BUILD IT AND YOU MUST SHARE IT? ESSENTIAL FACILITIES IN CANADA

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The concept behind the essential facilities doctrine is deceptively simple: where a firm owns a facility that is an essential input for firms producing a downstream product, competition law will in certain circumstances force the owner of the upstream facility to share that facility.

The difficulty lies in defining what those circumstances are in a way that does not lead to routine forced sharing. If competition law too easily forces owners of facilities to share them with their competitors, it deprives those owners of the fruits of their investment in creating the facility, and weakens, if not eliminates, incentives to develop new facilities. This in turn will reduce innovation and competition. In short, if the rule is "build it and you must share it", then firms will not build.

In Canada, the essential facilities doctrine is still in its infancy. While there is broad consensus that access to a facility should only be ordered in exceptional cases, paradoxically, the elements of section 79 of the Competition Act may be easier to meet where the conduct consists of a denial of access or a refusal to deal. Robust limiting principles are therefore required to constrain the ambit of this doctrine.

La doctrine des installations et équipements essentiels repose sur une prémisse d'une simplicité trompeuse : dans certains cas, la société propriétaire d'installations qui sont essentielles aux fabricants d'un produit en aval est obligée par la loi sur la concurrence de partager ces installations.

La difficulté est de définir ces cas d'une manière qui évite une pratique systématique de partage forcé. Si la loi sur la concurrence obligeait trop facilement le propriétaire à partager ses installations avec ses concurrents, cela le priverait des fruits de son investissement dans la création des installations, et du coup affaiblirait, voire éliminerait l'intérêt d'en édifier de nouvelles, décourageant ainsi l'innovation et la concurrence. Bref, si c'est la règle de « construire pour devoir partager ensuite », les sociétés ne construiront rien.

Au Canada, la doctrine des installations et équipements essentiels n'en est encore qu'à ses débuts. S'il est généralement entendu que l'accès à des installations ne doit être ordonné que dans des cas d'exception, il reste que, paradoxalement, les critères de l'article 79 seraient peut-être plus faciles à

remplir dans le cas d'un refus d'accès ou d'un refus de traiter. Il faut donc des restrictions fortes pour bien circonscrire la portée de cette doctrine.

INTRODUCTION

The concept behind the essential facilities doctrine is deceptively simple: where a firm owns a facility that is an essential input for firms producing a downstream product, competition law will in certain circumstances force the owner of the upstream facility to share that facility.

The difficulty lies in defining what those circumstances are in a way that does not lead to routine forced sharing. If competition law too easily forces owners of facilities to share them with their competitors, it deprives those owners of the fruits of their investment in creating the facility, and weakens, if not eliminates, incentives to develop new facilities. This in turn will reduce innovation and competition. In short, if the rule is "build it and you must share it", then firms will not build.

After a period that saw a number of successful essential facilities cases, the doctrine went into decline in the US after a devastating critique by the late Professor Phillip Areeda in 1989. He argued that the doctrine had been expanded with little regard to policy, to the point of becoming ridiculous, and proposed cutting it back.[2] Ultimately, the US Supreme Court did just that.

In Canada, the doctrine is still in its expansionist phase. In particular, the extent to which the doctrine will be recognized under our abuse of dominance provision (section 79) has yet to be conclusively determined. While there is broad consensus around the proposition that access to a facility should only be ordered in exceptional cases, paradoxically, the elements of section 79 may be easier to meet where the conduct consists of denial of access or a refusal to deal. Robust limiting principles are required if Canada is to avoid the expansion of the doctrine reaching the point of ridiculousness.

A SHORT HISTORY OF THE ESSENTIAL FACILITIES DOCTRINE

From railways to ski slopes

The essential facilities doctrine was the progeny of three seminal decisions of the US Supreme Court: *US v Terminal Railroad Association of St. Louis*,[3] *Associated Press v US*,[4] and *Otter Tail Power Co v US*.[5]

In *Terminal Railroad*, a combination of railroads in St. Louis acquired the railways and bridges needed to cross the Mississippi River and pass through St. Louis. Before these acquisitions, there were three competing ways for railways to cross the Mississippi. Afterwards, the combination controlled all three routes, and used this control to disadvantage competitors. The US Supreme Court compelled the combination to admit other railways as members.

Associated Press was similar. AP was (and is) an association of newspapers. Members gave each other access to their stories. AP also maintained its own staff of reporters. However, AP membership was exclusive based on geography: other newspapers could join apart from competitors of existing members. The US Supreme Court affirmed lower court decisions that the by-laws preventing competitors from joining violated section 2 of the *Sherman Act*.

While *Terminal Railroads* and *Associated Press* involved multi-firm conduct, *Otter Tail* was a unilateral case. Otter Tail was (and is) an electric utility company in Minnesota and the Dakotas. It wanted to stop municipalities from switching away from it to a municipal electricity distribution system when its contracts expired. The US District Court found that Otter Tail used four principal means: it refused to sell wholesale power to communities where it formerly sold power at retail; it refused "wheel" power to those communities (that is, to carry power from another generator to that community); it commenced litigation to prevent municipalities from issuing bonds to construct power generation facilities; and it used terms in its contracts with other generators to prevent them from selling power to these communities. The US Supreme Court affirmed these findings, holding that Otter Tail used its monopoly power to foreclose competition in violation of antitrust laws.

None of these seminal cases expressly invoked or developed what came to be known as the essential facilities doctrine. This was done by the Seventh Circuit in *MCI Communications Corp v AT&T*.[6] That case involved a multifaceted dispute between MCI and AT&T. One of the issues was AT&T's refusal to interconnect with MCI, which prevented MCI from offering certain services to its customers. The court referenced the essential facilities doctrine, noting that:

> A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a

> "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.[7]

The court went on to list what have become the four classic elements of the doctrine:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.[8]

A few years later, the doctrine arguably reached its summit with the US Supreme Court decision in *Aspen Skiing Co v Aspen Highlands Skiing Corp*.[9] Aspen consists of four ski hills. By 1967, Aspen Skiing Co. (known as "Ski Co.") owned three of them, while Highlands owned the fourth. Until the late-1970s, the ski hills had offered tickets good for six days on all four ski areas. But beginning with the 1978-79 ski season, Ski Co. discontinued the four-area tickets, and instead offered discounted tickets restricted to the three areas it owned. Ski Co. also refused to sell lift tickets to Highlands. Highlands' market share tumbled as a result, and Highlands sued, alleging a breach of section 2.

The US Supreme Court observed that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor".[10] But, "The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified", the court added.[11] The fact that the four-area ticket had been jointly offered before was a critical factor in the court's analysis:

> In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.[12]

Further on, the court added,

> the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival.[13]

It's all downhill from here

In 1989, the late Professor Phillip Areeda launched what turned out to be a devastating critique of the essential facilities doctrine at an ABA conference.

His thirteen page article begins by noting:

> As with most instances of judging by catch-phrase, the law evolves in three stages: (1) An extreme case arises to which a court responds. (2) The language of that response is then applied—often mechanically, sometimes cleverly—to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins.[14]

Essential facilities was, he proclaimed, in the expansionary second phase, and in need of being "brought back to antitrust policy". After a review of the cases, he proposed six limiting principles.

Areeda divided the cases into two categories: multifirm combinations, and single firm conduct cases. *Terminal Railroad* and *Associated Press* were both multifirm combination cases. Areeda approved of *Terminal Railroad*:

> Recognizing that the combination had obtained a monopoly through joint purchase, the Supreme Court wisely concluded that the most efficient remedy was to admit nonmember competitors to the consortium.[15]

Associated Press was, however, "a more doubtful case".[16] Areeda characterized the case as being about AP's policy of discriminating against competitors in its admissions policy, which the Supreme Court enjoined. However, Areeda notes, "the Court was very careful not to say that the Associated Press had to admit everyone".[17] He criticized the decision for its vagueness, noting:

> Whatever *Associated Press* held, it is often said to stand for more or less the following propositions, with the vague terms emphasized: (1) whenever competitors jointly create a *useful facility*, (2) that is essential to the competitive vitality of rivals, (3) and (perhaps) essential to the competitive vitality of the market, (4) and admission of rivals is consistent with the *legitimate* purposes of the venture, then (5) the collaborators must admit rivals on *relatively equal* terms.[18]

Turning to single firm conduct cases, Areeda offered four reasons why

propositions derived from multifirm cases should not govern unilateral refusals to deal.

First, unilateral conduct occurs much more frequently than multifirm conduct. Applying principles from multifirm cases to unilateral cases would lead to subjecting too many decisions to antitrust scrutiny:

> concerted action is exceptional, whereas unilateral action is omnipresent. Innumerable firms engage in unilateral action every day. We have to be very wary about examining the decisions of each of those firms in our economy, particularly when anything one has that another wants may be called an "essential facility."[19]

Second, multifirm conduct is easier to remedy. Where competitors create a shared resource, it is easy to order that they admit others who wish to join. Areeda's third reason was related to his second: a remedy of requiring admission is a "one-time remedy that does not require day-to-day control". It is also less likely to chill desirable activities.

Fourth,

> the combination itself might be evidence of essentiality. Allowing the competitors to combine in the first place indicates that the proposed venture is both important and beyond the individual capacity of the collaborators. No such inference can be drawn from the activities of single firms.[20]

It is noteworthy, however, that Areeda did not disapprove of all instances of requiring a single firm to deal with a rival. He characterized *MCI v AT&T* as "probably correct".[21] While not exactly approving of *Otter Tail*, he noted that Otter Tail may have evaded the regulation of its activities to the detriment of consumers.[22] *Aspen Skiing* came in for heavy criticism, however. First of all, Ski Co. was not a monopoly. Next, Areeda criticized the Supreme Court's approval of the proposition in the jury instructions that Ski Co. would be liable to Highland if it had acted "with exclusionary or anticompetitive purpose of effect". "This language," he commented, "has serious and questionable implications".[23] He illustrated the point with three examples: a patent holder refuses to license a patent because it wants to exclude a competitor; a newspaper decides to sell through its own employees because distributors charge too much; or an owner of a facility such as a warehouse or a laboratory refuses a request from a competitor to use that facility because it wants to improve its competitive position relative to that competitor – that is, to exclude the competitor. Areeda pointed out:

> Of course, the reason any business declines to share the fruits of its labor with competitors is because it wants to win in the marketplace.[24]

Ultimately, Areeda dealt with the case by noting that Ski Co.'s conduct was really a form of "quasi-exclusive dealing".[25]

Areeda concluded his article by offering six limiting principles. They are worth setting out in full:

> (1) There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional.
>
> (2) A single firm's facility, as distinct from that of a combination, is "essential" only when it is both critical to the plaintiffs competitive vitality and the plaintiff is essential for competition in the marketplace. "Critical to the plaintiff's competitive vitality" means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.
>
> (3) No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely (a) when it would chill desirable activity; (b) the plaintiff is not an actual or potential competitor; (c) when the plaintiff merely substitutes itself for the monopolist or shares the monopolist's gains; or (d) when the monopolist already has the usual privilege of charging the monopoly price for its resources.
>
> (4) Even when all these conditions are satisfied, denial of access is never per se unlawful; legitimate business purpose always saves the defendant. What constitutes legitimacy is a question of law for the courts. Although the defendant bears the burden of coming forward with a legitimate business purpose, the plaintiff bears the burden of persuading the tribunal that any such claim is unjustified.
>
> (5) The defendant's intention is seldom illuminating, because every firm that denies its facilities to rivals does so to limit competition with itself and increase its profits. Any instruction on intention must ask whether the defendant had an intention to exclude by *improper* means. To get ahead in the marketplace is not itself the kind of intention that contaminates conduct.
>
> (6) No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.

> Remedies may be practical (a) when admission to a consortium is at stake, especially at the outset, (b) when divestiture is otherwise appropriate and effective, or (c) when, as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing. However, the availability of a remedy is not reason to grant one. Compulsory sharing should remain exceptional.[26]

Another important critique was Einer Elhauge's 2003 bombshell, "Defining Better Monopolization Standards",[27] where he complained that

> Monopolization doctrine currently uses vacuous standards and conclusory labels that provide no meaningful guidance about which conduct will be condemned as exclusionary.[28]

Elhauge laid waste to the entire field of US monopolization law. When he came to the essential facilities doctrine, he made the important point that from an *ex post* perspective, forcing the owner of a monopoly facility to share that facility will appear to increase competition:

> The more fundamental problem is that, from an *ex post* perspective, excluding rivals from any property rights valuable and unique enough to enjoy monopoly power will generally constrain consumer choice, lower output, and raise prices, thus producing allocative inefficiency. This is certainly true with intellectual property, where sharing is normally costless, and thus any dissemination of the knowledge protected by the property right will produce more efficient competition in using that knowledge. But it is also true with any other kind of physical property that gives the owner monopoly power,[128] assuming sharing is not more costly than the efficiency gains from competitive use of the property.[29]

In other words, forcing an owner of a facility that confers market power will prevent the owner from enjoying that market power and thus increase competition. But, Elhauge adds:

> Such an *ex post* approach ignores the *ex ante* reality that it is precisely the prospect of being able to exclude rivals from one's property and charge a price above the marginal cost of using it that is necessary to encourage the prior investments that created the property, or enhanced or maintained its value.[30]

Thus forcing the owner of the facility to share destroys the incentive for the owner to have created the facility in the first place. The effect of forced sharing on the incentive to innovate is large, not small, Elhauge argues:

> [A] requirement of sharing imposes not a small, but a large reduction on the scope of monopoly power, and thus will have much more devastating effects on innovation incentives.[31]

After considering, and rejecting, several bases for imposing a duty to deal, Elhauge concludes that antitrust law should intervene against discriminatory refusals to deal. Ordering a firm to deal with another where its refusal to deal was discriminatory avoids the difficulties associated with other refusal to deal cases. This is because the monopolist has already set the price (by dealing with others) for access. In principle, this price is enough to have induced the monopolist to have invested to create the facility *ex ante*. As well, since it is the monopoly price, it does not undermine the incentive that rivals have to invest to duplicate the facility. Finally, such cases avoid the problem of the court having to set the price for access.[32]

Elhauge concludes:

> In short, while the ex ante efficiencies created by property rights do justify virtually all refusals to deal on terms other than the price set by the property owner, they do not justify discriminatory refusals to deal with those buyers who are (or deal with) rivals.[33]

The near-rejection of essential facilities in the US

Ultimately, Areeda's critique led to the near-rejection of essential facilities by the US Supreme Court, in two cases.

The first is the 2004 decision in *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*.[34] This case arose out of a dispute between AT&T and Verizon over telephone interconnections mandated by telecommunications regulations. AT&T was not the plaintiff.

In his majority opinion, Justice Scalia began by stating two fundamental principles. First, mere possession of monopoly power, and charging monopoly prices, is not unlawful. To be unlawful, it must be accompanied by anticompetitive conduct.

Second, antitrust law generally does not force market participants to share facilities with their rivals. He set out the reasons for this in a dense paragraph that is worth unpacking.

He began by noting that:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.

Put another way, the purpose of competition law is to encourage innovation and investment. When a firm does this, it will obtain a competitive advantage over its competitors, and perhaps even acquire market power. If competition law then swoops in and forces this firm to share the results of its innovation and investment, it risks undercutting its very purpose for existence.

Next, Scalia J. pointed to two problems with ordering one firm to deal with another:

> Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.

He concluded:

> Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[35]

Scalia J. immediately added that the right to refuse to deal with rivals is not unqualified, citing *Aspen Skiing*. But he carefully limited this qualification:

> Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.[36]

As for *Aspen Skiing* itself, Scalia J. observed that it is "at or near the outer boundary of §2 liability".[37] He distinguished that case on the basis that Ski Co. had decided to cease participation in a cooperative venture that had presumably been profitable, suggesting a willingness to forsake short-term profits to achieve an anticompetitive end.[38] He also noted that

Ski Co. had refused to sell to its competitor a product that it was selling at retail.

Finally, Scalia J. pointedly refused either to endorse or reject the doctrine of essential facilities:

> We have never recognized such a doctrine … and we find no need either to recognize it or to repudiate it here.[39]

The next case is *Pacific Bell Telephone Co v Linkline Communications, Inc.*[40] The question in *Linkline* was whether a price squeezing claim could be brought under section 2 of the *Sherman Act* in the absence of an antitrust duty to deal. The US Supreme Court held that it could not. Linkline was one of four internet service providers that complained that AT&T was charging them high wholesale prices to lease DSL internet lines, while charging low prices to its own retail customers; a classic price squeeze. The decision by lower courts that AT&T did not have an antitrust duty to deal with its rivals was not challenged before the US Supreme Court.

The court held that price squeezing claims were indistinguishable from "insufficient assistance" claims: neither are available in the absence of an antitrust duty to deal:

> There is no meaningful distinction between the "insufficient assistance" claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case. The *Trinko* plaintiffs challenged the quality of Verizon's interconnection service, while this case involves a challenge to AT&T's pricing structure. But for antitrust purposes, there is no reason to distinguish between price and nonprice components of a transaction. … The nub of the complaint in both *Trinko* and this case is identical—the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.

The implication of this passage is that refusal to deal claims are analytically identical to price squeezing claims. Put another way, a refusal to recognize a duty to deal necessarily involves a refusal to recognize price squeezes as an anticompetitive act. The converse is also true: the recognition of price squeezing as an anticompetitive act necessarily involves the recognition of a duty to deal.

HISTORY OF ESSENTIAL FACILITIES IN CANADA

While Canada's 1986 *Competition Act* has been hailed as the world's most economically literate, it is also true that the Act's provisions reflect the state of economic and judicial thinking, mostly from south of the border, at the time of its passage. When the 1986 Act was being drafted, essential facilities was still in what Areeda termed its expansionary phase in the US. It had yet to be brought back to antitrust principles.

To some extent, the Act's provisions on refusals to deal reflect this expansionary phase. Despite this, the approach to refusals to deal and essential facilities in Canada has been decidedly conservative until very recently. Two cases, however, suggest that essential facilities has reached an expansionary phase in Canada: *TREB* and *Vancouver Airport Authority*.

The *Competition Act* contains five provisions that could be used to challenge a refusal to deal or denial of access. The two most important are section 75, which is aimed at refusals to deal, and section 79, dealing with abuse of dominance, and which is the provision relied on in two cases dealing with access, *TREB* and *Vancouver Port Authority*. Additionally, section 76, price maintenance, contains a provision for remedying a refusal to deal that is motivated by a low pricing policy. These three provisions are discussed below.

Certain refusals to deal could potentially be challenged under section 77 (the exclusive dealing, tied selling, and market restriction provision) and section 90.1 (anticompetitive agreements between competitors).[41] These provisions are not addressed in this paper.

Section 75 – Refusal to Deal

Certain features of the *Competition Act*'s refusal to deal provision, section 75, are suggestive of an attempt to codify the essential facilities doctrine.

First, the provision focuses on the importance of the input for a firm, as section 75(1)(a) requires that:

> (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

However, section 75 stops short of requiring that the input be essential.

In *Nadeau Poultry Farm Limited v Groupe Westco Inc*, the Competition Tribunal held that in order to meet this test, the firm in question had to be affected in an "important or significant way", but that it was not necessary to show that it was affected to the point of being unable to carry on business.[42] After Westco had stopped supplying Nadeau with live chickens, Nadeau was forced to turn to suppliers in Quebec. The Tribunal accepted that a reduction of a certain, confidential but "large", percentage of revenue met the test, even though that revenue was within historical norms for the business.

While the precise threshold at which the test in section 75 will be met is uncertain, and expressed in qualitative rather than quantitative terms, it is clear that section 75 will become operative in cases where the input is somewhat less than essential, although it must be important.

Second, the ambit of who can be forced to supply pursuant to section 75 is much broader than under a traditional essential facilities test. Section 75 contains no requirement that the supplier be vertically integrated or that it control or have market power in the upstream market. In fact, section 75 is drafted so as to permit a supplier who is entirely innocent of any anti-competitive animus to be ordered to supply: "the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer".

Nevertheless, the experience to date is that orders under section 75 are extremely difficult to obtain. Only two applications under section 75 have succeeded. Both involved parts, for Chrysler cars[43] and Xerox copiers.[44] In both cases, there were no substitutes for the upstream product, that is, Chrysler and Xerox parts.

Section 76 – Price Maintenance

The *Competition Act*'s price maintenance provision, section 76, covers two situations where a supplier refuses to supply a customer because of the customer's low pricing policy.[45]

Section 76 is clearly not an essential facilities provision. Apart from a competitive effects test with a relatively low threshold ("adverse effect"), section 76 does not purport to incorporate any elements of the essential facilities test.

Indeed, section 76 has very few, if any internal controls over its ambit. If it is proven that the refusal to supply is motivated by the low pricing

policy of the customer, and if an adverse effect on competition is shown, then the remedy will likely follow. Section 76 does not just apply in situations where the supplier was previously supplying the customer, but can apply where a new customer is refused by the supplier. Incredibly, it is also not necessary that the supplier be engaged in the business of supplying the product to others! The provision applies to anyone who is "in the business of *producing* or supplying a product" (emphasis added), as well as to anyone who "has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography".[46] In other words, anyone who produces a product, but does not supply it to any resellers, and anyone who owns intellectual property, but does not license it to anyone, can potentially be forced to supply that product, or license that intellectual property, to another firm precisely so as to enable that firm to undercut the prices charged by the producer or owner of the intellectual property.

When private applications are considered, section 76 lacks another important control. To get leave to bring an application under sections 75 or 77, a would-be private applicant must show that its business is "directly and substantially affected" by the impugned practices. By contrast, to get leave to bring a section 76 application, the applicant must only show that its business is directly affected. There is no need for it to be substantially affected.[47]

The justification for including a refusal to deal provision in section 76 in the Act is obvious: the ultimate sanction imposed by a supplier on a customer who disregards its price maintenance policy is to cut off supply. Thus if the Act is to control price maintenance at all (an arguable point in itself), then there must be a mechanism to order the supplier to resume supplies.

Nevertheless, the expansiveness of the refusal to supply provisions in section 76 make them a potentially attractive avenue for firms seeking to force a supplier to do business with them; and a correspondingly worrisome provision for those concerned about the expansionist tendencies of the essential facilities concept.

One case that illustrates this is *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*.[48] Stargrove is a bargain-bin CD producer. It wanted to produce CDs with recordings that were in the public domain (that is, copyright over the sound recording had expired), but for which it needed so-called "mechanical licences", that is, a licence to make

copies of the musical work on a CD, as copyright over the words and music was still in force. When several companies that owned these rights turned it down, Stargrove commenced an application to bring a private application under sections 75, 76, and 77 to force the copyright owners to grant mechanical licences.

The Tribunal denied Stargrove's application for leave as regards sections 75 and 77, as it had failed to demonstrate that its business was substantially affected. But it met the "directly affected" test to proceed under section 76.

The Tribunal's previous decision in *Warner Music* also meant that intellectual property could not be the subject of an order under section 75.[49] But it refused to apply *Warner Music* to section 76, leaving open the possibility that this provision could apply to intellectual property. Moreover, although in *Visa/MasterCard*, the Tribunal held that "a resale is required under section 76 of the *Competition Act*",[50] in *Stargrove*, the Tribunal held that it was an open question whether section 76 extended to inputs, as opposed to products acquired for resale.[51]

As the *Stargrove* decision was a leave decision, the applicants benefited from a lower standard of proof. The decision therefore does not establish that section 76 can be applied to refusals to license intellectual property, or to refusals to supply inputs as opposed to products for resale; it only establishes that it might be. As the case was later settled, the question remains open.

Nevertheless, if section 76 came to be applied to refusals to supply inputs, as opposed to products for resale, it would expand significantly the range of cases where a supplier could be forced to supply a customer against its will. The Tribunal pointed this out in rejecting the Commissioner's contention that section 76 could be applied to refusals to supply inputs in *Visa/MasterCard*:

> The Commissioner's interpretation would mean that Canada has embarked on a form of price control where any increase in a price – an increased input – would be subject to section 76 consideration.[52]

Section 79 – Abuse of dominance

Refusal to deal is not listed among the enumerated anticompetitive acts listed in section 78.[53] Consequently, the question arises whether a

refusal to deal could be considered an anticompetitive act for purposes of section 79.

If the logic of the US Supreme Court's decision in *Linkline* is accepted, that is, that refusals to deal are analytically indistinguishable from price squeezing, then the express inclusion of price squeezing in paragraph 78(1)(a) means that refusals to deal should be recognized as potentially being an anticompetitive act for purposes of section 79.[54]

It could be argued that the inclusion of specific refusal to deal provisions in the Act (principally section 75, but also in section 76, discussed above) means that Parliament intended that refusals to deal be dealt with under those specific provisions, and not under the general abuse of dominance provisions. It is, however, well-established that there is overlap among the provisions in the Act generally, and those in Part VIII specifically.

While there is as yet no definitive ruling on whether section 79 covers anti-competitive refusals to deal, the Bureau takes the position that it does, and the cases to date tend to support that decision.

The Competition Bureau's Approach to (Essential) Facilities

The Bureau has at various times provided its view of the particular requirements of an essential facilities case under section 79.

In its 2001 *Enforcement Guidelines on the Abuse of Dominance Provisions*,[55] the Bureau merely noted that denial of access to a facility can be an anti-competitive act:

> Although not specifically listed in section 78, refusing to allow a competitor access to an incumbent's facility, or imposing restrictive terms of access, can constitute an anticompetitive act.[56]

In its discussion of margin squeezing, the Bureau stated that a necessary structural condition for squeezing to be profitable is that "there must be secure and significant unilateral or joint market power upstream", because "Otherwise, downstream customers can evade the squeeze by turning to other suppliers".[57]

Some years later, in 2008, the Bureau provided a more expansive outline of its approach to essential facilities, in its *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* ("*TAB*"). While the *TAB* was aimed at the telecommunications

industry, the Bureau states the essential facilities doctrine in the *TAB* in general, non-industry specific terms.

The Bureau refers to the doctrine as "denial of access to a facility" – leaving out the word "essential". The Bureau set out the following elements:

> i. A vertically integrated firm that has market power in the downstream (or retail) market for which the facility is an input in the time period following the denial.
>
> ii. A denial of access to the facility has occurred for the purpose of excluding competitors from entering or expanding in the downstream market or otherwise negatively affecting their ability to compete.
>
> iii. The denial has had, is having or is likely to have the effect of substantially lessening or preventing competition in the downstream market.[58]

The Bureau stated that it would begin its analysis with an assessment of downstream market power once denial has occurred. The purpose behind this seems to be to enable the Bureau to assess the importance of the upstream input to the downstream market:

> In cases where downstream firms do not currently have access, the ability and incentive of the allegedly dominant firm to impose a SSNIP in the downstream market will depend on the extent of barriers to entry, which in turn depends in part on the extent of upstream market power. For example, if upstream market power exists and it is very difficult or impossible for downstream competitors to duplicate the facility or obtain it from other sources, a denial of access to that facility would create a very high barrier to entry at the downstream level, and hence result in downstream market power as a result of the denial. [Emphasis added; footnote omitted]

Thus, while nowhere does the Bureau state that the upstream facility must be essential, the Bureau's test suggests that the upstream facility must be so important that denial of access creates a high barrier to entry to the downstream market.

Strikingly, the Bureau also suggests that the owner of a facility might be required to expand the facility to accommodate competitors, provided that it is not prohibitively expensive to do so:

> At the same time, the purpose would not be anti-competitive if there is a credible and valid business justification for the denial, such as if the

> reason access was denied was because it would be prohibitively expensive to build the necessary capacity to supply competitors. [Emphasis added][59]

In its *2012 Abuse Guidelines*,[60] which replace previous guidance on abuse of dominance, including the *TAB*, the Bureau did not articulate any position on essential facilities.

In March 2018, the Bureau released draft revised Abuse Guidelines.[61] The draft guidelines do not discuss essential facilities or refusals to deal. They do discuss the concept of market power arising from the ability to exclude market participants in a downstream market, however.

The *2018 Draft Abuse Guidelines* also recognize that dynamic competition sometimes results in a competitor achieving market power, and that it is this prospect of achieving market power that provides the incentive to innovate:

> The Bureau is also conscious to avoid enforcement action that chills dynamic competition in favour of increased static competition. Healthy dynamic competition may result in sequential "winner take all" competition for a market based on product quality or innovation, with the result that the successful firm acquires market power. Often, it is the prospect of market power that provides the incentive for firms to engage in dynamic competition.[62]

Access to Facilities Cases Under Section 79

To date, four cases under section 79 have involved access to facilities issues: *Interac, Tele-Direct, TREB, and Vancouver Airport Authority*.

Interac

In the mid-1980s, Canada's banks created the Interac network of banking machines, allowing their customers to withdraw money from other banks. In the mid-1990s, they added Interac Direct Purchase to the services they provided, allowing customers to pay for goods and services at the check-out with their bank cards. By this time, Interac had nine "charter" members, and 18 "sponsored" members. Only the charter members could connect directly to the Interac network; other members had to be sponsored by a charter member.

In an application filed in 1995, the Director of Investigation and Research (as the Commissioner of Competition was then styled) alleged that Interac's membership rules and fee structure prevented competition

in the market for the supply of shared electronic services and constituted a joint abuse of dominance by Interac's members.[63]

The Director alleged that by combining to create Interac, the nine largest financial institutions in Canada became members of a single dominant shared electronic network service. Growing consumer demand for shared electronic financial services offered through Interac made it essential for financial institutions to connect to Interac in order to retain their customer base and compete effectively in other retail financial services markets, the Director said.

Interac's charter members abused this dominant position by restricting access to its network in a number of ways, according to the Director. Only Interac's charter members could connect directly to the network; others had to be sponsored and connect indirectly. Charter membership was restricted to financial institutions that were also direct clearers in the Canadian Payments Association ("CPA") and who deployed ATMs, who were also required to become shareholders of Interac Inc. and make a significant investment. The sponsored membership category was less restrictive, but only financial institutions that were "issuers" (that is, that issue a bank card) were eligible. As well, the software used by the network was only licensed to charter members.

Interac's charter members negotiated a consent order with the Director that opened up membership to all commercial entities and allowed all members to connect directly to the network. It gave representation on Interac's board to each of three categories of members (direct connected financial institutions, direct connected non-financial institutions, and indirect connectors). The order also banned service access fees, restricting Interac's revenue to switch fees (per transaction fees) on a cost-recovery basis. The Tribunal duly approved the consent order in 1996.[64] As the case was settled, it is of little precedential value.

The *Interac* case illustrates the inevitable tendency of an order granting access to a facility forcing the Commissioner and the Tribunal to assume – and continue in – the role of a regulator. The consent order contained (and continues to contain) a highly detailed and prescriptive regulatory scheme: it regulated Interac's membership, governance, and fees. The consent order had no termination provisions and no prospect of ever being terminated; it was clearly envisioned as being in force indefinitely. It has required constant revision to adapt it to changing circumstances. Thus in 1998, it was varied, on consent, to provide for a

performance sanctions policy.[65] In 2000, it was amended to permit the imposition of monetary penalties on members for non-compliance with the rules.[66] In 2003, it was amended to broaden the definition of financial institution and converted into a consent agreement. The consent agreement was then amended in 2005 to provide for a minimum annual fee, to prevent cross-subsidization.[67] In 2013, it was restated, incorporating significant amendments. These amendments included a provision to include recovery of research and development costs as part of the switch fee, and provisions anticipating a restructuring of Interac from an association into a corporation.[68] The consent agreement was again restated in October 2017 to vary the governance provisions applying after the restructuring to permit a board comprised of eight directors appointed by financial institution members, four independent directors, plus the CEO.[69] The consent agreement continues in force, now against Interac Corp., more than twenty years after it was first issued.

Tele-Direct

The *Tele-Direct* case was the first contested case to consider refusals to deal under the abuse of dominance provisions.

Tele-Direct (Publications) Inc., a subsidiary of Bell Canada and BCE Inc., published Yellow Pages directories. The Director accused Tele-Direct of abuse of dominance in two markets, the market for advertising space, and the market for advertising services, as well as tied selling.

It was the allegation in relation to the market for advertising services that raised the essential facilities issue. The Director accused Tele-Direct of leveraging its market power over the advertising space market (a market it controlled) into the advertising services market (a market it did not control) by engaging in anti-competitive acts in its dealings both with agents and consultants. Among other things, the Director challenged Tele-Direct's policy of not dealing with consultants as agents for a customer.

This case manifests a number of difficulties inherent in presenting a refusal to deal as an anti-competitive act.

First, a refusal to deal is not a positive act, unlike every other sort of competitive response. Indeed, Tele-Direct argued that, as a matter of law, it was not obliged to help its competitors, and thus refusal to do so could not be an anti-competitive act. It added that each of anti-competitive

acts listed in section 78 involved actively initiating some action; none involves not doing something or refusing to assist a competitor.[70]

The Tribunal agreed with the general proposition that competitors do not have to help one another, but held that this might not apply in a case under section 79:

> As stated above, as a general proposition, competitors should not be required to assist one another. But, this general proposition may be shown to be inapplicable in a given section 79 case by the Director proving that the "act" of the respondent meets the elements of that section and is an anti-competitive act leading to a substantial lessening of competition. Then, any order of the Tribunal which may issue is, by definition, not an order to "assist" a competitor but rather, in the case of subsection 79(1), an order to cease and desist from anti-competitive conduct. [Emphasis added][71]

This is, of course, pure sophistry. An order to cease refusing to deal with someone is an order to deal with them, and such an order must include details as to the terms on which one must deal. Thus in his Further Amended Notice of Application, the Director sought orders requiring Tele-Direct to "accept orders for advertising space" from consultants and other agents on the same payment and credit terms its sales staff gave to advertisers, to provide agencies with marketing tools and information, and to license its trademarks to agencies.[72] In short, the orders sought – and that would have been granted – would have required Tele-Direct to assist its competitors, not just by accepting orders from them, but by providing them with credit, marketing information, and even licensed trademarks.

The Director went further still in final argument. In response to Tele-Direct's objection that consultants refused to take financial responsibility for the orders they placed, unlike agents who paid up front, the Director proposed that Tele-Direct's obligation to accept business from consultants be limited to cases where "the third party has guaranteed payment on behalf of the principal".[73]

As the Tribunal noted, this would mean Tele-Direct's having to set up a third sales channel to deal with consultants.[74] Thus the remedy sought by the Director morphed from ordering Tele-Direct to offer consultants the *same* terms as it offered others into ordering Tele-Direct to deal with them on *different* terms.

The Director's attempt to force Tele-Direct to set up a new sales channel highlights a second problem inherent in remedying a refusal to deal: such orders can involve the respondent having to incur costs in order to accept the complainant as a customer.

In *Tele-Direct*, the Tribunal's answer was that the costs that Tele-Direct would incur if it were forced to set up this third channel provided a valid business justification for Tele-Direct's refusal to deal with consultants.[75]

While the Tribunal's instinct that the owner of a facility should not be forced to incur costs in order to share it with a competitor seems right, the use of the business justification defence as a means to raise the issue strains the framework of section 79. A business justification is raised as a reason for the owner of the facility to refuse to grant access or to deal in the first place. But the issue of whether an owner of a facility should be forced to incur costs to assist a competitor goes to the broader question of how invasive we are prepared to be in our approach to access cases. Forcing the owner of a facility to expand that facility in order to accommodate a competitor is at the extreme end of invasiveness.

In any event, the narrow approach to business justifications established by the Federal Court of Appeal in *Canada Pipe* would likely exclude the costs of expanding the facility as a valid business justification for refusing access![76]

In considering the cost of creating the third channel, the Tribunal compared those costs with the relatively minor impact the refusal to deal was having.[77] This way of analyzing the cost of granting access finds no support in section 79, and could lead to an overbroad approach to refusals to deal under section 79. By using this analysis, the Tribunal could end up ordering firms to deal with their competitors simply because the inconvenience to the firm is less than the impact on competitors. This balance of inconvenience approach is not a defensible basis for forcing dominant firms to supply their competitors.

Tele-Direct also raised the issue of intellectual property rights. The Tribunal refused to qualify Tele-Direct's refusal to license its trademarks (such as the well-known "walking fingers" logo) to competitors as an anti-competitive act, holding that the right to determine whether or not, and to whom, to license a trade mark, was inherent in the nature of the right to license the trademark:

> Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.[78]

As will be discussed below, this has been overtaken by the decision of the Federal Court of Appeal in *TREB*.

TREB

In 2016, in *Commissioner of Competition v Toronto Real Estate Board*,[79] the Competition Tribunal held that The Toronto Real Estate Board ("TREB") abused its dominant position by refusing to include certain data in a data feed for so-called "virtual office websites" ("VOWs"), and by maintaining certain rules restricting its members' use of MLS data. This decision was upheld by the Federal Court of Appeal in late 2017.[80]

At heart, *TREB* was about the use of data to support innovative – and potentially disruptive – business models. The VOWs that the "innovative" real estate brokers wanted to offer would allow their customers to conduct searches and obtain information online, including historic sales data, that "traditional" real estate brokers provide to their customers by hand, email or fax.

Initially, TREB maintained rules against the use of MLS data in VOWs. It cut off at least one broker that violated these rules.[81]

The Commissioner applied to the Tribunal under section 79 seeking an order prohibiting these restrictions. But the Commissioner went further, asking for an order:

> directing TREB to implement such resources and facilities as the Tribunal deems necessary to ensure the operation of VOWs or similar services by, or on behalf of, member brokers;[82]

After the Commissioner began her application, TREB decided to allow brokerages to operate VOWs, but imposed certain restrictions on them, and did not include certain data (known as the "Disputed Data"

in the decision), such as data on sold properties, in the VOW data feed. It prohibited brokers from displaying historical sold data on VOWs, but did not impose any restrictions on brokers providing this data by hand, fax, or email. All brokerages, including the "innovative" brokerages, had access to the Disputed Data through the regular MLS data base (known as Stratus);[83] none had access to it in the VOW data feed. The problem was that the information from Stratus had to be assembled and uploaded manually to a VOW, which was not feasible.[84] One witness described the data available through Stratus as "disaggregated", requiring "brute force and hours of painstaking work" to analyze.[85]

The Commissioner characterized this as discriminatory, since TREB prevented brokerages from providing the Disputed Data through a VOW, but did not prevent brokerages from providing the very same information through means other than a website.[86] The Tribunal agreed, holding that:

> By shielding its Members from important forms of that disruptive competition, and thereby depriving consumers of the benefit of those enhanced services, TREB engaged in a discriminatory practice of anti-competitive acts that has prevented, and continues to prevent, competition substantially.[87]

Whether the case should be considered an essential facilities case was a matter of debate. TREB and its expert, Jeffrey Church, suggested that the case should be analyzed using the essential facilities framework advanced by the Bureau in a CRTC proceeding on essential services.[88] Church argued that the Commissioner should thus be required to show that TREB was dominant in both the upstream and downstream markets, based on previous statements by the Commissioner.[89] The Tribunal questioned this, not wishing to exclude a case where the respondent was not yet present in the downstream market:

> [210] The Tribunal questions whether it is necessary to establish, in an "essential facilities" case, that the respondent is dominant in both an upstream and a downstream market. The Tribunal does not wish to preclude the possibility that a demonstration could be made, in a particular case, that the respondent substantially controls a market for an upstream input, that it has engaged in a practice of anti-competitive acts in respect of that input, and that such practice has had, or is having the effect of preventing or lessening competition in a downstream market. This could include a downstream market in which the respondent is a new entrant

> or, in any event, a competitor that is not yet able to exercise market power in that market.[90]

This is certainly correct in my view.[91]

In any event, the Tribunal agreed with the Commissioner that TREB was not an essential facilities case on the basis that TREB was not denying the complainants *access* to an input, since they already had access to the data. It was the withholding of that data from the VOW feed that was the issue, the Tribunal said:

> [212] In brief, this is not a case in which an upstream input supplier is denying customers *access* to an input. TREB's Members already have access to the Disputed Data through TREB's Stratus system. Rather, the withholding of that information from TREB's VOW Data Feed, and the rules that restrict the manner in which TREB's Members can use and display that and other information, are what is at issue in this case. [Italics in original; underlining added][92]

There are two difficulties with this reasoning. First, contrary to the Tribunal's finding, denying access to an input is exactly what TREB was doing. The Tribunal found that a VOW data feed containing the Disputed Data was an input required by innovative brokerages, as the regular MLS data feed from Stratus was not an adequate substitute even though it contained the Disputed Data. The innovative brokerages needed the Disputed Data structured in a way that was usable in a VOW. The Stratus feed lacked this feature. This finding means that the (as yet non-existent) VOW data feed containing the Disputed Data was in a separate product market from the regular MLS data available through Stratus. The Commissioner was asking TREB to create this product to provide as an input to the innovative brokerages. She made this clear in her application, in asking for an order "directing TREB to implement such resources and facilities ... to ensure the operation of VOWs..."[Emphasis added].

This is most clear from the situation at the outset of the application, when TREB did not offer any VOW data feed at all. Clearly the Commissioner was asking for an order requiring TREB to create a product that either did not exist yet or that TREB did not produce or supply. But even after TREB created its VOW data feed, it lacked the key input needed by the innovative brokerages, that is, the Disputed Data.

Second, if the US Supreme Court was correct in holding that there is no analytical difference between refusals to deal, quality of service issues,

and price squeezes (as I believe it was), then it does not matter whether one characterizes TREB as a refusal to deal or as a quality of service case. On either characterization, the first question ought to have been whether it was appropriate to recognize a duty to supply the data to the innovative brokerages.

Having determined that the case was not an essential facilities case, the Tribunal moved into a conventional analysis of the elements of section 79.

The Tribunal held that TREB controlled the "relevant market", namely, "the supply of MLS-based residential real estate brokerage services in the GTA".[93] While TREB did not participate in this market, it had power over this market deriving from its control over the MLS system and how information on that system can be used.[94] This power to exclude a firm from the market constitutes market power, the Tribunal held:

> To the extent that the power to exclude comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price, it falls squarely within the definition of market power articulated in *Tervita*.[95]

Although the Tribunal rejected TREB's contention that the market power analysis should focus on the Disputed Data,[96] the Tribunal nevertheless found that there were no acceptable substitutes for the Disputed Data.[97] While this analysis was not conducted under the rubric of essentiality, it was in effect an examination of the importance of the Disputed Data to the "innovative agents who would like to be able to disrupt the market by offering the Disputed Data over a VOW".[98]

The Tribunal then turned to the second part of the section 79 test: whether TREB was engaging in a practice of anti-competitive acts.

The Tribunal added an important requirement to deal with the fact that TREB did not participate in the relevant market: where the respondent is not a participant in the relevant market, it must be shown that is has a "plausible competitive interest" in that market, the Tribunal held.[99] The Tribunal added this requirement in order to avoid the possibility that a "garden-variety" refusal to supply will be mistaken for anti-competitive conduct.[100] The Tribunal's analysis of the plausible competitive interest element is not highly developed in *TREB*; it is described simply as an

> interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest

of a customer in cultivating upstream competition for the supply of the goods or services that it purchases.[101]

In the case of a trade association, the plausible competitive interest element can be satisfied by showing that "it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors".[102]

The Tribunal also found that TREB's principal motivation was to insulate its members from disruptive competition from innovative internet-based real estate brokerages.[103]

Turning to the third element of the section 79 test, the Tribunal found that TREB's refusal to include the Disputed Data in the data feed substantially prevented competition in the supply of MLS-based residential real estate services in the GTA. The effect on competition was mainly on innovation: "but for" TREB's restrictions on the Disputed Data, there would be a broader range of services available, at a higher quality, and with more innovation. Indeed, the Tribunal was not satisfied that commission rates would go down.[104]

Having found that all three elements of the section 79 test were met, the Tribunal had to consider whether the intellectual property defence in subsection 79(5) applied. That provision exempts what is known as a "mere exercise" of an intellectual property right from the ambit of section 79. Thus a bare refusal to license intellectual property cannot be challenged under section 79.

The Tribunal held that as the MLS database did not attract copyright protection, the defence could not apply. It went on to consider, however, whether TREB's conduct would be immunized by the defence if the database were protected by copyright.

The Tribunal held that TREB's restrictions on the Disputed Data went beyond the "mere exercise" of an intellectual property right because TREB attached anti-competitive conditions to the use of the data by its members. TREB was using its control over the database to increase its market power beyond any advantages derived from the *Copyright Act* by, on the one hand, allowing its members to use the data to do business in the traditional way, but, on the other, not allowing innovators to use the data to disrupt the business of TREB's more traditional members.[105]

TREB appealed to the Federal Court of Appeal, and lost. The appeal

court made a number of comments that are relevant to the issue of essential facilities.

In particular, the court narrowed the intellectual property defence in section 79(5) to the point of extinction. The court wrote:

> In light of the determination that the VOW Policy was anti-competitive, subsection 79(5) of the Competition Act precludes reliance on copyright as a defence to an anti-competitive act. This is sufficient to dispose of the appeal in respect of copyright.[106] [Emphasis added]

After citing the text of subsection 79(5), the court continued:

> [180] Parliament clearly signaled, through the use of the word "only", to insulate intellectual property rights from allegations of anti-competitive conduct in circumstances where the right granted by Parliament, in this case, copyright, is the sole purpose of exercise or use. Put otherwise, anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification for the practice.[107] [Emphasis added]

In these passages, the court seems to be saying that an anti-competitive intention for a refusal to license is all that it takes to add the "something more" to take conduct beyond a "mere exercise" of an intellectual property right, and thus out of the safe harbour of subsection 79(5).

This is also inconsistent with wording of subsection 79(5). The English version of subsection 79(5) exempts an "act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under" various federal intellectual property statutes. Nowhere does subsection 79(5) require that the purpose of the exercise of the IP right be the right itself. Inherent in IP rights is the right to license, or not to license, the IP. Hence the exercise of IP rights includes licensing, or refusing to license, IP. The inconsistency is even more obvious when the French version of subsection 79(5) is considered:

> (5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits integrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel. [Emphasis added]

There is nothing in the French text to support the interpolation of a requirement that the sole purpose of an exercise of the IP right must be the IP right itself.

The court's interpretation is also inconsistent with the presence of subsection 79(5) in the *Competition Act*. Conduct cannot be determined to be anti-competitive under paragraph 79(1)(b) unless there is an anti-competitive intention present, whether objective or subjective. If subsection 79(5) only applies where there is no anti-competitive intention, then it only applies to conduct that would not be considered anti-competitive under paragraph 79(1)(b). Thus subsection 79(5) only applies where it is not needed, making it surplusage, which violates a canon of statutory interpretation relied on by the same court in *Canada Pipe*.[108]

Finally, the court's view that a refusal to license must be motivated by protection or use of the right itself is circular, and inconsistent with the purpose for which IP rights are granted in the first place. As the Competition Bureau recognizes in its *Intellectual Property Enforcement Guidelines*, intellectual property legislation is designed to deal with the non-rivalrous nature of intellectual property by giving the owner the right to exclude others and force them to bargain for access. The rationale for doing this is to encourage the creation of intellectual property. It is a necessary corollary of the existence of intellectual property that it gives its owner the power to limit or even exclude competition in relation to the intellectual property in order to enjoy monopoly returns during the period of protection. Thus the right to exclude competitors during the period of statutory protection is a feature, not a bug. For example, suppose the owner of a patent were approached by a would-be competitor, who says, license your patent to me so that I can compete with you and disrupt your business. On the traditional view of intellectual property, the patent owner is well within its rights to refuse to license for the very purpose of preventing this threatened competition and continuing to enjoy monopoly returns. In the leading case of *Molnlycke AB v Kimberly-Clark of Canada Ltd*,[109] the Federal Court of Appeal reflected this view, commenting that Parliament had expressly provided for the impairment of competition inherent in IP:

> Certainly the existence of a patent is apt to limit, lessen, restrain or injure competition - monopolies do - but its issuance and the inherent impairment of competition has been expressly provided for by an Act of Parliament, which has made provision for compulsory licensing in circumstances where it has considered the ordinary incidence of the

> statutory monopoly to be contrary to public policy. It is the existence of the patent, not the manner in which issue was obtained or how and by whom its monopoly is agreed to be enforced and defended, that impairs competition.

The Federal Court of Appeal's decision in *TREB* removes these important rights granted by Parliament.

Moreover, given the equivalence between intellectual property and regular property posited by the Bureau in its *IP Guidelines*, the *TREB* appeal decision suggests that any refusal to grant access to a facility or refusal to deal that is motivated by the desire of the owner of the facility to continue to enjoy the returns that the market power inherent in the facility confers would be subject to challenge.

Does *TREB* represent an example of an expansionist approach to essential facilities without regard to policy?

In the result, probably not, for two reasons. First, the Tribunal found as a fact that TREB, an association of real estate brokers, was discriminating in favour of traditional bricks-and-mortar brokerages and against innovative online brokers. Assuming this finding to be correct, it would bring the case within the category of discriminatory refusals to deal, where, according to Elhauge, intervention is appropriate.

Second, the MLS database was created by a group of competitors to benefit the industry as a whole. Where a group of competitors creates a facility, and then uses it to entrench their position vis-a-vis new entrants to the industry, intervention should more readily be contemplated.

That being said, there is one feature of the *TREB* case that is concerning. In her initial application, the Commissioner was seeking to force TREB to *create* a product that did not yet exist, namely a VOW data feed containing the Disputed Data. It is one thing to force a firm to remove restrictions on accessing an existing product (in this case, Stratus), but another to require it to create a new product in order to assist competitors. In a single firm case, this would be an intolerable imposition. It is only TREB's status as a trade association that can possibly justify such an extreme remedy.

Vancouver Airport Authority

If *TREB* was an essential facilities case in disguise, the Vancouver

Airport Authority case is a classic essential facilities case. As of the writing of this paper, the case had yet to be heard by the Tribunal; only the pleadings and expert reports filed on behalf of the Commissioner and the respondent airport authority were available.

On its facts, the case is quite simple. Vancouver Airport Authority ("VAA") only allows two catering companies access to the airside part of the airport to provide catering (that is, the preparation of airline meals), and galley handling (that is, the loading and unloading of meals and other items to and from aircraft). VAA turned down a number of other firms that wanted access to the airside to provide catering and galley handling. VAA also requires catering firms to lease space at the airport to prepare meals, rather than preparing them off-site.

In his application under section 79, the Commissioner has taken the position that VAA should allow *all* catering and galley handling firms access to its airside, so long as they meet customary health, safety, security, and performance requirements.

The Commissioner proposes two relevant markets: (a) the market for galley handling at the airport, and (b) the market for airside access for the supply of galley handling. Airside access is a necessary input for a firm wishing to compete in the market for galley handling at the airport.

VAA controls both markets, the Commissioner claims. First, and obviously, VAA is a monopolist in the market for airside access. Second, it controls the market for galley handling by controlling access to a necessary input, the Commissioner says, which gives it the power to exclude firms from supplying services at the airport.

The Commissioner alleges two practices of anti-competitive acts (a) VAA's refusal to grant access to the airport airside to would-be new entrants in the market for galley handlings, and (b) its requirement that galley handling firms lease land at the airport to operate kitchens, which constitutes tying of access to the airside for the supply of galley handling to leasing of airport land.[110]

In *TREB*, the Tribunal imposed an additional requirement in access cases: the Commissioner must show that upstream respondent have a "plausible competitive interest" in the downstream market.

The Commissioner alleges that VAA has a competitive interest in insulating incumbent catering firms at the airport from competition, because

the airport shares in their revenue, both from rent payments and fees paid under airside access agreements, which are calculated as a percentage of revenue.[111]

Finally, VAA's refusal to allow more firms onto the airside prevents competition in the market for galley handling at the airport. But for VAA's refusal, the Commissioner says, there would be more firms supplying these services, leading to higher quality, more innovation, and lower prices.[112]

In its response, VAA essentially appeals to its exercise of business judgment in the running of an airport. It notes that it does not provide catering or galley handling services and has no commercial interest in any firm that does. VAA points out that the incumbent catering firms have made significant capital investments to develop facilities at the airport.[113]

VAA justifies its requirement that catering firms maintain kitchens on the airport lands based on the fact that the airport is on an island reachable by four bridges, which become bottlenecks during rush hours. VAA notes that flight manifests are subject to last minute changes, yet delays in food reaching aircraft from off-site could delay flights, causing a domino effect of delays at the airport.

VAA attacks the Commissioner's theory on the competitive interest requirement in its Concise Statement of Economic Theory. It argues that it derives no benefit from restricting competition among firms providing catering and galley handling if the resulting market structure is inefficient. Moreover, it says, even if it was acting as a profit-maximizing monopolist, it would have an incentive to ensure the most efficient market structure in order to maximize its revenues from catering and galley handling firms.

The Commissioner's expert, Dr. Gunnar Neils, notes that in order for a firm to foreclose downstream competition through a refusal to grant access to an upstream input, the firm must be dominant in the upstream market, but does not need to be dominant or even active in the downstream market.[114] The upstream firm's motive to do so may come from a financial stake in the outcome of competition downstream.[115] He compares the VAA case to a case involving Luton Airport in the UK. Luton Airport awarded an exclusive concession for bus services, which led to higher prices. Since Luton received fees based on the expected revenue of

the bus operator, it had an incentive to favour one downstream provider over another.[116]

VAA's expert, Dr. David Reitman, argues that Dr. Neils' hypothesis that VAA can make more revenue from fees with two firms providing galley handling than with three assumes that demand for catering and galley handling is inelastic; that is, that there will be the same demand with two providers charging higher prices than with three charging lower prices. However, if VAA were attempting to maximize its fees, it would simply increase them until further increases were unprofitable. In other words, it does not get an additional benefit from restricting competition, because fees are already at the maximum. The same applies if demand is elastic, because higher prices would reduce demand. Once again, he says, "as long as VAA exercises control over flight caterers by setting the port fee rate, it derives no greater benefit by exercising further control through limiting entry of flight caterers".[117]

Dr. Reitman also takes issue with Dr. Neils' contention that there is room for a third caterer at the airport, based on the same reasoning. If VAA is seeking to maximize its revenues from caterers, then it will have increased its rents and fees to just below the point at which the incumbent caterers would exit the market. In other words, VAA would be leaving them with just enough return to keep them in the market, but not enough to weather entry by a third firm.[118]

Dr. Reitman takes his argument still further, arguing that if VAA wanted to maximize revenues, it would be better off allowing entry by another firm.[119]

It remains to be seen, of course, how the evidence will develop at the hearing, and what decision the Tribunal will make. Nevertheless, the Commissioner's case, as presented so far, illustrates the dangers of Areeda's second phase, that is, expansion of the doctrine with little regard to policy to the point of becoming ridiculous.

First, the upstream market proposed by the Commissioner, namely the market for airside access for the supply of galley handling, is simply a contractual licence to pass through a fence separating the ground-side from the airside parts of the airport property. There is, of course, no reason in principle why a licence to come onto land cannot be a product for purposes of the *Competition Act*. But forcing a land-owner to grant a licence to come onto land is at the extreme end of competition law

interventions, since it deprives the owner of that most fundamental of rights pertaining to property, namely, the right to exclude others from it.

Second, the VAA case provides an example of how it can be too easy to meet the elements of section 79 in an access case. If the facility is a truly essential input for participants in the downstream market, then its owner will have market power, and the owner's refusal to grant access to that facility is inevitably exclusionary. Thus the first two elements are easily met. The third element is also too easily met: since forcing the owner to share the facility will likely increase competition downstream, the owner's refusal to grant access will cause a substantial prevention of competition. Effectively, for the Commissioner to obtain an order in such a case, all that is needed is that the owner of a bottleneck input refuses to share it.

To take an example: suppose firm A is an online business that has, through millions of interactions with its customers, developed a database that gives it insights into its customers' preferences that in turn give it significant market power. Firm B wants to compete with A, but finds that without this data and these insights, it is unable to enter the market. A refuses to license the data to B. So the Commissioner brings an application. It is obvious that A has market power over the input (the data), and its refusal to license the patent to B is exclusionary given the market power in the downstream market that the data confers. Finally, there would be more competition if A were forced to license the data to B.

This is essentially what lay behind Elhauge's criticism of the doctrine:

> The more fundamental problem is that, from an ex post perspective, excluding rivals from any property rights valuable and unique enough to enjoy monopoly power will generally constrain consumer choice, lower output, and raise prices, thus producing allocative inefficiency.[120]

Thus, employing a standard section 79 analysis will result in owners of facilities being forced to share those facilities when other policy considerations suggest that they should not. Such forced sharing is not just inconsistent with property rights, it is destructive of the incentives to invest to build facilities or create new intellectual property that are inherent in the protection that the law accords property of all kinds, including intellectual property.

The only brake upon this ridiculous expansion of the doctrine is the plausible competitive interest requirement introduced by the Tribunal in

TREB. It remains to be seen whether this element will be robust enough. In VAA, the plausible competitive interest in the downstream market pleaded by the Commissioner is that VAA charges fees for the upstream product, namely, access to the airside. But every upstream supplier charges fees of some sort to its customers. If that is enough to create a plausible competitive interest in the downstream market, then the plausible competitive interest requirement is devoid of any meaning. Thus if the Commissioner's theory were to be accepted, it would wipe out any meaningful constraint on the essential facilities doctrine arising from the plausible competitive interest requirement.

The Bureau purports to recognize that forced sharing should be exceptional. For example, in its big data white paper, the Bureau wrote:

> One potential remedy imposes a duty to deal on an offending party in a conduct case. The Bureau is mindful that mandating a duty to deal can potentially chill incentives to innovate and should therefore be pursued only in exceptional circumstances in big data cases as in non-big data cases.[121]

Yet the way the Commissioner has pleaded the VAA case would make forced access routine rather than exceptional. The VAA case is, in short, an example of the expansion of the doctrine to the point of ridiculousness.

Third, the VAA case also highlights difficulties arising from transforming the Commissioner and the Tribunal into regulators, in this case, of airport operations. The remedy sought by the Commissioner would require VAA to permit an unlimited number of caterers to have access to the airport. Surely, however, there must be some upper limit on the number of catering trucks that can drive over the four bridges to the airport and deliver services airside at the airport. If the Commissioner's application succeeds, the Tribunal will have to regulate this aspect of airport operations at Vancouver Airport.

The Tribunal will also have to regulate health, safety, security, and performance requirements at Vancouver Airport, since the order sought by the Commissioner would require VAA to accept any firm that meets "customary health, safety, security, and performance requirements". If VAA rejects any applications from catering firms on the grounds that they do not meet these requirements, the dispute over this point will be adjudicated by the Tribunal.

THE FUTURE OF ESSENTIAL FACILITIES IN CANADA

Orders requiring a firm to grant access to a facility to another firm, or to deal with another firm, are at the extreme end of the range of possible competition law interventions. Such orders deprive firms of important common law and statutory rights relating to property and freedom of contract. They are, arguably, tantamount to an expropriation of part of the bundle of rights that we call property. Accordingly, they should only be granted in the most exceptional of cases. It follows that limiting principles are required to constrain a doctrine that could otherwise easily get out of hand.

Paradoxically, the elements of section 79 are especially easy to meet in essential facilities cases; and the few cases to date do not provide the robust limiting principles that are required to prevent the expansion of this doctrine reaching the point of ridiculousness.

I will not attempt to improve upon the limiting principles proposed by Areeda nearly thirty years ago. They remain valid. However the following limiting principles might be suggested as being particularly appropriate to the doctrine of essential facilities as it is being developed in the context of Canada's *Competition Act*.

First of all, we need to abandon the fiction that there is no difference between an omission and an act of commission, and that characterising the remedy for a refusal to grant access as an order that the firm stop refusing to grant access somehow means that the order is not a mandatory order requiring a firm to grant access. Wrongs of omission are very different from wrongs of commission. In competition law as in other areas of law, an omission is only a wrong if there is a legal duty to do whatever it is one has not done. Getting this point right ensures that the analysis will be focussed where it should be: on whether or not there is a competition law duty to grant access or to deal with another firm.

Second, the *Competition Act* contains a provision expressly targeted at refusals to deal, in section 75. It is extremely difficult to make out a case under section 75, as it should be. Since there is a greater risk of false positives under section 79 than under section 75, section 75 should be the preferred route for cases involving a refusal to grant access or a refusal to deal, absent compelling reasons why section 79 should be used. Bringing an access case under section 79 because the case would be too difficult

to prove under section 75 is a sign that the case may not be one of those exceptional cases where access should be ordered.

Third, in a case under section 79, a mere refusal by a single firm to grant access to a facility, or to supply a product, should generally be immune from competition law scrutiny, just as mere refusals to license IP are immune. Something more is required.

This is because the right to determine whether or not, and to whom, to grant access, is inherent in the nature of all property. All property, not just IP, is a legal construct. Property is usually defined as a "bundle of rights", with the right to exclude others from it being fundamental.[122] The Bureau comments in its *Intellectual Property Enforcement Guidelines* that "[p]rivate property rights are the foundation of a market economy", and points to the key aspect of property rights, namely, the right to exclude, and thus, to force those who want access to that property to bargain for it. The Bureau's approach to IP is thus to regard it as analogous to physical property.[123] This goes both ways.

Contrary to the decision of the Federal Court of Appeal in *TREB*, that something must be more than the fact that the refusal will have an exclusionary effect, even if that exclusionary effect is intended. Property rights, whether they relate to real property, chattels, or IP, confer the right to exclude, or to grant access to, others.

Similarly, a desire to continue to enjoy the monopoly rents that owning property may confer does not supply the "something more" element. Competition law recognizes that firms that acquire market power through legitimate means legitimately enjoy the profits that come with it. The Bureau recognized this in its *2001 Abuse Guidelines*:

> In situations where it is established that one supplier (wholesaler) possesses the market power required to exercise control, and that this control has been acquired through means that do not contravene the Act, potential monopoly profits can be extracted simply by charging a monopoly price for the product at the wholesale level. This is not an abuse of market power.[124]

Similarly, in the 2012 *Abuse Guidelines*, the Bureau states:

> Section 79 guards against anti-competitive conduct by firms with market power, and promotes conditions under which all firms are afforded an opportunity to succeed or fail on the basis of their respective ability to compete; however, it does not seek to establish equality among

> competitors. For example, the fact that a firm holds market power is not, in and of itself, sufficient to warrant intervention under section 79. Likewise, charging higher prices to customers, or offering lower levels of service than would otherwise be expected in a more competitive market, will not alone constitute abuse of a dominant position.[125]

Thus competition law recognizes that a firm that has acquired market power legitimately is entitled to enjoy that market power, by, for example, charging higher prices. Characterizing a refusal to share the facility that creates the market power as "exclusionary" is really just another way of saying that the firm should not be permitted to enjoy the market power inherent in the facility. It would chill innovation and thus dynamic competition, as the Bureau recognizes in its *2018 Draft Abuse Guidelines*: "Often, it is the prospect of market power that provides the incentive for firms to engage in dynamic competition."[126]

In some cases, there may be compelling public policy reasons to interfere with these property rights. Forced sharing of telecommunications infrastructure may be one example. Where these public policy reasons exist, the forced sharing should be accomplished through sector-specific regulation.

Fourth, a dispute around the quality or terms of access or supply should be analyzed in the same way as a case involving a refusal to grant access or to deal. In other words, before the Tribunal can make an order about the quality or terms of access or supply, there must be a sufficient basis to order access or supply in the first place.

Fifth, no firm should be required to create or expand a facility in order to share it with a competitor, or to compromise its own use of the facility. There may be exceptions to this principle in cases involving discriminatory refusals to deal.

Finally, as with all mandatory orders, before ordering a firm to grant access or to deal with another, the Tribunal needs to consider whether it has the competence to craft an enforceable order and to enforce it. The VAA case raises this issue: the Tribunal should think long and hard before it decides to get into the business of regulating airport operations. The Tribunal also needs to consider whether it is undertaking a regulatory burden that will require it to revisit the order repeatedly, and for an indefinite duration.

With these limiting principles in mind, in what kinds of cases should a firm be ordered to grant access or to supply a firm?

First, the upstream input must be truly essential, not desirable, and it must be impossible for the firm seeking access to reproduce it. In other words, the degree of market power required to satisfy the dominance element must be at the very high end of the range.

Second, because the elements of section 79 are too easily met in access cases, more is required than the exclusionary effect that a mere refusal to grant access or to deal causes. The Tribunal's requirement that a plausible competitive interest in the downstream market must be shown is a good start. This requirement must be robust, however. The mere fact that the owner of the upstream input makes money from that input is not a plausible competitive interest in the downstream market. Unfortunately, the Tribunal provided little guidance on the scope of the plausible competitive interest requirement.

The structural preconditions outlined by the Bureau in relation to price squeezes in the *2001 Abuse Guidelines* also provide helpful guidance. In particular, the Bureau explained that price squeezes only make sense where domination of the upstream market is not enough, and the firm also needs to dominate the downstream market.[127]

Similarly, while it would be unwise to attempt a definitive list of the categories of cases where a remedy is more likely appropriate, there are two fairly obvious candidates: (a) cases involving multi-firm conduct, where a group of competitors creates a facility and then uses the market power inherent in that facility to exclude other competitors; and (b) cases involving a discriminatory refusal to deal. It should be noted that cases falling within the first category will likely also fall within the second category.

Endnotes

[1] Michael Osborne practises competition law as a partner of Cassels Brock & Blackwell LLP.

[2] P Areeda, "Essential Facilities: An Ephitet in Need of Limiting Principles" (1989) 58 Antitrust LJ 841.

[3] *United States v Terminal Railroad Association*, 224 US 383 (1912).

[4] *Associated Press v United States*, 326 US 1 (1945).

[5] *Otter Tail Power Co v United States*, 410 US 366 (1973).

[6] *MCI Communications Corporation and MCI Telecommunications Corporation,*

Plaintiffs-appellees, v American Telephone and Telegraph Company, Defendant-appellant, 708 F2d 1081 (7th Cir) (1982) [*AT&T*].
[7] *Ibid* at 1132.
[8] *Supra* note 6 at 1132-1133.
[9] *Aspen Skiing v Aspen Highlands Skiing*, 472 US 585 (1985) [*Aspen Skiing*].
[10] *Ibid* at 600.
[11] *Supra* note 9 at 601.
[12] *Supra* note 9 at 602.
[13] *Supra* note 9 at 610.
[14] *Supra* note 1.
[15] *Supra* note 1 at 842.
[16] *Ibid*.
[17] *Ibid*.
[18] *Supra* note 1 at 844.
[19] *Ibid*.
[20] *Supra* note 1 at 845.
[21] *Ibid*.
[22] *Supra* note 1 at 848.
[23] *Supra* note 1 at 849.
[24] *Supra* note 1 at 850.
[25] *Ibid*.
[26] *Supra* note 1 at 852-3. Footnotes omitted.
[27] Einer Elhauge, "Defining Better Monopolization Standards" (2003) 56 Stan L Rev 253.
[28] *Ibid* at 253.
[29] *Supra* note 27 at 296.
[30] *Ibid*.
[31] *Supra* note 27 at 303.
[32] *Supra* note 27 at 308.
[33] *Supra* note 27 at 308-309.
[34] *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004) [*Trinko*].
[35] *Ibid* at 408.
[36] *Ibid*.
[37] *Supra* note 34 at 409.
[38] *Ibid*.
[39] *Supra* note 34 at 411.
[40] *Pacific Bell Telephone Co v Linkline Communications, Inc*, 555 US 438 (2009) [*Linkline*].
[41] In *Canada (Commissioner of Competition) v The Toronto Real Estate Board* (15 April 2013), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20For%20Order%20and%20Order_238_38_4-15-2013_3949.pdf>, after finding that because the Toronto Real Estate Board did not compete in the market at issue, s. 79 could not

apply, the Tribunal suggested that s. 90.1 might provide a partial remedy. This decision was overturned on appeal: 2014 FCA 29.

[42] *Nadeau Poultry Farm Limited v Groupe Westco Inc et al* (8 June 2009), CT-2008-004, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2008-004_Reasons%20for%20Order%20and%20Order_532_38_6-8-2009_2220.pdf> at para 131.

[43] *Canada (Director of Investigation and Research) v Chrysler Canada Ltd* (1989), 27 CPR (3d) 1.

[44] *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83.

[45] Specifically, s. 76(1)(b), which deals with a supplier that refuses to supply a customer because of that customer's low pricing policy, and s. 76(8) where another firm induces a supplier to refuse to supply a customer because of that customer's low pricing policy.

[46] Paragraphs 76(3)(a) and (c).

[47] Subsections 103.1(7) and (7.1).

[48] *Stargrove Entertainment Inc v Universal Music Publishing Group Canada* (14 December 2015), CT-2015-009, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2015-009_Reasons%20for%20Order%20and%20Order%20Granting%20an%20Application%20for%20Leave%20Under%20Section%20103.1%20of%20the%20Competition%20Act_79_38_12-14-2015_4783.pdf>. I acted for two of the respondents in this case.

[49] *Canada (Competition Act, Director of Investigation and Research) v Warner Music Canada Ltd*, (1997) 43 BLR (2d) 93, 78 CPR (3d) 321.

[50] *Canada (Commissioner of Competition) v Visa Canada Corp* (23 July 2013), CT-2010-10, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2010-010_Reasons%20for%20Order%20and%20Order%20Dismissing%20the%20Commissioner's%20Application_337_38_7-23-2013_7109.pdf> at para 115 [*Visa/Mastercard*].

[51] *Supra* note 48 at para 36.

[52] *Supra* note 50 at para 135.

[53] In 2000, following the collapse of Canadian Airlines International and its merger with Air Canada, which left Canada with one dominant domestic air carrier, denial of access by an air carrier to essential facilities was added to s. 78 as an anti-competitive act (SC 2000, c 15, s 13). The concern behind this provision was that Air Canada might contract for most or all of the facilities available at an airport, such as landing slots, service counters, and gates. While in force, s. 78(1)(k) read as follows:

> (k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

The government then made Regulations Respecting Anti-Competitive Acts

of Persons Operating a Domestic Service, SOR/2000-324 to define essential facilities for purposes of s. 78(1)(k):

ESSENTIAL FACILITIES AND SERVICES

2. (1) For the purposes of paragraph 78(1)(k) of the Competition Act, facilities and services that are essential to the operation in a market of an air service, as defined in subsection 55(1) of the Canada Transportation Act, are those

(a) that are required in order to provide a competitive air service;

(b) that cannot reasonably or practicably be purchased, acquired, provided or replicated by another air carrier on its own behalf;

(c) that are effectively controlled by the air carrier who denies access to them or refuses supply of them; and

(d) that can be feasibly provided to another air carrier, having regard to operational or safety considerations, or legitimate business justifications of the air carrier referred to in paragraph (c).

The Bureau then issued draft Enforcement Guidelines on the Abuse of Dominance in the Airline Industry (2001, published online but no longer available). The draft guidelines explain the Bureau's approach to these provisions, and, by extension, its thinking on essential facilities more generally. The guidelines were never finalized. The airline industry-specific provisions remained on the books until 2009, when they were repealed by SC 2009 c2, s 427. No cases were ever brought alleging a denial of access to an essential facility by an air carrier.

[54] *Competition Act*, RSC 1985, c C-34, s 78(1)(a).

[55] Canada, *Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions, 2001* [2001 Abuse Guidelines].

[56] *Ibid* at s 4.2.

[57] *Supra* note 55 at Appendix III.

[58] Canada, Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry,* 2008 at s 4.2.2 [*TAB*].

[59] *Ibid*.

[60] Canada, Competition Bureau, *Enforcement Guidelines – The Abuse of Dominance Provisions*, (Ottawa: 2012) [*2012 Abuse Guidelines*].

[61] Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines – Draft,* (Ottawa: 2018) [*2018 Draft Abuse Guidelines*].

[62] *Ibid* at s 3.10.

[63] Statement of Grounds and Material Facts of February 11, 1998 (#103b) in *Director of Investigation and Research v Bank of Montreal* (20 June 1996), CT-1995-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/0093a38PPG-3102004-67.pdf>.

[64] *Director of Investigation and Research v Bank of Montreal* (20 June 1996), CT-1995-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=160>.

[65] *Supra* note 63; Order Varying Consent Order of June 20, 1996 (#109a) in *Director of Investigation and Research v Bank of Montreal* (20 June 1996), CT-1995-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/0109a38JQY-3152004-6471.pdf>.

[66] *Bank of Montreal v The Commissioner of Competition* (8 September 2000), CT-1995-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/012038KYU-3152004-4966.pdf>.

[67] *Bank of Montreal v The Commissioner of Competition* (13 June 2005), CT-1995-002, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1995-002_0132a_38IGU-6202005-5782.pdf>.

[68] *Bank of Montreal v The Commissioner of Competition* (11 September 2013), CT-2013-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2013-003_Order%20Varying%20and%20Restating%20the%20A_4_38_9-11-2013_4045.pdf>.

[69] *Bank of Montreal v Commissioner of Competition* (20 October 2017), CT-2017-014, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2017-014_Order%20varying%20and%20restating%20the%20Amended%20Consent%20Agreement_4_66_10-20-2017_6595.pdf>.

[70] *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc* (26 February 1997), CT-1994-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1994-003_0204a_38LFB-472004-7743.pdf> at para 587 [*Tele-Direct*].

[71] *Ibid* at para 588.

[72] Notice of Application (Further Amended October 18, 1995) (#66d) in *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc* (26 February 1997), CT-1994-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-1994-003_0066d_38LFB-472004-3056.pdf>.

[73] *Supra* note 70 at para 730.

[74] *Supra* note 70 at para 731.

[75] *Supra* note 70 at para 733.

[76] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at para 73 :

> To be relevant in the context of paragraph 79(1)(b), a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts.

[77] *Supra* note 70 at para 733.

[78] *Supra* note 70 at para 66.

[79] *Commissioner of Competition v Toronto Real Estate Board* (27 April 2016), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_66_4-27-2016_7296.pdf> [*TREB*]. Although my law firm acted for TREB, I had no involvement in this case and have no knowledge of the facts other than what is available on the public record.

[80] *Canada (Commissioner of Competition) v The Toronto Real Estate Board*, 2014 FCA 29.
[81] *Realtysellers (Ontario) Limited v Toronto Real Estate Board*, 2007 CanLII 50283 (ONSC).
[82] Notice of Application, filed on 27 May 2011 in *Commissioner of Competition v Toronto Real Estate Board* (27 April 2016), CT-2011-003, online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347>.
[83] *Supra* note 79 at para 239.
[84] *Ibid.*
[85] Witness Statement of John Pasalis, Realosophy Realty Inc, at paras 19-23.
[86] See for example the Commissioner's Reply in *Commissioner of Competition v Toronto Real Estate Board* (27 April 2016), CT-2011-003 (#24) Online: Competition Tribunal <http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reply_24_45_9-2-2011_3281.pdf> at para 20.
[87] *Supra* note 79 at para 712.
[88] Submission of the Commissioner of Competition to CRTC Proceeding: *Review of Regulatory Framework for Wholesale Services and Definition of Essential Service* (9 November 2006), 2006-14.
[89] Church referenced the Commissioner's submission to CRTC Proceeding: *Review of Regulatory Framework for Wholesale Services and Definition of Essential Service, Ibid.*
[90] *Supra* note 79 at para 210.
[91] The Tribunal's reasoning on this point is substantially the same as the view I expressed in *Report of Michael Osborne, CRTC Proceeding: Review of Regulatory Framework for Wholesale Services and Definition of Essential Service*, at 56.
[92] *Supra* note 79 at para 212.
[93] The Tribunal's conclusion on market definition is at para 161.
[94] *Supra* note 79 at para 266.
[95] *Supra* note 79 at para 176.
[96] *Supra* note 79 at para 200.
[97] *Supra* note 79 at para 214-251.
[98] *Supra* note 79 at para 245.
[99] *Supra* note 79 at para 279.
[100] *Supra* note 79 at para 281.
[101] *Ibid.*
[102] *Supra* note 79 at para 280.
[103] *Supra* note 79 at para 430.
[104] *Supra* note 79 at para 639.
[105] *Supra* note 79 at paras 756-757.
[106] *The Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*TREB FCA*], at para 176.
[107] *Ibid*, at para 180.
[108] *Supra* note 76 at para 26.

[109] *Molnlycke AB v Kimberly-Clark of Canada Ltd*, (1991) 132 NR 315, 27 ACWS (3d) 794 at para 10.
[110] Notice of Application at para 36.
[111] Notice of Application at paras 45-47.
[112] Notice of Application at paras 52-57.
[113] Response at para 45.
[114] Neils Report at s 2.98.
[115] Neils Report at s 2.99.
[116] Neils Report at s 2.100.
[117] Reitman Report at 84.
[118] Reitman Report at 85.
[119] Reitman Report at 87-103.
[120] *Supra* note 27 at 296.
[121] Canada, Competition Bureau, *Big data and innovation: key themes for competition policy in Canada*, (Ottawa: February 2018) at 9. Note that the use of the term "offending party" indicates a lack of understanding of the structure of the *Competition Act* on the part of the Bureau. Section 79 does not create offences or even lay down specific conduct-based prohibitions. Rather, section 79 provides that if certain elements are met, the Tribunal can make an order prohibiting the conduct at issue. Unless and until the conduct is prohibited by the Tribunal, it is lawful. Consequently, it is incorrect to speak of a "breach" of section 79.
[122] Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 2: "Property is sometimes referred to as a "bundle of rights". That characterization means that property does not refer to the thing, but rather to a right, or better, a collection of rights (over things) enforceable against others. Explained another way, the term property signifies a set of relationships among people concerning claims to tangible and intangible items".
[123] Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (2016) at ss 3.1-3.2.
[124] *Supra* note 55 at Appendix III, page 34.
[125] *Supra* note 60 at 1.
[126] *Supra* note 61 at s 3.10.
[127] *Supra* note 55 at Appendix III, page 34.