# BACK TO THE FUTURE: MODERNIZING CANADA'S MONOPOLIZATION LAW

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*Since 2002, Canada's abuse of dominance law has been moving from the "conduct-effects-remedy" paradigm, established in the 1986 Act, to a "contravention-punishment" paradigm. The conduct-effects-remedy paradigm focuses on finding a remedy where conduct by a firm has anti-competitive effects. By contrast, the contravention-punishment paradigm seeks to punish firms that contravene rules, and thereby deter other firms from contravening those same rules.*

*The increased administrative monetary penalties enacted in 2022 and proposals to allow damages actions move Canada further down the road to the contravention-punishment paradigm. But this model may not just deter abuse of dominance; it risks also deterring aggressive competition and thus making Canada's economy less, not more, competitive.*

*This paper argues that we should return to the conduct-effects-remedy model of the 1986 Competition Act. Then, in order to realize the goal of providing a remedy for conduct that harms competition, section 79 should be broadened to include conduct that causes harm because it is widespread in a market, even if no one firm enjoys the requisite degree of market power.*

*Depuis 2022, le droit canadien sur l'abus de position dominante est passé d'un paradigme « comportement-effet-réparation », établi dans la loi de 1986, à un paradigme « contravention-peine ». Le paradigme « comportement-effet-réparation » s'efforce de trouver une réparation lorsque le comportement d'une entreprise à des effets anticoncurrentiels. En revanche, le paradigme « contravention-peine » cherche à châtier des entreprises qui contreviennent aux règles, donc à dissuader d'autres entreprises de contrevenir à ces mêmes règles.*

*Les sanctions administratives pécuniaires accrues établies en 2022 et la proposition de permettre des actions en dommages et intérêts font avancer le Canada sur la voie du paradigme « contravention-peine ». Toutefois, il est possible que ce modèle ne fasse pas que dissuader l'abus de position dominante. Il risque aussi de dissuader la concurrence agressive et par le fait même de rendre l'économie canadienne moins concurrentielle, et non le contraire.*

*L'auteur soutient que nous devrions revenir au modèle « comportement-effet-réparation » de la Loi sur la concurrence de 1986. Ainsi, pour atteindre*

*l'objectif d'accorder une réparation pour un comportement qui nuit à la concurrence, l'article 79 devrait être élargi pour inclure tout comportement qui cause préjudice, car il s'agit de quelque chose de courant dans un marché, même si aucune entreprise en particulier ne détient le niveau de puissance commerciale requis.*

## 1. Introduction

Canada's 1986 *Competition Act*[2] was hailed as the most economically literate competition law in the world.[3] In the forty years since its enactment, there have been a number of incremental changes to the Act, but the basic framework established in 1986 remains in place today.

That basic framework is relatively simple: price fixing conspiracies are treated as criminal offences, while mergers and other competitive practices are presumptively lawful, and subject to intervention when they harm competition.

That framework is under attack in various proposals made in response to the government's current consultation on reforms to the *Competition Act*, including proposals to allow class actions for damages caused by abuse of dominance made by my colleagues Julie Rosenthal, Adil Abdulla and Arash Rouhi in their article "Optimal Enforcement of Abuse of Dominance: The Case for a Private Cause of Action."

Indeed, since 2002, we have been moving from what I will call a "conduct-effects-remedy" paradigm, established in the 1986 Act, to what might be called a "contravention-punishment" paradigm. The conduct-effects-remedy paradigm focuses on finding a remedy where conduct by a firm has anti-competitive effects. By contrast, the contravention-punishment paradigm seeks to punish firms that contravene rules, and thereby deter other firms from contravening those same rules.

In this paper, I will argue that instead of going further down the road towards the contravention-punishment model, we should return to the insight behind the 1986 Act.

I begin with a history leading up to the 1986 Act and the subsequent shift away from the conduct-effects-remedy paradigm towards a contravention-punishment paradigm. I then discuss the problems associated with this contravention-punishment paradigm and address whether administrative monetary penalties are really needed to control anti-competitive conduct.

I then address the difficulties caused by the current focus on intention. Finally, I offer some thoughts on improvements to the *Competition Act's* abuse of dominance provisions.

## 2. A short history of abuse of dominance in Canada

### A) 1986 and all that

The key feature of the modern *Competition Act* enacted in 1986 was the adoption of markedly different approaches to different competitive practices: conspiracies would continue to be dealt with through criminal prohibitions, while mergers and monopolies would be controlled through civil provisions whose focus was on remediation rather than punishment. The 1986 reforms were the product of over thirty years of discussion and several tentative steps towards reform.

It is worth briefly charting the path that led to this approach.

Before the 1986 reforms, the *Combines Investigation Act* (as the Act was then known),[4] contained a criminal prohibition on mergers and monopolies that operated "to the detriment or against the interest of the public, whether consumer, producers or others".[5]

Prosecutions under the mergers and monopolies offence were rare, and convictions rarer still.[6] The typical finding was that the Crown had not proven the detriment to the public element beyond a reasonable doubt.

The MacQuarrie Committee report, issued in 1952,[7] was perhaps the first attempt to apply modern economic thinking to competition law. This seminal report recognized the problem of single-firm monopolies. Its recommendations were enacted later that same year,[8] resulting in the creation of the post of Director of Investigation and Research (now, the Commissioner of Competition) and the Restrictive Trade Practices Commission. While the Director and the RTPC could now inquire into "monopolistic situations or restraint of trade", the substantive treatment of monopolies was essentially unchanged from the 1923 *Combines Investigation Act*.[9]

It was the Economic Council of Canada's ground-breaking *Interim Report on Competition Policy* that, in 1969, laid down the core principles of what became the 1986 *Competition Act*. Famously, the Economic Council recommended that "Canadian competition policy should aim primarily at bringing about more efficient performance by the economy as a whole".[10] This had nothing to do with creating Canadian champions that could compete on the world market while dominating the home market, as many

suppose today; rather, efficiency is an "economy-wide concept" that "poses the question of how well the economy is doing one of its basic jobs – that of allocating resources between different tasks, and in this way determining what goods and services get produced, how they are produced, and for whom they are produced".[11]

The Economic Council also recommended the structural bifurcation of competition law that is the hallmark of the 1986 Act. It recommended that collusive arrangements between competitors to fix prices, allocate markets, rig bids, and restrict entry or expansion should be subject to "essentially *per se* prohibition under criminal law". It also recommended retaining criminal prohibitions on resale price maintenance and misleading advertising.[12]

Mergers and monopolization, however, should be dealt with through the civil law, the Economic Council urged. It pointed to the "greater flexibility afforded by civil law" as being especially desirable "in those areas of the policy that do not lend themselves well to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices".[13]

The Economic Council said that it was "necessary" that a specialized tribunal should adjudicate mergers and monopolies cases, because these cases would require "difficult balancing judgments founded upon complex economic arguments and analyses".[14] The council expressed the hope that this tribunal's processes would be less formal than those of a court, and "devoid of any strong sense of crime and punishment".[15]

The council also stressed that the "philosophy of approach" to what are termed "restrictive trade practices"[16] in the 1986 Act should be essentially the same as for mergers. They should not be "treated as undesirable *per se*", but rather, "the presumption would be that while the practices could well be harmless or even beneficial to the public in some circumstances, they could be harmful in others". The tribunal would "examine cases where harmful effects were suspected and, upon finding that harm was indeed being done, to impose and/or recommend appropriate remedies".[17]

The council was emphatic on this point, adding that:

> *It should be re-emphasized that none of the above classes of practices would be an offence or be banned as such.* Only where there was reason to suppose that their use in a particular situation might be having a deleterious effect on the public interest would they become the subject of hearings by the tribunal. [Emphasis in original][18]

## B) Conduct-effects-remedy paradigm

The 1986 *Competition Act* reflects exactly the philosophy of approach recommended by the Economic Council. Part VIII, entitled "Matters Reviewable by Tribunal" does not prohibit any conduct. To the contrary, all of the practices dealt with by Part VIII are presumptively lawful. A practice caught by this part only becomes unlawful once the Competition Tribunal has issued an order prohibiting it.[19]

This conduct-effects-remedy paradigm can be found in each of the unilateral conduct provisions in Part VIII (exclusive dealing, tied selling, market restriction, refusal to deal, resale price maintenance, and abuse of dominance). That is, in order to obtain a remedy, the Commissioner must show that conduct of the respondent is harming competition (or is likely to do so). Unless and until the Tribunal orders a remedy, the conduct is lawful, and an order from the Tribunal does not involve any declaration that the conduct was unlawful.[20] There are two different standards of harm to competition prescribed in this Part: the "substantial lessening or prevention of competition" standard applies to most of these provisions, while the lower "adverse effect on competition" was introduced in 2002 when the Act was amended to permit private applications for refusal to deal (section 75). This standard is also used in the civil resale price maintenance provision introduced in 2009 (section 76). The abuse of dominance provision (section 79) also has a threshold requirement of showing that the respondent enjoys market power.

The structure can be observed in section 79. Nothing in this provision contains any *ex-ante* prohibition; it provides that *if* the Tribunal finds that three requirements are met, it *may prohibit* the conduct:

> 79 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.[21]

This feature of Part VIII remains mostly intact today, despite what might be termed a creeping re-criminalization of monopolization that has been underway in Canada.

## C) Creeping re-criminalization of unilateral conduct

The creeping re-criminalization of abuse of dominance began in 2002, when Parliament added "administrative monetary penalties" ("AMPs") to the remedies available under section 79.

The existence of a penalty is logically inconsistent with the idea that the conduct dealt with in section 79 is lawful until the Tribunal prohibits it. Nevertheless, the provisions enacting the AMPs did not change this structural feature.[22] Section 79 still does not contain any language prohibiting any conduct; it permits the Tribunal to prohibit the conduct going forward.

Indeed, the AMPs provisions[23] employ somewhat tortured language to avoid any suggestion that the conduct was unlawful before the Tribunal prohibited it. Thus AMPs are available "if the Tribunal makes an order … under subsection (1) or (2)"—there is no suggestion of a "breach", "violation", "contravention", or "infringement" of section 79. Similarly, a higher AMP, of $15 million, could be imposed "for each subsequent order"—a tortured way of avoiding saying "for each subsequent violation" or similar. Yet more contortions are found in the provision describing the purpose of AMPs; they are "to promote practices by that person that are in conformity with the purposes of this section and not to punish that person". Given that "punish" means "inflict a penalty", and that both words come from the Latin word for "pain" ("*poena*"), this assertion by the legislator defies common sense. It is possible that it was included to ensure that AMPs would not be characterized as having a "true penal consequence" that would trigger constitutional protections afforded a person charged with a criminal offence.. But other federal AMP schemes do not include a similar provision.[24] The best explanation for the linguistic gymnastics found in the AMP provisions is that Parliament wanted to avoid any suggestion that AMPs change section 79's structure to make abuse of dominance unlawful.

In Budget 2022, Parliament amended the AMP provisions to increase the maximum penalty to the greater of $10 million[25] and "three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues".[26]

In parallel with these changes, the Competition Bureau consistently uses language that suggests that conduct covered by section 79 is unlawful *before* the Tribunal has made an order. A recent example is the Bureau's press release announcing its recent settlement with Isologic, where the Bureau states that it "found that Isologic's contractual practices with certain customers *contravened* the abuse of dominance provisions of the Competition Act".[27] In another recent news release, about an inquiry into certain practices by Quebec Professional Association for Real Estate Brokers, the Bureau notes that its "investigation is ongoing and there is no conclusion of *wrongdoing* at this time".[28]

In its online guidance, the Bureau also claims that the *Competition Act* "says that a dominant entity can't abuse its dominance by using its market power in a way that hurts competitors or competition".[29] Of course, the Act says no such thing.

Indeed, this very issue was squarely before the British Columbia Supreme Court in *Novus Entertainment Inc.* Novus pleaded that Shaw engaged in abuse of dominance. In response to Shaw's motion to strike, Novus argued that the addition of AMPs changed the fundamental character of section 79.[30] Because the Tribunal can now impose a penalty for past conduct, that conduct is now unlawful when it occurs, Novus argued. The court disagreed, holding that the conduct is not unlawful until after the Tribunal makes an order:

> While the amendments have the effect of allowing the tribunal to consider a respondent's prior conduct in the determination of any monetary penalty it might impose under the Act, the Tribunal must first make an order under s. 79(1) that a respondent has engaged or is engaging in anti-competitive acts. Section 36 provides a person must fail to comply "with an order of the Tribunal" as a pre-requisite to suing for the recovery of loss or damage. The Tribunal has exclusive jurisdiction under the Act to make a determination whether conduct is anti-competitive. Until such determination is made by the Tribunal, it cannot be said a party's conduct is unlawful.[31]

The Bureau's mischaracterization of the nature of the abuse of dominance provision seem to be aimed at changing it from being purely remedial to one more along the traditional criminal lines of prohibited conduct followed by a penalty—a contravention-punishment paradigm. Of course, no one is proposing full re-criminalization of monopolization (in Canada, at least), presumably because that would re-impose the requirement of proof beyond a reasonable doubt. Instead, we now have the cakeist solution of immense fines imposed on the lower, civil standard of balance of probabilities.

## 3. Chilling competition

The question must therefore be asked: will moving from a conduct-effects-remedy paradigm to a contravention-punishment one increase competition or chill it?

### A) The "puzzle of exclusionary conduct"

Competition authorities and academics have long recognized that over-enforcement of anti-monopolization provisions can have the perverse outcome of reducing competition. Why is that? Because competition is not a genteel game; it's a Darwinian contest among fierce rivals. It involves firms trying to beat their rivals and gain sales and market share at their expense.

This, in turn, makes it hard to distinguish aggressive competition on the merits (which we want) from anti-competitive conduct (which we don't want). Frank Easterbrook, a noted U.S. antitrust scholar and judge, described this as a "puzzle of exclusionary conduct":

> Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike.[32]

This reason this puzzle matters is that whenever a firm is penalized for aggressive competition on the merits, as opposed to truly anti-competitive conduct, then the very activity that competition law wants to promote is instead deterred.

The Bureau explicitly recognizes this in its *Abuse of Dominance Enforcement Guidelines*:

> When enforcing section 79, a significant consideration for the Bureau is to avoid chilling or deterring pro-competitive or efficiency-enhancing conduct. The Bureau recognizes that it is often challenging to distinguish anti-competitive conduct from aggressive competition on the merits, as in many cases the goal of aggressive competition is to marginalize rivals or eliminate them from a market. The Bureau recognizes that firms may acquire a dominant position by simply out-competing their rivals, for example, by offering higher quality products to consumers at a lower price. In these cases, sanctioning firms for simply being dominant would undermine incentives to innovate, outperform rivals and engage in vigorous competition. Such vigorous competition is the sort of competitive dynamic that the Act is

> designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.[33]

These concerns may be even greater in digital markets and platforms, where dynamic competition can lead to "winner take all" outcomes, as the Bureau notes:

> The potential for enforcement action to chill dynamic competition in favour of increased static competition is an important consideration for the Bureau in determining whether to pursue an enforcement action, or even what remedy to pursue if enforcement action is warranted. 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. Focussing enforcement on static outcomes may result in longer term harm as it may undermine the incentives for firms to engage in beneficial dynamic competition, and caution must be exercised when intervening in fast-moving markets.[34]

The Competition Tribunal also expressed similar concerns in *Canada (Director of Investigation & Research) v Tele-Direct (Publications) Inc.*[35] There, the Tribunal was concerned that the lack of an objective test for identifying anti-competitive conduct could chill competition. The Director of Investigation and Research contended that Tele-Direct's response to competitive entry was "overwhelmingly aggressive". But trying to determine whether a response was overwhelmingly intense would be a "highly subjective exercise", and doing so could chill competition:

> What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (*e.g.*, price freezing or cutting, incentives, product improvements, increased advertising).[36]

The United States Department of Justice used to recognize this same principle. In its 2008 report on Section 2 of the Sherman Act, the Antitrust Division wrote: "The problem is not simply one that demands drawing fine lines separating different categories of conduct; often the same conduct can

both generate efficiencies and exclude competitors."[37] The Antitrust Division withdrew the report in 2009. The Federal Trade Commission, however, continues to recognize in its guidance that single-firm conduct can be pro- or anti-competitive depending on the circumstances.[38]

Indeed, nearly every kind of conduct that has given rise to monopolization cases can be pro-competitive in the right circumstances. Exclusive dealing, for example, can exclude rivals. But it can also ensure that the dealer provides good service to customers,[39] or that the dealer carries a full range of products. Tying and bundling can enable a firm to leverage dominance in one market to achieve market power in another market. But bundles, for example the quadruple play of cable TV, internet, phone, and mobile phone, benefit consumers immensely and give rise to competition among providers of bundles.[40]

### B) Cloud of unknowing

The difficulties of distinguishing between pro- and anti-competitive conduct have important effects for a firm that is considering how to respond to competitors. It is often impossible for a firm to know for certain whether any proposed business practice could be the subject of an order under abuse of dominance provisions. Quite apart from the unfairness of imposing a punishment on someone for an infraction they could not know they were committing, this will cause some firms to pull their competitive punches—to compete less aggressively.

Indeed, a firm often cannot know for certain whether *any* of the three elements in the provision (dominance, anti-competitive conduct, or substantial lessening or prevention of competition) are met for any given proposed business practice.

First, a firm often cannot know for certain whether it has the "substantial degree of market power" required by paragraph 79(1)(a); "Market power is not an easy concept to handle".[41]

One way to assess market power is to look to high margins as evidence of supra-competitive pricing, and thus market power.[42] But this approach has only worked in two abuse of dominance cases (*Tele-Direct* and *Canada Pipe*), and one merger case (*CWS*).

Another way to determine the existence of market power is to look at market shares. High market shares coupled with barriers to entry can indicate the existence of market power.[43] However, while firms typically have a

general sense of position in the market, relatively few firms know for certain what their market share is. They do not, for obvious reasons, have access to data from their competitors that would enable them to determine this with precision. This difficulty is further compounded by the fact that there are a number of different ways to measure market share. For example, in the recent Rogers-Shaw merger case, there was a live debate among the economists (and the parties) as to whether market share should be measured by share of subscribers or share of gross adds (new subscribers gained over a period of time).[44] Other ways to measure market share include dollar sales, unit sales, capacity, and, for natural resources, reserves.[45]

Paradoxically, the firms best able to identify that they have market power are those that control an essential facility. Firms in that position will be well aware that they have the power to exclude rivals. Yet refusing to share an essential facility is perhaps the least blameworthy sort of anti-competitive conduct—even if we do ultimately force the owner to share it—and forcing the owner of an essential facility to share it involves a serious interference with property rights. The Bureau seems to have recognized this in its case against Vancouver Airport Authority: not only did it not seek an AMP, but in its press release announcing the application, it refrained from using "contravention" language, but instead used the more neutral "restricting competition".[46]

Determining whether a firm enjoys market power or has high market shares also requires definition of the relevant product and geographic markets. While most firms will have a good sense of what those are, it is worth noting that market definition has been hotly contested in many (if not most) of the cases before the Tribunal. Some cases have turned on market definition. For example, in the recent *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited* merger case, the Tribunal rejected outright the product market proposed by the Commissioner.[47] In *CWS*, the Tribunal accepted the Commissioner's contention that landfill sites in Michigan and New York were not a part of the relevant market.[48] In both of these cases, the market definition drove the ultimate result.

The second element, practice of anti-competitive acts (paragraph 79(1)(b)), also poses some difficulties for a firm. As noted above, it is extremely difficult to distinguish aggressive competition on the merits from anti-competitive conduct, since both look much the same. The analytical framework that has developed ostensibly focusses on the *purpose* of the conduct: "an anti-competitive act is identified by reference to its purpose".[49] The requisite purpose is an *intended* predatory, exclusionary, or disciplinary effect on

a competitor or, following the 2022 amendments to section 78, an intended "adverse effect on competition". As I discuss below, intention is a poor screen for determining whether conduct is pro- or anti-competitive. In any event, the focus on intention is somewhat misleading, because evidence of subjective intent is not required. Intention can be assessed objectively: if the predatory, exclusionary, or disciplinary effects are reasonably foreseeable, then the intention element is met (subject to there being a reasonable business justification that rebuts this intention).[50]

Ultimately therefore, the test under paragraph 79(1)(b) as developed by the courts comprises three elements: whether the conduct has a predatory, exclusionary, or disciplinary effect; whether that effect is reasonably foreseeable; and whether a reasonable business justification changes the overall character of the act.

This test was codified in 2022. The chapeau of subsection 78(1) now defines an anti-competitive act as "any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition". It will be interesting to see whether the Tribunal treats this definition as a mere codification of the existing jurisprudence, or as changing the substantive requirements of section 78. It might be argued, for example, that the intention requirement is one of subjective intention, and not merely the current objective test.

There is surprisingly little guidance on when these anti-competitive effects are foreseeable. In *Laidlaw*, the Tribunal simply says that "actions will be presumed to have been intended to have the effects which actually occur in the absence of convincing evidence to the contrary".[51] In *Nielsen*, the "unquestionable effect" of exclusivity provisions in contracts was "to exclude all potential competitors", which "Nielsen can be presume to have intended".[52] In *Tele-Direct*, the Tribunal likened purpose to the "overall character of the act".[53]

However, the Tribunal has also recognized that even dominant firms are entitled to respond to entry, and that any competitive response will negatively impact the new entrant: "Anything short of accommodation is likely to make the post-entry prospects less attractive than the pre-entry benefits enjoyed by the incumbent".[54] So it would seem that some intention to make life less comfortable for competitors is allowed. But the Tribunal has also cautioned that dominant firms do not necessarily have the same freedom as non-dominant firms: "the Tribunal does not apply a safe-harbour for

practices which a non-dominant firm would likely have undertaken in similar circumstances”.[55]

As well, certain types of potentially anti-competitive conduct involve factors that cannot be known by the firm. In predatory pricing cases, for example, the Bureau uses as a screen whether the alleged predatory price can be matched by competitors without their incurring losses (this is also known as the equally efficient competitor test). The Bureau uses this screen because of “difficulties inherent in applying a price-cost test to identify predatory pricing”.[56] The alleged predator cannot be expected to know whether its competitors can match its prices without incurring losses, however.

It is all but impossible to draw any sort of practical guidance from the cases about how aggressively a dominant competitor can compete. The test for anti-competitive conduct seems to be not unlike the famous test for obscenity: “I know it when I see it”.[57] This may be an unavoidable feature of any unilateral conduct provision, since it is the effects on competition that matter, and these depend on factors that are external to the firm whose conduct is under examination.

But the result is that a potentially dominant firm that is considering a competitive response to, say, a new entrant, has to tread very carefully, since any anti-competitive effects caused by its response are likely to determine the overall character of that response.

The third element, substantial lessening or prevention of competition (paragraph 79(1)(c)), is all but impossible for a single firm to assess on its own. As the cases show, it is difficult to determine after the fact whether conduct has caused a substantial lessening or prevention of competition; but it is harder still for a single firm to determine beforehand whether a proposed competitive response is likely to do so. A single firm lacks the ability to gather the necessary evidence from other industry participants (and rightly so!).

### C) Inevitable certification and settlement

The difficulties associated with distinguishing pro- from anti-competitive conduct mean that if class actions are permitted in abuse of dominance cases, those class actions will inevitably be certified. This in turn will effectively force defendants to pay large settlements—even in unmeritorious cases.

To understand why this will happen, it is necessary to look at how class actions are managed in Canada.

Before an action can proceed as a class action, it must be certified by the court (authorized, in Quebec). In Canada's common law jurisdictions, and in the Federal Court, a five-part test is applied:

- The pleadings must disclose a cause of action.
- There must be an identifiable class of two or more persons.
- The claims or defences must raise common issues.
- A class proceeding must be the preferable procedure for resolving the common issues.
- There must be a suitable representative plaintiff.

Of these five requirements, only the first (cause of action), third (common issues), and fourth (preferable procedure) are typically in issue.

The first requirement, that the pleadings disclose a cause of action, is assessed using the same test as on a motion to strike. Thus the claim will only fail this requirement if it is "plain and obvious" that it does not disclose a cause of action.[58]

In conducting this analysis, courts assume that the facts pleaded are true "unless they are manifestly incapable of being proven".[59] Pleadings must be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies".[60] Novelty is rarely a handicap, as the court must "err on the side of permitting a novel but arguable claim to proceed to trial".[61]

As a result, even badly drafted claims will typically pass this threshold requirement.

Perhaps the most extreme example of courts allowing novel, but fundamentally unsound, claims to proceed is the saga of waiver of tort as a stand-alone cause of action. In the early 2000s, a number of academics theorized that waiver of tort, hitherto an election of remedies, could be a stand-alone cause of action to force a wrongdoer to disgorge profits even in the absence of any injury to a plaintiff. In 2006, the Ontario Divisional Court adopted this notion and affirmed the certification of a class action based on waiver of tort even though the plaintiffs had no damages.[62] Plaintiffs began

to plead waiver of tort in price-fixing cases to get around difficulties inherent in proving loss on a class-wide basis. The British Columbia Court of Appeal accepted the notion that waiver of tort could be used to circumvent the requirement in the *Competition Act* that the plaintiff have suffered a loss.[63] It was not until 2020 that the Supreme Court of Canada put an end to this experiment, ruling that waiver of tort is not a stand-alone cause of action.[64] But this experiment cost defendants millions.[65]

Courts are also reluctant to rule on the scope of the *Competition Act's* provisions at a preliminary stage. In *Williams v Audible Inc*, for example, the British Columbia Supreme Court refused to grant summary dismissal of a claim alleging that exclusivity provisions in a distribution agreement between Audible Inc. and Apple constituted a form of unlawful market allocation, contrary to paragraph 45(1)(b).[66] The exclusivity provisions required Apple to source audiobooks exclusively from Audible, and prohibited Audible from integrating its content with any other internet-based distribution service. Audible also sells audiobooks to consumers, making it a competitor as well as a supplier to Apple. It can be difficult to determine whether this type of arrangement, known as a "dual distribution" arrangement, is vertical (and thus lawful) or horizontal (and thus potentially unlawful). Given this difficulty, the court refused to dismiss the claim, although it ultimately denied certification on other grounds.

The abuse of dominance provisions would be an even better playground for creative pleading by plaintiffs. Unlike the criminal provisions in the Act, which tend to be tightly drafted, the abuse of dominance provisions are deliberately broad in scope. They constitute, in a sense, a genus, with many potential species of cases that are left to be developed by the Tribunal. As part of this development, the Tribunal has imposed additional screens in particular types of cases. For example, where a firm is accused of leveraging a dominant position in an upstream market over a downstream market that it does not compete in, by, for example, refusing access to some essential facility, the firm must have a plausible competitive interest in the downstream market.[67] This screen is not found anywhere in the *Competition Act*, yet without this screen, the Act could too easily be used to force firms to supply goods and services to firms that they do not wish to accept as customers. Similarly, the equally efficient competitor screen employed by the Bureau in analyzing predatory pricing cases avoids penalizing firms for *lowering* their prices—an important goal given that lower prices are a desirable outcome of competition. There is, however, no prospect whatsoever that courts will develop screens of this nature at the pleadings stage if abuse of

dominance class actions are allowed. Screens will only be developed after trial, which may never occur.

The common issues requirement will also be relatively easy to meet in putative abuse of dominance class actions. The existence of common issues is at the heart of class action certification; the ability of a class action to deliver a result for a class depends upon the existence of issues that can be determined for the class as a whole.

The plaintiff must show "some basis in fact" to support the proposed common issues. There is some debate in the jurisprudence on this. In Ontario, plaintiffs must show some basis in fact (1) that the common issue actually exists, and (2) that it is common across the entire class.[68] The Federal Court also follows a two-step approach.[69] By contrast, a recent decision from the British Columbia Court of Appeal has been interpreted by some as rejecting this two-step approach in favour of a one-step requirement that the plaintiff show that the issue is common to the class.[70]

Whether the "some basis in fact" test is a two-step or a one-step test, it is clear that it sets a low bar. In *Pro-Sys Consultants Ltd v Microsoft Corp*, the Supreme Court declined an invitation to adopt the more robust analysis conducted at the certification stage by US courts and assess certification requirements on a balance of probabilities.[71] Rather, "certification does not involve an assessment of the merits of the claim"; the court should not resolve conflicting facts and evidence at certification. At the same time, however, certification is meant to be a "meaningful screening device". While the court does not make a determination on the merits, neither does certification "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".[72]

Courts have also repeated warned against getting into the "battle of the experts" and resolving conflicts between experts at certification.[73] The test to be applied to the plaintiff's expert evidence is whether it is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement".[74] For loss issues, it only need "offer a realistic prospect of establishing loss on a class-wide basis".[75]

The Supreme Court's decision in *Godfrey* provides a good example of how this rule leads to an uncritical acceptance at certification of the expert evidence tendered by plaintiffs. One of the issues in that case was whether the methodology proposed by the plaintiff's expert could show that all class members suffered harm. He had admitted that his methodology generated average numbers, which, the defendants argued, meant that some class

members might not have been impacted. But the court accepted his methodology because it was not apparent that the expert had resiled from his opinion that all class members would be impacted.[76] Effectively, so long as the plaintiff's expert does not break down on cross-examination, his or her evidence will be accepted.

In price fixing class actions, economic evidence is usually only relevant to the existence and quantum of loss or damages. Since the enactment of the *per se* conspiracy provisions in section 45, proof of an unlawful conspiracy is relatively simple. The plaintiff need only prove that the parties to the agreement are competitors (which is usually straightforward, but could involve some degree of market definition) and that they entered into an agreement to fix prices, allocate markets, or restrict output. Plaintiffs usually have the benefit of enforcement in other countries to establish some basis in fact that there was a conspiracy.

By contrast, each of the three elements that must be shown in an abuse of dominance case involves expert economic evidence. Expert evidence is required to define product and geographic markets; to determine whether the respondent has market power; to determine whether the respondent's conduct had a disciplinary, exclusionary, or predatory effect on a competitor; and finally, to determine whether or not the conduct has resulted in a substantial lessening or prevention of competition.

In an abuse of dominance class action, then, plaintiffs will presumably commission a report from an economist to establish some basis in fact for each of these elements. It will be all but impossible for defendants successfully to refute this evidence at certification; the judge will be faced with two witnesses, each with a doctorate in economics, contradicting each other on a subject about which the judge will know next to nothing. Courts will follow the injunction in the caselaw not to get into the battle of the experts and instead certify the claim as a class action.

What will happen next is that defendants will settle, rather than face the immense costs of going to trial and the risk of a damages award that threatens the business' very existence. They will, as the Supreme Court recognized in *Babstock*, be "practically compelled to pay a settlement to the plaintiff".[77] These settlements can be very large indeed. By way of example, in two cases alleging quite novel—and highly questionable—theories of breaches of section 45, defendants nevertheless agreed to massive settlements after the certification: defendants in the Visa/Mastercard case paid over $188 million in settlements, while Microsoft agreed to a settlement worth about $500

million. Interestingly, the Microsoft case began life as an attempt to bring a private action for an alleged abuse of dominance by Microsoft. The British Columbia Supreme Court struck those allegations, holding that "in the absence of an order of the Competition Tribunal … conduct of the nature described in Part VIII of the *Competition Act* does not constitute illegal or unlawful means".[78] The case was then re-configured as a case alleging a conspiracy contrary to section 45.

Plaintiffs have large incentives to bring cases against Canada's large corporations. Class proceedings legislation establishes what Perell J. described as the "entrepreneurial model for the class action regime".[79] It provides a profit motive for plaintiff firms to bring class actions; it deliberately creates an incentive for firms to launch class actions whenever they sense that they can obtain a settlement that will generate a large fee. In British Columbia, no costs can be awarded against an unsuccessful plaintiff, which removes any incentive against bringing a spurious claim. Thus, unlike the Bureau, which brings cases based on its view about what is best for competition, class action plaintiff firms will bring cases based on what will yield the highest fees, without regard for what is best for competition. The likelihood that courts will certify even dodgy abuse of dominance cases means that plaintiffs will have an incentive to bring them.

### D) Staying well back of the yellow line

One important enforcement mechanism is not even in the *Competition Act*: legal advice provided by lawyers to their clients. It is partly through this mechanism that high AMPs and the risk of class actions can chill competition.

Legal advice on unilateral conduct issues is different from advice on cartel issues in two respects. The first is the confidence level with which a lawyer can advise whether or not proposed conduct will create issues under the relevant provisions of the *Competition Act*. The second is the degree of caution that we urge on our clients.

It is usually easy to identify a hard-core cartel and advise clients not to get into it (or to get out if they have entered into a cartel). It is also generally easy to identify with confidence when conduct is unlikely to raise issues under section 45. There are, of course, grey zones. Dual distribution arrangements can be difficult to unravel. But the Bureau's statement in the *Competitor Collaboration Guidelines* that *bona fide* arrangements will be examined under section 90.1 instead of section 45 gives considerable comfort.

Because of the criminal nature of the conspiracy provisions, lawyers typically recommend a cautious approach. For example, although none of these provisions forbid the sharing of competitively sensitive information, there is a risk that a court may infer the existence of a price fixing agreement from information exchanges followed by parallel behaviour. As a result, lawyers typically advise clients not to exchange such information. The analogy I use with clients is that they should “stay well back of the yellow line”, just as at a train station. Information exchanges are like standing at the edge of the platform: both are risky.

Advising on unilateral conduct (abuse of dominance, exclusive dealing, refusal to deal, etc) is different in both respects.

We cannot advise a client with high degree of confidence whether proposed business conduct will constitute an abuse of dominance. This is because of the difficulties inherent in distinguishing aggressive competition on the merits from anti-competitive conduct, and the impossibility of knowing for certain whether the elements of section 79 will be met in any given case. The same is true for the other restrictive trade practices in the Act: we cannot know with confidence whether the effects of the conduct will merit intervention by the Tribunal.

We can, of course, retain economists to assist with the analysis. With their help, we may be able to more confidently advise clients. But even a cursory review of the cases shows that economists reach diametrically opposed conclusions on practically every element in every case. There can be no guarantee that the conclusions an economist might reach in advising a client will ultimately be accepted by the Tribunal.

We could, in theory, ask the Bureau for an advisory opinion under section 124. But it seems that even the Bureau is unwilling (or unable) to determine in advance whether proposed conduct will cause a substantial lessening of competition. In its *Fee and Service Standards Handbook for Written Opinions*, the Bureau says that it will not “provide an assessment of the effects on competition of the proposed conduct or practice”.[80]

Until now, this has not been a problem. The worst that clients typically face in an abuse of dominance case is to be told to stop whatever the conduct is. The Bureau has, wisely, only sought AMPs in two cases, both of which involved egregious conduct that directly impacted consumers.

However, the further down the road we go toward a contravention-punishment model, the more the advice that lawyers give to clients on unilateral

conduct will resemble the advice they give on criminal matters: stay well back of the yellow line. Clients too, hearing that they could be fined up to three percent of annual worldwide gross (not net!) revenues, as well as large class action settlements, may decide that the risks of aggressive competition on the merits are too high and pull their competitive punches.

The problem with this is that unlike in cartel matters, where we want firms to stay well back of the yellow line, in unilateral conduct, we want them to compete aggressively—that is, compete right up to the platform edge. But sky-high penalties coupled with uncertainty as to where exactly the platform edge is means that firms with a strong position in the market may become competition-shy.

## 4. Are AMPs really needed to control anti-competitive conduct?

If AMPs have the potential to chill pro-competitive conduct, as I argue above, then it is worth asking whether they are really needed to control anti-competitive conduct.

There have been only four abuse of dominance cases commenced since AMPs were introduced. The Commissioner has only sought AMPs in two of those cases, *Direct Energy* and *Reliance Home Comfort*. Both cases involved some rather nasty practices designed to thwart competition in the water heater rental market. The applications against both companies allege a litany of bad conduct designed to make switching difficult at the end of a water heater rental contract: requiring consumers to complete paperwork to return a water heater; arbitrary restrictions on where and when water heaters can be returned; levying exit fees on consumers in the form of account closure fees, drain, disconnection, and pickup charges, and fees for purported damage to water heaters; and even continuing to charge rental fees after the consumer switches.[81] Direct Energy had agreed to stop similar practices in a 2002 consent order, but had resumed them the day after the consent order expired.[82] As both companies settled, none of these allegations were ever proven. But three things jump out at the reader: first, much of the alleged conduct was against consumers directly; second, it involved dishonest practices; and third, both companies used remarkably similar tactics.

Both companies agreed to pay an AMP as part of their settlements with the Commissioner; Reliance Home Comfort paid $5 million, and Direct Energy, $1 million.

Few would doubt that the allegations against Reliance Home Comfort and Direct Energy would, if proven, have merited a substantial AMP. The same can be said of the *Laidlaw* case:[83] Laidlaw had used evergreen contracts with punitive termination provisions and threatened or actual litigation against customers to prevent switching. That case predated the availability of AMPs, however.

But at the other end of the spectrum lies the Vancouver Airport Authority ("VAA") case.[84] The Commissioner challenged VAA's decision not to allow a third in-flight caterer to operate at the airport. This was a pure "essential facilities" case: the Commissioner was asking the Tribunal to force VAA to rent space on its land to a caterer. VAA believed it had good reasons not to do this (which the Tribunal accepted in dismissing the case). But even supposing that the Commissioner had won, imposing an AMP on VAA would have been outrageous. The Commissioner appears to have recognized this; he did not seek an AMP.

Nor did the Commissioner seek an AMP against the Toronto Real Estate Board ("TREB"). This case was about access to real estate data feed that was structured in such a way as to support a new, and potentially disruptive, real estate agency business model. Here, unlike in VAA, the Tribunal found that TREB's purpose refusing this data feed was to insulate its members from competition.[85] As the Commissioner had not sought an AMP, none was ordered. Would one have been appropriate? While TREB's purpose was anti-competitive, the conduct effectively was that of refusing to help competitors to disrupt the business model of TREB's members. Whatever the merits of competition law requiring a dominant firm to aid a competitor to compete against it, requiring that firm to pay a fine as well would seem a step too far.

Given the paucity of cases since the introduction of AMPs, it is difficult to say whether AMPs truly are needed to deter potentially anti-competitive conduct. In the absence of compelling evidence that they are needed, the fact that they have the potential to chill pro-competitive practices suggests that AMPs should not be retained.

## 5. The intentionalist fallacy

As discussed above, intention has emerged as the primary distinguishing factor between pro- and anti-competitive conduct: "it is now settled law that the focus of the assessment under paragraph 79(1)(b) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary

negative effect on a competitor".[86] I believe that this is an error that should be corrected.

Until the 2022 amendments, intention was a necessary, but not sufficient, condition for finding that conduct is anti-competitive. The conduct must also have had the requisite predatory, exclusionary, or disciplinary effect. That is not the case in Australia and New Zealand, where an intention to cause a substantial lessening of competition is sufficient.[87] With the 2022 amendments to the *Competition Act*, intention on its own is likely now sufficient, since anti-competitive acts are now defined by reference to intention, not effects: "anti-competitive act means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition".[88]

There are two problems with using intention as the main determinant of whether conduct is anti-competitive or not.

The first problem is that that businesses compete to win, not to increase competition. Competition is a by-product of businesses trying to beat each other in the market place; to gain sales, revenue, and market share at each other's expense. "Competitors often dislike each other. And competitors almost always want to hurt each other's business" as the Alberta Court of Appeal put it.[89]

The second problem is that if the goal of unilateral conduct provisions is to provide a remedy for conduct that reduces competition, intention is completely irrelevant. Intention does not assist in determining whether conduct has or has not reduced competition.

Intention is, of course, relevant in a contravention-punishment model, since the law is reluctant to punish or award damages in the absence of some fault. But the cases have established that intention can be presumed from the effects of conduct, which essentially wipes it out as a meaningful screen.

Intention seems to matter most where the respondent asserts that it has a reasonable business justification for the conduct. A reasonable business justification can rebut the "deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct".[90]

To date, a reasonable business justification has been found in only one case: *VAA*. VAA said that it decided to limit the number of full-service caterers to two because it was concerned that having a third caterer might

be unsustainable, and lead to there being only one. The Commissioner objected that VAA conducted only a superficial analysis: it made this decision during a one hour meeting and failed to consult airlines. The Tribunal disagreed: the question was not whether VAA was correct, but whether the decision was made in good faith:

> However, the question is not whether VAA's senior management was as correct and as thorough as the Commissioner would have preferred or some observers might expect. Rather, it is whether the individuals in question made a genuine and good faith decision on the basis of information that was sufficiently robust to withstand an allegation of having been so superficial that it lacked credibility or was otherwise inadequate.[91]

The Bureau now complains that this approach "would mean that conduct could significantly harm competition but be permitted to continue because the firm convinces the Tribunal it sincerely believes a justification that does not hold up to objective scrutiny".[92] This is true, but if the focus is on intention, as opposed to effects, then the Tribunal's finding makes sense. It is the logical result of the focus on intention.

## 6. Back to the future

We are, perhaps, at a crossroads. We can continue towards a contravention-punishment model of unilateral conduct; or we can climb into the DeLorean and return to the conduct-effects-remedy model of the 1986 *Competition Act*.

The contravention-punishment model involves high penalties for abuse of dominance, including potentially class actions for damages, in order to deter abuse of dominance. For all the reasons outlined above, the risk is that this model will not just deter abuse of dominance, but will also deter aggressive competition; it will make Canada's economy less, not more, competitive. In order to reduce this risk, the provisions must be tightly drafted, and limiting principles such as intention must be relied on. Without limiting principles, we will be headed for the worst of both paradigms: a broadly worded provision with punitive remedies.

The conduct-effects-remedy model, by contrast, does not chill aggressive competition. As originally envisioned by the architects of the 1986 Act, proceedings can be less contentious, without the stigma of having "contravened" the *Competition Act* or committed "wrongdoing".

In order to return to this model, AMPs would either be repealed, or only be available in cases where the conduct is so egregious as to be outside the

boundaries of acceptable commercial behaviour, for example, where the conduct is independently unlawful, such as breach of contract, fraud, misrepresentations, intimidation, or other tortious behaviour.

But going back to the future does not mean that the abuse of dominance provisions should be returned to their 1986 state without any modernization. I propose three ways to modernize these provisions below.

## A) Redefining dominance

The first way that I would modernize section 79 is to simplify and expand the dominance requirement.

First, I would simplify it. Instead of requiring "substantial or complete control" of a "class or species of business", I would reframe this element to reflect the jurisprudence. The requirement should simply be that the firm have a "substantial degree of market power".

Second, I would broaden the joint dominance concept to capture conduct that causes harm because it is widespread in a market, even if no one firm enjoys the requisite degree of market power.

As it stands, conduct that is widespread in a market, but where no one firm is dominant, is difficult to remedy. Section 79 arguably does envision the possibility of an application in these circumstances, since the paragraph 79(1)(a) refers to "one or more persons" controlling a market, and paragraph 79(1)(b) provides that "that person or those persons have engaged" in a practice of anti-competitive acts. But to date no contested case has been brought on a joint dominance theory. As a result it is as yet unknown whether coordinated conduct is required for a finding of joint dominance. The Bureau's guidance on this point is confusing: it says both that similar or parallel conduct is not sufficient, but that evidence of coordinated behaviour is not necessary:

> Similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to hold a jointly dominant position. Further, evidence of coordinated behaviour by firms in the allegedly jointly dominant group may be probative insofar as it may explain why members of the allegedly dominant group are not vigorously competing. However, the Bureau does not consider such evidence as necessary to establish that a group is jointly dominant, if there is other evidence that competition among members of the allegedly dominant group is not sufficient to discipline their exercise of a substantial degree of market power.[93]

If a group of firms are engaging in similar or parallel conduct, and they collectively enjoy market power, then the conduct has the potential to cause competitive harm. That should therefore be enough to satisfy the dominance or market power element. There should be no need to show coordination. Remember: the goal is not to stigmatize or punish, but to provide a remedy for competitive responses that harm competition.

One might even consider doing away with the dominance requirement entirely, since if a substantial lessening or prevention of competition is observed, then in principle it can be inferred that the firm involved had sufficient market power to effect this result. In its 2005 report, the Economic Advisory Group for Competition Policy (a group that advises the European Commission on competition policy), pointed this out:

> In terms of procedure, the economic approach implies that there is no need to establish a preliminary and separate assessment of dominance. Rather, the emphasis is on the establishment of a verifiable and consistent account of significant competitive harm, since such an anti-competitive effect is what really matters and is already proof of dominance.[94]

Thus removing the dominance element should in principle have no impact on the application of section 79. This may be a step too far, however, if for no other reason than that the existence of market power can be a useful screen for quickly triaging cases.

### B) Streamlining paragraphs 79(1)(b) and (c)

The second way that I would modernize section 79 is to streamline paragraphs 79(1)(b) and (c) into a single test.

In what is perhaps the worst decision decided under the *Competition Act*, the Federal Court of Appeal insisted in *Canada Pipe* that section 79(1)(b) and (c) must each give rise to a distinct legal test. Thus the focus under paragraph (b) is the intended effect of the conduct on competit*ors*, while paragraph (c) looks at the effect on competit*ion*.[95]

This was, and is, a nonsensical approach. The emphasis on "competitors" created a hole that had to be patched up in *TREB*. That case involved a challenge to rules imposed by Toronto Real Estate Board on its members. The Tribunal initially dismissed the case because the rules had no impact on TREB's competitors; TREB was not a participant in the real estate market.[96] The Federal Court of Appeal acknowledged that this result flowed from *Canada Pipe*, but held that "competitor" need not be a competitor of the respondent.[97] Even with the tweak in *TREB*, the focus on competitors is also

inconsistent with the axiom that competition law protects competition, not competitors.

What did the court get wrong in *Canada Pipe*? In its zeal to preserve the purity of principles of statutory interpretation and avoid conflating the tests under each element of abuse of dominance, the Federal Court of Appeal failed to appreciate that these elements are not entirely distinct. Indeed, the anti-competitive nature of conduct comes from its effects on competition. As noted above, it is even possible to infer the existence of market power from observed anti-competitive effects. To some extent, each element of section 79 reflects a single, simple, insight: the focus should be on whether or not conduct by a single firm (or group of firms) is causing a substantial lessening of competition.

Paragraphs 79(1)(b) and (c) could thus be collapsed into a simple test: the firm or firms are engaged in conduct that causes or is likely to cause a substantial lessening or prevention of competition.

The Bureau proposes essentially this in its submission in response to the federal government's discussion paper.[98] Where I part ways with the Bureau, however, is that I would not include intention in a modernized section 79.

### C) A new name

My third reform would be to rename the abuse of dominance provision. Apart from its slightly kinky connotations, the term "abuse of dominance" carries a certain stigma of wrongdoing. Given that the same conduct can be either pro- or anti-competitive depending on its effects, it would be better to use a less loaded term.

The US term, "monopolization", may not be much better. Down under, in Australia and New Zealand, the term "misuse of market power" is used. "Misuse" carries less stigma than "abuse", but it is not entirely free of stigma. Another possibility might be simply "conduct having anti-competitive effects". But that it is a mouthful. Perhaps "anti-competitive practices" might be best.

## 7. Promoting, not chilling, competition

The *Competition Act* is meant to promote competition. Hard core cartels are prohibited *per se* because they are always bad for competition. There is thus no such thing as over-deterrence of hard core cartels.

But that is not the case with conduct dealt with in Part VIII of the *Competition Act*. The same conduct can be pro- or anti-competitive, depending on the circumstances. As a result, it is not obvious what the right approach is. We do know that over-deterrence will deter vigorous competition, leading to less, not more, competition. A contravention-punishment paradigm carries with it a serious risk of over-deterrence. This paradigm, by its very design, will cause large firms to pull their competitive punches. What we want instead is a system that can stop conduct that harms competition without chilling vigorous competition. The conduct-effects-remedy paradigm adopted in 1984 does that. If the provision were simplified and broadened, and if the Bureau is given the resources to challenge unilateral conduct that harms competition, then it can fulfil its objective.

## ENDNOTES

[1] Michael Osborne is Chair of Cozen O'Connor's Canadian Competition Practice.

[2] *Competition Act,* RSC 1985, c C-34 [*Competition Act*].

[3] Michael J Trebilcock et al, *The Law And Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 31.

[4] Although the *Competition Act*, *supra* note 2 was in many ways a new act, it was enacted by way of comprehensive amendments to the *Combines Investigation Act*, SC 1923, c 9 [*Combines Investigation Act*], and is thus technically the same statute.

[5] The original *Combines Investigation Act*, *supra* note 4 defined "combines" as including "mergers, trusts or monopolies", as well as various agreements to lessen competition (s 2(1)). The definition only applied where the combine operated (or was likely to operate) "to the detriment of or against the interest of the public, whether consumers, producers, or others". Section 26 made it a criminal offence to be involved "in the formation or operation of a combine". At this time, the *Criminal Code* contained a provision prohibiting conspiracies to lessen competition unduly (see RSC 1927, c 36 s 498). There was considerable overlap between the kinds of agreements listed in this provision and those in the definition of "combine". In 1960, this duplication was eliminated. The *Criminal Code* conspiracy provision was brought into the *Combines Investigation Act* as section 32, and the mergers and monopolies offence became a separate offence, as section 33 *Combines Investigation Act and the Criminal Code, Act to Amend the*, SC 1960, c 45 s 13 [*Combines Investigation Act and the Criminal Code, Act to Amend the*]. Section 32 now prohibited conspiracies that lessened competition "unduly", while the new section 33 prohibited the formation (but not the operation) of mergers or monopolies that operated "to the detriment or against the interest of the public, whether consumer, producers or others".

[6] There are seven reported cases involving charges of merger or monopoly. Of those, six involved mergers and resulted in acquittals. The only one that involved monopoly behaviour also resulted in a conviction: *R v Eddy Match Co* (1951), 104 CCC 39, 13 CR 217 (QCKB). Eddy Match used a number of tactics that would be familiar to a competition lawyer today—rebates, exclusive dealing, fighting brands, etc.

[7] MacQuarrie Committee (Committee to Study Combines Legislation), *Report to the Minister of Justice* (Ottawa, Queen's Printer, 1952).

[8] *Combines Investigation Act*, SC 1949 c 12, renumerated and amended by SC 1952 c 39.

[9] *Combines Investigation Act and the Criminal Code, Act to Amend the*, *supra* note 5 at s 13.

[10] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 9 [*Interim Report on Competition Policy*].

[11] *Ibid* at 8.

[12] *Ibid* at 101-103. The report contains an interesting discussion on the

advisability of retaining the "unduly" requirement—a discussion that continued until 2009!

[13] *Ibid* at 109.

[14] *Ibid* at 110.

[15] *Ibid.*

[16] The Economic Council of Canada used the phrase "trade practices not covered by broad prohibitions" (*ibid* at 120).

[17] *Ibid.*

[18] *Ibid* at 122.

[19] This point is well-established. See *Pro-Sys Consultants Ltd v Microsoft Corp*, 2006 BCSC 1047 at paras 32-46 [*Pro-Sys BCSC*] ("the fact that the Defendants' alleged conduct was of the nature described in Part VIII of the *Competition Act* does not, in the absence of an order of the Competition Tribunal, make such conduct unlawful for the purposes of the tort of interference with economic relations. Such conduct is not unlawful simply as a result of being of the nature described in Part VIII"); *Procter & Gamble Co v Kimberly-Clark of Canada Ltd* (1991), 40 CPR (3d) 1 at para 148, 1991 CarswellNat 215 (FC) ("abuse of dominant position in the Competition Act is not a criminal or even civil illegality. […] There is no improper conduct until such time as the Competition Tribunal so finds."); *Harbord Insurance Services Ltd v Insurance Corp of British Columbia* (1993), 9 BLR (2d) 81 at para 16, 1993 CarswellBC 526 (BCSC) ("the conduct complained of is per se lawful but may be prohibited under Part VIII because it lessens competition or offends against the policy set by the Tribunal to foster competition in the market: that does not make it unlawful"); *Chadha v Bayer Inc* (1998), 82 CPR (3d) 202 at para 9, 1998 CarswellOnt 5225 (ONCJ) ("before any prohibition is made at the Tribunal, the effect of s.79 is plainly not to make the activity described unlawful"); *ICE Fashionable Accessories Inc v Holt, Renfrew & Co* (2001), OJ No 1527 at para 18, 2001 CarswellOnt 1320 (ONSCJ). There are some outliers. In *Royal J&M Distributing Inc v Kimpex Inc*, 2021 ONSC 3777, the court relied on a 1989 decision to conclude that whether section 76 could support an action was "not settled law". The court ignored all of the other decisions that settle this point. In *Dow Chemicals Canada ULC v NOVA Chemicals Corporation*, 2018 ABQB 482, the court held that restrictions in a contract would contravene s 90.1 of the *Competition Act*, *supra* note 2. The court was either not referred to, or simply ignored, the authorities listed above.

[20] The merger (s 92) and anti-competitive agreements (s 90.1) provisions share the same basic structure: neither is unlawful until the Tribunal makes an order.

[21] *Competition Act*, *supra* note 2, s 79(1).

[22] *Novus Entertainment Inc v Shaw Cablesystems Ltd*, 2010 BCSC 1030 at para 35 [*Novus Entertainment Inc*].

[23] *Competition Act*, *supra* note 2, ss 79(3.1)-(3.3).

[24] See for example the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c 40; *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126.

[25] Or $15 million for a "subsequent order," as discussed above.

[26] *Competition Act*, *supra* note 2, s 79(3.1)(b).

[27] Canada, Competition Bureau, *Competition Bureau reaches agreement with Isologic to protect competition in healthcare*, (News Release), (24 March 2023) online: <canada.ca/en/competition-bureau/news/2023/03/competition-bureau-reaches-agreement-with-isologic-to-protect-competition-in-healthcare.html> [emphasis added].

[28] Canada, Competition Bureau, *Competition Bureau obtains court order to advance an investigation of competition in the Quebec real estate services market*, (News Release), (20 February 2023) online: <canada.ca/en/competition-bureau/news/2023/02/competition-bureau-obtains-court-order-to-advance-an-investigation-of-competition-in-the-quebec-real-estate-services-market.html> [emphasis added].

[29] Canada, Competition Bureau, *Abuse of dominance and restrictive trade practices*, (17 June 2023), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/compliance-and-enforcement/corporate-compliance/abuse-dominance-restrictive-trade-practices>.

[30] *Novus Entertainment Inc*, *supra* note 22.

[31] *Ibid* at para 35.

[32] Frank H Easterbrook, "When is it worthwhile to use courts to search for exclusionary conduct?" (2003) 2003:2 Colum Bus L Rev 345 at 345.

[33] Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines*, (Enforcement Guidelines), (7 March 2019), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/abuse-dominance-enforcement-guidelines> at para ix [*Abuse of Dominance Enforcement Guidelines*].

[34] *Ibid* at para 95.

[35] (1997), 73 CPR (3d) 1, 1997 CarswellNat 3120 (CT) [*Tele-Direct*].

[36] *Ibid* at para 601.

[37] United States Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (18 March 2022) online: <justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_71_>.

[38] United States Federal Trade Commission, *Guide to Antitrust Laws – Single Firm Conduct*, online: <ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct>.

[39] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 66.

[40] In *Canada (Commissioner of Competition) v Rogers Communications Inc*, 2023 Comp Trib 1 [*Rogers*], the Tribunal discussed bundled offerings, finding that post-merger there will be at least three firms offering bundled offerings, an increase of one from before the merger.

[41] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 236 at para 52 [*Canada Pipe*].

[42] *Tele-Direct*, *supra* note 35 at paras 285-286; *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 at paras

74-83 [*CWS*]; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2005 Comp Trib 3 at para 161.

[43] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 29.

[44] See *Rogers*, *supra* note 40 at paras 199-222.

[45] Canada, Competition Bureau, *Merger Enforcement Guidelines*, (Enforcement Guidelines), (6 October 2011), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/merger-enforcement-guidelines>.

[46] Canada, Competition Bureau, *Competition Bureau takes action against Vancouver Airport Authority*, (News Release), (29 Sept 2016) online: <canada.ca/en/competition-bureau/news/2016/09/competition-bureau-takes-action-against-vancouver-airport-authority.html>.

[47] 2022 Comp Trib 18.

[48] *CWS*, *supra* note 42.

[49] *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at para 66 [*Canada Pipe FCA*] [emphasis in original].

[50] *Ibid* at para 72; see also *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289, 1992 CarswellNat 1628 (CT) [*Laidlaw*].

[51] *Laidlaw*, *supra* note 50 at para 154.

[52] *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd* (1995), 64 CPR (3d) 216 at para 131, 1995 CarswellNat 2684 (CT) [*Nielson*].

[53] *Tele-Direct*, *supra* note 35 at para 541.

[54] *Ibid* at para 595.

[55] *Commissioner of Competition v Toronto Real Estate Board*, 2016 Comp Trib 7 at para 310 [*TREB*].

[56] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 61.

[57] *Jacobellis v Ohio*, 378 US 184 (1964).

[58] *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2008), 56 CPC (6th) 88, 2008 CarswellOnt 1156 (ONSCJ); *Caputo v Imperial Tobacco Ltd* (2004), 236 DLR (4th) 348, 2004 CarswellOnt 423 (ONSCJ); *Hunt v T & N plc*, [1990] 2 SCR 959 at 978-980, 1990 CarswellBC 216 (SCC); *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 27 [*Godfrey*]. In theory, the plaintiff bears the burden of showing that the action discloses a cause of action (*Momi v Canada (Minister of Citizenship & Immigration)*, 2006 FC 738); in practice, however, it is defendants that have to show that the cause of action is not viable.

[59] *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22 [*Imperial Tobacco*].

[60] *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at para 14, 1985 CarswellNat 151 (SCC).

[61] *Imperial Tobacco*, *supra* note 59 at para 21.

[62] *Serhan Estate v Johnson & Johnson* (2006), 269 DLR (4th) 279, 2006 CarswellOnt 3705 (ONSCJ) [*Serhan*].

[63] *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503 [*Infineon*].

[64] *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 [*Babstock*].
[65] Johnson & Johnson paid $4 million to settle the *Serhan* case. Settlements in DRAM totaled over $79 million, but as there were other causes of action asserted, it may not be fair to blame this settlement on the refusal of the BCCA to kill off waiver of tort.
[66] 2022 BCSC 834. Courts have, of course, struck pleadings alleging breaches of the *Competition Act* in other cases. In the credit card interchange case, for example, British Columbia courts held that there was no cause of action under "new" section 45 (*Watson v Bank of America Corp*, 2015 BCCA 362), but the Quebec Court of Appeal refused to rule out the possibility (*9085-4886 Québec inc c Bank of Montreal*, 2019 QCCA 1301).
Courts have also confirmed that section 45 does not apply to buyer side conspiracies in *Mohr v National Hockey League*, 2022 FCA 145 and *Latifi v The TDL Group Corp*, 2021 BCSC 2183.
[67] *TREB*, *supra* note 55 at paras 279–282; *Canada (Commissioner of Competition) v Vancouver Airport Authority*, 2019 Comp Trib 6 at paras 459–466 [*VAA*].
[68] *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718 at para 85; *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at para 79; *Simpson v Facebook*, 2021 ONSC 968 at para 43; *Mancinelli v Royal Bank of Canada*, 2020 ONSC 1646 at para 220; *Stenzler v TD Asset Management Inc*, 2020 ONSC 111 at para 41; *Kuiper v Cook (Canada) Inc*, 2018 ONSC 6487, aff'd 2020 ONSC 128 at paras 26-36; *Kaplan v Casino Rama,* 2019 ONSC 2025 at para 54; *Das v George Weston Limited*, 2017 ONSC 4129 at para 623; *Batten v Boehringer Ingelheim (Canada) Ltd*, 2017 ONSC 6098 at paras 14-15; *Dine v Biomet Inc*, 2015 ONSC 7050 at paras 15-19; *Crosslink Technology Inc v BASF Canada*, 2014 ONSC 4529 at paras 34-35.
[69] *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185.
[70] *Nissan Canada Inc v Mueller*, 2022 BCCA 338 at para 133.
[71] 2013 SCC 57 [*Pro-Sys SCC*].
[72] *Ibid* at paras 101-103, 126.
[73] *Ibid* at para 126; *Infineon*, *supra* note 63 at para 68; *Irving Paper Ltd v Atofina Chemicals Inc* (2009), 99 OR (3d) 358, 2009 CarswellOnt 8610 (ONSCJ).
[74] *Pro-Sys SCC*, *supra* note 71 at para 118.
[75] *Ibid.*
[76] *Godfrey*, *supra* note 58 at paras 99-102.
[77] *Babstock*, *supra* note 64 at para 21, quoting JM Martin, "Waiver of Tort: An Historical and Practical Study" (2012), 52 Can Bus LJ 473 at 476
[78] *Pro-Sys BCSC*, *supra* note 19 at para 49.
[79] *Bancroft-Snell v Visa Canada Corp*, 2015 ONSC 7275 at para 80.
[80] Competition Bureau, *Fee and Service Standards Handbook for Written Opinions*, (Bulletin), (7 April 2020) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competition-bureau-fee-and-service-standards-handbook-written-opinions> at Section 3.
[81] *The Commissioner of Competition v Reliance Comfort Limited Partnership* (20 December 2012), CT-2012-002 (notice of application), online: Competition

Tribunal <Reliance - Notice of Application - Competition Tribunal (ct-tc.gc.ca)> [*Reliance*]; *The Commissioner of Competition v Direct Energy Marketing Limited* (20 December 2012), CT-2012-003 (notice of application) at para 18, online: Competition Tribunal <Direct Energy - Notice of Application - Competition Tribunal (ct-tc.gc.ca)> [*Direct Energy*].

[82] *Direct Energy*, *supra* note 81 at para 18.

[83] *Laidlaw*, *supra* note 50.

[84] *VAA*, *supra* note 67.

[85] *Ibid* at para 322.

[86] *TREB*, *supra* note 55 at para 272.

[87] *Competition and Consumer Act 2010*, 1975/51, s 46 (Austl); *Commerce Act*, 1986/5, s 36 (NZ). The Bureau has proposed adopting this in Canada; see Competition Bureau, *The Future of Competition Policy in Canada*, (Submission by the Competition Bureau), (15 March 2023) online: <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada#sec-2> at s 2.1 [*Future of Competition Policy*].

[88] *Competition Act*, *supra* note 2, s 78(1).

[89] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, 1996 ABCA 275 at para 56.

[90] *Canada Pipe FCA*, *supra* note 49 at para 73.

[91] *VAA*, *supra* note 67 at para 608.

[92] *Future of Competition Policy*, *supra* note 87 at s 2.2.

[93] *Abuse of Dominance Enforcement Guidelines*, *supra* note 33 at para 49.

[94] Economic Advisory Group for Competition Policy, *An economic approach to Article 82*, (July 2005) at 4.

[95] *Canada Pipe FCA*, *supra* note 49 at paras 77-83.

[96] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2013 Comp Trib 9.

[97] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2014 FCA 29.

[98] *Future of Competition Policy*, *supra* note 87.