumulative legal tests. The first one calls for a determination of the existence of an anti-competitive act, while the second calls for a determination of the effect of the prevention or lessening of competition. In applying the first test, one must look for the purpose of the practice by studying its intentional negative effect on one or more competitors. In that framework, the respondent company may argue that there is a credible and overriding business justification to refute the existence of an effect that excludes or disciplines a competitor. In applying the second test, one must appreciate the practice's effect on competition by following a comparative methodology based on either the but for test, already applied, or the detriment to the consumer test, which could apply in future cases involving section 79 of the Competition Act.

L'auteur montre que la caractérisation de la notion d'abus de position dominante repose sur deux critères légaux distincts et cumulatifs dont le premier exige la constatation de l'existence d'un agissement anti-concurrentiel, alors que le second nécessite la détermination de l'effet d'empêchement ou de diminution de la concurrence. L'application du premier critère requiert la recherche de l'objet du comportement en scrutant son effet négatif intentionnel sur un ou des concurrents. Dans ce cadre, l'entreprise intimée peut alléguer l'existence d'une justification commerciale crédible et prépondérante pour réfuter l'existence d'un effet d'exclusion ou de mise au pas d'un concurrent. L'application du deuxième critère exige l'appréciation de l'effet du comportement sur la concurrence en suivant un cadre méthodologique comparatif et relatif à l'aune du critère de l'absence hypothétique (but for test) déjà appliqué ou celui du préjudice au consommateur qui pourrait trouver application dans de futures affaires mettant en cause l'article 79 de la Loi sur la concurrence.

Introduction

Like the competition laws of most nations and regions,[2] Canadian law[3] does not, as such, prohibit a company from dominating a market. Rather, it is the abusive exploitation of a dominant position that is prohibited by section 79 of the *Competition Act*[4] ("CA"). To bring it into play, the cumulative existence of three distinct factors must be established, the first being the identification of the existence of a market power[5] that is substantial[6] and the other two being the characterization of the concept of abuse through the concepts of "a practice of anti-competitive acts"[7] with the effect of "the prevention or lessening of competition."[8] Accordingly, the Competition Tribunal (the "Tribunal") can only make a remedial order and/or impose administrative monetary penalties ("AMP") based on section 79 if the company in question holds a dominant position in the relevant market and has engaged in an anti-competitive act that substantially lessens competition.

The purpose of this paper is to highlight the fundamental legal characteristics of the concept of abuse, as understood in sections 79 and 78 CA, based on its interpretation in the case law[9] and the subsequent doctrinal critiques.[10] This paper is also part of a broader debate over the difficulties in drawing a proper distinction between a legitimate act and conduct that lessens competition when determining what constitutes abuse of dominant position.[11] More particularly, the study delves into the specific problem of defining a suitable standard to detect *abuse* resulting from unilateral behaviour by a dominant company, along with the resulting legal[12] and economic[13] consequences. Automatically, that study will not include the aspects surrounding the determination of a dominant position or a market control situation.[14] Moreover, at a point where Canadian law is entering a period known as "postmodern"[15] with, in particular, the imposition of AMPs that can be as high as CA$10 million left to the discretion of the Tribunal[16] in the event of the abuse of dominant position, it becomes important to determine what characterizes the concept of abuse referred to in sections 79 and 78 CA. That is the essential objective of this paper.

Accordingly, the structure of this study encompasses the normative framework imposed by the analysis and interpretation of the concept of abuse through a company's dominant position. It is based on two

separate legal tests called for by section 79 and established in the case law.[17] First, the legal test called for by paragraph 79(1)(b) CA requires the identification of the anti-competitive purpose of the conduct, which is analyzed, in this circumstance, through its intentional negative effect on the competitor (**1**); second, paragraph 79(1)(c) CA measures the effect of the conduct on the market; which must lead to the prevention or lessening of competition (**2**).

1. The anti-competitive purpose of the act, predatory goal or design

To characterize the existence of abuse as understood in section 79 CA, the first stage consists in identifying the "practice of anti-competitive acts." While the interpretation of the concept of a "practice" does not raise any major difficulties, since it excludes isolated or situational behaviours and strategies by companies and is primarily aimed at acts that cover a certain period of time,[18] that is not the case for "anti-competitive acts" which, in this context, are viewed more subjectively by focusing on the determination of the purpose of the act engaged in. The predatory goal or design of the company in question must lie at the heart of its conduct. As the FCA reminded us in *Canada Pipe*: "'[p]urpose' is used in this context in a broader sense than merely subjective intent on the part of the respondent [...]. In order to apply paragraph 79(1)(b), the purpose or character of the impugned conduct must therefore be determined."[19]

The identification of this predatory purpose raises three sets of difficulties relating to its *manifestation*, its *proof*, and the possibility of its *justification*. Thus, conduct constitutes an anti-competitive act if it is aimed at excluding or disciplining a competitor, first of all (**1.1**); then this element may be proven directly through subjective intent or indirectly by resorting to circumstantial evidence (**1.2**). Meanwhile, the conduct is in no way based on any credible and overriding justification (**1.3**).

1.1 The manifestation of the act: the effect of excluding or disciplining a competitor

The interpretation of the concept of an anti-competitive act focuses on the importance of considering the effect of the act on one or more

competitors (1.1.1.), which consequently puts priority on the detection of the class of exclusionary abuses (1.1.2.).

1.1.1 The importance of the effect of the act on one or more competitors

Conduct constitutes an anti-competitive act within the meaning of paragraph 79(1)(b) CA if, first and foremost, its purpose is to exclude or discipline a competitor. The effect under consideration at this stage is the one that the company's conduct has on its actual or potential competitor or competitors. As the FCA states in *Canada Pipe*, it would be premature and irrelevant to measure or consider the effect of the conduct on competition. Rather, the analysis should focus on the effects of the act on one or more competitors:

> The paragraph 79(1)(*b*) inquiry is thus focused upon the intended effects of the act *on a competitor*. As a result, some types of effects on competition in the market might be irrelevant for the purposes of paragraph 79(1)(*b*), if these effects do not manifest through a negative effect on a competitor. It is important to recognize that "anti-competitive" therefore has a restricted meaning within the context of paragraph 79(1)(*b*). While, for the Act as a whole, "competition" has many facets as enumerated in section 1.1, for the particular purposes of paragraph 79(1)(*b*), "anti-competitive" refers to an act whose purpose is a negative effect on a competitor.[20]

While this statement may seem clear in theory, in practice it can be extremely difficult to isolate the effects of the conduct on competitors from its effects on competition in general, and the market in particular. The link between competition and the competitors seems inextricable, for there can be no competition without competitors.[21] As the doctrine has already found, the FCA's definition of anti-competitive acts "raises the spectre of protecting competitors rather than competition."[22] Indeed, a pro-competitive act can have the effect of harming a competitor, especially if that competitor is not efficient:[23] a vigorous competitive process[24] where market share is gained often "harms" competitors.[25] The provision regarding abuse of dominant position is not designed to penalize "winners," that is, companies that have achieved dominance primarily due to their ingeniousness, good

performance, and/or technological advances, in short, because of their merit.[26] It does not censure "reasonable competitive conduct."[27]

In this regard, how then are we to distinguish between a legitimate act which, in essence, "*harms*" or *hinders* a competitor and an anti-competitive act that is purely and simply designed to *exclude* or *discipline* a competitor? For this purpose, it is essential to rely on a careful and detailed analysis of the intent behind the impugned conduct and its exclusionary or disciplinary effect on a competitor. To satisfy the requirement of paragraph 79(1)(b), one must therefore determine the purpose or character of the impugned conduct,[28] and its predatory consequences on a competitor. Accordingly, an anti-competitive act is "one whose purpose is an intended negative effect on a competitor that is [...] exclusionary or disciplinary."[29] It is therefore the *intent to eliminate competitors*, in this instance, the market takeover strategy, that serves as a test for the definition of the anti-competitive act referred to in paragraph 79(1)(b). Such elimination may consist of either the exclusion of competitors that are already in the relevant market or potential competitors, or the "disciplining" of existing competitors by preventing or slowing down their expansion in the market.

Accordingly, it is important to distinguish and identify the nuance between an anti-competitive act as understood in paragraph 79(1)(b) CA, and a normal act which, although it may even be "tough," hinders a competitor but is not anti-competitive in nature. The nuance between these two types of conduct, the former potentially being deemed abusive while the latter is tolerated, lies primarily in the *intent* behind the conduct: it is permissible, for example, to engage in acts designed to protect the company's commercial interests by making it outperform its competitors, but it is not permissible to engage in acts designed for the sole purpose of excluding from the market or knowingly hindering the expansion and advancement of competitors. A quick review of the *Tele-Direct*[30] and *Nielsen*[31] cases will illustrate the cryptic distinction between an act that is anti-competitive and an act that is normal and legal.

In the *Tele-Direct* case, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc. (hereinafter collectively "Tele-Direct") controlled the Canadian regional markets for the provision of space and services in an advertising directory of the "Yellow Pages" variety; Tele-Direct

had no competition other than in two regional markets in Ontario. In adapting to that regional competition in Ontario, Tele-Direct had adopted, for those markets only, a series of measures that were very aggressive, but beneficial to its customers, such as holding prices for several years, offering extra services free of charge, and improving the quality and look of the directories. In his application, the Director of Investigation and Research (now the "Commissioner of Competition") argued that this aggressive policy by Tele-Direct constituted an anti-competitive act. He also contended that the respondent had restricted the adoption of those measures to the only markets where it felt competitive pressure (market targeting policy). The Tribunal took note of Tele-Direct's response to the arrival of new competitors and found that the aggressive policy adopted by the company, in the form of lower prices or the targeting of newcomers, did not constitute an anti-competitive act. The Tribunal found that the fact of reacting to the arrival of new competitors by adopting an aggressive policy was consistent with the purpose of paragraph 79(1)(b) and section 1.1. CA. It noted that "[c]ompetition, even 'tough' competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct."[32]

However, in the *Nielsen* case, the Tribunal was able to characterize certain predatory practices that intentionally had an adverse effect on a competitor as anti-competitive. D & B Company (Nielsen) had signed contracts with all of the major grocery stores and drugstores which gave it exclusive access to their data collected by scanning bar codes at the checkout. An exclusivity clause in those contracts required that Nielsen's co-contracting parties not communicate that data to anyone but Nielsen. Accordingly, Nielsen was obtaining that data for onerous title; some of the contracts stipulated that if the retailer ever communicated the data to another company, Nielsen would pay it less and the retailer would be required to return the earlier payments. The contracts generally had a five-year term. The Tribunal found that "[TRANSLATION] the standard exclusivity clauses had inarguably had the effect of preventing any potential competitor from obtaining the retailer's scanned data."[33] The Tribunal added that Nielsen could be deemed to have deliberately sought that result and then noted that the spacing of the contract renewals confirmed the intent to keep out potential competitors.[34]

In light of the case law, the line between an anti-competitive act and competitive conduct (for instance, a defensive or offensive response to the arrival of new competitors) is definitely blurry, tenuous, and porous, but it depends on a subjective factor: intent. To be anti-competitive, the conduct must not just cause harm to the competitors, for it is in the nature of a competitive act to "harm" competitors by spurring them to improve themselves and thus benefit society. To fall under the auspices of paragraph 79(1)(b) CA, the impugned conduct must go farther and be aimed at *excluding, evincing or disciplining* competitors: this presupposes the capacity to distinguish between a bona fide intent to do better than one's competitors and the intent in bad faith to exclude them or squeeze them out of the market.[35]

Based on the foregoing, the analysis of the purpose of the conduct should serve to determine whether it is competitive conduct or anti-competitive conduct. Accordingly, the motive for the act, the intent behind it and the design ascribed to it constitute essential elements for determining its pro- or anti-competitive nature.[36] In summary, conduct will be an anti-competitive act as understood in paragraph 79(1)(b) if its purpose is to exclude or discipline a competitor, not because of the effect of the act on competition. Here, no reference is made to the effect of the act on competition or consumers. The analysis must essentially be limited to the predatory intent against the competitor. Which is why the FCA held, on this point, in *Canada Pipe*, that the Tribunal had erred in law in applying paragraph 79(1)(b). Indeed, the Tribunal had decided that the discounts and rebates granted by Canada Pipe under its stock distribution program (SDP) did not constitute an anti-competitive practice inasmuch as they did not have the effect of lessening competition.[37] However, the FCA bore in mind that the determining factor in the analysis of paragraph 79(1)(b) is not the effect on competition, but rather the intentional negative effect on one or more competitors.[38] This approach indicates a leaning of the concept of anti-competitive conduct toward the category of exclusionary practices.

1.1.2. A leaning toward the category of exclusionary practices

An anti-competitive act is not, ultimately, determined either by reference to the effect of the act on competition,[39] or by reference to its impact on the consumer's welfare.[40] One must rather consider the intentional negative purpose of the conduct on the competitor. A negative effect

on a competitor is either exclusion or discipline. In this regard, section 78 CA sets out, for illustrative, indicative and non-exhaustive purposes, a list of practices that could constitute an anti-competitive act. In considering the anti-competitive acts listed in section 78, the Tribunal deemed, in *NutraSweet,* that the common denominator between all the anti-competitive acts listed, other than paragraph 78(1)(f), lay in the anti-competitive design pursued by the author of the act, which is to either exclude or discipline competitors.[41] In fact, this case law definition of an anti-competitive act primarily targets the specific category of exclusionary or predatory practices which are often contrasted, in this area, with exploitative practices. After having summarily presented the often overlooked distinction between the exclusionary anti-competitive act and the exploitative anti-competitive act, we will then show that the definition of the anti-competitive act, as conceived of and interpreted by the courts, dips inexorably toward the category of exclusionary and evincing practices, to the detriment of exploitative practices.

Having appeared in connection with the assessment of market power, the distinction between exclusionary practices and exploitative practices lies in the manner in which a dominant company is likely to engage in an anti-competitive practice, either through exclusionary acts or by exploiting its strong position to the detriment of the market players. In the first scenario, the dominant company adopts exclusionary conduct in order to push up its competitors' production costs: for example, the company may sign long-term exclusive supply contracts with the manufacturer of a product which will thus remain unavailable to its competitors; those competitors will then be forced to use a more expensive or lower-quality product than the shut-out product, which will increase their costs. The resulting increase in the competitors' costs[42] causes a decrease in production on the market; and thus prices will be maintained or forced to rise. This power shows the company's ability to shut out its competitors and refers to the exclusion dimension of market power, highlighted by Bain.[43] Thus, the dominant company tries to shut its current competitors out of the market, slow down their development (expansion), or prevent potential competitors from entering the market. The goal is to gain a monopolistic position which it can then capitalize on by raising its prices and/or decreasing the selection and quality of the products offered to the consumer. Such acts constitute "exclusionary or predatory practices." Meanwhile,

in the second scenario, the company limits its own production in order to maintain or increase the price. In particular, this power is indicative of the ability to directly increase the price by limiting production. This is the exploitative dimension of market power attributed to Stigler.[44] The dominant company directly exploits its market power and uses it against its business partners or customers, engaging in an "exploitative abuse." Practices are thus known as "exploitative" when they result from acts the dominant company uses to profit the most from its economic power, at the expense of its co-contracting parties. By way of illustration, such practices as discriminatory pricing, reducing supply for certain customers during a shortage, and setting overly high prices in relation to the value of the service can all be considered exploitative abuses.

Given the current state of the interpretation of paragraph 79(1)(b) CA, the primary purpose of this paper is to consider essentially exclusionary or predatory practices. Not only because the definition given to this concept by the courts is based on the practice's effects on a competitor, as we have just seen, but also because, for one thing, the indicative list contained in section 78 CA contains only (except for 78(1)(f)) exclusionary practices and, for another, in its recent *Guidelines*, the Competition Bureau does not raise the possibility that the anti-competitive act could result from an exploitative practice.

To begin with, a summary analysis of the list drawn up in section 78 CA shows that it contains, essentially, and for illustrative and indicative purposes, only exclusionary practices. It must be remembered that the wording of the section merely supplements and illustrates, for indicative purposes, the definition of the concept of an anti-competitive act contained in paragraph 79(1)(b) CA, which means that any practice not listed in this provision can nevertheless be deemed to be an anti-competitive act. Notwithstanding this limitation, an analysis of the wording lets us consider what Parliament wanted, as of the adoption of the CA, to categorize as anti-competitive acts for *illustrative* purposes. Subsection 78(1) CA reads as follows:

> 78. (1) For the purposes of section 79, "anti-competitive act," without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

With the exception of item (f), this list contains most of the exclusionary practices. These are the significant exclusionary practices adopted

by dominant companies which result in the evincing or disciplining of real or potential competitors. Indeed, this provision contemplates eight forms of exclusionary practices, running the gamut from the squeezing of margins or prices [78(1)(a) CA] to exclusivity [78(1)(h) CA], to predatory pricing practices [78(1)(i)], including predatory standard-setting [78(1)(g)] and the pre-emption of scarce facilities [78(1)(e)]. These exclusionary practices must, of course, be aimed at excluding or disciplining a competitor in order to be characterized as anti-competitive acts.

Then, in its recent *Enforcement Guidelines* on the abuse of dominance provisions, the Competition Bureau only raises exclusionary practices as anti-competitive acts, which it divides into exclusionary and predatory conduct, while ignoring exploitative practices.[45] Exclusionary conduct is defined based on the standard of raising rivals' costs, while predatory conduct primarily contemplates predatory pricing.[46] No reference is made to exploitative practices as defined below. This fact situation is due to the suspicion that has developed toward the exploitative practices category, notably the practice of overpricing.[47] In addition, since exclusionary abuses are behind exploitative abuses and often enable their commission, prioritizing the former has been accepted.

Regardless, in principle nothing prohibits extending the application of paragraph 79(1)(b) CA to exploitative practices, which have the effect of excluding or disciplining a competitor, such as the practice of predatory pricing. The Tribunal may have to rule on this question eventually, and it will certainly require an appreciation of the evidence which, in that instance, may be circumstantial or objective.

1.2. Establishment of the anti-competitive act: the admission of circumstantial or objective evidence

In principle, the nature of the conduct and its purpose are the main factors to be considered in determining whether an act has the anti-competitiveness required by paragraph 79(1)(b) CA. Accordingly, only the *factors* which tend to prove the negative intent to exclude and/or discipline one or more competitors seem pertinent for determining the anti-competitive nature of the act. A summary review of the *Canada Pipe* case will illustrate the importance of identifying the pertinent

factors tending to establish the existence or non-existence of a negative intent against a competitor.

Canada Pipe Ltd. had a commercial policy of granting its distributors discounts and rebates on their purchases if they would agree to buy their cast-iron drain, waste and vent products (waste and ventilation products) exclusively from its subsidiary, Bibby Ste-Croix (Bibby). This stocking distributor program (SDP) rewarded the participating distributors through a discount and two rebates.[48] The discount, granted at the time of purchase, could reach 45% of the list price and could not be recovered by Bibby when the distributor decided to opt out of the SDP. The two discounts of 7% and 4% applied respectively to the volume of products purchased on a quarterly and annual basis. The distributors were free to opt in or out of the SDP at any time, since opting out at the end of a calendar year entailed no loss of rebates.

The question that held the Tribunal's attention was whether the SDP was anti-competitive in nature, not only due to its purpose and character but also due to its effect on the competition based on the tests suggested by paragraphs 79(1)(b) and 79(1)(c) CA.

Reviewing all of its previous case law and recognizing the subtle distinction between an anti-competitive act and a legitimate act, the Tribunal found that the SDP was not anti-competitive, inasmuch as the system set up by Bibby did not shut out access to the market, on the one hand, or force the resellers to buy from it, on the other. As for the determination of whether the SDP had an exclusionary effect, the Tribunal found that such nature is discovered by considering, first and foremost, the costs involved in switching suppliers: "[TRANSLATION] the anti-competitive effect depends on the costs of switching suppliers."[49] However, in this case, the only costs of switching were the rebates that had to be given up if one switched suppliers. A distributor that opted out of the SDP lost the fraction of the annual rebate corresponding to the period elapsed since the beginning of the year, but it could opt back into the program, on the same conditions, the next quarter. Notwithstanding the questionable loyalty-building nature of such a program, the Tribunal found it legitimate, in the following words:

> [TRANSLATION] While it is true that the SDP rebate and discount structure is an inducement to exclusivity, the Tribunal cannot

> conclude, in this case, that this program had an effect tending to exclude [...]. In the case at bar, consumers can only obtain the purchasing rebates and discounts by buying cast-iron products exclusively from Bibby, but those rebates and discounts only constitute a financial inducement to join the SDP.[50]

By categorizing the SDP discounts and rebates as financial inducements to exclusivity, the Tribunal recognized not only their legitimacy, but also their competitive character, inasmuch as the central point concerning the costs of switching suppliers showed no adverse impact on competition or any exclusionary effect on the market. The Tribunal based itself preponderantly on the potential competition, that is, access to the market which remained open and thereby validated the SDP: "[TRANSLATION] [t]he Tribunal recognizes that getting into the market can be difficult, but this difficulty does not seem to be related to the SDP [...]. That is how, the SDP notwithstanding, new businesses got a foothold in the market."[51]

It is this reasoning by the Tribunal that would be censured by the FCA on appeal. According to the FCA, the Tribunal erred in law by assigning an overriding value to access to the market and, especially, by not having adopted the tests suggested by the application of paragraphs 79(1)(b) (anti-competitive purpose) and 79(1)(c) (effect of preventing or lessening competition).

Accordingly, as regards the determination of the anti-competitive purpose of the SDP, which is what concerns us in this section, the FCA reproached the Tribunal for not having made an analysis based on the determination of the predatory intent aimed at harming competitors as required by paragraph 79(1)(b) CA. This determination, inferred directly or indirectly, is unrelated to the considerations involving the link that must exist between the impugned conduct and the diminishing of competition on the one hand, and the detriment to consumers on the other hand. According to the FCA, these two aspects are not relevant in applying paragraph 79(1)(b).[52] The CAF insisted on the importance of considering, in this regard, only the factors and elements that *establish* the negative intent to exclude and/or discipline a competitor, in these words:

> Obviously, if an act is to be found anti-competitive, there must be evidence linking the impugned practice to the requisite intended negative effect on a competitor: the practice must be found to cause or at least contribute to the intended negative effect. Such a negative effect on a competitor must also be found to be the "purpose" of the practice in question, and to this end, all relevant factors must be taken into account and weighed to determine if the requisite purpose is established.[53]

While it is important to focus on the elements and factors that tend to demonstrate the predatory purpose of the anti-competitive conduct, an equally fundamental question concerns the *manner* in which it must be *proven*. From this point of view, even though it remains fundamental in the context of the application of paragraph 79(1)(b) CA, the anti-competitive design requirement,[54] manifested by an exclusionary or disciplining effect on a competitor, in no way means the establishment of direct evidence of the subjective intent. The FCA, like the Tribunal, limited the scope of the predatory intent by finding, rightly, that the anti-competitive design need not be proven directly by any subjective intent. In this regard, it is sufficient to establish such anti-competitive intent by resorting indirectly to evidence inferred or deduced from the circumstances of the case, notably, by an appreciation of the objective effects that are foreseen or reasonably foreseeable from the conduct in question.[55]

Given the difficulty of resorting, in the field of business, to direct evidence of the subjective intent in view of the obstacles to gaining access to internal documents establishing such evidence, in the form of oral or written statements by the management personnel of a company, it is therefore more feasible to use, in this specific context, indirect evidence based on the presumption of knowledge of the effects and consequences that can reasonably be foreseen from the conduct. In other words, proof of the predatory intent to exclude or discipline a competitor can be made *objectively* in reliance on the consequences that are foreseeable from the conduct in question, by inference or deduction. In *Laidlaw,* the Tribunal had already ruled unequivocally in this regard, in these words:

> [TRANSLATION] A demonstration of subjective intent [...] is not required to find the existence of anti-competitive practices.

> Demonstrating that there was a subjective intent is often next to impossible when dealing with large corporations, unless compelling evidence is available [...]. Section 79 of the act provides for both prosecution and civil penalties. In this context, whether dealing with companies or individuals, they are deemed to have had the intent of profiting from the effects of their acts.[56]

Meanwhile, in the antitrust field, the use of objective elements based on the presumption of knowledge of the reasonably foreseeable consequences of the conduct for purposes of establishing a subjective factor such as anti-competitive intent is not new and has been well known in Canadian law since *R v Nova Scotia Pharmaceutical Society*.[57] In that case, the Supreme Court held that the factor of intent (*mens rea*, in this context) required by the former section 45 CA comprises two elements: a subjective element which is the parties' intent to enter into the agreement and their knowledge of its terms, and an objective element, consisting of the intent to unduly lessen competition, which is deduced from the circumstances of the case. In this regard, the Supreme Court established the presumption that business people have knowledge of the foreseeable consequences of a practice engaged in: "the accused as a reasonable business person would or should have known that this was the likely effect of the agreement."[58]

Even though the comparison seems broad, since the abuse of dominance provision is a civil provision which is "reviewable" before the Tribunal and it does not comprise a *mens rea* requirement as such, it remains nevertheless that the application of the concept of anti-competitive conduct is subject to the finding of an intentional element which can be proven directly in a subjective manner or indirectly by objective inference or deduction.

1.3. Justification for the act: overriding and credible pro-competitive purpose

A practice will constitute an anti-competitive act if (i) it is aimed at excluding or disciplining a competitor, and (ii) there is no objective, credible and overriding justification for it. Accordingly, conduct engaged in for the overriding purpose of improving the company's means of production and distribution will not be anti-competitive, even if it *incidentally* results in the exclusion of a competitor, so long

as its purpose is credibly and overridingly pro-competitive. While the valid business justification principle is widely accepted, the entire problem lies, however, in *how* the arguments about the pursuit of legitimate operational objectives should be taken into consideration in the determination of an alleged anti-competitive act. This section deals with this issue by first defining the normative framework for all arguments concerning the existence of an economic justification. Then the scope of that justification, that is, the weight it should bring to bear on that appreciation, is studied by questioning the *overriding* requirement. Last, the principal characteristics pertaining to the causal link and the credibility of such justification will be addressed.

To begin with, it is important to bear in mind the normative framework in which any argument concerning an economic or operational justification will be taken into consideration for purposes of applying the abuse of dominance law. Any claim regarding the existence of a possible legitimate justification must be assessed when determining whether an act has an anti-competitive purpose, that is, under the requirement mandated by paragraph 79(1)(b) CA. Indeed, a business justification relates to the purpose of the act, not its effect on the market or competition. Once it is demonstrated that the overriding motivation for the act is economic or commercial, then the requirement of a negative effect on a competitor is not met. As a result, the act is deemed to be valid, without the need to look at its effect on the market, since it is based on factors pertaining to efficiency, economic performance, an objective necessity or commercial legitimacy. The FCA properly reminded us of this normative framework in *Canada Pipe*. In that case, the Tribunal, in first instance, had accepted the business justification for the SDP, because such a program supposedly made it possible for the company to manufacture and supply a full range of cast-iron waste and venting products.[59] The FCA circumscribed the legal framework in which one must consider any argument concerning a valid business justification. It mentioned that this framework is constituted by paragraph 79(1)(b), that is, in the determination of the anti-competitive purpose of the act in question: "A business justification for an impugned act is properly relevant only in so far as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor."[60]

In determining the anti-competitive purpose of the practice, it is just as important to specify that claims concerning the existence of an economic justification are considered to be *pertinent factors.* In other words, the elements that involve the existence of a justification are incorporated into the overall analysis of the determination of the anti-competitive nature of the practice under paragraph 79(1)(b) CA. From this point of view, they do not constitute an automatic defence that will overcome the negative effect on a competitor, as is the case with section 96 and subsection 90.1(4) CA.[61] Instead, they *mitigate* this effect, for if they prove to be material, the practice is purely and simply found valid. This clarification is fundamental, for the consideration of arguments concerning a valid business justification in the appreciation of abuse of dominance has a limited scope and cannot hold an independent place that would serve to counter the anti-competitive effect already determined.[62] The integrative method calls for such narrow logic. Indeed, based on this so-called integrative method, which applies to the interpretation of paragraph 79(1)(b) CA, efficiency arguments are taken into account *a priori* in the very appreciation of the purpose of the impugned conduct. From this perspective, if they are material and decisive, the practice in question is found to have been based on a valid business justification.

Therefore it goes without saying that even if the arguments concerning the existence of a valid justification do not constitute an automatic defence, they must nevertheless hold an *overriding* place in the purpose of the conduct in order to be used as an economic legitimizer. In other words, they must be "an alternative explanation for the overriding purpose of that conduct"[63] and thus "*overcome* the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question."[64] The overriding standard is met and satisfied, in this context, if the economic justification *counterbalances* or *neutralizes* the evidence tending to establish the existence of an anti-competitive purpose.[65] Thus, the justification is valid if it has a *scope* that will act as a credible *counterbalance* to any allegation that a competitor was excluded or disciplined. There is no doubt that an analysis of the overriding standard calls for the comparative techniques of the "counterfactual method" which suppose a comparison between

two hypothetical situations involving the *presence* and *absence* of the supposed legitimate justification.[66]

A valid business justification is generally based on economic efficiency or a pro-competitive rationale, such as superior competitive performance. It can cover a full heterogeneous range of elements involving the efficiency and economic legitimacy of the act. As the FCA has reminded us, "To be relevant in the context of paragraph 79(1)(b), a business justification must be a credible *efficiency* or *pro-competitive rationale* for the conduct in question, attributable to the respondent, which relates to and *counterbalances* the anti-competitive effects and/or subjective intent of the acts."[67]

In practice there can be at least three types of valid business justification: a justification involving the objective necessity of the act; a justification that involves aligning with the prices of competitors (the "meeting competition defence") and, finally, a justification based on the existence of gains in economic efficiency or benefit to the consumer.

The objective necessity of the act refers to its indispensable nature. It must be established that without the act the company could not objectively pursue its operations: "[s]uch necessity must be based on objective factors that apply in general for all undertakings in the market. On the basis of these factors the dominant company must be able to show that without the conduct the products concerned cannot or will not be produced or distributed in that market."[68] Some considerations relating to legitimacy based on the nature or purpose of the act can also explain its indispensable and essential nature.

Meeting competition in terms of prices also obeys a fair competition logic. The proportionality test it implies presents three supplemental conditions: the reasonable, indispensable and proportionate nature of the conduct which provides a rationale for a price decrease below the price threshold set by competitors. This business justification only applies to pricing abuses, for example, predatory pricing. In the latter instance, it must be specified that the justification is only admissible if the price is higher than or equal to the average avoidable cost.

Finally, the last category of valid business justifications concerns claims of the existence of efficiency gains, which are assessed from the

standpoint of whether they are of a nature to validate the act *ex ante*; in other words, the issue is to determine whether the gains are sufficient to counterbalance the negative effect on a competitor. Accordingly, in terms of efficiency gains, the regulatory authorities only accept cost savings that add value and contribute to the company's wealth. Thus, savings from cuts in production, service, quality or product selection are not taken into account. Three types of efficiency gains are taken into account: gains in productive efficiency, allocative gains and dynamic gains. Productive efficiency is achieved when the company produces and/or distributes its goods at the lowest possible cost, thus using the least possible resources. Gains in productive efficiency cover a broad range of cost savings which the company is likely to realize in the production and distribution of its goods and services. This is the case for economies of scale, economies of scope, economies of density, economies related to a technology transfer, and network economies in particular. These are generally appreciated quantitatively. And it is up to the parties claiming them to prove them.

However, productive efficiency gains do not include simple cost savings in production which do not have repercussions on all market players, only from the point of view of the parties. *Allocative* efficiency pertains to the allocation of resources, i.e., the manner in which the company's available resources are distributed for their most valuable utilization. An example of allocative efficiency is when goods or services match what consumers want the most in terms of quantity and quality. *Allocative* efficiency pertains to the mechanism that results from the economic process. Finally, dynamic efficiency pertains to an important aspect of competition: innovation. Dynamic efficiency primarily involves any improvement in product quality, the launch of new products, or the discovery of new technical processes. Dynamic efficiency gains have a direct repercussion on society's quality of life. They improve the well-being of society.

Finally, claims of efficiency or a pro-competitive rationale must meet certain characteristics to be able to be taken into account and eventually used as a *counterweight* to an alleged negative intent against a competitor. In particular, they must be credible and have a direct and necessary link to the impugned practice.

To prevent parties from raising a frivolous, hypothetical or far-fetched business justification, it must be based on *credible* considerations. Accordingly, claims of the existence of a business justification must have a degree of probity to support their credibility in terms of achievement. Parties that raise such arguments must establish that the pro-competitive purpose of the act was achieved or is achievable. The idea behind that requirement is to make sure that the business justification is material, not far-fetched or abstract. It is by measuring the scope of the anti-competitive purpose that this element is verified. In this regard, the regulatory authorities will analyze the *probability of achieving the gains and the pro-competitive rationale.* Thus, in *Superior Propane*, the Competition Tribunal held that a quantification of the alleged gains was required of the parties.[69] It was the same in the recent case of *Tervita,* where the FCA reminded us that the establishment of efficiency gains must be based on the most objective standard possible.[70] This is why both the quantitative and qualitative evidence should prevail when it comes to establishing the credibility of claims concerning efficiency and a pro-competition rationale. The Bureau reminds us, rightly, in its most recent *Guidelines*, that: "When assessing the overriding purpose of an alleged anti-competitive practice, the Bureau will examine the credibility of any efficiency or pro-competitive claims raised by the allegedly dominant firm(s), their link to the alleged anti-competitive practice, and the likelihood of these claims being achieved."[71]

Concretely, regardless of the type of efficiency gains in question, the burden of proof is on the parties, as the FCA clearly confirmed in *Superior Propane.*[72] Accordingly, to avail themselves of the reality of the expected efficiency gains, the parties can generally use documents prepared in the normal course of operations. These may be accounting statements, by plant and by business, internal studies, strategic plans, integration plans, studies by management consultants, and other available information.

Claims of efficiency gains or a pro-competitive rationale must, finally, be necessary and have a direct link with the impugned conduct. This means that there must be a clear and direct causal link between the efficiency rationale being claimed and the conduct which is suspected of being anti-competitive. In determining such a direct and necessary causal link, one must ask whether there are any alternative means that

would be more flexible and less restrictive than the impugned conduct for realizing the pro-competitive rationale and gains being claimed. If the answer is affirmative, then it is deemed that there is no direct and necessary causal link between the efficiency that is claimed and the impugned conduct. In that instance, the business justification is not found valid. Meanwhile, if the answer is negative, that is, were it not for the impugned conduct, the achievement of the efficiencies would be seriously compromised or impossible, the direct and necessary link between the business justification and the impugned practice is determined sufficient, which means the justifications can be found valid. In *Canada Pipe* the FCA reproached the Competition Tribunal for not having proceeded with an examination of the direct and necessary link that must exist between the business justification and the allegedly anti-competitive conduct: "In the case at bar, the Tribunal's reasons do not establish the *requisite efficiency-related link* between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(*b*)."[73]

2. The restrictive effect of the act, the prevention or lessening of competition

It is not enough to simply demonstrate anti-competitive intent, it is also necessary to prove that the conduct has had or will likely have the effect of lessening or preventing competition. In other words, it must be established that the conduct has a restrictive effect on *competition.* The legal basis for this requirement is found in paragraph 79(1)(c) CA, which states that "the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market." This provision calls for a test to measure the degree of prevention or lessening of competition due to the conduct, which must be substantial. It is similar to the test under section 92 CA concerning mergers, on which the FCA recently rendered an important decision in *Tervita.*[74] However, as regards the analysis and interpretation of the legal test called for by paragraph 79(1)(c) CA with which we are concerned in this section, the key precedent to date is *Canada Pipe.*

This second part of the study will specifically address the question of the determination of the appropriate legal test for applying paragraph 79(1)(c). This question can nevertheless be dealt with on an isolated basis, without considering the normative and teleological context in which it fits. Following the same line of thought, it is essential to envisage, first, the general approach based on the substantial restriction of competition required by this provision (**2.1.**), before coming to the specific and pragmatic approach which uses a bundle of indicators (**2.2.**).

2.1. General approach based on a substantial restriction of competition

In 1986, the criterion based on a substantial restriction of competition replaced that of the lessening of competition to the *detriment of the public*. It is worth remembering that the regulation of monopolies and mergers was based, under the former law, on the test of the lessening of competition to the detriment of the public. In *Irving*[75] the Supreme Court had held that to satisfy this test, the Crown had to demonstrate not only the lessening of competition but also that the conduct "is likely to operate to the detriment or against the interest of the public."[76] In that case, since the acquisition by *Irving* of five English-language dailies in New Brunswick did not jeopardize the freedom of the press, the Court concluded that the merger was not against the public interest. This atypical interpretation would create a heavier evidentiary burden and make a condemnation difficult, all the more so since the evidence had to be established beyond any reasonable doubt based on the probative standards of the penal regime then in force. The 1986 reform was a prime opportunity to abandon this test in favour of a competition test based essentially on the lessening or prevention of competition.

2.1.1. The prevention or lessening of competition

The CA establishes the standard of the substantial lessening or prevention of competition in the framework of the regulation of the conduct of companies in a dominant position and mergers.[77] As stated above, paragraph 79(1)(c) CA makes the finding of an abuse of dominance subject to a demonstration that "the practice has had, is having or is likely to have the effect of preventing or lessening competition

substantially in a market." Accordingly, conduct is only prohibited to the extent its effect substantially lessens competition.

The substantial prevention or lessening of competition results from conduct that is likely to have the effect of creating, maintaining or increasing the company's ability to exercise, unilaterally or in coordination with others, greater business power or greater market power. It is widely acknowledged that market power is a company's ability to raise prices to a supra-competitive level, at a profit and over a certain period of time. Accordingly, any act or conduct that generates, maintains or strengthens market power is abusive. Such an act is deemed to lessen competition and can give rise to an order and/or AMP by the Tribunal.

The substantial lessening of competition test mandated by paragraph 79(1)(c) CA is thus appreciated using the benchmark of the exercise of market power. However, it can have two aspects: either the prevention or the lessening of competition. There is a shade of meaning between these two sides of the substantial restriction of competition to the extent the lessening of competition interferes with *existing or real* competition, while the prevention of competition is appreciated on a more forward-looking basis in relation to the *potential or eventual* competition which is thereby lessened. Competition is thus lessened where the conduct allows a company to *reduce real and current emulation* in the relevant market. Meanwhile, it is prevented in situations where the act makes it possible to *interfere with the growth of competition:* the conduct prevents the competition which would otherwise develop.

Adopting an *approach based on the effects* of the act rather than its form, the case law primarily considers "the impact [...] on the relevant market."[78] In this difficult exercise, prioritizing pragmatism and casuistry, it had not yet managed to define a standard or test that would enable a determination of an act that restricted competition. The *Canada Pipe* case closes this gap somewhat by adding, for the first time, indicators and clarifications as to how to apply paragraph 79(1)(c). According to the FCA, the *but for* test is appropriate for applying paragraph 79(1)(c).[79] It consists in asking the essential question of whether the relevant market would be substantially more competitive – in the past, present and, eventually, in the future – *but for* the impugned conduct.[80]

2.1.2. A relative, comparative and teleological appreciation

The appreciation of the substantial restriction of competition requires, in this framework, a relative methodology which compares two situations, drawing a parallel between the hypothesis of the absence and the presence of the act performed by the dominant company. The appreciation must first be *relative,* not absolute: the test is not "whether the relevant markets would or did attain a certain level of competitiveness in the absence of the impugned practice, or whether the level of competitiveness observed in the presence of the impugned practice is 'high enough' or otherwise acceptable."[81] The appreciation supposes a comparative methodology[82] between, on the one hand, the level of competitiveness in the relevant market *in the presence of* the impugned practice and, on the other hand, the degree of emulation, *in the absence of* the impugned practice. This comparison leads to a determination of the abusive effect of the practice. According to the Court:

> In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(*c*), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial." This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially."[83]

Then, and this is the most important point here, as regards the determination of the prevention or lessening of competition, the Tribunal erred in law by relying exclusively on the analysis of access to the market. According to the Court the Tribunal did not ask the right question suggested by the "but for" test mandated by paragraph 79(1)(c) CA. The Tribunal should have proceeded with a comparative analysis between, on the one hand, the competitive conditions of the market in the presence of the SDP and, on the other hand, with the competitive conditions in the absence of the SDP; if it had, it would have deduced whether the loyalty program has had, is having or is likely to have the

effect of preventing or lessening competition in the market for the distribution of cast-iron waste products. Just a reference to the entry of competitors in the market, while the SDP was present, was not sufficient, in and of itself, to find the SDP competitively valid.[84]

Consequently, the application of the *but for* test calls for the creation of a model of the realities of the market in the presence and absence of the impugned practice.[85] It calls for a complex analytical framework based on the *counterfactual tests* model, which evaluates and estimates on a comparative basis the past, current or future situations in the absence of the impugned practice.[86] As one author notes, "[a] counterfactual is, literally speaking, the opposite of the factual. In analytical terms, it is what will, or is likely to, happen in the absence of the some actual or likely occurrence."[87] The relevance of this "counterfactual" approach for measuring the lessening and prevention effects of competition was recently reaffirmed by the FCA in *Tervita* by approving, on this point, the Tribunal's analysis in first instance in a merger case:

> In determining whether competition is likely to be prevented, the Tribunal assesses whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger, acting alone or interdependently with one or more rival. This is a form of "but for" analysis. In the case at hand, this requires comparing a world in which Tervita owns the relevant secure landfills (Silverberry, Northern Rockies and Babkirk) with a world in which Babkirk is independently operated as a secure landfill.[88]

Notwithstanding the evidentiary difficulties inherent in establishing hypothetical markets due to, in particular, the unavailability of reliable economic data, the "but for" test constitutes the most used legal standard for determining the effects of the prevention or lessening of competition required by paragraph 79(1)(c) CA since *Canada Pipe*. The Competition Bureau confirms that it uses this standard to appreciate the abusive character of practices by dominant companies under section 79 CA.[89]

The appreciation of the restrictive effect on competitiveness of a practice by a dominant company must be set in a temporal framework with three dimensions, past, present and future: "the effect on

competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future."[90] However, it must be specified that unlike mergers law, which puts the emphasis on a forward-looking perspective, the appreciation of a unilateral practice by a dominant company is more focused on the retrospective and present dimensions, but without ignoring future market developments, notably in high-tech industries.[91]

The standard behind the lessening or prevention of competition standard must also be applied teleologically by considering the various purposes laid down in section 1.1 CA. The FCA clearly stated this in *Canada Pipe*: "for the purposes of paragraph 79(1)(c), in undertaking its assessment of whether there is an actual or likely substantial preventing or lessening of competition, the Tribunal must ensure that the methodology chosen to apply the 'but for' test reflects the multiple purposes or objectives set out in section 1.1. Four different purposes are described in section 1.1." All of these purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition for the purposes of paragraph 79(1)(*c*)."[92] In addition, the "but for" test should also take account of the particular purposes recognized for the abuse of dominance provision.

Section 1.1 CA reads as follows:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

This introductory provision influences the interpretation of all of the CA's other provisions, notably the application of paragraph 79(1)(c), whence its importance. Similarly, it quite clearly enshrines the concept that competition is a means of achieving the end-results which are specifically assigned to it, not a given end-result or condition of the

market.[93] In fact, since the major reform of 1986, section 1.1 CA has assigned four basic purposes to Canada's competition law: namely, the promotion of economic efficiency, the improvement of Canadian participation in world markets, the participation of small and medium-sized enterprises (SMEs) in the economy, and access by consumers to competitive prices and product choices. In its general sense, economic efficiency means having the means mobilized to maximize wealth.[94] More specifically, economic efficiency is equivalent to the criterion of the production of the greatest possible wealth (maximization of value, production). Indeed, it is only based on the assumption that the end-result sought is the production of the greatest possible wealth that the economy makes it possible to come to the conclusion that competition is efficient.

The purpose of ensuring that consumers benefit from competitive prices and varied choices seems to constitute the meeting point of all the other purposes pursued by the CA. From this perspective, anti-trust laws are designed to promote corporate practices that are based on merit for the ultimate benefit of society as a whole, and the consumer in particular. Such practices must have the effect of offering the consumer competitive prices, and a varied selection of quality products or new products. The protection of SMEs, which gives them an opportunity to participate in the economy, is based on the idea of preserving fair competition, economic freedom, and the strengthening of economic democracy. Competition law guarantees access by SMEs to the market because of the important role they have and play in the economy for society.[95]

As worded, these purposes can sometimes clash or, at least, lead to fundamental and functional contradictions. With a view to evening out and diluting such potential teleological conflicts, the case law indicates that no particular purpose prevails over another,[96] even though their economic dimension may be very significant.[97] Consequently, in the specific context of the abuse of dominance provision, a strictly economic standard similar to the total surplus standard which applies under section 96 CA would be inappropriate.[98] The chosen standard should be more flexible to take into account all the general purposes sought by section 1.1 CA, but it would also necessitate the integration of the specific purposes pursued by the abuse of dominance prohibition.

In this regard, an analysis of the specific legislative purposes of section 79 CA reveals that protection of the consumer and SMEs are high priorities. The comments of the Minister of Consumer and Corporate Affairs when the enactment was adopted are explicit in this regard: "[TRANSLATION] the proposed abuse of dominance provision will see to it that dominant companies will compete with their rivals in terms of efficiency, not by abusing their market strength. This provision is very important to protect consumers, newcomers in the market and, in particular, small business."[99] As the Bureau mentions in its *Guidelines,* even though this provision does not seek to establish equality among competitors, "Section 79 promotes conditions under which all firms are afforded an opportunity to succeed or fail on the basis of their respective ability to compete,"[100] not their ability to exclude or discipline competitors. Thus, the purpose of the abuse of dominance prohibition is to encourage dominant companies to adopt practices that will tend to develop efficiency in the interests of the consumer. Accordingly, it is not deemed restrictive to grab the market share of a rival by offering a better product or lower prices, for these measures benefit consumers in the subject markets.[101]

Meanwhile, although proof of the effect of the act on consumers is largely irrelevant for purposes of the application of paragraph 79(1)(b) CA, except "in assessing the credibility and weight of a proffered business justification,"[102] it "is more appropriately considered under paragraph 79(1)(*c*)."[103] Following the same line of thought, it would be appropriate to take account of the practice's negative repercussions on prices, quality, selection, and innovation. Moreover, a specific approach based on an analysis and interpretation of a *bundle of indicators* tends to make this the preferred route.

2.2. Approach based on a bundle of indicators

The specific approach taken to determine whether a practice prevents or lessens competition is an approach that is essentially designed to measure the impact or effect of the practice on the relevant market. It should be as holistic as possible and should take a multitude of factors and indicators into account, derived from an economic analysis and which may have been used in earlier phases of the analysis, either to determine the company's controlling position, such as entry barriers, or to determine the anti-competitive purpose of the impugned

practice, such as the benefit to the consumer, as an overriding factor which makes a business justification credible and objective. In this last section, we will begin by studying the possible standards and tests used to determine, specifically, the predatory effect on competition of a unilateral practice adopted by a dominant company in an attempt to determine which ones are best adapted to the normative, jurisprudential and functional requirements of section 79 CA **(2.2.1.)**. Then we will broach, from a more practical standpoint, a review of the lateral factors taken into account in this holistic analysis **(2.2.2.)**.

2.2.1. Other standards and tests proposed

While advocating the "but for" test for purposes of applying paragraph 79(1)(c) CA, the case law has, meanwhile, implied that this was not the sole admissible test and, as a result, that other tests could be appropriate.[104] The essential requirement being that the chosen test must be flexible enough to enable a full appreciation of the particular fact situation, while reflecting on all the purposes of the CA.[105] Whence the interest of this subdivision, which envisages a quick examination of the tests proposed in the doctrine for appreciating and determining the anti-competitiveness of a practice by a dominant company. The underlying logic consists in defining a test in light of which the company's practice is assessed to find out if it *lessens or prevents competition.*

Schematically, four (4) other key tests have been proposed to measure the restrictive effect on competition of a unilateral act by a dominant company. These tests are: sacrifice, no economic sense, equally efficient competitor, and detriment to the consumer. We will address each of these tests in turn and consider to what extent they match the requirements of paragraph 79(1)(c) CA as outlined above and could, as a result, apply to that paragraph.

The *sacrifice test*[106] is based on the idea of giving up a benefit or profit. This idea of giving up an economic advantage is considered incompatible with and contrary to the market economy mechanism, since it is accepted that companies are in business to maximize their profits. Thus, according to this test, a practice that generates short-term losses is deemed to be anti-competitive.

The sacrifice tests presents a theoretical advantage, from the probative point of view, of considering price and cost data that only pertain to the company in question, not its rivals. Which should facilitate its use. However, it has several limitations, the most important of which is its limited field of application to predatory prices. It could thus be used to appreciate the practice mentioned in paragraph 78(1)(i): "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor." The appreciation of such *predatory price* practices is now based on this standard and, moreover, constitutes its preferred playing field through the *average avoidable cost*[107] benchmark. However, this test would not properly be applied to exclusivity contracts, for instance.[108] Which means that it could then not be used as a general test under paragraph 79(1)(c), which is intended to apply to all exclusionary or exploitative practices likely to lessen or prevent competition. In addition to other inadequacies which show the difficulties in appreciating and determining predatory prices, the sacrifice test also fails to meet the requirement of generality and flexibility dictated by the paragraph 79(1)(c) standard, since its scope is confined to predatory price practices.

The *no economic sense* test[109] is an extension of the sacrifice test, which is thus generalized to include all unilateral practices. It is always based on the "senselessness" of any economic sacrifice, which is no longer confined to just book profits, but extends to all economic opportunities. Under this test, any practice will be deemed to lessen or prevent competition unless it has an underlying economic justification, other than the intent to limit competition. "[TRANSLATION] Under this test, a practice is anti-competitive if and only if it is not commercially reasonable or there is no profit to the respondent, other than excluding rivals."[110] This test brings up two questions: does the impugned practice lessen or prevent competition? If so, does the practice nonetheless provide an economic advantage to the dominant company, apart from the harm to competition?

Although it is similar to the sacrifice test, the no economic sense test is still broader, insofar as it covers the plausible theory whereby the company is not making a sacrifice, but is unable to economically justify its conduct. However, the no economic sense test, as appealing as it may be, because of its generality, would be unlikely to apply to section 79 CA since it intermingles everything and makes no distinction

between the two legal tests mandated by paragraphs 79(1)(b) and 79(1)(c) CA respectively. One of the major lessons of *Canada Pipe* is that one must avoid the error of such intermingling when characterizing the concept of abuse of dominant position. However, the *no economic sense* test seems to repeat exactly the same type of reasoning as used by the Tribunal in first instance, which was censured by the FCA on appeal.[111]

The same pitfall that exists when intermingling the legal tests for paragraphs 79(1)(b) and 79(1)(c) CA plagues the third test, known as the *equally efficient competitor* test. According to this test, inspired from the research of Professor (also Judge) Posner,[112] any practice that tends to exclude from the market a competitor that is just as efficient as the dominant company in question is deemed to restrict competition. In addition to its internal limitations which would impede its implementation,[113] it is obvious that the *equally efficient competitor* test cannot do anything more than meet the requirements of paragraph 79(1)(b) CA, which focuses on the effect of the act on competitors. It is consistent with this wording because it is also aimed strictly at competitors. Taking it farther, this test only contemplates the exclusion of competitors that are just as efficient as the dominant company in question. Accordingly, it does not cover the exclusion of competitors that are deemed less efficient. But as Professor Gavil demonstrated, even the exclusion of competitors that are less efficient, but that could still offer lower prices, can undermine competition.[114] In the final analysis, although the equally efficient competitor test seems to respond to the standard of paragraph 79(1)(b), it offers nothing in terms of grasping paragraph 79(1)(c). So it would not be appropriate for characterizing the concept of abuse under section 79 CA.

Finally, the last test proposed, but not the least, is the *harm* or *detriment to the consumer* test.[115] It is based on the consumer surplus standard.[116] Thus, any practice that actually or potentially interferes with or limits the consumer's interests, in terms of price, choice, variety, quality and product innovation, is deemed to lessen or prevent competition. In this context, consumer means *any person who responds to an offer without market power, notwithstanding that person's professional or lay status.*[117] This concept includes consumers in the usual sense and most SMEs. To begin with, such a test seems to include all the purposes stated in section 1.1 CA, since its *integrative* ability allows it to cover not only the conditions relating to economic efficiency (decrease

in production or increase in prices of products) but also those involving the quality of products and services, a varied selection (free choice) and the development of new products (innovation), as well as economic democracy (market access by SMEs). Then, and above all, it seems to satisfy the requirements of the two legal tests laid down in *Canada Pipe*. Indeed, in that case, the Hon. Justice Alice Desjardins clearly states the role to be played by the "detriment to the consumer" test when applying the two legal tests under paragraphs 79(1)(b) and 79(1)(c) CA. While the FCA affirmed that the Tribunal erred in law by considering this test to be an *independent* and *autonomous* element in the framework of the application of paragraph 79(1)(b),[118] it nevertheless specified that this test could be viewed from two standpoints:

1) either in the assessment of the credibility and overriding nature of a valid business justification as a *single*[119] element in the determination of the anti-competitive act: "The effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification;"[120]

2) or as a factor in the determination of the lessening or prevention of competition: "evidence [of 'detriment to the consumer'] is more appropriately considered under paragraph 79(1)*c*)."[121]

While it is consistent with the normative framework that is called for to characterize the abuse of dominant position, the *detriment to the consumer* test is *flexible* enough to be applied to the main exclusionary practices, including those listed for illustrative purposes in section 78 CA and those not listed, whether vertical acts or horizontal practices. It is admitted that it is especially well suited for vertical restrictions. By way of illustration, a selective distribution agreement will generally lessen intra-brand competition, while stimulating inter-brand competition, i.e., competition between distributors of different brands of products. A selective distribution agreement will eliminate the risk of parasitism that the distributors who invest in service quality are exposed to from distributors that do not bear the same costs and can offer lower prices. It may be that an agreement with such effects does not meet the requirements of the sacrifice test (the supplier sacrifices the profit earned from wider distribution), or the no economic

sense test (other than its exclusionary effects, the agreement makes no economic sense), or the equally efficient competitor test (the exclusivity agreement leads to the elimination of equally efficient competitors). Only with the *detriment to the consumer* test can an agreement with such ambivalent effects on competition be found non-restrictive. Consequently, this test is "sufficiently flexible to allow a full assessment of all factors relevant in the particular fact situation at issue, and must be reflective of the different objectives of the Act."[122]

It emerges from this brief overview of the main applicable tests that only the *detriment to the consumer* test meets the normative and functional requirements for the application of paragraphs 79(1)(b) and 79(1)(c) CA, as considered and construed in *Canada Pipe.* Thus, apart from the *but for* test advocated by the FCA, the *detriment to the consumer* test seems capable of playing a similar role in future cases.

2.2.2. Lateral tests relative to entry and various factors

We have already found that a substantial prevention or lessening of competition results from a practice that is likely to create, maintain or increase the market power of the dominant company. Thus, a practice that creates, maintains or strengthens market power is found to be anti-competitive. Since the substantial lessening of competition test called for by paragraph 79(1)(c) CA is also appreciated based on the exercise of market power, it requires the examination of a set of factors that will measure the relative level of competitiveness and emulation in the relevant market, by positing the absence and presence of the impugned practice. Meanwhile, these factors can play several roles in the analysis of competitiveness, it being understood that they can be equally considered to define the market and to measure commercial power and the lessening or prevention of competition. In this last subsection, we will only look at their role in the framework of the appreciation of the *effect of preventing or lessening* of competition as stated in paragraph 79(1)(c) CA. In this regard, we will primarily study the considerations of entry or barriers to entry, which are key here. We will close this subsection with a brief study of the restrictive effects on prices and other non-price factors that could be considered to be effects of the lessening of competition due to a practice by a dominant company.

Competition can be substantially prevented or lessened if the relevant market has a structure and dynamic that make it difficult, if not impossible, for potential rivals to enter and/or expand. These rivals are represented, on the one hand, by companies that are not in the relevant market, but are operating in a related market, and which could refit their facilities so as to be able to produce in the relevant market[123] and, on the other hand, by new companies that may make a new entry into the relevant market.[124] Thus, potential competition means the competitive pressure exercised by companies that are absent from the relevant market, but that could enter it within a given period of time, without inasmuch exposing themselves to major additional costs. To appreciate this ease of entry, one must determine whether there are any barriers to entry of a nature that would expose potential entrants to obstacles or lengthy delays to entry.

If one deems a barrier to entry to be any obstacle that prevents or delays the sufficient and dissuasive arrival of potential rivals in the market, it goes without saying that such obstacles can prevent, and above all delay or slow down, competition in the market. To determine such obstacles and know whether they are of a nature to prevent or delay potential competition, one must then meticulously analyze the conditions and characteristics of access to the relevant market with the basic idea of determining whether such conditions *lessen or prevent competition*: "This analysis of the occurrence of entry in the Western Canada and Ontario markets provides no indication that the Tribunal considered expressly whether the SDP was responsible for a *substantial increase* in the difficulty of gaining entry in the market, and hence a *substantial lessening* of competition."[125]

Two types of sources have been identified for the obstacles that prevent or delay the entry of potential competitors, but both are related to market conditions: the first involves the actual structure of the market and its basic conditions, and it creates *structural barriers* to market entry; and the second, which involves the strategy employed by the companies that artificially implement practices likely to hinder market entry—these are *strategic barriers.*

Structural barriers pertain to the fundamental operating conditions of a given market. They come from the structure and dynamic of the market (for instance, demand or production costs) and escape the

strategic influence of the companies that are in place. It is true that some categories of structural barriers may seem to arise from the conduct of the companies that are in place—for example economies of range or vertical integration—but unlike strategic barriers, they arise from the competitive operation of the market, not a scheme to shut out market access. They can be diverse in nature and consist primarily of regulatory barriers, especially *cost advantages.*[126] Cost advantages consist most notably of "sunk costs"[127] as well as economies of scale and range.

Aside from the entry barriers related to the competitive structure of the market itself, there are artificial barriers set up by the companies in place to discourage the arrival of new companies or make the operations of new entrants unprofitable. Such entry barriers are therefore the result of strategies executed by the companies that are in place to block access to the market by preventing, delaying or dissuading the entry of potential competitors. Strategic barriers can take many forms: from predatory pricing to the creation of overcapacity, to the granting of discounts and rebates. Similarly, a company's *contractual practices* consciously intended to shut out market access can also constitute entry barriers. A prime example is the long-term exclusive distribution (or supply) contract which contains clauses that make the distributor more loyal.[128] Exclusive supply or distribution contracts have the particular feature of being able to shut off access to the market by putting the available demand under the control of the company that is in place. Thus, they tend to discourage entry by new companies. As the Tribunal noted in *Superior Propane* "[TRANSLATION] the contract terms, such as those dealing with long-term exclusivity, automatic renewal, termination costs, right of first refusal, and storage tank ownership have the effect of greatly increasing entry and expansion costs, and it therefore finds that they constitute a barrier to entry."[129] As we can see, this involves most of the practices contemplated in section 78 CA.

In the interest of pragmatism, the competition authorities are putting more stress on the analysis of the impact of entry conditions on the *lessening or prevention of competition.* It is in this vein that the Tribunal, in *Tele-Direct,* found the potential competition of niche directory publishers inadequate, despite a challengeable market which was not hard to enter. But, since the presence of niche directories only had a negligible influence on Tele-Direct's market power, the Tribunal, rightly,

minimized this element, stating that "The smaller or niche directories are, by their very nature, limited in scope and influence. Thus, although entry on this scale is easy, up to a point (since each new entrant must find a new 'niche' and there is a limited number), entry by smaller directories does not limit Tele-Direct's market power."[130]

Meanwhile, efficiency losses are considered to be effects that lessen or prevent competition. They consist of all the acts that result in the reduction of any of the above-mentioned efficiency categories. In particular, the adverse impact on the allocation of resources holds special importance. Indeed, a price increase further to a practice by a dominant company generally leads to a drop in demand, which induces a shift of part of it to less ideal substitutes. This phenomenon leads to an inefficient allocation of resources, also known as a "deadweight cost." There is a deadweight cost when units are not being produced although buyers would be ready to pay for them at a price higher than their marginal cost of production. In this context, it is just as important to take account of all the purposes stated in section 1.1 CA. In this regard, it is essential to consider both the deadweight cost sustained by society and the loss in consumer gains due to the transfer of wealth induced by the price increase. Similarly, non-price effects resulting from a lessening of quality, choice or innovation must be seen as anti-competitive effects.

Conclusion

It emerges from this study that the characterization of the concept of abuse of dominant position covered in paragraphs 79(1)(b) and 79(1)(c) CA depends on two separate and cumulative legal tests: the first one calls for a determination of the existence of an anti-competitive act, while the second calls for a determination of the effect of the prevention or lessening of competition. These two legal tests borrow an approach based on the effects of the act rather than just its form or nature. In applying the first test, the purpose of the act must be identified by studying its intentional negative effect on one or more competitors. In the analysis under this test, the respondent company may claim that there is a credible and overriding business justification to *refute* the veracity of the existence of an effect that excludes or disciplines a competitor. The application of the second test requires the measurement and assessment of the effect of the act on competition,

using a methodological approach that compares two scenarios: one where the impugned practice is present, the other where it is absent. This exercise enables a relative appreciation of the prevention or lessening of competition based on the "but for" test, which satisfies the need for flexibility in the application of paragraph 79(1)(c).

Of all the other tests put forth to measure the restrictive effect of a unilateral practice by a dominant company, only the *detriment to the consumer* test seems to meet the requirements of the normative framework called for to characterize an abusive act as understood in paragraphs 79(1)(b) and 79(1)(c) CA. The *detriment to the consumer* test could therefore be put to use in future cases where the abuse of dominance provision is at issue.

Endnotes

[*] The French version of this article was included in the 2013 Vol. 26 No. 2 issue of the Canadian Competition Law Review.

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[2] On the general movement of convergence of competition laws, see David J. Gerber, *Global Competition: Law, Markets, and Globalization*, (Oxford: Oxford University Press, 2010) at 76-117; Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge: Cambridge University Press, 2010) ch 2-7; Laurence Idot, "Réflexions sur la convergence des droits de la concurrence," online: (2012) 4 Concurrences 49321 <http://www.concurrences.com>. Regarding the abuse of dominant position provision in particular, see Paul S. Crampton, "'Abuse' of 'Dominance' in Canada: Building on the International Experience" (2005-2006) 73 Antitrust LJ 803.

[3] The terminology is, inarguably, borrowed from European competition law, where section 102 of the *Treaty on the Functioning of the European Union* (formerly section 86 of the Treaty of Rome, which became section 82 further to the Treaty of Amsterdam) prohibits the abuse of dominant position. Under the former legal system, the law prohibited monopolization under the criminal system, as in the American legal system. For a study of the evolution of the law on the abuse of dominant position, see in particular Crampton, *supra* note 2 at 843-60; George Addy, John Bodrug & Charles Tingley, "Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement" (2012) 25:2 Can Comp L Rev 276 at 276-83; Jeffrey Church & Roger Ware, "Abuse of Dominance Under the 1986 Canadian *Competition*

Act" (1998) 13 Review of Industrial Organization 85; Donald M. Thompson, "Monopolization and Abuse of Dominant Position: The Unanswered Questions" in R. Syan Khemani & WT Stanbury, eds, *Canadian Competition Law and Policy at the Centenary* (Halifax: The Institute for Research on Public Policy, 1991) at 315; Donald M. Thompson, "NutraSweet: The Evolution of Law on Abuse of Dominant Position" (1991) 18 Can Bus LJ 17; Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy*, (Toronto: University of Toronto Press, 2002) at 504.

[4] RSC 1985, c C-34 [*CA*].

[5] *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc.* (1997), 73 CPR (3d) 1 at 540, [1997] CCTD No 8 (Comp Trib) [*Tele-Direct*].

[6] This involves the concept of market control, market power or dominance. Regarding these concepts, see in particular Trebilcock et al, *supra* note 3 at 504; Karounga Diawara, *Le contrôle de la puissance de marché : Contribution à une approche juridique du marché*, (Cowansville, QC: Éditions Yvon Blais, 2011) at 147-261 [Diawara, *Contrôle de la puissance de marché*].

[7] *Supra* note 4, s 79(1)(b).

[8] *Ibid* at s 79(1)(c).

[9] We will primarily analyze the decision by the Federal Court of Appeal ("FCA") in *Canada Pipe*: *Canada (Commissioner of Competition) v Canada Pipe Co.*, 2006 FCA 233, [2007] 2 FCR 3 [*Canada Pipe FCA*]; on appeal from the decision of the Tribunal: *Canada (Commissioner of Competition) v Canada Pipe* (2005), 40 CPR (4th) 453, 2005 Comp Trib 3 (Comp Trib) [*Canada Pipe CT*]. The Tribunal recently rendered its judgment in the case of *Toronto Real Estate Board*: *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2013 Comp Trib 9, [2013] CCTD No 9 [*TREB*]. The Commissioner of Competition has decided to appeal this decision to the FCA. Since this matter is still pending before the courts, we will not comment on it specifically, even though it raises issues addressed in this paper.

[10] Michael Trebilcock, "Abuse of Dominance: A Critique of *Canada Pipe*" (2007) 22 Can Comp Rec 1 [Trebilcock, "Abuse of Dominance"]; Ralph A. Winter, "Presidential Address: Antitrust Restrictions on Single-firm Strategies" (2009) 42 Can J Econ 1207; Addy, Bodrug & Tingley, *supra* note 3 at 276-325; Donald G McFetridge, "Economics and Canadian Competition Policy" (2012) 25:2 Can Comp L Rev 540 at 638-45.

[11] Regarding the difficulty in making this distinction, see in particular *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd.* (1992), 40 CPR (3d) 289 at 295, [1992] CCTD No 1, point VI (Comp Trib) [*Laidlaw*].

[12] The legal consequences relate primarily to the foreseeability and intelligibility of the standard thus adopted.

[13] The economic challenge is to strike a balance between Type I errors (wrongfully penalized valid practices) and Type II errors (unpenalized abusive practices). See A Douglas Melamed, "Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal" (2005) 20:2 Berkeley Tech LJ 1247 at 1247-50.

[14] For an in-depth discussion of these questions, see in particular and recently Diawara, *Contrôle de la puissance de marché*, *supra* note 6 at 147-261; Addy, Bodrug & Tingley, *supra* note 3 at 283-84, 287-88.
[15] This "postmodern" period is marked in particular by the major 2009 reform of the law on anti-competition agreements and the procedural law on mergers: see Melanie L Aitken, "The 2009 Amendments to the *Competition Act*: Reflecting on their Implementation and Enforcement, and Looking Toward the Future" (2012) 25:2 Can Comp L Rev 659; Addy, Bodrug & Tingley, *supra* note 3 at 293-302; Karounga Diawara, "La réforme du droit des ententes anticoncurrentielles : aperçu du domaine du nouveau régime hybride à double volet" (2010) 1:3 Bulletin de droit économique 23; Neil Campbell & Sorcha O'Carroll, "The Americanization of Canada's Competition Act" (2009) 48 Can Bus LJ 446.
[16] *CA*, *supra* note 4, s 79(3.1). In the event of a repeat offence, the AMP can reach a maximum of CA$15 million. It is interesting to note that s 79(3.3) states that this fine is not designed to punish, but rather to "*promote practices* by that person *that are in conformity with the purposes*" of s 79; the penalty is thus based on dissuasion (italics added).
[17] As laid down by the FCA in *Canada Pipe*, see *Canada Pipe FCA*, *supra* note 9. All of our subsequent developments adhere to this normative framework.
[18] *Canada (Director of Investigation and Research) v NutraSweet Co.* (1990), 32 CPR (3d) 1 at 57, [1990] CCTD No 17 (Comp Trib) [*NutraSweet*]; Canada, Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions*, (Ottawa: Industry Canada, 2012) at 11 [*Enforcement Guidelines*].
[19] *Canada Pipe FCA*, *supra* note 9 at para 67.
[20] *Ibid* at para 68.
[21] Eleanor Fox, "We Protect Competition, You Protect Competitors" (2003) 26:2 World Competition 149; Eleanor Fox, "What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect" (2002) 70 Antitrust LJ 371.
[22] McFetridge, *supra* note 10 at 645.
[23] However, even the entry or presence of a less efficient competitor can stimulate competition when a dominant company engages in monopolistic pricing.
[24] For a description of this process, see in particular Andrew I Gavil, "Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance" (2004) 72 Antitrust LJ 3.
[25] It is enough just to think of the principle of *creative destruction*, so dear to Schumpeter. See Trebilcock, "Abuse of Dominance," *supra* note 10 at 7.
[26] As pointed out by Judge Hand in *United States v Aluminum Co. of America (Alcoa)*, 148 F2d 416, 65 USPQ (BNA) 6 (2d Cir 1945): "the successful competitor, having been urged to compete, must not be turned upon when he wins."
[27] Canada, Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (Ottawa: Consumer and Corporate Affairs Canada,

1985) at 26 [*Competition Law Amendments*].
[28] *Canada Pipe FCA*, *supra* note 8 at para 67.
[29] *Ibid* at para 77.
[30] *Supra* note 5.
[31] *Canada (Director of Investigation and Research) v D & B Companies of Canada* (1995), 64 CPR (3d) 216, [1995] CCTD No 20 (Comp Trib) [*Nielsen*].
[32] *Tele-Direct*, *supra* note 5 at 179-80.
[33] *Nielsen*, *supra* note 31 at 259.
[34] *Ibid.*
[35] Timothy Brennan & Alan Gunderson, "2006 in Competition Policy and Enforcement: An Economic Perspective" (2007) 22 Can Comp L Rev 77.
[36] In considering the list of anti-competitive acts enumerated in section 78 of the Act, the Tribunal concluded in *NutraSweet* that the common denominator among all anti-competitive acts is the anti-competitive design pursued by the author of the act, which is to exclude or discipline its competitors. See *NutraSweet*, *supra* note 18 at 65.
[37] To find that the conduct in question was anti-competitive, the Tribunal required a link between the SDP and a lessening of competition. See *Canada Pipe CT*, *supra* note 9 at para 191.
[38] *Canada Pipe FCA*, *supra* note 9 at para 77.
[39] *Ibid* at para 78.
[40] *Ibid* at para 79.
[41] *Supra* note 18 at 65.
[42] This is known as "raising rival's costs": on this concept, see in particular Thomas G Krattenmaker & Steven P Salop, "Anticompetitive Exclusion: Raising Rival's Cost to Achieve Power over Price" (1986) 96 Yale LJ 209; Roger Ware, "Understanding Raising Rival's Costs: A Canadian Perspective" (1994) 15 Can Compet Pol'y Rec 9; John E Lopatka, "Raising Rivals' Costs and Alcoa: A Reply to Ware" (1994) 15 Can Compet Pol'y Rec 45; Eric B Rasmusen, J. Mark Ramseyer & John S Wiley Jr., "Naked Exclusion" (1991) 81 Am Econ Rev 1137.
[43] Joe S Bain, *Industrial Organization*, (New York: Wiley, 1966).
[44] George Stigler, *The Organization of Industry*, (Chicago: University of Chicago Press, 1968).
[45] *Enforcement Guidelines*, *supra* note 18 at 12-14.
[46] *Ibid* at 13.
[47] *Ibid* at 1. In American law, see the case of *Trinko*: *Verizon Communications Inc. v Law Offices of Curtis v Trinko LLP*, 540 US 398 at 879, 124 S Ct 872 (2004).
[48] The distributors that did not join the SDP were only entitled to a 6% discount off the list price. They received no rebate.
[49] *Canada Pipe CT*, *supra* note 9 at para 214.
[50] *Ibid* at para 257-258 (underscore added).
[51] *Ibid* at para 260-261.
[52] *Canada Pipe FCA*, *supra* note 9 at paras 59-83.
[53] *Ibid* at para 78.

[54] *Ibid* at para 67.
[55] *Ibid* at para 70.
[56] *Laidlaw*, *supra* note 11 at 116-17; see also *NutraSweet*, *supra* note 18 at 35-36.
[57] [1992] 2 SCR 606, 93 DLR (4th) 36 [*PANS*].
[58] *Ibid* at 660.
[59] *Canada Pipe CT*, *supra* note 9 at para 259.
[60] *Canada Pipe FCA*, *supra* note 9 at para 87 (underscore added).
[61] See in particular Karounga Diawara, «L'intégration des objectifs économiques et sociaux dans l'appréciation de l'exception d'efficience» (2012) 53 C de D 257 at 268-71.
[62] The FCA recalled the factor role played by a valid business justification in the context of s 79(1)(b) CA; see *Canada Pipe FCA*, *supra* note 9 at para 88.
[63] *Enforcement Guidelines*, *supra* note 18 at 11.
[64] *Canada Pipe FCA*, *supra* note 9 at para 87.
[65] *Ibid* at para 88.
[66] Cento Veljanovski, "Counterfactual Tests in Competition Law" (2010) 9:4 Competition Law Journal 436.
[67] *Canada Pipe FCA*, *supra* note 9 at para 73.
[68] PJ Loewenthal, "The Defence of 'Objective Justification' in the Application of Article 82 EC" (2005) 28:4 World Competition 455 at 464.
[69] *Commissioner of Competition v Superior Propane Inc.* (2001), 11 CPR (4th) 289 at para 233, 2001 FCA 104 [*Superior Propane CT1*]; on appeal, the FCA admitted that the Tribunal had, rightly, required that efficiency gains be quantified insofar as possible: *Commissioner of Competition v Superior Propane Inc.*, 2003 FCA 53 at para 34-38, [2003] 3 FC 529 [*Superior Propane FCA2*].
[70] *Tervita Corporation, Complete Environmental Inc and Babkirk Land Services Inc. v Commissioner of Competition*, 2013 FCA 28 at para 147-52, 360 DLR (4th) 717 [*Tervita*].
[71] *Enforcement Guidelines*, *supra* note 18 at 11.
[72] *Superior Propane CT1*, *supra* note 69 at paras 156-57.
[73] *Supra* note 9 at para 91 (emphasis added).
[74] *Supra* note 69.
[75] *R v KC Irving*, [1978] 1 SCR 408, 72 DLR (3d) 82 [*Irving*].
[76] *Ibid* at para 27.
[77] Subsection 92(1) CA states that the Tribunal can make an order where it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." This standard is similar to that under paragraph 79(1)(c), subject to the temporal and forward-looking dimension imposed by an analysis of the mergers. In this regard, see *Tervita*, *supra* note 70 at paras 87-101.
[78] *Canada Pipe FCA*, *supra* note 9 at para 171; *Nielsen*, *supra* note 31 at 257; *Laidlaw*, *supra* note 11 at 333; *NutraSweet*, *supra* note 18 at 34.
[79] *Canada Pipe FCA*, *supra* note 9 at para 41.

[80] *Ibid* at para 38.
[81] *Ibid* at para 37.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid* at paras 53, 55.
[85] *Ibid* at para 46.
[86] Veljanovski, *supra* note 66.
[87] *Ibid* at 3.
[88] *Supra* note 70 at para 85.
[89] *Enforcement Guidelines*, *supra* note 18 at 12.
[90] *Canada Pipe FCA*, *supra* note 9 at para 36.
[91] Diawara, *Contrôle de la puissance de marché*, *supra* note 7 at 62-63, 206-11.
[92] *Canada Pipe FCA*, *supra* note 9 at para 48.
[93] On the distinction between competition means and competition conditions, see Karounga Diawara, "Politique en matière de concurrence et intégration des marchés intérieurs," (2006) 1 Review of European and Russian Affairs 57-76.
[94] In this regard, wealth is defined as the total value of production. This concept only takes market value into account. Production that is not the subject of marketable exchange is excluded from it: Richard A Posner, "Wealth Maximization Revisited" (1985) 2 Notre Dame JL Ethics & Pub Pol'y 85.
[95] Regarding the protection of SMEs under competition law and the importance of their role in society, see Karounga Diawara, «La préservation de l'accès au marché par le droit de la concurrence: aspects fondamentaux et pratiques," in Charlaine Bouchard, ed, *Droit des PME*, (Cowansville : Éditions Yvon Blais, 2011) at 409.
[96] *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada) Ltd.* (1992), 41 CPR (3d) 289; *(Canada) Commissioner of Competition v Superior Propane Inc.* (2001), 11 CPR (4th) 289, [2001] 3 FC 185 (CA).
[97] *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 644-45, 58 DLR (4th) 255; *Tervita*, *supra* note 70 at paras 155-57.
[98] *Canada Pipe FCA*, *supra* note 9 at paras 47-49.
[99] *Competition Law Amendments*, *supra* note 27 at 24.
[100] *Enforcement Guidelines*, *supra* note 18 at 1.
[101] *Tele-Direct*, *supra* note 5 at 196.
[102] *Canada Pipe FCA*, *supra* note 9 at para 79.
[103] *Ibid.*
[104] *Ibid* at para 44.
[105] *Ibid* at paras 47-49.
[106] Melamed, *supra* note 13.
[107] For further particulars of this test applicable to predatory pricing, see McFetridge, *supra* note 10 at 631-38.
[108] Due to investments made in research and development a company may have to accept short-term losses initially to earn future profits from an

innovation. Nonetheless, this does not constitute predatory pricing.

[109] Gregory J Werden, "Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test" (2006) 73:2 Antitrust LJ 413.

[110] Melamed, *supra* note 13 at 389.

[111] *Canada Pipe FCA*, *supra* note 9 at para 83.

[112] Richard A Posner, *Antitrust Law*, 2d ed (Chicago: University of Chicago Press, 2001) at 194-95.

[113] The equally efficient competitor test would be hard to apply, for it requires a comparison of the costs and prices of the respondent company with those of competing companies. However, such evidence is often, if not always, unavailable.

[114] Keeping a competitor that is less efficient than the respondent company in the market can be good for competition, since it ensures that the consumer has choices while leaving the respondent company with the peace of mind that comes with having a monopoly: in this regard, see in particular Gavil, *supra* note 24; JR Hicks, "Annual Survey of Economic Theory: The Theory of Monopoly" (1935) 3:1 Econometrica 1.

[115] Regarding this test, see in particular Diawara, *Contrôle de la puissance de marché*, *supra* note 6 at 263; Steven C Salop, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard" (2006) 73:2 Antitrust LJ 311-74.

[116] See Diawara, *Contrôle de la puissance de marché*, *supra* note 6 at 343-44.

[117] *Ibid* at 382.

[118] *Canada Pipe FCA*, *supra* note 9 at para 79.

[119] *Ibid*; "Simply stated, improved consumer welfare is on its own insufficient to establish a valid business justification for the purposes of paragraph 79(1)(*b*)" (underscore added).

[120] *Ibid.*

[121] *Ibid.*

[122] *Ibid* at para 47.

[123] Known as *uncommitted entrants*, these companies, which can easily refit their facilities and produce in the relevant market, put a certain pressure on the dominance of the company that is already in place. The same applies to companies that are already present in the relevant market and that could prevent the exercise of market power by the respondent company by increasing their production substantially and disciplining price increases by the respondent company.

[124] These are new companies entering the relevant market for the first time, as opposed to companies that are already present in the relevant market or a related market.

[125] *Canada Pipe FCA*, *supra* note 9 at para 53.

[126]Advantages that either keep potential entrants from gaining entry to the market or delay such entry or, once they have entered the market, from developing their operations efficiently with the effect of adding to the competition.

[127] *Sunk costs* are the investments the new entrant must make, which cannot be recovered if it must exit. It means all of the investments the company makes to enter the market and expand its market share, but without the ability to recover them when the company discontinues its operations—if it exits the market. For example, advertising, promotion, and new product launches, costs of acquiring highly specialized equipment, and recruiting and training personnel will constitute sunk costs; for a detailed explanation of the economic advantage of sunk costs: Thomas Ross, "Sunk Costs and the Entry Decision" (2004) 4 Journal of Industry Competition and Trade 79; Stephen Martin, "Sunk Cost and Entry" (2002) 20 Review of Industrial Organization 291.

[128] Phillippe Aghion & Patrick Bolton, "Contracts as Barriers to Entry" (1987) 77 Am Econ Rev 388.

[129] *Superior Propane CT1*, *supra* note 69 at para 150; *Laidlaw, supra* note 11 at 347-48.

[130] *Tele-Direct*, *supra* note 5 at para 244.