

LOYALTY IS USUALLY GOOD – THE TREATMENT OF LOYALTY PROGRAMS UNDER THE *COMPETITION ACT*

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Loyalty programs are pervasive. They are a form of competition which usually lowers prices and benefits customers. They may also generate efficiencies, encourage the supplying firm to invest in the development and marketing of new products, and incentivize distributors to promote the supplier's products. However, in certain circumstances loyalty rebates may allow market power to be exercised through raising rivals' costs and/or strengthening barriers to entry. This article examines the application of the exclusive dealing and abuse of dominance provisions of the Competition Act² to loyalty programs and suggests how the Commissioner of Competition may choose which enforcement track to pursue when anti-competitive concerns arise.

On retrouve des programmes de fidélisation partout. Il s'agit d'une forme de concurrence qui, généralement, fait baisser les prix et avantage les clients. Ils peuvent aussi engendrer des efficacités, encourager le fournisseur à investir dans le développement et la commercialisation de nouveaux produits et inciter les distributeurs à promouvoir les produits du fournisseur. Toutefois, dans certains cas, les remises de fidélité peuvent permettre l'exercice d'un pouvoir de marché au moyen de la hausse des coûts des rivaux ou du renforcement des obstacles à l'entrée. Cet article examine l'application des dispositions sur l'exclusivité et l'abus de position dominante de la Loi sur la concurrence aux programmes de fidélisation et suggère des façons dont le Commissaire de la concurrence peut choisir la voie d'exécution à suivre lorsque naissent des préoccupations relatives à la concurrence.

1. Introduction

Loyalty (or “fidelity”) discounts are in widespread use in both consumer and business markets. They include a diverse range of rebates, discounts, allowances or other price-related benefits offered by sellers to buyers in exchange for some form of loyalty in the purchases they make. The strongest form of loyalty programs offer price concessions in exchange for exclusivity or for a substantial portion of a customer's business. However, traditional volume rebates and frequent-purchasing reward programs also provide buyers with incentives to increase their purchases from a seller and may be subject to review under the Act.³

Loyalty programs are usually pro-competitive. They directly benefit customers through lowering prices and can be an important form of competition between suppliers. They may also generate efficiencies for customers and/or for the supplier offering the loyalty discount. For example, they may encourage the supplying firm to invest in development and/or marketing of additional products.⁴ Similarly, they may incentivize distributors or other resellers to promote the supplier's products more vigorously. However, in certain circumstances loyalty rebates may create, preserve, or enhance market power – most notably by raising rivals' costs or strengthening barriers to expansion or entry.⁵ Such situations may be subject to review under the exclusive dealing and/or abuse of dominance provisions of the Act.⁶ The history of enforcement activity under both provisions has been sparse, which is consistent with a legal framework that limits intervention to situations where there is injury both to current or potential *competitors* and to *competition* in the market as a whole.

2. Overview of the Legal Framework

In 1975, the “Stage I Amendments” overhauled significant portions of the *Combines Investigation Act*.⁷ The “archaic and ineffective” criminal monopolization offence was replaced by various “reviewable practices,” including exclusive dealing. Such provisions treat conduct that is only occasionally anti-competitive as subject to review and remedial orders, rather than as violations.⁸

The “Stage II Amendments” completed the modernization of Canada's competition laws in 1986.⁹ The changes included a new reviewable practice of abuse of dominant position and the establishment of a Competition Tribunal (the “Tribunal”) to adjudicate reviewable practices applications brought by the Director of Investigation and Research (subsequently re-named the Commissioner of Competition (hereinafter “the Commissioner”)) under the Act.

While loyalty rebates are not expressly referred to in the Act, they may be reviewable as exclusive dealing and/or as an abuse of dominant position.¹⁰ There are substantial similarities but also a few important differences between these provisions.

(a) Exclusive dealing

Exclusive dealing is specifically dealt with in section 77 of the Act,

along with tied selling and market restriction. The policy consideration behind this provision has been described as addressing conduct that “deprives the market of products which are in demand and which would produce needed price competition in the market”.¹¹

The Act defines exclusive dealing as:

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

(i) **deal only or primarily** in products supplied by or designated by the supplier or the supplier’s nominee, or

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

(b) any **practice** whereby a supplier of a product **induces** a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;¹²

Subsection 77(2) sets out the elements that the Commissioner (or a private applicant¹³) is required to prove in an exclusive dealing case as well as the available remedies:

77.(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in **by a major supplier** of a product in a market or because it is widespread in a market, is likely to

(a) **impede entry** into or **expansion** of a **firm** in a market,

(b) **impede introduction** of a product into or **expansion** of sales of a **product** in a market, or

(c) have any other **exclusionary effect** in a market,

with the result that competition is or is **likely to be lessened substantially**, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.¹⁴

(b) Abuse of dominance

Sections 78 and 79 were introduced to address anti-competitive unilateral conduct that was not specifically covered by other reviewable distribution practices in Part VIII of the Act. The Commissioner (but not private parties) may apply to the Tribunal for a remedial order where a firm (or group of firms) with a dominant position engages in anti-competitive conduct to preserve or enhance market power. More precisely, subsection 79(1) sets out three required elements that comprise an abuse of dominant position:

79 (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely **control**, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of **anti-competitive acts**, and

(c) the practice has had, is having or is likely to have the effect of **preventing or lessening competition substantially** in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.¹⁵

(c) Analytical framework

There are significant parallels between subsections 77(2) and 79(1). As stated by the Federal Court of Appeal (“FCA”) in *Canada Pipe*:¹⁶

First, both provisions require an initial determination that the firm in question occupies a position of dominance: subsection 77(2) refers to a “major supplier of a product in a market”, while paragraph 79(1)(a) requires that “one or more persons substantially or completely control... a class or species of business”. Second, both provisions call for the identification of a particular type of conduct, namely a practice of exclusive dealing with an exclusionary effect in the case of ss.77(2), and a practice of anti-competitive acts in the case of ss.79(1). Third, both provisions require a finding of actual or likely substantial lessening of competition.¹⁷

The chart below provides a comparison of the required elements as well as the available remedies under the two provisions:

Element		Exclusive Dealing	Abuse of Dominant Position
Market Position of Supplier	Single Firm	Major supplier of a product in a market	Substantially controls a class or species of business anywhere in Canada (dominant position)
	Multiple Firms	The practice is widespread in a market	Multiple firms could collectively have substantial control of a class of business (joint dominance)
Loyalty-generating Conduct	Supplier Action	Requiring or inducing a customer to deal only or primarily in products supplied by the supplier ¹⁸	Engaging in anti-competitive acts (including the non-exhaustive list in section 78)
	Frequency of Conduct	Practice	Practice
	Relationship between Conduct and Competitors	Likely to: (a) impede entry into or expansion of a firm in a market, (b) impede introduction of a product into or expansion of sales of a product in a market, or (c) have any other exclusionary effect in a market (Purpose is irrelevant)	Generally interpreted as acts which have an exclusionary, entry-detering or predatory purpose targeted at competitors (Negative effects on a competitor are not required)
Harm to Competition		Competition is likely to be lessened substantially	Likely to have the effect of preventing or lessening competition substantially in a market

Remedies	Primary Remedial Order	Prohibition order	Prohibition order
	Additional Remedial Orders	Any other condition necessary to overcome the effects of the practice in the market or to restore or stimulate competition in the market	Any order to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice
	Penalties	Not available	Up to \$10,000,000 (and for each subsequent order, up to \$15,000,000)
	Private Right of Action	Private parties may apply for leave to make an application to the Tribunal if they are directly and substantially affected by exclusive dealing ¹⁹	Not available

The remainder of this paper is organized around the parallel structure of the two provisions. We discuss the two key cases dealing with loyalty rebates (*Canada Pipe*²⁰ and *NutraSweet*²¹) in this framework since both were brought under sections 77 and 79 of the Act. While the exclusive dealing provision only applies to sellers, not buyers, buyer-side exclusivity practices may also be covered by the abuse of dominance provisions.²² Accordingly, we discuss the treatment of such practices as an abuse of dominance in the *D&B Companies*²³ case. Before doing so, we provide a brief factual overview of the *NutraSweet*, *Canada Pipe* and *D&B Companies* cases.

(d) *NutraSweet*

NutraSweet was the first abuse of dominance case before the Tribunal. The conduct at issue involved supply contracts between NutraSweet and purchasers of aspartame. NutraSweet also offered trademark and logo display and marketing allowances to its customers. These practices were

challenged on the basis that they created exclusive supply relationships and impeded Tosoh, the only other aspartame supplier, from competing effectively. NutraSweet was also alleged to be selling below its acquisition cost.

The Tribunal found that NutraSweet substantially controlled, through its market power, the sale of aspartame in Canada. Further, NutraSweet engaged in a number of anti-competitive acts, including the logo display allowances and cooperative marketing allowances which induced exclusive supply relationships. As a result, competition was prevented or lessened substantially.²⁴ The Tribunal issued an order prohibiting NutraSweet from entering into or enforcing the contract terms in question with Canadian customers unless those terms also appeared in contracts between NutraSweet and any competitors of those Canadian customers.²⁵

(e) *Canada Pipe*

Canada Pipe was the leading supplier of cast-iron drain, waste and vent (“DWV”) products to distributors in Canada. These distributors in turn sold the DWV products to contractors for use in construction projects. Canada Pipe offered a Stocking Distributor Program (the “SDP”) which provided quarterly and annual percentage rebates to distributors. In return, the SDP required that distributors must stock only cast-iron DWV products supplied by Canada Pipe. The SDP did not require a minimum purchase beyond a threshold amount, and the rebates were the same in value regardless of size of purchase. Distributors were permitted to opt out of the program without penalties other than foregoing the rebates.

The Commissioner filed an application to the Tribunal under the exclusive dealing and abuse of dominance provisions alleging that the SDP: (i) was anti-competitive, (ii) gave Canada Pipe the ability to set prices above competitive levels, (iii) deterred new entry and expansion of competitors in the relevant markets, and (iv) allowed Canada Pipe to exercise its market power.²⁶ The Tribunal concluded that Canada Pipe had a dominant position in six relevant geographic markets for the sale of DWV products.²⁷ However, it had not engaged in a practice of anti-competitive acts, and in any event, there had not been any substantial lessening or prevention of competition attributable to the SDP.²⁸

The majority of the FCA upheld the Tribunal’s conclusion with respect

to market power.²⁹ However, the FCA set aside the Tribunal's decision on the basis that it had erred in applying the legal tests under the exclusive dealing and abuse of dominance provisions. The FCA therefore sent the matter back to the Tribunal for redetermination.³⁰

Prior to the redetermination hearing, the Commissioner and Canada Pipe negotiated a 5-year consent agreement settlement.³¹ Canada Pipe agreed to offer a modified rebate program to distributors in Canada as an alternative to the SDP (which was permitted to continue). The modified option provided rebates and multiplier discounts to distributors meeting a minimum purchase requirement, but was not conditional on exclusive purchases of DWV products from Canada Pipe. The consent agreement also required that the rebates under the SDP not exceed those available under the modified rebate program.³²

(f) *D&B Companies*

D&B Companies addressed loyalty-inducing practices in the context of buyer-side fidelity rebates. The case involved the supply of scanner-based market tracking services in Canada. D&B Companies, which carried on business as A.C. Nielsen, used contracts which offered retailers significant financial inducements for exclusive access to the scanner data. It also entered into long-term contracts with manufacturers of consumer packaged goods for the supply of scanner-based market tracking services.³³

The Tribunal concluded that Nielsen had a dominant position. It determined that the long-term manufacturer contracts, along with the exclusive arrangements for access to scanner data, were intended to exclude potential competitors generally and one US-based competitor, Information Resources, Inc., specifically. These anti-competitive acts were found to have resulted in a substantial prevention or lessening of competition in the Canadian market for scanner-based market tracking services. Accordingly, the Tribunal issued an order prohibiting Nielsen from, among other things, entering into future contracts containing exclusivity clauses and enforcing exclusivity provisions in its existing contracts.³⁴

3. Significance of Supplier's Market Position

Under both sections 77 and 79, loyalty-inducing conduct is only of concern if the supplier has a relatively significant market position. It is generally believed that the "major supplier" requirement for

exclusive dealing is a lower threshold than the holding of a dominant position. However, it is not clear whether some degree of market power is required.³⁵ In any event, both provisions require that a relevant market must be defined.³⁶

(a) Market position of supplier

The definition of “major supplier” was considered by the Restrictive Trade Practices Commission (“RTPC”) in *Director of Investigation and Research v. Bombardier Ltd.*³⁷

A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells. Where available, a firm’s market share is a good indication of its importance since its ability to gain market share summarizes its capabilities in a number of dimensions. Other characteristics of a supplier which might also be used in assessing its importance in an industry are its financial strength and its record as an innovator. However, the characteristics which are most relevant will vary from industry to industry.³⁸

The RTPC referred to the share of sales of snowmobile products held by Bombardier in Quebec and the Maritimes (60%) and Ontario (40%). Further, the RTPC observed that Bombardier held a strong market position in a large number of local markets based on its successes in recruiting strong dealerships. It determined that Bombardier “is undoubtedly a major supplier at the distributor level.”³⁹ Bombardier was also found to be a major supplier at the retail level of the geographic regions in question.⁴⁰ While the term “market power” was not used in this 1980 decision, we expect that under the modern approach to that concept, Bombardier might have been regarded as having market power because of its high market shares, subject to consideration of whether there were also material barriers to entry into these markets.

The *Bombardier* approach was endorsed by the Tribunal in *NutraSweet*.⁴¹ Once the relevant product and geographic market were defined, the Tribunal found that it was not necessary to look beyond the respondent’s extremely large market share (over 95%) and share of production capacity in order to conclude that The NutraSweet Company (“NSC”) was obviously a major supplier in the Canadian aspartame market.⁴² The Tribunal also concluded that NutraSweet had market power.⁴³

The FCA in *Canada Pipe* did not discuss the definition of “major supplier” under subsection 77(2) in detail. However, it did note that market

definition and market power were integral elements in determining whether the respondent was a “major supplier”.⁴⁴ We expect that the major supplier requirement will be interpreted as requiring some degree of market power, even if the level is not as significant as for a dominant position.⁴⁵

(b) Relevant product market

The statutory language in subsection 77(2) explicitly requires that a “market” be defined. While the term is not used in the abuse of dominance provision, the phrase “class or species of business” in paragraph 79(1)(a) has been interpreted to mean the relevant product market.⁴⁶

In determining the relevant product market, an assessment of “whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes” must be undertaken.⁴⁷ The FCA in *Canada Pipe* agreed with the holding in *Southam*⁴⁸ that an assessment of substitutability should consider available direct and indirect evidence. Direct evidence may include statistical evidence of buyer price sensitivity and anecdotal evidence, as well as buyers’ testimony on previous or hypothetical responses to price changes. Indirect evidence includes the extent of functional interchangeability and industry views or behavior.⁴⁹ The Tribunal in *D&B Companies* agreed that where direct evidence of switching behavior in response to small changes in relative price is unavailable, it is necessary to examine other evidence regarding both buyers’ and suppliers’ characteristics.⁵⁰

The FCA in *Canada Pipe* ultimately found that the Tribunal’s conclusions on the relevant product market were reasonable. They were based on indirect evidence such as “views, strategies, behaviors and identity of buyers” (evidence that cast iron offered advantages of meeting all requirements for fire and life safety purposes), “end-use and physical characteristics” (the durability and lower level noise of cast iron), and “price relationships and relative price levels” (evidence that Canada Pipe reacted to new entry by aggressively lowering its prices). Similarly, the Tribunal in *NutraSweet* defined the relevant product market narrowly as aspartame based on a lack of evidence of direct competition between aspartame and caloric sweeteners, as well as very weak evidence of indirect competition between diet and full-caloric products.⁵¹ The Tribunal in *D&B Companies* examined evidence on the timeliness, detail, accuracy, reliability and cost of collection of retail sales data as well as the extent to which product movement data can be combined with casual

data and ultimately concluded that the relevant product market was scanner-based market tracking services.⁵² In all three cases, the scope of the product market was generally consistent with the products covered by the loyalty-related conduct, although this need not always be the case.

(c) Geographic market

While the term “market” in the exclusive dealing provision does not specifically mention a geographic dimension, it is generally recognized that this is a fundamental aspect of defining a relevant market. Similarly, the phrase “throughout Canada or any area thereof” in the abuse of dominance provision has been interpreted as referring to the identification of a relevant geographic market.⁵³

More specifically, the process of geographic market definition has been interpreted as “an attempt to determine the extent of the territory where there is competition and in which prices for a product tend to uniformity”.⁵⁴ In considering whether an area should be included in the relevant geographic market, the primary analysis is whether it is “sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas.”⁵⁵

In *NutraSweet*, the Tribunal concluded that Canada was a separate geographic market for the purposes of evaluating the effects of the company’s marketing practices based on country-specific clauses in multi-country contracts along with average price differences across multiple jurisdictions.⁵⁶ In *D&B Companies*, the Director alleged that the relevant market was Canada, which was not disputed by the respondent.⁵⁷ In *Canada Pipe*, the Tribunal concluded that there were six geographic markets within Canada, primarily based on significant price variations between regions and differences in the extent of effective competition in the various areas.⁵⁸ The SDP operated more broadly than the six problematic geographic markets, in contrast to *NutraSweet* and *D&B Companies* where the geographic scope of the market and the exclusivity were aligned.

(d) Market power

The concept of “control” of a class of business under paragraph 79(1) (a) has repeatedly been interpreted as being synonymous with market power.⁵⁹ Market power is generally interpreted to mean “an ability to set prices above competitive levels for a considerable period”.⁶⁰

The FCA in *Canada Pipe* recognized that “market power is not an easy concept to handle”.⁶¹ A direct approach, such as showing that prices or profits are actually above the competitive levels, is not always readily available. In those circumstances, the Tribunal must consider indirect approaches using indicia such as market share, barriers to entry and customer countervailing power in order to determine whether market power exists.⁶²

The Tribunal made a determination of market power in *Tele-Direct* based in part on evidence of large accounting profits.⁶³ However, in *D&B Companies* and *NutraSweet*, among other cases, there was insufficient evidence to use the direct approach.⁶⁴ Similarly, the Tribunal found that evidence of high margins in *Canada Pipe* was incomplete (e.g. it only dealt with two of the three products in question). As a result, the Tribunal proceeded to consider evidence under the indirect approach: barriers to entry, large market share, range of products, national presence, the limited penetration of competitors and the fact that the market offered only limited growth potential. This led the Tribunal to conclude that the respondent did control a substantial part of (i.e. possess market power in) six cast-iron DWV geographic markets.⁶⁵

The FCA in *Canada Pipe* stated that while “a large market share leads to a prima facie conclusion that the firm likely has market power”, evidence of market share alone is not sufficient to support a finding of market power if barriers to entry are non-existent.⁶⁶ Evidence of significant entry into the market can demonstrate that barriers are not problematic, provided that “[e]ntry, of course, must be both effective and viable to be significant”.⁶⁷

In *Canada Pipe*, the Tribunal considered evidence of barriers to entry such as sunk costs, cost of entry, incumbent advantage and the SDP itself. The Tribunal found that while distributors and contractors maintained some leverage, countervailing power was weak because Canada Pipe had been able to maintain its SDP for an extended period of time despite large distributors’ preferences for a volume-based rebate.⁶⁸ The evidence on barriers to entry was not conclusive. However, Canada Pipe’s large market share, range of products and national presence, as well as the limited penetration of competitors, were the basis on which the Tribunal concluded that it did control a substantial part of the six cast iron DWV markets.⁶⁹ The majority of the FCA upheld these findings of the Tribunal as reasonable.⁷⁰

In *NutraSweet*, the Tribunal found NutraSweet's very high market share (over 95% of sales in Canada) along with the entry conditions and certain constraints affecting its largest customers (i.e. that Coke and Pepsi would be critically dependent on NutraSweet after the United States use patent expired because they would have to rely on NutraSweet for significant volumes of a highly important input) as sufficiently compelling evidence that "control" was clearly substantial.⁷¹

Similarly, the Tribunal in *D&B Companies* found that Nielsen *prima facie* had market power after observing that "there is no dispute that Nielsen is the sole supplier in the relevant market and thus has a 100 percent market share."⁷² The Tribunal also noted that entry possibilities had been affected by the anti-competitive acts of Nielsen. In addition, survey evidence from customers supported a conclusion of market power. The customers expressed concerns about their position vis-à-vis Nielsen, which the Tribunal would not have expected if the customers were confident that they could look after their own interests.⁷³

The evidence relevant to control or market power under paragraph 79(1)(a) may overlap with the examination of the alleged anti-competitive acts and their effects under paragraph 79(1)(b) and the assessment of whether there is a substantial lessening of competition under paragraph 79(1)(c). As the FCA commented in *Canada Pipe*, the same evidence might be "potentially and unavoidably relied upon at several points in the analysis, in respect of different requisite elements."⁷⁴

The Tribunal in *Canada Pipe* struggled with the tension between the requirement to consider whether the SDP, which was the alleged practice of anti-competitive acts, also constituted a barrier to entry contributing to control or market power. Ultimately, the Tribunal found that the evidence on the barriers to entry was not conclusive and was therefore not convinced that the SDP program impeded expansion by competitors in the absence of evidence from them in the form of business plans, financial forecasts or sales projections. While the Tribunal was satisfied that the SDP had an impact on the marketplace, it did not find direct evidence to support the conclusion that the SDP was a barrier to entry. Evidence of entry after the implementation of the SDP led the Tribunal to note that entry was possible, even though the possibilities were limited somewhat by the respondent's considerable market share.⁷⁵ Based on the foregoing analysis, the Tribunal concluded that the SDP was not a practice of anti-competitive acts. However, this finding was overturned by the FCA and

remanded for reconsideration on the basis that the Tribunal misapplied the legal test for paragraph 79(1)(b).⁷⁶

4. Anti-competitive Conduct

The second element under either section 77 or 79 involves an analysis of whether the conduct is anti-competitive. For loyalty-generating conduct, the focus will be on whether the conduct induces (or requires) a customer to deal only or primarily in products supplied by the supplier. However, there is an important difference: anti-competitive conduct is assessed based on *effects* on a competitor for exclusive dealing but with reference to *purpose* or intent to injure a competitor for abuse of dominance.

(a) Loyalty-generating conduct

The reviewable practice of exclusive dealing covers both contractual (or what might be termed “coercive”⁷⁷) exclusivity and inducements to exclusivity.⁷⁸ In general, loyalty rebates will be examined under the inducement branch since the customer will have the option of obtaining the rebates by choosing to meet the qualifying conditions.

The exclusive dealing provisions explicitly contemplate that partial exclusivity may be sufficient: reviewable conduct arises where a supplier requires or induces a customer “to deal only or primarily in products supplied by the supplier”.⁷⁹ Full exclusivity will be readily identifiable, but it is not yet clear what “primarily” will be interpreted to mean in practice. It is important to note that the “primarily” requirement is part of the definition of exclusive dealing. It is therefore assessed at the level of the supplier’s dealings with individual customers, and is a necessary prerequisite before reaching the broader issue of whether there is a sufficient degree of foreclosure of competitors or prospective entrants.⁸⁰

In *NutraSweet*, the Tribunal accepted that the various financial incentives provided to customers (as well as the exclusivity clause in customer contracts⁸¹) constituted exclusive dealing within the meaning of paragraph 77(1)(b) because “the customers clearly agreed to deal only or primarily in the products of NSC and in return received various rebates whose existence depends on exclusive use of NutraSweet brand aspartame.”⁸² Similarly, trademark display or logo display allowances required customers to display the NutraSweet name and logo on their packaging and in print and television advertising featuring products containing

NutraSweet-branded aspartame in return for substantial discounts from the gross price of the aspartame. Cooperative marketing allowances provided a further per pound discount to customers for support of marketing programs that promoted products of the customer containing only NutraSweet-branded aspartame.⁸³ Since the conduct generally resulted in full exclusivity, the Tribunal did not need to interpret the meaning of “primarily”.⁸⁴

While there is no specific reference to loyalty-generating conduct by suppliers in the non-exhaustive list of anti-competitive acts enumerated in section 78, there is a reference to a purchaser obtaining exclusivity from suppliers:

(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;⁸⁵

Given the similarity between this paragraph and the definition of exclusive dealing, it is likely that loyalty-generating conduct by suppliers will be assessed similarly under section 79 as it is under section 77.

D&B Companies involved a purchaser requiring upstream sellers not to sell to any competing downstream purchasers. The Commissioner alleged that Nielsen’s practice of signing exclusive contracts for scanner data with retailers and offering significant financial inducements for such exclusive access were exclusionary practices.⁸⁶ Again, it was not necessary to interpret the term “primarily” because there was full exclusivity.

In 2002, the Commissioner investigated IKO Industries Ltd. (at the time Canada’s largest manufacturer of asphalt roofing products) in connection with its policy of giving distributors loyalty rebates on residential asphalt roofing shingles. The rebates were viewed as an abuse of IKO’s dominant market position which impeded the entry and expansion of competitors. To address the Commissioner’s concerns, IKO agreed to modify its rebate program to give customers a choice between the type of loyalty rebates it had been using and volume-based rebates, and that the level of rebates would vary in the modified loyalty program with the volume of percentage of shingles purchased from IKO. According to the Bureau, these modifications diminished the incentive to exclusivity inherent in the original loyalty rebates.⁸⁷ However, the summary of this case resolution (which was not memorialized in a consent agreement) does not provide any guidance on the “primarily” test.

In summary, there has not been any significant jurisprudence regarding the “only or primarily” element of section 77. Situations where a customer purchases all of its requirements from a supplier in exchange for a loyalty rebate will of course satisfy the “only” branch of this test – even though the result in the market at large may only be partial foreclosure, depending on the extent to which customers choose to participate in or forego the loyalty program. However, it is unclear whether primarily might mean “close to all” (e.g. perhaps 90% or more), “a majority” (i.e. any level above 50%) or somewhere in between (e.g. a substantial proportion such as $\frac{2}{3}$ or $\frac{3}{4}$). Given that the degree of overall market foreclosure may be considerably less than the fraction of purchases of an individual customer that are captured through loyalty rebates, we would suggest that a relatively high volume threshold (e.g. at least 75%) should be employed for the “primarily” test. In the extreme case where the supplier is selling to 100% of the customers in the market, a supplier which does not induce those customers to obtain at least 75% of their purchases through its loyalty mechanism will have left rivals with at least a 25% plus market share. In the more likely scenario where the supplier is only selling to a portion (e.g. 80%) of customers in the market, failure to achieve at least 75% of individual customers’ purchases through loyalty inducements will leave a correspondingly larger market share for rivals (e.g. $20\% + (25\% \times 80\%) = 40\%$).

(b) Relationship between the conduct and the supplier’s rivals

The FCA in *Canada Pipe* did not find it necessary to assess the differences between the provisions in paragraphs 77(2)(a)-(c) and 79(1)(b) which require a link between the conduct of the supplier and its impact on current or potential future rivals.⁸⁸ Both contemplate that any type of exclusionary effect could be relevant, which would include the use of loyalty rebates to disadvantage rivals through complete or substantial foreclosure of customers. However, paragraphs 77(2)(a)-(c) require that the conduct must have an exclusionary *effect*⁸⁹ whereas the concept of an anti-competitive act under paragraph 79(1)(b) focuses on the *purpose* of the conduct.

(i) Exclusionary effects

The exclusionary *effects* element of the exclusive dealing provision is “clearly of a relative nature, as indicated by use of the word ‘impede’ in paragraphs 77(2)(a) and (b), rather than a more categorical verb, such as ‘prevent’”.⁹⁰ The FCA in *Canada Pipe* emphasized that the Tribunal must

not limit itself to considering barriers to entry and the effects of the loyalty program (as would be the focus from the perspective of prevention).⁹¹ Rather, the proper analysis should be based on a broader perspective implied by the word “impede” or “lessening”, which would involve a consideration of “whether, in each of the relevant markets, competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice.”⁹²

Evidence of exclusionary intent without any actual effect would not be sufficient to justify a remedial order under section 77. Conversely, lack of exclusionary intent is not a defense if loyalty rebates (or other forms of exclusive dealing) impede or exclude a rival. Unfortunately, the degree of impeding or excluding has not been clarified in the case law to date. In our view, a meaningful materiality standard must be implicit in these terms; otherwise, competitors would be able to use (or threaten to use) section 77 whenever facing even modest competitive pressure from loyalty rebates offered by a major supplier.

(ii) Exclusionary purpose

The purpose or character of the impugned conduct must be determined as part of the legal test under paragraph 79(1)(b). Section 78 provides a non-exhaustive list of anti-competitive acts which all focus on purpose, rather than effects. Moreover, as the FCA noted in *Canada Pipe*, all of the acts (with the exception of paragraph 78(f)), reference a purpose which involves an “intended negative effect on a competitor that is predatory, exclusionary or disciplinary”.⁹³ More recently, the Tribunal in *TREB* has held that the word “competitor” is not restricted to competitors of the respondent allegedly engaging in an abuse of dominance.⁹⁴ This has emboldened the Commissioner to challenge conduct by the Vancouver Airport Authority (the “VAA”) that allegedly affects competition between suppliers in a market in which the VAA does not compete.⁹⁵

Some commentators have expressed concern that the approach adopted by the FCA places undue emphasis on the “protection of competitors” instead of the “protection of competition”.⁹⁶ However, as the FCA made clear in *Canada Pipe*, there is a separate requirement to consider competition in paragraph 79(1)(c). In other words, what gives rise to “abuse” of a dominant position is conduct that is targeted at a competitor, but there must also be a substantial negative effect on competition in the market in order for the conduct to be actionable.⁹⁷

Loyalty programs that are designed to create or strengthen barriers to expansion or entry may be viewed as having an exclusionary purpose. For example, if a loyalty program is established to discourage most of the buyers in a market from trading with a rival supplier, the rival may have difficulty making sales or its costs to acquire or retain sales may significantly increase. Loyalty programs may also be designed to increase customer switching costs and make it materially more difficult for rivals to compete for customers and thereby increase a rival's costs. However, loyalty programs could also have these effects when a supplier does not have these improper purposes and is simply pursuing the ordinary incentive that firms have (and that is normally pro-competitive) to increase sales.

Subjective intent is not required to establish an anti-competitive purpose under paragraph 79(1)(b).⁹⁸ As a result, proof of an intended negative effect on a competitor may be established either directly through evidence of subjective intent, or indirectly through reasonably foreseeable consequences of the acts themselves and the circumstances surrounding the acts.⁹⁹

A finding of a link between the nature of the conduct and a decrease in competition is not necessary under paragraph 79(1)(b).¹⁰⁰ In considering whether the SDP was an anti-competitive act, the Tribunal had focused on four issues: the contractual nature and binding effect of the SDP, business justifications asserted by Canada Pipe, the impact of the SDP on competitors, and switching costs.¹⁰¹ However, the FCA held that the Tribunal incorrectly focused on whether there was a decrease in competition in the market when assessing the SDP, instead of focusing on the act itself to discern its purpose. The relationship between the conduct and the competitor(s) under section 79(1)(b) is ultimately whether “the act displays the requisite intended effect on *competitors*; it is not directly concerned with the state of *competition* in the market or the general causes thereof.”¹⁰² While this approach has been prescribed by the FCA within the context of the “anti-competitive act” element of the analysis, it is important to recognize that there is also a causality requirement that must be established between this element and the separate requirement of a substantial lessening or prevention of competition.

In *NutraSweet*, the Tribunal found that exclusive supply agreements, including the trademark display allowances and cooperative marketing allowances, had an exclusionary purpose. In the Tribunal's view, these

allowances created an “all-or-nothing” choice: if customers did not want to commit to using the NutraSweet logo or sourcing all of their aspartame needs from NutraSweet, they were forced to go to another supplier for all of their supply needs because purchasing without the discounts would be too expensive. As a result, new suppliers would need to be sufficiently established in order for customers to entrust them with all of their supply needs.¹⁰³

The meet-or-release clauses in the exclusive supply agreements involved a more complex analysis. The Tribunal found that such clauses were sought by the two largest customers, Coke and Pepsi, but that the clauses were helpful to NutraSweet in making exclusivity more acceptable and that they “serve as an inducement for customers to enter into exclusive agreements”.¹⁰⁴ Tosoh claimed that the meet-or-release clauses effectively gave NutraSweet an advantage over its competitors, and the Tribunal ultimately found that the purpose of the clause was to discourage competitors from submitting bids since they knew that NutraSweet would be provided with an opportunity to meet any price submitted by its competitors.¹⁰⁵

In *D&B Companies*, the Tribunal found that the exclusive scanner data contracts, which required that retailers not provide the data covered by the contract to anyone other than Nielsen, were intended to prevent potential competitors from obtaining the data needed to offer scanner-based market research that would compete with Nielsen’s services. This finding was based on various evidence including Nielsen’s strategy of staggering contract renewals. In the Tribunal’s view, staggering increased Nielsen’s bargaining position vis-à-vis retailers and demonstrated an intention to deter would-be competitors from entering the market because data from most of the major retail chains was essential to compile useful market research offerings for consumer products manufacturers. The Tribunal also considered “preferred supplier” clauses in some of Nielsen’s contracts and determined that their purpose was the same as the contractual exclusivity provisions, namely to exclude potential competitors.¹⁰⁶

In a submission to the OECD Competition Committee Roundtable on Airline Competition, the Bureau noted that frequent flyer loyalty programs in the airline industry may have anti-competitive implications. The Bureau cautioned that loyalty programs with predatory features might be considered anti-competitive. For example, an increase in frequent flyer miles beyond what a dominant carrier would normally offer in similar

circumstances may be viewed as having the intention and purpose of eliminating or disciplining smaller competitors or new entrants.¹⁰⁷

In 2001, the Commissioner brought an abuse of dominance application, alleging that Air Canada engaged in predatory conduct on a number of passenger airline service routes.¹⁰⁸ The Commissioner alleged that Air Canada's frequent flyer program was a key feature that made Air Canada's services more attractive to consumers than those offered by its domestic competitors and contributed to barriers to sustainable entry.¹⁰⁹ According to the Commissioner, Air Canada's policy of matching the prices charged by low cost carriers (e.g. WestJet) coupled with other advantages such as the Aeroplan loyalty program forced WestJet to choose between losing a substantial portion of its passengers to Air Canada or further lowering its prices (essentially a "reducing rivals' revenues" theory of harm).¹¹⁰ The application was bifurcated, with the first phase focusing on whether Air Canada's prices were predatory (i.e., below its avoidable cost). Although the Tribunal concluded that some fares were below avoidable cost, it did not specifically address the loyalty program in its analysis.¹¹¹ The Commissioner then discontinued the application before the phase two hearing on dominance and competitive effects as a result of Air Canada's filing for protection from bankruptcy.¹¹²

(c) Business justification

The FCA in *Canada Pipe* has stated that the business justification doctrine is not an absolute defence to an alleged abuse of dominant position.¹¹³ Rather, it is a factor in determining whether the overriding purpose of the impugned conduct is an anti-competitive act or whether there is a non anti-competitive explanation as to why the practice was pursued.¹¹⁴ A valid business justification must have "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."¹¹⁵ In other words, proof of a business justification for the conduct from the respondent might rebut the "deemed intention" arising from the actual or foreseeable effects of conduct that is alleged to be anti-competitive.¹¹⁶

While there is no formal efficiencies defense for abuses of dominant position (or exclusive dealing),¹¹⁷ efficiencies can provide a business justification if they are credible. The Tribunal will consider whether documentary and other available evidence demonstrate that the overall purpose of conduct such as a loyalty program is based on efficiency goals

or other legitimate business justifications. For example, Canada Pipe argued that its SDP effectively leveled the playing field between small and large distributors because the rebates were not based on volume of sales. It also argued that the SDP allowed customers to stock a variety of products, including those that would not otherwise be available but for the efficiencies generated by the SDP, which in turn allowed Canada Pipe to maintain a full line of such products. The Tribunal accepted the latter argument,¹¹⁸ but was overturned on the point. The FCA held that a business justification must also be attributable to the respondent, because “it is the latter’s allegedly anti-competitive conduct which is sought to be explained” and that the Tribunal’s reasons did not establish the requisite efficiency-related link between the SDP and the respondent.¹¹⁹ In doing so, it appears to have held that the consumer welfare benefits asserted by Canada Pipe were insufficient to establish a valid business justification on their own.

The FCA’s approach to the business justification issue appears to be unnecessarily narrow. Businesses often strive to provide price and non-price benefits to their customers to encourage expanded or repeat business, and such activity is generally pro-competitive. There is no good reason why, as a matter of principle, actions must be shown to benefit the supplier in addition to its customers. Moreover, in applying this principle to the case at hand, the FCA gave short shrift to the Tribunal’s finding that the SDP assisted Canada Pipe in ensuring that a full range of products were available to its customers, and that this was beneficial to distributors and their customers as well as to Canada Pipe.¹²⁰ As stated by Musgrove and Szentesi, “Canada Pipe was doing so to meet legitimate customer needs – which would appear to be more properly characterized as effective competition on the merits than inappropriate exclusionary conduct.”¹²¹

The *NutraSweet* and *D&B Companies* decisions (which pre-date the FCA’s decision in *Canada Pipe*) provide little additional insight into business justifications. The Tribunal disagreed with the respondent’s submission in *NutraSweet* that exclusivity allowed for lower inventory costs than if each customer had to look after its own needs, as per-unit inventory costs are less when inventories are centrally managed. The Tribunal concluded that this claim was not an “efficiency defence” as it could always be claimed the risk and cost of holding plant and inventory are reduced if there is a single supplier rather than several.¹²² Absent evidence that an industry has special characteristics that would make this

claimed source of cost savings important, the Tribunal did not see any reason to give the submission any weight.¹²³ In *D&B Companies*, the Tribunal considered the commercial interests of both parties to the conduct in question and the resulting restriction on competition. The Tribunal did not find any non-anti-competitive rationale for Nielsen's conduct.¹²⁴

5. Effects on Competition

The language in paragraphs 77(2)(c) and 79(1)(c) is very similar although not identical. The Tribunal in *NutraSweet* viewed the legal test under these two provisions to be the same.¹²⁵ The FCA in *Canada Pipe* was generally receptive to this approach, but noted that there are differences that could be relevant in particular situations such as the time frame for the assessment.¹²⁶ There is also a surprising difference in the treatment of preventions of competition. However, the need for a “but-for” comparative analysis and the main contours of “substantiality” are common to both and have now been clarified significantly in the jurisprudence.

(a) Time frame

Paragraph 79(1)(c) of the Act requires that the “practice *has had, is having or is likely to have* the effect of preventing or lessening competition substantially in the market”.¹²⁷ In contrast, paragraph 77(2)(c) states that “competition *is or is likely to be lessened* substantially”.¹²⁸ As a result, the FCA held in *Canada Pipe* that the abuse of dominance provision encompasses past conduct, whereas the reviewable practice of exclusive dealing does not extend to conduct that is no longer occurring.¹²⁹ This is consistent with the possibility that administrative monetary remedies can be imposed for an abuse of dominant position, but not for exclusive dealing. In the absence of such a remedy, there would be little purpose to be served by bringing a case related to conduct which is no longer occurring.

(b) Prevention of competition

Paragraph 79(1)(c) references prevention and lessening of competition, whereas paragraph 77(2)(c) only mentions lessening of competition. In practice, this difference between the two provisions has not yet been of any significance. In cases that involve lessening of competition, the phrase “substantial lessening of competition” has been interpreted in the

same manner for both exclusive dealing and abuse of dominance (as well as in the merger provisions, which also use this test¹³⁰¹³¹).

“Prevention of competition” generally refers to situations where competition would be likely to increase in the future (e.g. as a result of expansion, entry of new firms or innovation).¹³² It is certainly possible that anti-competitive acts which are exclusionary in nature (e.g. loyalty rebates which effectively lock up all or most of the customers in a market) can prevent expansion or entry or the introduction of improved products or technologies by current or potential competitors. Preventions of competition arising from these types of anti-competitive acts are covered by paragraph 79(1)(c).

There would be no logical reason to omit prevention scenarios from the exclusive dealing (or tied selling) provisions in the Act. While Parliament has done so in the literal wording of subsection 77(2), and it is generally presumed that differences in legislative wording are intentional,¹³³ in this situation it appears that there may simply have been a drafting slip. This is evident from the wording of paragraphs 77(2)(a) and (b), which explicitly refer to impeding the introduction of an entity or expansion of a firm, or the entry into or expansion of sales of a product in a market.¹³⁴

In *NutraSweet*, the Tribunal adopted the approach employed by the RTPC in *Bombardier* in its analysis of how a substantial lessening of competition in the market would be assessed under subsection 77(2):

Whether exclusive dealing by a supplier impedes expansion or entry of competitors in the market is most easily and meaningfully considered as **part of the determination** of whether there is or is likely to be a **substantial lessening of competition** as a result of the practice.¹³⁵

The Tribunal in *NutraSweet* did not undertake a separate analysis under section 77(2) on the basis that “the fundamental test of substantial lessening of competition is the same in both sections 79 and 77 of the Act, the same conclusions apply”.¹³⁶ This stretching of the concept of lessening is difficult to reconcile with the clear distinction between prevention and lessening subsequently set out by the Supreme Court in *Tervita*.¹³⁷ However, it avoids the nonsensical result that section 77 would otherwise be internally inconsistent.

The FCA in *Canada Pipe* did not assess this difference in wording between paragraph 79(1)(c) and subsection 77(2). The majority commented that the Tribunal’s analysis of the evidence concerning

barriers to entry and the effects of the SDP was conducted from the narrow perspective of prevention (i.e. paragraph 79(1)(c)), and not the broader perspective as suggested by the word “impede” or “lessening”.¹³⁸ In the majority’s view, the appropriate test with respect to paragraph 79(1)(c) was whether the relevant market would be substantially more competitive without the SDP.¹³⁹ However, the absence of the term “prevention” was not noted.

(c) “But-for” analysis

Since “lessening” and “prevention” are relativistic terms, it is clear that they require a comparative assessment of competition with and without the conduct which is being challenged. The FCA held that the Tribunal erred in *Canada Pipe* by failing to consider whether “the evidence on record demonstrated that the SDP had the effect of substantially lessening competition in the past, present or future, as compared to the markets’ likely competitiveness in the absence of the practice.”¹⁴⁰ The Tribunal’s conclusions under paragraphs 79(1)(c) and 77(2)(c) had been based on three main factors: the existence of competitive pricing, the increasing presence of imported cast iron DWV products, and the entry of a new cast iron DWV manufacturer. Instead of a broad, relative and comparative approach, the FCA observed that the Tribunal had focused on the narrow, absolute issues of whether there was entry and competition.¹⁴¹

The FCA has suggested that a comparative “but-for” assessment should generally consider factors such as:

- (1) whether entry or expansion might be substantially faster, more frequent or more significant in the absence of the impinging conduct;
- (2) whether switching between products and suppliers might be substantially more frequent;
- (3) whether prices might be substantially lower;
- (4) whether the quality of products might be substantially greater; or
- (5) differences in product or supplier choice.¹⁴²

In the context of loyalty rebates, the fourth¹⁴³ and fifth¹⁴⁴ factors may not be particularly significant, but the remaining three are all highly relevant:

- (1) The assessment of entry or expansion is a central issue when considering whether loyalty rebates would have any exclusionary effects.

However, the issue is not just whether entry or expansion would occur “substantially faster” in the absence of the loyalty rebates. In our view, the magnitude of entry or expansion that would be expected to occur will be more relevant than any speed differential in most cases.

- (2) The relative frequency of switching is an asymmetric factor. If there would be significantly more frequent switching of suppliers by customers but-for the loyalty program, this could indicate that the rebates have been lessening competition. However, the lack of material differences in switching frequency between the actual and but-for comparatives is not necessarily probative, since markets can be operating quite competitively where customer switching is easy, even if actual switching does not often occur.
- (3) The relative difference in price levels is likely to be the most important factor in the analysis (where evidence is available) because it should largely encapsulate the effects of other factors such as entry and switching. Loyalty rebates generally provide customers with price reductions (unless the pre-rebate list price is artificially inflated). As in a predation analysis, the theory of harm to competition normally would need to be based on an expectation that the loyalty rebates will reduce or eliminate the ability of the rival to exert competitive discipline on the powerful supplier. This would be expected to materialize in the form of exercising market power by charging higher prices over the long term than in the but-for scenario. Thus the short term pro-competitive benefits of low prices must be balanced against expected long-term high prices to consumers.

(d) Substantiality

The concept of “substantial” lessening or prevention of competition has generally been interpreted in the abuse of dominance context, for purposes of the merger provisions and in respect of other reviewable practices under Part VIII of the Act to mean the ability to exercise market power by maintaining prices above competitive levels (or the level that would prevail in the absence of the relevant conduct or transaction) by a material amount for a significant period of time. The magnitude of a price differential that will be considered substantial has not been established definitively, although a range of 5-10% has been discussed in some cases.¹⁴⁵ The relevant time frame for such a determination also has not

been settled. Time frames of 1-2 years have been considered in earlier cases.¹⁴⁶ However, the Supreme Court of Canada suggested that it could be longer: “how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he [referring to Justice Mainville of the FCA] referred to as the ‘temporal dimension’ of the barriers to entry: ‘... the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue’”.¹⁴⁷

6. Efficiencies

The Act requires that the Commissioner and the Tribunal consider whether gains in efficiencies outweigh the anti-competitive effects of a merger or a competitor agreement.¹⁴⁸ However, no such defence exists for the other reviewable practices including exclusive dealing and abuse of dominance.

As discussed above, a respondent may make efficiency arguments as part of a business justification to demonstrate it is not engaging in a practice of anti-competitive acts under paragraph 79(1)(b).¹⁴⁹ However, this assessment relates to the purpose of the conduct that was engaged in and does not involve measuring the efficiencies or balancing them against the effects on competition.¹⁵⁰

The Act requires the Tribunal to consider whether any lessening or prevention of competition is attributable to the “superior competitive performance” of the dominant firm.¹⁵¹ If a lessening or prevention of competition is simply a result of a dominant firm’s effectiveness as a competitor, the Tribunal should not issue an order because this type of activity is encouraged by the Act.¹⁵²

This provision appears to be structured as a clarification to paragraph 79(1)(c) rather than as a defence. It is certainly possible that a firm may achieve a dominant position through superior competitive performance. However, superior competitive performance need not be invoked by a respondent unless it has also engaged in a practice of anti-competitive acts that is lessening or preventing competition. In such situations it may be more difficult to assess the relative contributions of the anti-competitive activity and the superior performance.

There is not yet any meaningful jurisprudence regarding this provision. NutraSweet argued that its large market share was due to its superior economic performance.¹⁵³ However, the Tribunal did not give any material weight to that submission. In *Canada Pipe*, the Tribunal recognized the company's ability to maintain a full line of products as a positive factor that was consistent with the notion of superior competitive performance, but did not ground its decision on this basis.¹⁵⁴

In principle, purchaser loyalty may be the result of a supplier's superior competitive performance, both as a result of the incentives provided by price concessions and/or other dimensions of competition (e.g. customer service, innovation, etc.). Distinguishing between anti-competitive effects arising from the foreclosure or raising of costs of a rival, versus market outcomes which emerged from the superior competitive performance of the firm offering a loyalty program, may be quite difficult. Failure to give meaningful consideration to vigorous competition that includes loyalty rebates may result in over-enforcement errors and a chilling effect on pro-competitive conduct.

7. Remedies

In deciding whether to proceed under exclusive dealing, abuse of dominance, or both, the Commissioner has indicated that he will consider a number of factors – including the available remedies which is one of the key differences between the two provisions.¹⁵⁵ The primary remedies for both exclusive dealing and abuse of dominance are prohibition orders. Such orders can be supplemented, where necessary, by other mandatory remedial orders. However, there are also possible penalties under section 79 but not 77, and possible private rights of action in relation to section 77 but not 79.

(a) Remedial orders

An order that prohibits the continuation of a loyalty program usually would be expected to be a sufficient remedy for harms to competitors and customers arising from such conduct. However, where there is other inter-related conduct or where a rival has been substantially weakened by anti-competitive acts over an extended period of time, there may be a basis for a broader order to overcome the lessening or prevention of competition.

In *NutraSweet*, the Tribunal issued an order prohibiting NutraSweet

from entering into or enforcing certain contract terms with Canadian customers unless such terms also appeared in contracts between NutraSweet and any competitors of the Canadian customers.¹⁵⁶ The Tribunal's order in *D&B Companies* also required amendments to Nielsen's contracts to temper their exclusionary impact and included additional mandatory requirements to provide certain data to a new entrant competitor.¹⁵⁷ Affirmative obligations in addition to prohibition orders have also been included in other non-loyalty consent agreements¹⁵⁸ and we can expect this approach will continue to be used in future cases where the Commissioner believes some form of "reset" is needed in the market.

The consent agreement between Canada Pipe and the Commissioner illustrates a more tailored approach. Canada Pipe was allowed to continue its SDP provided it also offered a modified rebate program that had certain features in parallel with the continuation of its SDP but without the exclusivity inducements.¹⁵⁹ This was narrower than a standard prohibition order – and arguably beyond the jurisdiction of the Tribunal since the power to impose additional orders is structured as a supplement to, rather than an alternative to, the prohibition order remedy.

(b) Penalties

The Commissioner may seek administrative monetary penalties of up to \$10 million (or \$15 million for a subsequent occurrence) in addition to prohibition or other remedial orders.¹⁶⁰ Since the introduction of administrative monetary penalties ("AMPs") for abuse of dominance, a total of \$6 million in AMPs have been imposed in two abuse of dominance cases, both in relation to the Canadian water heater industry. Reliance Comfort Limited Partnership agreed to pay an AMP of \$5 million in November 2014 under the terms of a consent agreement to address the Bureau's concerns that its water heater return policies and procedures were aimed at preventing consumers from switching competitors.¹⁶¹ Direct Energy Marketing Limited agreed to pay an AMP of \$1 million under the terms of a consent agreement in October 2015 to resolve similar Bureau concerns that it had abused its dominance by restricting competition and limiting consumer choice in Ontario's residential water heater industry.¹⁶²

(c) Private actions

Any person who is directly and substantially affected in their business by a practice referred to in section 77 may apply to the Tribunal for

leave to bring an application for a remedial order.¹⁶³ The private right of action was added in 2002 in order to allow private parties to pursue their own remedies in cases where the Commissioner has not taken action.¹⁶⁴ However, damages are not available as a remedy to a private applicant.¹⁶⁵ The requirement for private applicants to obtain leave before proceeding with a private action was included as a safeguard to reduce potentially unmeritorious litigation. The FCA has clarified the requirements for leave as follows:¹⁶⁶

The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits.¹⁶⁷

There have been no applications for leave to bring private actions related to loyalty programs. There have been several leave applications in connection with other forms of exclusive dealing but none have been granted.¹⁶⁸ This reconfirms the importance of the leave prerequisite as a mechanism for screening out unmeritorious private actions.

8. Conclusion

We believe that the enforcement of the Act should follow a restrained approach in respect of loyalty programs. It can be difficult to differentiate between aggressive competition, which is enormously beneficial, and overly aggressive conduct that results in anti-competitive effects.¹⁶⁹ The greater the uncertainty and the greater the legal risks associated with potential enforcement of an “abuse of dominance” provision, the greater the likelihood that firms will pull their competitive punches, usually to the detriment of customers and overall economic welfare.¹⁷⁰

The actual enforcement history in Canada and in most other sophisticated competition law jurisdictions indicates that problematic unilateral conduct is extremely rare and concerns arising from loyalty programs are even rarer. For example, the Bureau launched seven abuse of dominance investigations in 2015 and closed eight investigations without commencing any applications to the Tribunal (which is not dissimilar to its 2014 activity level).¹⁷¹ There have only been seven contested abuse of dominance proceedings before the Tribunal since this provision was added in 1986, and only two involved loyalty rebates by suppliers.

The design of the reviewable practices in Part VIII of the Act, including

exclusive dealing and abuse of dominant position, is generally consistent with this principle of restraint:

- Market power can serve a gate-keeping function to avoid challenges of business conduct that could not possibly have welfare-reducing anti-competitive effects.¹⁷² It would be desirable to get confirmation from the Tribunal that the “major supplier” element of section 77 will be interpreted in this manner.
- The parallel focus on *competitors* (current or potential) and *competition* provides an appropriate legal framework that addresses both harm to the market and the mechanism by which such harm occurs — while limiting the scope for the law to be used as a tool for protecting competitors from competition.
- The focus on prohibition and other remedial orders is appropriate to address the rare cases where there is a genuine harm, without over-detering vigorous competition.

Loyalty rebates provide a good illustration of the importance of distinguishing opportunities and inducements from contractual or other “coercive” behavior. Customers are rarely harmed when given inducements such as price discounts, choices and other benefits.¹⁷³ As with predation, the theory of harm to competition for challenging a loyalty program (as either exclusive dealing and/or an abuse of dominance) normally would be based on an expectation of reduced competition from current rivals or potential entrants *and* an increase in prices arising from successful implementation of foreclosure using near-term price reductions to obtain loyalty from a substantial portion of the customers in a market.¹⁷⁴

In our view the more important reason [for cautious enforcement] relates to the time frame in which any market power becomes exercisable: coercive conduct seeks to achieve the exclusion contemporaneously, whereas incentivizing conduct generally will not allow market power to be exercised unless and until the other significant competitors have been eliminated from the market or disciplined. As a result, challenges to incentivizing conduct carry a much higher risk of over-enforcement through premature intervention blocking current benefits in situations where the potential longer-term anticompetitive effects may not materialize.¹⁷⁵

In the specific context of loyalty programs, we therefore suggest

the following possible framework for enforcement action by the Commissioner (as summarized in the chart below):

- (1) No enforcement action is warranted where a loyalty program does not have any material exclusionary effects or anti-competitive purpose.
- (2) If there is only an exclusionary effect but no anti-competitive purpose, an action under the exclusive dealing provision is possible. However, having regard to scarce enforcement resources the Commissioner should consider whether the affected rival(s) may have the ability to address the issue through the private right of action in section 103.1.
- (3) If there is an anti-competitive purpose but no exclusionary effects, an abuse of dominance application is theoretically possible – provided there is also a substantial lessening of competition. However, the Commissioner should carefully consider whether any enforcement action is warranted when no damage has been caused to rivals and whether the requisite effect on competition could be shown to be connected to the conduct in the absence of such an impact on rivals.
- (4) If there is evidence of both anti-competitive purpose and exclusionary effects, but the respondent firm is a “major supplier” that does not have a dominant position in the relevant market, an exclusive dealing application would be appropriate (provided that the substantial lessening of competition element can also be established).
- (5) If there is an anti-competitive purpose and exclusionary effects resulting from loyalty rebates offered by a dominant firm, the Commissioner would likely want to consider bringing an application jointly under sections 77 and 79. The Commissioner may also consider the possibility of seeking administrative monetary penalties under section 79, but we suggest that this extra remedial step generally should not be pursued against a supplier that has offered short-term price reductions (which benefit customers) in the absence of clear evidence of intent to eliminate an existing competitor from a market.

		ANTI-COMPETITIVE PURPOSE?	
		No	Yes
EXCLUSIONARY EFFECTS?	No	No case	Possible s. 79 application
	Yes	Possible s. 77 application (or competitor may bring private action)	Dominant Firm: s. 79 (with possible AMP) and s. 77 applications Major Supplier: s. 77 application only

In summary, loyalty programs are pervasive and in most cases they provide lower prices, which increase competition and benefit customers. The number of loyalty rebate (or other unilateral conduct) cases brought under the reviewable practices provisions of the Act suggests that problematic situations are extremely rare. When a firm with a significant market position does engage in loyalty-inducing conduct for the purpose, or with the effect, of foreclosing or impeding rivals to a serious degree, and there is a resulting prevention or lessening of competition that is substantial, the exclusive dealing and/or abuse of dominance provisions in the Act provide a workable framework for obtaining adequate remedies. In most cases, prohibition or other tailored remedial orders will be appropriate and sufficient.

Endnotes

¹ Neil Campbell is the Co-Chair of Competition and International Trade and Florence (Sze Pui) Chan is an Associate in the Competition Group in the Toronto office of McMillan LLP.

² *Competition Act*, RSC 1985, c C-34 (the “Act”), ss 77–79.

³ Loyalty programs may be structured to cover a single product or multiple products. We do not attempt in this article to address tied selling or bundling issues specifically, although the legal framework for doing so is very similar to exclusive dealing: see s 77 of the Act.

⁴ This was the case in *Commissioner of Competition v Canada Pipe Company Ltd*, 2005 Comp Trib 3 at 167 [*Canada Pipe – Tribunal*]; discussed below.

⁵ Canada, Competition Bureau, “Competition Bureau Submission to the OECD Competition Committee Roundtable on Fidelity Rebates” (14 June 2016), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04083.html>> at III b [*Bureau OECD Submission*].

⁶ Act, *supra* note 2, ss 77–79.

⁷ See Bill C-2, *An Act to Amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend the Combines Investigation Act and the*

Criminal Code, SC 1974-75-76, c 76; amending the *Combines Investigation Act*, RSC 1970 c C-23 [*Combines Act*].

⁸ See generally A Neil Campbell & J William Rowley, “The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?” (2008-2009) 75 *Antitrust LJ* 267 at p. 277.

⁹ Bill C-91, *An Act to Establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof* (assented to 17 June, 1986), RSC 1986, c 26.

¹⁰ Loyalty rebates clearly fall into the definition of exclusive dealing in section 77, but are conspicuously absent from the long list of exclusionary conduct in section 78 that may constitute an “anti-competitive act” for purposes of the abuse of dominance provisions. This could give rise to a statutory interpretation argument that Parliament did not intend the abuse of dominance regime to be applied to the specific types of conduct addressed in section 77 (exclusive dealing, tied selling or market restriction). However, the section 78 list of anti-competitive acts is non-exhaustive and the Tribunal has now dealt with numerous parallel section 77 / section 79 cases (many of which are discussed below) without any suggestion that section 79 is unavailable for conduct covered by section 77.

¹¹ Canada, House of Commons, Standing Committee on Finance, Trade and Economic Affairs, “Minutes of Proceedings and Evidence” (3 December 1974) at 50; as cited by Calvin S Goldman, Navin Joneja & Elizabeth Yuh, “A Canadian Perspective on Tied Selling and Exclusive Dealing” in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, (Portland, Oregon, Hart Publishing, 2007) at p. 9.

¹² Act, *supra* note 2, s 77(1). [emphasis added]

¹³ The availability of private rights of action is discussed in the Remedies section below.

¹⁴ Act, *supra* note 2, s 77(2). [emphasis added] The Tribunal is prohibited from making an order if exclusive dealing will be engaged in only for a reasonable period to facilitate the entry of a new supplier or product into a market, see s 77(4)(a).

¹⁵ Act, *supra* note 2, s 79(1). [emphasis added]

¹⁶ *Commissioner of Competition v Canada Pipe Company Ltd.*, 2006 FCA 233, [2007] 2 FCR 3 [*Canada Pipe FCA – Commissioner’s Appeal*].

¹⁷ *Ibid* at 21.

¹⁸ Alternatively, a supplier may require or induce a customer that purchases a product to refrain from dealing in a specific class or kind of product: see Act, *supra* note 2, s 77(1)(a)(ii), reproduced above.

¹⁹ See Act, *supra* note 2, s 103.1(1), which also applies to various other reviewable practices, as discussed in the Remedies section below.

²⁰ *Canada Pipe – Tribunal*, *supra* note 4.

²¹ *Canada (Director of Investigation & Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 at 24 (Comp Trib) [*NutraSweet*].

²² See the discussion of the Act, s 78(h) in the Loyalty-generating conduct section below.

²³ *Canada (Director of Investigation and Research) v D&B Companies of Canada* (1995) 64 CPR (3d) 216 (Comp Trib) [*D&B Companies*].

²⁴ *NutraSweet*, *supra* note 21 at 154–156.

²⁵ *Ibid* at 181.

²⁶ *Canada Pipe – Tribunal*, *supra* note 4 at 1–2.

²⁷ *Ibid* at 161.

²⁸ *Ibid* at 284–285.

²⁹ *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 236 at 53, 268 DLR (4th) 238 [*Canada Pipe FCA – Cross Appeal*].

³⁰ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 100.

³¹ *Canada (Commissioner of Competition) v Canada Pipe Co* (12 December 2007), CT-2002-006, online: Competition Tribunal < http://www.ct-tc.gc.ca/CMFiles/CT-2002-006_130_45KOT-12202007-8411.pdf > [*Canada Pipe Consent Agreement*].

³² *Ibid* at 8 and 10.

³³ *D&B Companies*, *supra* note 23 at 2.

³⁴ *Ibid* at 193–229.

³⁵ *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc* (1997) 73 CPR (3d) 1 at 72, [1997] CCTD No 8 [*Tele-Direct*]; held that, if market power exists, the firm is a major supplier. However, it did not discuss the possibility that a firm without market power could constitute a major supplier.

³⁶ There is some support in economic theory for skipping the market definition step and examining market power directly where there is available information to do so (see, e.g., Carl Shapiro, “The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years” (2010) 77:1 *Antitrust LJ* 49; and Joseph Farrell & Carl Shapiro, “Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition” (2010) 10:1 *B.E. Journal of Theoretical Economics* at p. 9. However, subsection 77(2) contains an explicit reference to a “product in a market”, and paragraph 79(1)(a) contains references to “a class or species of business” and “throughout Canada or any area thereof” which have been interpreted as synonymous with product and geographic markets. Thus the Tribunal appears to be required to make findings regarding the relevant market as a pre-condition to making a remedial order under either provision. For example, the FCA in *Canada Pipe* agreed with the Tribunal’s view that a determination of the relevant market, which identifies “existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition,” is a precondition for assessing market power: *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 11. The Bureau has hedged slightly on this issue in its *Abuse of Dominance Guidelines*, noting that while defining relevant product markets is “a usual step in establishing market power, market definition is not an end in itself and may defy precision in all cases.” See Canada, Competition Bureau,

“Enforcement Guidelines - The Abuse of Dominance Provisions”(Ottawa: Industry Canada, 2012), online: <[www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/\\$FILE/cb-abuse-of-dominance-provisions-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf)> at p. 3 [the “*Abuse of Dominance Guidelines*”].

³⁷ (1980) 53 CPR (2d) 4, 1980 CarswellNat 988 (WL Can) [*Bombardier*].

³⁸ *Ibid* at 27.

³⁹ *Ibid* at 29.

⁴⁰ *Ibid* at 31.

⁴¹ *NutraSweet*, *supra* note 21 at 165.

⁴² *Ibid* at 167.

⁴³ *Ibid* at 82.

⁴⁴ *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 5.

⁴⁵ A similar type of approach has been adopted in the interpretation of an “adverse effect on competition” (an element of the reviewable practices of refusal to supply and price maintenance – see Act, *supra* note 2, ss 75(1)(e) and 76(1)(b), respectively) to mean a degree of market power which is less than a “substantial lessening of competition”: see *Nadeau Ferme Avicole Ltée / Nadeau Poultry Farm Ltd v Groupe Westco Inc*, 2009 Comp Trib 6 at 369, aff’d 2011 FCA 188 at 116 (in respect of s 75). This approach was also followed in *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 at 350–353 (in respect of s 76).

⁴⁶ *D&B Companies*, *supra* note 23 at 38; *NutraSweet*, *supra* note 21 at 83. For more detail regarding the Bureau’s approach on defining relevant product markets, see *Abuse of Dominance Guidelines*, *supra* note 36 at s 2.1.

⁴⁷ *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 12.

⁴⁸ *Canada (Director of Investigation & Research) v Southam Inc*, [1995] 3 FCR 557 at 163, 63 CPR (3d) 1 (CA) [*Southam*].

⁴⁹ *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 10-13.

⁵⁰ *D&B Companies* *supra* note 23 at 75.

⁵¹ *NutraSweet*, *supra* note 21 at 44.

⁵² *D&B Companies*, *supra* note 23 at 110.

⁵³ *Ibid* at 38; *NutraSweet*, *supra* note 21 at 83. For more detail regarding the Bureau’s approach on defining relevant geographic markets, see *Abuse of Dominance Guidelines*, *supra* note 36 at s 2.2.

⁵⁴ *NutraSweet*, *supra* note 21 at 48.

⁵⁵ *Ibid* at 46.

⁵⁶ *Ibid* at 51.

⁵⁷ *D&B Companies*, *supra* note 23 at 111.

⁵⁸ *Canada Pipe – Tribunal*, *supra* note 4 at 112.

⁵⁹ *D&B Companies*, *supra* note 23 at 113; *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992) 40 CPR (3d) 289 at 96 [*Laidlaw*]; *NutraSweet*, *supra* note 21 at 47; *Tele-Direct*, *supra* note 35 at 71.

⁶⁰ *NutraSweet*, *supra* note 21 at 73. As the Competition Bureau notes, market power may also encompass an ability to maintain “other elements of competition such as quality, choice, service, or innovation below the

competition level, for a significant period of time”. For more detail regarding the Bureau’s approach to market power, see the *Abuse of Dominance Guidelines*, *supra* note 36 at s 2.3.1.

⁶¹ *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 52.

⁶² *Ibid* at 23. The Bureau has elaborated on its approach to assessing market share as an indication of market power in the *Abuse of Dominance Guidelines*, *supra* note 36 at s 2.3.1.

⁶³ *Tele-Direct*, *supra* note 35 at 286.

⁶⁴ *D&B Companies*, *supra* note 23 at 113; *NutraSweet*, *supra* note 21 at 73, 82.

⁶⁵ *Canada Pipe – Tribunal*, *supra* note 4 at 127–129, 138–144, 156, 161.

⁶⁶ *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 24, *Canada Pipe – Tribunal*.

⁶⁷ *Ibid*, *Canada Pipe – Tribunal*.

⁶⁸ *Canada Pipe – Tribunal*, *supra* note 4 at 157–159.

⁶⁹ *Ibid* at 161.

⁷⁰ *Canada Pipe FCA – Cross Appeal*, *supra* note 29 at 45–51.

⁷¹ *NutraSweet*, *supra* note 21 at 82.

⁷² *D&B Companies*, *supra* note 23 at 115.

⁷³ *Ibid* at 115–118.

⁷⁴ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 27.

⁷⁵ *Canada Pipe – Tribunal*, *supra* note 4 at 148–149, 156.

⁷⁶ *Ibid* at 261–262; *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 92.

⁷⁷ Kenneth L Glazer & Brian R Henry, “Coercive vs Incentivizing Conduct: A Way Out of the Section 2 Impasse?”, (2003) 18:1 Antitrust 45.

⁷⁸ The same alternative branches are applicable to the reviewable practice of tied selling: Act, *supra* note 2, s 77(1). The Tribunal in *Tele-Direct* found that the prohibition against tied selling not only addresses explicit contractual requirements to purchase the tied product, but also covers situations in which there is a discount or other advantage that effectively precludes a choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined by the Tribunal on the evidence, irrespective of the legal nature of the purchase arrangement: *Tele-Direct*, *supra* note 35 at 519.

⁷⁹ Act, *supra* note 2, s 77(1)(a)(i).

⁸⁰ See “Relationship Between the Conduct and the Supplier’s Rivals” section, below.

⁸¹ The Tribunal has taken a very legalistic approach to the coercive branch of exclusive dealing. In *NutraSweet* it did not find evidence that customers were refused or threatened with a refusal to supply if they chose not to enter into exclusive contracts, and therefore held that they had not been “required” to deal with NutraSweet exclusively: *NutraSweet*, *supra* note 21 at 160.

⁸² *Ibid* at 162.

⁸³ *Ibid* at 107.

⁸⁴ *Ibid* at 162. The *Canada Pipe* decisions also do not address the “primarily” requirement because the SDP rebates were based on full exclusivity.

⁸⁵ *Act, supra* note 2, s 78(1)(h). [emphasis added]

⁸⁶ *D&B Companies, supra* note 23 at 2, 120. The Commissioner also alleged that Nielsen’s long-term contracts for the sale of its scanner-based market tracking services to manufacturers of consumer packaged goods were anti-competitive acts.

⁸⁷ Canada, Competition Bureau, “Annual Report of the Commissioner of Competition for the Year Ending March 31, 2003”, online: <<http://publications.gc.ca/collections/Collection/RG51-2003E.pdf>> at p 55.

⁸⁸ *Canada Pipe FCA – Commissioner’s Appeal, supra* note 16 at 98.

⁸⁹ *Act, supra* note 2, s 77(2).

⁹⁰ *Canada Pipe FCA – Commissioner’s Appeal, supra* note 16 at 98.

⁹¹ *Ibid*.

⁹² *Ibid* at 58.

⁹³ *Ibid* at 64, 77. See also *NutraSweet, supra* note 21 at 40.

⁹⁴ In *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7 [*TREB*], a trade association of real estate brokers was found to be engaging in anti-competitive acts related to the introduction of new technologies by certain brokers competing in the market, even though they were not competing against the association itself.

⁹⁵ The Commissioner’s application alleged that the two relevant markets are the supply of galley handling at the Vancouver Airport and the airside access provided by the Vancouver Airport Authority for the supply of galley handling: *Commissioner of Competition v Vancouver Airport Authority* (29 September 2016), CT-2016-015 (Notice of Application) online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2016-015_Notice%20of%20Application_2_66_9-29-2016_5321.pdf>.

⁹⁶ See, e.g., Michael Trebilcock, “Abuse of Dominance: A Critique of *Canada Pipe*” (2007) Can Comp Rec 1 at p. 7.

⁹⁷ This appears to preclude the use of the abuse of dominance provision to address “excessive pricing” (regardless of whether engaged in unilaterally or by firms that collectively have a dominant position), unlike the regime in Europe which (controversially), can be used to challenge high pricing by dominant firms. For further discussion, see Campbell & Rowley, *supra* note 8 at p. 336.

⁹⁸ *Canada Pipe FCA – Commissioner’s Appeal, supra* note 16 at 70.

⁹⁹ *Ibid* at 72. The FCA at 70 referred to the testimony before the House of Commons Legislative Committee on Bill C-91 (which eventually became the *Competition Act*) in emphasizing that subjective intent is not necessary to find that conduct is anti-competitive under paragraph 79(1)(b). The FCA concluded that the removal of the phrase “object of the practice” in the final version of paragraph 79(1)(b) was an indication that Parliament did not intend to require subjective intent for the abuse of dominance provision.

¹⁰⁰ *Ibid* at 77.

¹⁰¹ *Canada Pipe – Tribunal, supra* note 4 at 203.

¹⁰² *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 78.

¹⁰³ *NutraSweet*, *supra* note 21 at 115.

¹⁰⁴ *Ibid* at 119.

¹⁰⁵ *Ibid* at 118–119.

¹⁰⁶ *D&B Companies*, *supra* note 23 at 131–134.

¹⁰⁷ Competition Bureau, “Competition Bureau Submission to the OECD Competition Committee Roundtable on Airline Competition” (16 June 2014), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03746.html>>.

¹⁰⁸ *Commissioner of Competition v Air Canada* (March 5 2001), CT-2001-002 at 1, 2 (Notice of Application) online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2001-002_0001_40MJO-4132004-1304.pdf>.

¹⁰⁹ *Ibid* at 45–46, 79.

¹¹⁰ *Ibid* at 106–107.

¹¹¹ *Commissioner of Competition v Air Canada*, 2003 Comp Trib 13.

¹¹² *Commissioner of Competition v Air Canada* (October 29 2004) CT-2001-002 (Notice of Discontinuance) online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2001-002_0146_40OQC-1112004-9051.pdf>. Subsequently, in 2011, the Bureau filed an application alleging that an Air Canada and United Continental Holdings proposed joint venture would lead to the exercise of market power on several trans-border routes based on the parties’ cooperation on pricing, capacity setting (route planning), frequent-flyer programs, revenue-sharing and cost-sharing. The Commissioner also took issue with three pre-existing “coordination agreements” that allowed the carriers to coordinate on other aspects of competition including through providing reciprocal access to Air Canada’s and United Continental Holdings’ respective frequent flyer programs. The Bureau challenged these arrangements under the competitor agreements reviewable practice (section 90.1). The Bureau considered that entry or expansion by rival air carriers was unlikely – partly due to significant barriers to entry including frequent flyer programs and incentives towards exclusivity in corporate customer contracts, which contributed to significant switching costs. The parties resolved the Commissioner’s concerns in a Consent Agreement which prohibited the parties from coordination on certain aspects of competition on specific overlapping routes including: coordinating their prices, coordinating the number of seats available at each price, pooling revenue or costs, and sharing commercially sensitive information. However, the Consent Agreement did not address the frequent flyer programs or the loyalty-generating aspects of corporate or group contracts. See *Commissioner of Competition v Air Canada, United Continental Holdings Inc, United Airlines and Continental Airlines Inc* (October 24 2012) CT-2011-004 (Consent Agreement) online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-004_Consent%20Agreement_169_45_10-24-2012_2558.pdf>.

¹¹³ The concept of business justification does not appear to have any explicit role under section 77, because the focus in the exclusive dealing reviewable

practice is on exclusionary effects rather than an anti-competitive purpose (see discussion above). Nevertheless, given that evidence regarding purpose may indirectly be informative as to effects, and vice versa, it can be expected that respondents will attempt to bring forward business justifications under section 77 where such evidence is available.

¹¹⁴ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 73 and 88.

¹¹⁵ *Ibid* at 73.

¹¹⁶ *Ibid* at 73.

¹¹⁷ In contrast, there is a complex efficiencies defence available in respect of mergers and competitive agreements: see *Act*, *supra* note 2, ss. 96 and 90.1(4)–(6).

¹¹⁸ *Canada Pipe – Tribunal*, *supra* note 4 at 259.

¹¹⁹ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 90–91.

¹²⁰ *Ibid* at 87, 90–91.

¹²¹ James B Musgrove and Steve Szentesi, “Loyalty Programs and Abuse of Dominance: Canada Pipe” (Paper delivered at the Continuing Legal Education Society of British Columbia, December 2006) [unpublished] at 3.2.11.

¹²² *NutraSweet*, *supra* note 21 at 152.

¹²³ *Ibid*.

¹²⁴ *D&B Companies*, *supra* note 23 at 122, 154.

¹²⁵ *NutraSweet*, *supra* note 21 at 168–169.

¹²⁶ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 93–95.

¹²⁷ *Act*, *supra* note 2, s 79(1)(c). [emphasis added]

¹²⁸ *Ibid*, s 77(2)(c). [emphasis added]

¹²⁹ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 94. The limitation period for challenging past conduct is three years after the practice has ceased: *Act*, *supra* note 2, s 79(6).

¹³⁰ In *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at 54–55 [*Tervita*], the Supreme Court of Canada held that the “lessening” branch under section 92 of the *Act* focuses on whether the merged entity would increase its existing market power.

¹³¹ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 95.

¹³² *Tervita*, *supra* note 131 at 54–55; *TREB*, *supra* note 95 at 474.

¹³³ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Canada: LexisNexis Canada, 2014) at pp. 217–220.

¹³⁴ *Act*, *supra* note 2, s 77(2)(b).

¹³⁵ *NutraSweet*, *supra* note 21 at 168, citing *Bombardier*, *supra* note 37 at 55–56.

¹³⁶ *Ibid* at 169.

¹³⁷ *Tervita*, *supra* note 131 at 55.

¹³⁸ *Canada Pipe FCA – Commissioner’s Appeal*, *supra* note 16 at 98.

¹³⁹ *Ibid* at 58.

¹⁴⁰ *Ibid* at 55.

¹⁴¹ *Ibid* at 57.

¹⁴² *Ibid* at 58.

¹⁴³ For example, potential quality differences were not a factor in the *NutraSweet*, *Canada Pipe* and *D&B Companies* cases.

¹⁴⁴ In *NutraSweet*, the Tribunal concluded that as long as NutraSweet remained the sole supplier of aspartame, it could set prices so that customers had little effective choice in supplier. Based on the foregoing and evidence that the strategy was introduced when its use patent was in force, the Tribunal concluded that the purpose of NutraSweet's branded ingredient strategy was to exclude future or existing competition. See *NutraSweet*, *supra* note 21 at 110–112.

¹⁴⁵ See, e.g. *Laidlaw*, *supra* note 60 at 66–67, 78, 96; *Commissioner of Competition v CCS Corp*, [2012] CCTD No 14 at 297, 2012 Comp Trib 14 and *Tervita*, *supra* note 131 at 44–46; *Canada (Director of Investigation and Research) v Hillsdown Holdings Canada Ltd*, (1992) 41 CPR (3d) 289 at 119 (Comp Trib) [*Hillsdown Holdings*]; and *Canada (Commissioner of Competition) v Superior Propane Inc*, (2000) 7 CPR (4th) 385 at 252, 311, 2000 Comp Trib 15. The *Abuse of Dominance Guidelines* do not specify a price threshold.

¹⁴⁶ *Laidlaw*, *supra* note 60 at 66–67, 78; *Tervita*, *supra* note 131 at 44–46; *Hillsdown Holdings*, *supra* note 146 at 119. The *Abuse of Dominance Guidelines* (*supra* note 36) confusingly refer to a one year standard time frame at part 2.3, fn. 17, but suggest a more vague frame of reference, based on what would constitute a reasonable period for competitors to challenge market power, at part 4, fn. 28.

¹⁴⁷ *Tervita*, *supra* note 131 at 70.

¹⁴⁸ *Act*, *supra* note 2, ss 96 and 90.1(4)–(6).

¹⁴⁹ There is no explicit counterpart in the exclusive dealing provision, although evidence related to the purpose of conduct may be indirectly relevant to the assessment of its effects: see *supra* note 114.

¹⁵⁰ See the discussion of *Canada Pipe FCA – Commissioner's Appeal*, *supra* note 16 at note 116.

¹⁵¹ *Act*, *supra* note 2, s 79(4).

¹⁵² Omar Wakil, *2016 Annotated Competition Act* (Toronto: Carswell, 2016) at p. 229.

¹⁵³ *NutraSweet*, *supra* note 21 at 140.

¹⁵⁴ *Canada Pipe – Tribunal*, *supra* note 4 at 269. The FCA did not directly consider this issue. It overturned the Tribunal's findings regarding the lack of a substantial lessening or prevention of competition without any assessment of whether there was superior competitive performance: see *Canada Pipe FCA – Commissioner's Appeal*, *supra* note 16 at 58.

¹⁵⁵ *Bureau OECD Submission*, *supra* note 5 at III.a.iii.

¹⁵⁶ *NutraSweet*, *supra* note 21 at 227.

¹⁵⁷ *Canada (Director of Investigation and Research) v D&B Companies of Canada* (30 August 1995), CT-1994-001 (Consolidated Order) online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1994-001_0143c_45QED-4152004-6360.pdf>.

¹⁵⁸ See, for example, the “*Interac*” case: *Director of Investigation and Research*

v Bank of Montreal et al (20 June 1996), CT-1995-002, online: Competition Tribunal <<http://www.ct-tc.gc.ca/CMFiles/0092a38PEW-3102004-3532.pdf>>.

¹⁵⁹ *Canada Pipe Consent Agreement*, *supra* note 31, at pp. 3-4.

¹⁶⁰ *Act*, *supra* note 2, s 79(3.1). The C.D. Howe Institute Competition Policy Council recently convened a session on the private rights of action under the *Act*. Some of the Council members supported expansion of the *Act* to allow for private rights of action under section 79 while others were concerned that this would have a chilling effect on vigorous competition and generate strategic or other unmeritorious litigation.

¹⁶¹ *Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership* (3 November 2014), CT-2012-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2012-002_Registered%20Consent%20Agreement_170_38_11-5-2014_3504.pdf> [*“Reliance Comfort”*]. In addition to the prohibition order, Reliance Comfort agreed to take steps to make it easier for consumers to terminate their water heater rental agreement.

¹⁶² *Canada (Commissioner of Competition) v Direct Energy Marketing Limited* (20 October 2015), CT-2012-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2012-003_Registered%20Consent%20Agreement_127_38_10-30-2015_8295.pdf> [*“Direct Energy”*].

¹⁶³ *Act*, *supra* note 2, s 103.1(1). The private right of action also applies to refusal to supply (s 75) and price maintenance (s 76), but not abuse of a dominant position (ss 78–79).

¹⁶⁴ Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess, 37th Parl, 2002 (assented to 4 June 2002), SC 2002, c 16.

¹⁶⁵ Private plaintiffs made several attempts to use the reviewable practices in Part VIII of the *Act* as the illegal acts to ground claims for damages under torts such as civil conspiracy and interference with economic relations. Such claims have been consistently rejected on the basis that reviewable practices are lawful unless and until they are prohibited (which is the exclusive purview of the Tribunal): see, e.g., *Cellular Rental Systems Inc v Bell Mobility Cellular Inc* (1995), 61 CPR (3d) 204 (Ont Div Ct); *Polaroid Canada Inc v Continent-Wide Enterprises Ltd* (1994), 59 CPR (3d) 257 (Ont Gen Div); *Harbord Insurance Services Ltd v Insurance Corporation of British Columbia* (1993), BLR (2d) 91 (BCSC); *Procter & Gamble Co v Kimberly-Clark of Canada Ltd* (1990), 49 FTR 31, 40 CPR (3d) 1 (TD). The introduction of AMPs for abuse of dominance could support the opposite conclusion, but in the only reported case addressing this issue to date the Tribunal followed the historic line of jurisprudence: see *Novus Entertainment Inc v Shaw Cablesystems Ltd*, 2010 BCSC 1030, 191 ACWS (3d) 1103.

¹⁶⁶ See *B-Filer Inc v Bank of Nova Scotia*, 2006 FCA 232 [B-Filer], which confirmed the Tribunal’s adoption of the test described by the FCA in *Barcode Systems Inc v Symbol Technologies Canada ULC*, 2004 FCA 339, at 17 [Barcode Systems Inc].

¹⁶⁷ *B-Filer*, *supra* note 166 at 1-3.

¹⁶⁸ See *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15 [CarGurus];

B-Filer, *supra* note 166; and *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26 [*Stargrove*]. A notice of appeal has been filed to the FCA in the *CarGurus* matter.

¹⁶⁹ See Campbell & Rowley, *supra* note 8 at pp. 273–274.

¹⁷⁰ *Ibid* at p. 350.

¹⁷¹ Global Competition Review, *2016 Rating Enforcement*, (London: Law Business Research, July 2016). [The Global Competition Review also reports similar enforcement data for numerous other jurisdictions including the US.]

¹⁷² See Campbell & Rowley, *supra* note 8 at pp. 309, 324–325.

¹⁷³ *Ibid* at p. 269.

¹⁷⁴ A possible exception may arise if the loyalty program does not in fact lower prices, despite appearing to offer discounts. However, this may be primarily a theoretical consideration since it does not appear to be common in ordinary business practice.

¹⁷⁵ Campbell & Rowley, *supra* note 8 at p. 343, drawing upon Glazer & Henry, *supra* note 78.