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## TABLE OF CONTENTS / TABLE DES MATIÈRES

### ARTICLES

#### FORMER COMMISSIONER JOHN PECMAN ARTICLE

##### Introduction

CCLR Editorial Team .....1

Unleash Canada's Competition Watchdog: Improving the effectiveness and ensuring the independence of Canada's Competition Bureau

John Pecman.....5

##### Challenges and Pitfalls in Cartel Fining

Marcel Boyer, Anne Catherine Faye, Eric Gravel & Rachidi Kotchoni...50

### DEVELOPMENTS / DÉVELOPPEMENTS

#### LOOKING BACK: REFLECTIONS ON COMPETITION POLICY DEVELOPMENTS

##### Introduction

Thomas Ross .....83

A historical perspective of a made-in-Canada remedy for anticompetitive behaviour

J.J. Camp, Q.C. ....85

### 2017 JAMES H. BOCKING MEMORIAL AWARD WINNER / LAURÉATE DU PRIX COMMÉMORATIF JAMES-H.-BOCKING 2017

Loyalty Discounts and Rebates: A Commentary on Canada Pipe and Abuse of Dominance in Canada

Corinne Xu .....100

### SCHOLARS PANEL ON ESSENTIAL FACILITIES / GROUPE D'EXPERTS SUR LES INSTALLATIONS ESSENTIELLES

##### Introduction

Renée Duplantis .....120

The Lamentable Rise of an Expanded Essential Facilities Doctrine in Canada: the Troubling Economic Foundations of the Toronto Real Estate Board Decision

Jeffrey Church .....122

Build It and You Must Share It? Essential Facilities in Canada

Michael Osborne .....188

**COMMENTS / COMMENTAIRES**

Section 36 Requests for Access to Information and the Competition Bureau: hast thou forsaken me?

Mohsen Seddigh .....233

# ARTICLES

## INTRODUCTION TO FORMER COMMISSIONER JOHN PECMAN'S ARTICLE

CCLR Editorial Team

*The CCLR Editorial Team was delighted when former Commissioner John Pecman agreed to contribute an article reflecting on his long career at the Competition Bureau and looking ahead to the challenges facing his successor. We present that article with this issue. We wish to thank the former Commissioner for the obvious care and effort that went into preparing such a rich and thought-provoking piece. In it, he reviews the profound changes that have taken place in Canadian competition policy over his career, he explains his areas of focus and the Bureau's accomplishments during his time as Commissioner and, provocatively, he lays out a series of recommendations for legislative and policy changes going forward. He has given us much to think about and we anticipate that his ideas will be widely discussed over the coming months and years.*

*John Pecman joined the (then) Bureau of Competition Policy right out of graduate school in 1984. An economist joining a law enforcement agency, he did not imagine that he would spend over thirty years in the same organization -- including over five years as its Commissioner. However, he arrived at an exciting time for competition policy in Canada as the new Competition Act and Competition Tribunal Act of 1986 remade large parts of the Canadian law on (especially) single-firm conduct and mergers. It was arguably the most exciting time in Canadian history to become engaged in the field and over his career John has made important contributions across the Bureau, serving in a series of increasingly senior positions up to and including his time as Commissioner. Over this period he has been involved in a number of the most important cases in the Competition Act era.*

*Commissioner Pecman's tenure will be remembered for several signature accomplishments. He brought to the office great credibility as a highly experienced enforcement official and a refreshing openness seen in his personal approachability but, more importantly, in his willingness to actively engage with stakeholders and consult widely during the policy formulation process. His time as Commissioner saw the creation of many new guidance documents and the revision of several others, providing much greater – and very much appreciated – clarity on the Bureau's approach to a number of complicated issues. He embraced transparency and dialogue,*

*and championed compliance – with his model of “shared compliance” – over strictly aggressive enforcement. Indeed, he saw the tremendous value in, and energized, many non-enforcement activities such as advocacy work, regulatory interventions and industry studies.*

*In addition to these domestic accomplishments, John was a great competition diplomat for Canada. Ever increasing cross-border merger and cartel activity compels national and regional competition authorities to work together to share information and best practices and to try to lower costs for all parties involved in enforcement activities. To this end, under his leadership the Bureau signed a number of MOU agreements with other agencies. He was also universally recognized as one of the leaders of the International Competition Network. His widely-respected efforts raised Canada’s profile putting it front and centre in global competition policy initiatives, assuring that Canada was an active contributor to, and beneficiary of, ICN activities. In recent years he was a strong champion, within the ICN, for greater support for the work of agency economists. Not a surprising focus for the first economist to be the Canadian Commissioner, perhaps, but his efforts have very positively raised the profile of competition economics at the ICN.*

*The 2012-2018 period could not have been an easy time to be the Canadian Commissioner of Competition. Having to address a number of new challenges arising from, for example, the new economics of the digital economy and popular concerns that competition policy should address an expanding set of goals, and to do that with an ever-shrinking budget must have been daunting. But John embraced the challenges and made great progress. His will be a difficult act to follow.*

*L’équipe de la Revue est absolument ravie que l’ex-commissaire John Pecman ait accepté de lui faire part de ses méditations sur sa longue carrière au Bureau de la concurrence et les défis qui attendent son successeur. Nous souhaitons le remercier pour le soin et l’effort qu’il a mis à l’articulation de cette réflexion riche et féconde, que nous vous présentons dans ce numéro. Il y fait une rétrospective des profondes mutations des politiques canadiennes sur la concurrence qu’il a vu s’opérer au fil des ans; décrit ses principaux champs d’intervention et les réalisations du Bureau pendant son mandat comme commissaire; et joue les trouble-paix en recommandant une série de réformes des lois et politiques. Un article qui donne certes matière à réflexion; nous croyons que les idées qu’il présente alimenteront les débats pour les mois et années à venir.*

*À peine John Pecman terminait-il ses études supérieures qu’il a rejoint*

*les rangs du Bureau de la politique de concurrence (de son ancien nom), en 1984. Économiste embauché dans un organisme d'application de la loi, il était alors loin de s'attendre à y passer les trente prochaines années – dont plus de cinq ans au poste de commissaire. Or, son arrivée coïncidait avec un tournant majeur : les nouvelles Loi sur la concurrence et Loi sur le Tribunal de la concurrence de 1986 réécrivaient tout un pan du droit canadien de la concurrence, et plus particulièrement celui sur la fusion et le comportement individuel des entreprises. S'ensuivit possiblement l'un des épisodes les plus palpitants de l'histoire du pays pour travailler dans le domaine, et c'est ce que fera John Pecman, qui apportera d'importantes contributions au Bureau et en gravira les échelons jusqu'à finalement devenir commissaire. Au cours de sa carrière, il prendra part à plusieurs des affaires marquantes du régime de la Loi sur la concurrence.*

*On se souviendra du mandat du commissaire Pecman, ponctué de plus d'une réalisation distinctive : l'homme a beaucoup renforcé la crédibilité du Bureau de par sa riche expérience, sa facilité d'abord – témoignant d'un rare degré d'ouverture – et, surtout, sa détermination à consulter tout un éventail de parties intéressées dans l'élaboration des politiques et à entretenir la relation avec elles. Sous sa houlette, de nombreux documents d'encadrement ont été rédigés ou refondus, ce qui a apporté des précisions – fort appréciées – sur la ligne de conduite du Bureau en ce qui a trait à diverses questions complexes. Il a épousé les principes de transparence et de dialogue, et a fait de la conformité son cheval de bataille – avec son modèle de « conformité partagée » – plutôt que la mise en application par la contrainte. En effet, il a vu toute la valeur des activités ne passant pas par la coercition (campagnes de sensibilisation, interventions réglementaires, études du monde des affaires), et œuvré à les dynamiser.*

*Et outre tout ce qu'il a fait au pays, John Pecman s'est aussi avéré un brillant diplomate pour le Canada en matière de concurrence. Avec la multiplication des fusions transfrontalières et des cartels, les autorités nationales et régionales sont poussées à collaborer, à échanger renseignements et pratiques exemplaires, et à tenter de réduire les coûts pour toutes les parties qui interviennent dans le processus d'application du droit; c'est pourquoi, sous sa gouverne, le Bureau a conclu des protocoles d'entente avec ses semblables. L'homme est aussi universellement reconnu comme l'une des têtes pensantes du Réseau international de la concurrence (RIC). Ses efforts méritoires ont propulsé le Canada à l'avant-scène des initiatives mondiales de réglementation de la concurrence; ils se sont avérés l'assurance non seulement que le pays participe activement aux activités du*

*RIC, mais aussi qu'il en bénéficie. Dans les dernières années, il s'est fait le champion des économistes au sein du réseau, prônant un meilleur soutien à leur travail. Cette intercession, si elle n'est pas surprenante venant du premier économiste à devenir commissaire de la concurrence au Canada, a grandement contribué à accroître la considération accordée dans le RIC à la science économique en matière de concurrence.*

*Il a dû être particulièrement ardu d'occuper les fonctions de commissaire de 2012 à 2018 : cela revenait à composer avec toutes sortes de difficultés posées, par exemple, par la nouvelle économie numérique, le foisonnement des buts de la réglementation en matière de concurrence sous la pression populaire, ou des compressions budgétaires toujours plus importantes. Qu'à cela ne tienne : John Pecman s'est montré à la hauteur de tous ces défis, et capable de véritables prouesses. Son successeur aura fort à faire pour l'égalier!*

## **UNLEASH CANADA'S COMPETITION WATCHDOG: IMPROVING THE EFFECTIVENESS AND ENSURING THE INDEPENDENCE OF CANADA'S COMPETITION BUREAU**

Former Canadian Commissioner of  
Competition John Pecman<sup>1</sup>

*For three decades I had the honour of working at Canada's Competition Bureau – an agency internationally recognized as a leader in effective competition law enforcement. Though when I started as a case handler in 1984 I never expected, nor planned, to serve as Commissioner, leading the agency and the staff that have given so much to me both professionally and personally has been the highpoint of a rewarding career in service to the public. Though there is much to reflect on, my experience working to advance the principles of competition as an executive member of both the International Competition Network and the Organization for Economic Cooperation and Development certainly stands out.*

*In my time at the Bureau, Canada's competition law and the Bureau itself have undergone tremendous change. Now, operating in a marketplace that is evolving at a frenetic pace, I believe the Bureau stands at a crossroads in its history; where evolution, both for the Bureau and for the legislation that it enforces, is absolutely imperative. Having had the opportunity to reflect on my three decades in competition law enforcement, I believe that the time is ripe to share the insight I have gained – with the goal of igniting a discussion about improving the institutional design, legislation and function of Canada's Competition Bureau. In what follows, I propose to provide: an overview of the Bureau's current design and function, historical background on Canada's competition law and the Competition Bureau, highlights of recent developments within the Bureau, an analysis of the current issues (and trends we expect will continue) in competition law and policy – and how the Bureau has responded to these. I will conclude by providing substantive recommendations for both structural (institutional) and legislative reform.*

*I must preface this by saying that I am exceptionally proud of what we have accomplished together in my thirty years of employment at the Bureau – and in particular the work we have done in the last five years to strengthen the agency and prepare it for the future. When you lead an organization, it goes without saying that your successes are not yours alone but rather belong to the staff, who are the foundation upon which you stand. The Bureau is an organization that is teeming with talent and, in*

*that respect, is well positioned to tackle the challenges that await it in the not too distant future.*

*Pendant trois décennies, j'ai eu l'honneur de travailler au Bureau de la concurrence du Canada; un organisme reconnu comme chef de file mondial dans l'application efficace du droit de la concurrence. Il faut toutefois savoir qu'en 1984, à mes débuts comme responsable de cas, j'étais à cent lieues de me douter que j'allais un jour devenir commissaire et prendre les rênes de cet organisme auquel je dois tant sur les plans professionnel et personnel, ce qui fut le point d'orgue de ma gratifiante carrière au service du public. Bien des choses me reviennent à l'esprit, mais je retiens tout particulièrement mon travail de promotion des principes de concurrence comme membre de l'exécutif du Réseau international de la concurrence et de l'Organisation de coopération et de développement économiques.*

*Durant ma carrière au Bureau, j'ai vu énormément de changements dans le droit canadien de la concurrence et au Bureau lui-même. À présent que le marché se transforme à un rythme effréné, le Bureau se trouve à la croisée des chemins : lui-même et la loi dont il veille à l'application doivent absolument évoluer. Ayant pu réfléchir sur mes trente années dans l'application du droit de la concurrence, je crois que le moment est venu de faire part de mes expériences. J'espère ainsi susciter un débat sur l'amélioration du modèle institutionnel, de la législation, et des fonctions du Bureau de la concurrence du Canada. Dans les lignes qui suivent, je présente une vue d'ensemble de l'actuel Bureau et de ses fonctions; son historique et celui du droit de la concurrence au Canada; les faits saillants de l'actualité du Bureau; une analyse des questions de l'heure (et des tendances que nous espérons voir se maintenir) dans ce domaine du droit et les politiques y afférentes; et les mesures que le Bureau a adoptées au vu de tout cela. Je conclurai par des recommandations concrètes en vue d'une réforme structurelle (institutionnelle) et législative.*

*Je dois tout d'abord dire que je suis extrêmement fier de ce que nous avons accompli ensemble durant mes trente années au Bureau, et surtout du travail que nous avons abattu dans les cinq dernières pour renforcer l'organisation et la préparer aux défis de l'avenir. Quand vous êtes à la tête d'une organisation, il va sans dire que vos réussites ne sont pas que les vôtres; elles sont surtout celles du personnel, sans qui vous ne seriez pas grand-chose. Le Bureau débordant de gens de talent, il est bien placé pour s'attaquer aux problèmes qui seront notre lot dans un avenir proche.*

## Introduction

Competition and free markets promote the efficient allocation of resources and create strong incentives for innovation and productivity enhancements in the economy<sup>2</sup>. Unnecessary government regulation in place of free markets imposes costs on businesses and stifles innovation and productivity.<sup>3</sup> Thus, effective competition law and policy are key elements in ensuring the competitiveness and efficiency of the Canadian economy and better enable Canadian businesses to compete in the international arena.<sup>4</sup> Parliament recognized this fact in section 1.1 of the *Competition Act* (the *Act*). Other governments across the globe recognize that healthy markets require effective competition regimes to foster sustained economic development. Free market capitalism is now recognized by even the world's most communist and socialist regimes as the undisputed system for generating wealth and innovation. Other jurisdictions such as Australia have gone beyond traditional competition law enforcement to enhance their competitiveness by focusing on the promotion of competition and having integrated competition analysis in their legislative frameworks.<sup>5</sup>

The purpose of the *Act* is to ensure that market forces work to create efficient businesses with incentives to innovate, and that consumers benefit from lower prices and better products and services. The *Act* sets out a range of business activities that may undermine the operation of competitive markets. Through its investigative and enforcement authority, the Bureau combats price-fixing cartels, anti-competitive mergers and dominant firms that abuse their market power, as well as misleading advertising and other deceptive marketing practices. The Competition Bureau (Bureau) conducts investigations and recommends action to the Commissioner of Competition, who may refer criminal cases to the Public Prosecution Service of Canada (PPSC) for prosecution or work with the Department of Justice Canada to litigate civil cases. In civil reviewable matters, the Commissioner may seek remedial relief before the Competition Tribunal (Tribunal); a specialized quasi-judicial body composed of federal court judges and lay members. Limited private enforcement of competition laws are also permitted through damage suits under the criminal provisions of the *Act* or through cease-and-desist orders issued by the Tribunal for certain market restrictions. The Bureau's mandate also extends to competition advocacy – the Commissioner appears before federal and provincial boards, commissions or other tribunals, advocating for principled deregulation of markets and increased reliance

on market forces in key sectors of the economy. Notable interventions have been made in the telecommunications, financial services, energy and transportation sectors. Within the organization, the Bureau's Planning, Policy and Advocacy Directorate has responsibility for liaising with the Department of Innovation, Science and Economic Development's (ISED) Strategic and Innovation Policy Sector on amendments to legislation that will impact competition. The Commissioner and/or his representative also appear before Standing Committees of Parliament to speak to issues related to the *Act*. Additionally, as part of the Commissioner's mandate as a competition advocate, the Bureau conducts market studies and makes recommendations for improving competitive practices within certain industries.<sup>6</sup>

The Bureau reports to ISED (formerly Industry Canada), which is responsible for marketplace frameworks and by extension, for ensuring that Canadians have a fair, efficient and competitive marketplace. The Commissioner serves as a senior officer of ISED and reports to the Deputy Minister on non-enforcement matters. The Deputy Minister of ISED has administrative and budgetary control over the Bureau, including sign-off on all executive hires by the Bureau. As the Commissioner is appointed by the Governor-in-Council and enforcement-related decisions are not subject to ministerial review or approval,<sup>7</sup> the Bureau has a degree of functional autonomy from ISED and positions itself as an independent law enforcement agency. It is, however, important to note that the Bureau's stated independence from ISED does not necessarily extend to competition policy settings.<sup>8</sup>

This hybrid model of an enforcement agency within a government department primarily concerned with industrial policy has, at times, been the subject of some controversy and led to calls for greater structural separation to protect the Bureau from potential political interference. Public debates on this very subject arose after the failure of proposed bank mergers in 1999 and the following year, during Air Canada's acquisition of Canadian Airlines, when the federal cabinet sidelined the application of the *Act* to enable the consummation of the airline merger. Subsequently, the Commissioner of the day asserted that his office was perceived as not being independent from political interference, and the government needed to address this issue.<sup>9</sup> Similar sentiments were echoed by other competition law practitioners as well as the Chairman of the Australian Competition and Consumer Commission (ACCC) who warned of the danger of political meddling, noting the importance

of the ACCC's independence.<sup>10</sup> During an interview regarding *Act* amendments, then President and CEO of the Canadian Chamber of Commerce, Nancy Hughes Anthony, stated: "There is a perception that the competition commissioner [Konrad Von Finckenstein] is not allowed to work without [political] interference."<sup>11</sup> Thereafter, the Senate Banking Committee urged John Manley, then Minister of Finance, to minimize political interference to enable the Bureau to determine whether a bank merger was good for consumers and for the banking system.<sup>12</sup>

The Organization for Economic Cooperation and Development (OECD) has also raised concerns with the appearance of conflict of interest stemming from the lack of perceived independence of the Bureau from a government department that is responsible for both setting and promoting industrial policy. In a 2002 report on the role of competition policy in regulatory reform for Canada, the OECD noted that "the Commissioner appears less independent than enforcement bodies in many other OECD member countries."<sup>13</sup> The report goes on to state that "public perceptions about the Commissioner's independence or lack of it may be an instance of a more widespread public impression that government decisions depend on political influence as much as on policy merits."<sup>14</sup> In a follow-on study by the OECD in 2004, the report observed that the Bureau had taken a number of communication-related actions to publicize its enforcement independence from Industry Canada. However, the report suggests that "lingering misperceptions" could be further dispelled by presenting the Bureau's budget separate from Industry Canada or more significantly by "making it a stand-alone agency, reporting to Parliament through the Minister of Industry but responsible for its own finances and personnel, or *locating it elsewhere within the government structure*" (emphasis added).<sup>15</sup> The debate surrounding the autonomy and structure of the Bureau was extended to the Commissioner's influential role in legislative amendments to the *Act* in a paper authored by a former Commissioner in 2002.<sup>16</sup> The paper suggested that competition policy in Canada might be better served if the policy function were severed from the Bureau's enforcement function as is the case in Australia and the United Kingdom. Prior to this, another former Commissioner had also called for reform of the institutional framework of the Bureau, recommending an integrated agency model, similar to those found in the U.S. (Federal Trade Commission) or in Europe (Directorate General Competition), whereby the Bureau would become both investigator and adjudicator of competition cases, as opposed to the current bifurcated model, where matters are adjudicated by the courts or the Tribunal<sup>17</sup>.

In this same vein, the report of the Competition Policy Review Panel in 2008, recommended the separation of the Bureau's enforcement function from its advocacy function, and further advocated for the creation of a Canadian Competitiveness Council, an independent agency with a broad mandate to publish about, research on, and serve as the public advocate for competition.<sup>18</sup>

With the increasing internationalization and complexity (both legal and economic) of competition law enforcement in Canada, the Competition Policy Review panel report also suggested that the Bureau does not have sufficient resources to effectively carry out its broad competition policy mandate.<sup>19</sup> The Bureau's increased scope of responsibilities directly relates to increased globalization and international trade liberalization, including the North American Free Trade Agreement and the Canada-Europe Comprehensive Economic and Trade Agreement, which increase cross-border commercial transactions in Canada, and demand for increased international cooperation in enforcement and harmonization of competition laws. With the growing number of multi-national companies operating in multiple jurisdictions and the emergence of the digital economy, cooperation and coordination with other international competition authorities enhances detection, investigation and prosecution of hard-core cartels and mass-marketing fraud and improves the effectiveness of international merger reviews. Other pressures on the Bureau include: increasing interventions and enforcements in deregulating markets (most notably in the telecommunications sector), the rapid development of new technologies, which have led to an exponential increase in cyber-crime (e.g. rising number of on-line frauds), court decisions (e.g. the Supreme Court of Canada (SCC) in *Tervita*) that require the Bureau to quantify anti-competitive effects, and the rising costs associated with handling digital records.

The Bureau has responded to the increased workload brought about by greater demands on its services by placing increased emphasis on the concept of shared compliance, captured by the Framework on Competition and Compliance,<sup>20</sup> to support a balanced approach to its mandate, including education, advocacy and enforcement. This serves to limit the need for costly and time consuming contested proceedings before the courts or applications to the Tribunal. In what follows, I will provide historical background on Canada's competition law and the Bureau, recent developments within the Bureau, an analysis of the current issues and trends in competition law and policy – and how the

Bureau has responded to these. I will conclude by providing substantive recommendations. The themes I touch on will include independence, resources, legislative modernization and structural reform.

## Historical Background

Since the introduction of its first competition legislation – *An Act for the Prevention and Suppression of Combinations formed in the Restraint of Trade*, Canada's competition law and its various agencies, including the Bureau, have undergone major structural change, beginning in the 1950s with the establishment of the dedicated office of the Director of Investigation and Research (the Director), which is today known as the Competition Bureau. Prior to 1976, the *Combines Investigation Act*, the predecessor of the *Act*, was entirely criminal in nature. In January 1984, when I joined what was then the Bureau of Competition Policy, the *Combines Investigation Act* was still in effect in an amended form to include the services sector of the economy and civil restrictive trade practices provisions (those covering vertical restraints like exclusive dealing and tied selling) that were adjudicated before the specialized Restrictive Trade Practices Commission. The Bureau of Competition Policy was just recovering from the longstanding and costly petroleum market inquiry and was facing considerable criticism from stakeholders. There was no meaningful merger control function at the time, nor were there any significant monopoly cases. The Bureau's focus was decidedly on cartel and retail price maintenance enforcement, despite having lost its search powers in the SCC's decision in the *Hunter v. Southam* charter challenge that same year. There was a very active division dedicated to regulated industries that was producing landmark regulatory interventions in the telecommunications and transport sectors. The deceptive marketing practices group reported directly to the Director and was housed in a separate building. The Bureau was, at that time, under the purview of the Department of Consumer and Corporate Affairs, the federal department responsible for marketplace framework regulations and consumer protection.

My very first case files involved retail price maintenance offences against *Gyrafalcon Corporation*, an exclusive distributor of Robert Bateman prints, and *Hoffman La-Roche* for the retail supply of effervescent vitamin tablets. Interestingly, the searches in both of these cases were executed with criminal code warrants and both companies pleaded guilty and were fined \$50,000.

In June of 1986, Canada's competition law was once again modernized with the coming into force of both the *Act* and the *Competition Tribunal Act*. Significant changes occurred in light of the new acts including most notably:

1. The inclusion of civil provisions, the most important of which included mergers, abuse of dominance, vertically restrictive practices, refusal to supply and certain deceptive marketing provisions. These were to be handled by a specialized quasi-judicial Tribunal, whose decisions could be appealed to the Federal Court of Appeal (FCA).
2. The creation of a pre-merger notification regime, including the addition of merger filing fees.
3. The inclusion of a requirement for the Commissioner to apply through the courts for the use of his formal investigative powers like search warrants, written returns of information and examination of witnesses under oath. This was to ensure compliance with the provisions of the Canadian Charter of Rights and Freedoms, which entered into force four years prior.
4. The elimination of the Director's market inquiry powers.

Additionally, in order to prohibit or seek divestitures in a merger under the new law, the Director was now required to demonstrate that the merger has or was likely to "prevent or lessen competition substantially". However, the Tribunal was not to make an order if the merger was likely to bring about "gains in efficiency that will be greater than, and will offset", the anti-competitive effects. This unique "efficiencies defence" included in the merger provisions was heavily influenced by the "Chicago School" approach to economics, which argued that increased profits and concentration were the natural outcome of higher efficiencies and indicative of healthy competition. At the time, policy makers were of the view that the so-called "efficiencies defence" would indeed promote the efficiency of the Canadian economy and enable Canadian companies to better compete internationally. Since that time, observers have characterized the efficiencies defence as a necessary public interest consideration within the Bureau's merger review processes, which do not promote consumer welfare – a more common objective of competition laws.<sup>21</sup>

Following the coming into force of the new acts, the Bureau created

a dedicated merger branch to ensure that merger review would receive the financial and human resources required to fulfill this mandate. As a young case officer, I was assigned to this branch. This assignment followed my work on the first merger before the Tribunal, the *Palm Dairies* case, which was significant for the fact that the Tribunal refused to issue a consent order approving the remedies negotiated between the Director and the parties. Later, the *Act* was amended to enable the Commissioner to register consent orders with minimal oversight. Also, at the time of the new merger review process, practitioners were expressing concerns over the small number of mergers that were being challenged before the Tribunal and remarking that the most complex cases were being settled in the Director's office,<sup>22</sup> most often through a restructuring of the deal to resolve competition concerns.

During my tenure as a senior case manager in the merger branch, I worked on a number of transactions where concerns were resolved through consent agreements, including ADM Industries/Maple Leaf Mills, Canadian Waste Services/Capital Environmental Resources, Abitibi-Consolidated/Donohue and Lafarge/Blue Circle. However, it was as the senior officer on the landmark Superior Propane/ICG litigation that I was able to participate in my first case before the Tribunal involving a claimed "efficiencies defence" to what the Commissioner at the time found to be an anti-competitive transaction. After two appeals to the FCA, the Tribunal's initial decision stood – allowing the merger to proceed, using a modified "balancing-weights" approach (adding wealth transfer considerations of low income households impacted by the merger) to the application of the total surplus standard.

Following the *Superior Propane* decision, the Bureau advocated for the amendment of the merger provisions by narrowing the efficiencies defence so that efficiencies would be considered as a factor in the assessment of the effects of a merger, more in keeping with a consumer welfare standard. Notably, this idea was advanced in Bill C-249, a private member's bill that received third reading in the House of Commons in 2003, but ultimately died on the order paper before any debate took place in the Senate.

Non-merger efficiency considerations were also considered by the Tribunal. I was privileged to have led the Bureau file in the Laidlaw waste disposal case where important jurisprudence was developed regarding restrictive contracting practices, including the rejection of efficiency

explanations as a justification for the anti-competitive conduct in this particular case.<sup>23</sup> I also note that, more broadly, the Bureau achieved a number of early successes at the Tribunal in the era of non-merger civil matters, beginning with *Nutrasweet*.

In 1995, the Mulroney government dismantled the Department of Consumer Affairs in a structural overhaul that saw the Bureau of Competition Policy become part of the Department of Industry. For all intents and purposes, there was little impact for staff at the working level, like myself. The challenge was mainly felt at the executive level of the agency, where the Director of Investigation and Research became a member of the departmental management committee, whose discussions of industrial policy related to support for national champions, among other things. These were anathema to the Bureau, which defends the principle that competition should exist on merit, and without unnecessary restraints or incentives granted by government.

It is widely accepted in competition law circles that the most egregious harm to the economy from private restraints comes from hard-core cartels.<sup>24</sup> As they pose the greatest threat, they are of the greatest concern to all competition law enforcement agencies and, naturally, addressing them is a top priority. In 1993, the Bureau adopted what, in my experience, is the best tool to prosecute and deter cartels - its immunity program. Further revised in 2000, the Bureau's immunity program followed in the footsteps of the US DOJ Antitrust Division's "first in" amnesty program. Under the Bureau's Immunity program, the first firm or individual that self-reports and cooperates with the Bureau receives full immunity from prosecution. Expanding this highly effective tool in 2010, the Bureau established its leniency program, which provides reduced penalties for those who self-report and cooperate, but miss the opportunity to be first in line. As the Senior Deputy Commissioner for Criminal Matters, I worked closely with the PPSC to develop the first leniency program and revise the memorandum of understanding (MOU) between the Bureau and the PPSC. Our cartel settlement programs became an international best practice, and were replicated in concept by many other competition agencies. The advent of the immunity program marked the beginning of an enormously successful period of cartel enforcement, which continues to this day.<sup>25</sup> In fact, during my tenure as Commissioner alone, the immunity and leniency programs brought in 27 convictions and guilty pleas.

International cooperation began to figure prominently in the Bureau's

work in the late 1990s, starting first in cartel enforcement with a case related to the sale of thermal fax paper, followed closely by others, including the vitamin, graphite electrodes, citric acid and lysine cartel investigations. Since that time, the Bureau has played a prominent leadership role in the international competition law enforcement community. The Bureau is one of the founding members of the International Competition Network (ICN), serving as its secretariat since its inception in 2001 and chairing the ICN Steering Group on two separate occasions. Additionally, the Bureau has participated actively in all five ICN working groups and presently serves as co-chair of the Agency Effectiveness Working Group. On a personal level, serving as the ICN-OECD liaison and hosting the first ICN Chief Economist Workshop (2016) with UBC, as well as the ICN Cartel Workshop (2017), stand out as important accomplishments.

The Bureau's international work extends to the OECD, where it is an active member of the Competition Committee, and to the International Consumer Protection and Enforcement Network, where it serves in a leadership role. The Bureau's active work in international cooperation is driven by its desire to promote further convergence of competition laws, improve the cost effectiveness of cross-border investigations, reduce inconsistent outcomes, support capacity building and develop trusting working relationships.

In 2008, the previously-mentioned Competition Policy Review Panel released its final report. The report, which calls competition the strongest spur to innovation and value creation, made a number of recommendations for improving the state of competition policy in Canada. This included recommendations for legislative amendments to outmoded or ineffective provisions of Canada's competition laws.<sup>26</sup> Ultimately, these recommendations formed the basis for the most significant amendments to the *Act* in over two decades, subsequently introduced in 2009. Included among these were changes to the Bureau's merger review regime that harmonized our process with the United States (US) by implementing a two-stage process, increased the notification threshold and decreased the limitation period on post-closing challenges to one year from three. The new amendments provided the Bureau with the ability to seek administrative monetary penalties for abuse of dominance and added de-criminalized pricing practices provisions, and civil competitor collaboration provisions.

Most notably, the new legislation brought significant change to how the Bureau dealt with the most serious cartels, increasing fines to \$25 million and jail time to 14 years, while simultaneously making cartels *per se* illegal and removing the so-called “undueness provisions”. Prior to these changes, price-fixing was only considered illegal if the agreement had the impact of unduly lessening competition, “a combination of some market power and some behaviour likely to injure competition”.<sup>27</sup>

In 2011, the Bureau met another significant change, albeit this time without much fanfare, when the competition policy function was acquired by the Department of Industry in an MOU between the two organizations. This leads us to today, where the Bureau provides policy advice to the department on emerging public interest incursions to the *Act*, like the Harper government’s aborted price gap legislation, or the current Bill C-49, an act to amend the Canada Transportation Act,<sup>28</sup> as it relates to airline joint ventures, on an as-requested basis. Without lessening the importance of the aforementioned amendments, it is important to note that the 2009 amendments are now almost a decade old. What is more disconcerting is the fact that, despite repeated requests by the Bureau for needed amendments to the competition laws to address Canada’s rapidly evolving economy, ISED has not undertaken a comprehensive review of the legislation since having withdrawn the policy role from the Commissioner some eight years ago.

### **Appointment as Commissioner**

In 2012, I found myself suddenly appointed Interim Commissioner, following the unexpected departure of then-Commissioner Melanie Aiken. At the time of my appointment I was described as a “highly experienced enforcer.”<sup>29</sup> While that may have been true, and it may have set certain expectations about what kind of a Commissioner I would be, it left out some important information about what I intended to bring to the table. It was my objective from the outset to bring an entirely new approach to the Bureau – that is, one of an open, transparent and collaborative organization. I believe we achieved significant progress in implementing this approach. From the outset, I saw my role not as a caretaker, but as a leader, and I set out to demonstrate that both internally and externally. I demonstrated both in words and in actions that we would, together, build an organization that was focused on what I called the 4Cs - increasing Compliance, greater transparency through increased Communication, improved Collaboration, both externally

and internally, and delivering better results for Canadians. I am sure that my early statements about shared compliance, the Bureau's use of section 11 orders, and our return to advocacy work were a surprise to many, but I felt then – and continue to feel - that being transparent about where I wanted to take the organization was of the utmost importance.

In June 2013, I was appointed Commissioner and justifiably or not, I certainly felt like the “Black Swan” Commissioner – I was the first career Bureau staffer and the first non-lawyer to head the Bureau in its entire history. On top of this, I had determined that my goal during my tenure was to build a stronger, more trusted and more effective agency – one that was transparent, collaborative, flexible, and better prepared to meet the challenges it would inevitably face in the future. This would translate into significant change for both the Bureau and its stakeholders.

Internally, this began with the Bureau's realignment process, which incorporated four elements — an internal restructuring, a new governance structure, increased delegation, and a three-year strategic plan. From my perspective, this was the means to shift away from an insular, unilateral approach that saw the Bureau structure and staff operating in silos and was no longer serving it or anyone else well. To support a more collaborative approach to work, we restructured the Bureau, reducing the number of branches from eight to four. We also added the Competition Promotion Branch, which was to be the Crown Jewel of realignment – our outward facing branch tasked with tearing down the proverbial wall surrounding the Bureau. At the same time, we established a unit that would work entirely on increasing compliance – encouraging businesses to adopt credible and effective compliance programs. Further, a new governance structure was established – creating four new committees with a view to increase horizontal decision-making across the Bureau. As part of this new structure, we also increased the delegation of authority, giving additional latitude and responsibilities to Deputy Commissioners, an act that created a cascading effect of increased responsibility and greater ownership of work right down to the officer level. Finally, we developed a three-year strategic plan that outlined our guiding principles and core values, and laid out our commitments for the coming three years in five key areas: increasing compliance, empowering Canadians, promoting competition, collaborating with partners and championing excellence. This was a new direction for the Bureau – and it was not without its challenges -- but we pulled together and got the work done. I believe the Bureau is a far more collaborative and effective agency

because of it. I would like to make particular mention of the Bureau's senior management team, without whom none of this would have been achievable. Their support, particularly around the areas of operating as "one Bureau" and in increased delegation served to empower our team and facilitated our goal of increased Bureau effectiveness.

From the beginning, my goal in moving the Bureau forward was to create a culture of continuous incremental improvement, with a view to building the trust – in our work and with our stakeholders be they government, industry, the Bar or Canadian consumers. We did this in a number of ways: through shared compliance, collaboration initiatives, providing increased guidance and improved relationships with key stakeholders.

### Shared Compliance

As noted earlier, I began speaking very early in my tenure about the notion of shared compliance, namely the interrelated roles of the Bureau, legal and business community towards compliance with the Act. From my perspective, adopting a collaborative approach to ensuring compliance with the law has enabled the Bureau to achieve immeasurably more than it could have acting alone – and this has benefitted consumers, businesses and the Canadian economy as a whole. We undertook this initiative in the spirit of collaboration, reaching out to our partners in international law enforcement agencies to learn from their experiences. Simultaneously, we began updating and rebranding the Conformity Continuum and Compliance Bulletin in consultation with our partners in the legal and business communities. Then, in keeping with the theme of continuous improvement, we moved forward with the establishment of a Compliance Unit to oversee and coordinate our compliance-related activities.

I believe that this approach has served the Bureau and its counterparts well – supporting increased engagement on the part of the business community and a strategic approach to competition law enforcement, both of which have advanced our objective of increasing compliance.

### Increased Guidance

An integral part of the idea of increased transparency and shared compliance is increased guidance. Again, from the outset of my term, I was determined to provide greater clarity, transparency, and certainty for

the business and legal community with regard to how the Bureau would approach its work, starting with the release of the “Bulletin on Transparency”. We began incrementally, increasing our use of position statements and then moved on to other documents, including updating the Intellectual Property Enforcement Guidelines, the Corporate Compliance Bulletin, the Abuse of Dominance Guidelines, and the Immunity and Leniency FAQs. More recently, we provided insight into how Big Data might impact competition law enforcement, penning a white paper on the subject.

At the time of my departure from the Bureau, there were a number of ongoing initiatives to increase guidance. The Bureau had recently released for public consultation a bulletin to provide greater insight into our approach to the assessment of efficiencies in merger reviews. As well, the Bureau was moving forward on the development of a comprehensive communications protocol. I hope that these initiatives will be successful in further improving the organization’s culture of transparency. Clarity is important for the business community and in turn, supports economic growth and investment in Canada. By providing increased guidance, the Bureau supported these objectives and our key priority – increased compliance.

### Improved Relationships and Collaboration

Strong working relationships are one of the hallmarks of any successful organization and the Bureau is no exception. With that in mind, during my tenure, the Bureau invested significant effort into improving our relationships with a number of key stakeholders, in particular those with whom we work most closely. I believe we have made great strides in our relationship with, the Department of Justice Competition Bureau Legal Services (CBLS), the Canadian Bar Association (CBA), and with ISED. The Competition Tribunal/Bar Liaison Committee and the Tribunal’s directive on mediation are prime examples of the advances that the Bureau has made in improving our external relationships with key stakeholders. We also took steps to improve our relationship with the PPSC, and I hope that the Bureau will continue to strengthen this important relationship in the years ahead.

In that same vein, we sought to improve our formal working relationships with our law enforcement partners both domestically and internationally, through 65 new or updated cooperation agreements spanning all sectors, and by increasing collaborative enforcement.

## Current Issues in Competition Law and Policy

Never has it been more challenging to be a competition agency. The increasing globalization and digitalization of commerce has made modern competition law enforcement full of risk and complexity. The current issues that agencies face mean that it is more important than ever to ensure that agencies are independent and properly resourced.

One major issue that competition agencies are faced with is the current populist concern over rising concentration and economic inequality, commonly referred to as the “hipster antitrust” movement. In a widely-read article, *The Economist* argued that, over the past several decades, many US industries, including airlines, healthcare and technology have undergone significant consolidation, leading to high corporate profits and deepening income inequality.<sup>30</sup> Similarly, a report by the US Council of Economic Advisers highlighted the issue of growing concentration in the US economy and suggested it could be resulting in firms gaining monopsony power over labour and depressing wages.<sup>31</sup>

Unsurprisingly, the concerns over increasing concentration have placed competition law enforcement in the spotlight. Some commentators have argued that the problem lies in the traditional competition framework that has consumer welfare at its centre. For example, Lina Khan of the Open Markets Institute, a US think tank, has argued that, “[t]he current framework in antitrust fails to register certain forms of anticompetitive harm and therefore is unequipped to promote real competition—a shortcoming that is illuminated and amplified in the context of online platforms and data-driven markets.”<sup>32</sup> Khan goes on to argue that, “[m]odern doctrine assumes that advancing consumer welfare is the sole purpose of antitrust. But the consumer welfare approach to antitrust is unduly narrow... [t]he rise of dominant internet platforms freshly reveals the shortcomings of the consumer welfare framework and that it should be abandoned.”<sup>33</sup>

US policymakers have also responded by advocating for changes to antitrust laws. In their *A Better Deal* plan, the US Democratic Party criticized antitrust institutions for having “allowed large companies to get larger, resulting in higher prices and limited consumer choice in daily expenses such as travel, cable, and food and beverages. And because concentrated market power leads to concentrated political power, these companies deploy armies of lobbyists to increase their stranglehold on

Washington.”<sup>34</sup> Among their proposals to remedy this perceived problem, they suggest:

[N]ew merger standards that require a broader, longer-term view and strong presumptions that market concentration can result in anticompetitive conduct. These standards will prevent not only mergers that unfairly increase prices but also those that unfairly reduce competition—they will ensure that regulators carefully scrutinize whether mergers reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete. In an increasingly data-driven society, merger standards must explicitly consider the ways in which control of consumer data can be used to stifle competition or jeopardize consumer privacy.

In addition, under our new standards, companies proposing the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal. By forcing consolidating companies to justify the benefits of their mergers, we will not only prevent harmful concentration, we will also incentivize companies to be better corporate citizens.<sup>35</sup>

The debate over the proper approach to competition law enforcement is not limited to the US—the EU has also weighed in. Notably, EU Competition Commissioner Margrethe Vestager has spoken about ensuring “fairness” in her explanation of the role of competition policy.<sup>36</sup> The European Commission has stretched the traditional framework in its enforcement work. For example, in *Dow/DuPont* the Commission put conditions on the merger over concerns that it would affect competition in “areas of innovation,” rather than in clearly discernible pipeline products.<sup>37</sup> Radically, in response to the emergence of big technology companies such as Google, EU policymakers have suggested regulating online platforms in the same manner as public utilities<sup>38</sup> and breaking them up.<sup>39</sup> More recently, and uncharacteristically, the Senior Deputy Governor of the Bank of Canada, Caroline Wilkins has also expressed concern about the ever-increasing size and market power of big technology companies.

The problem with those advocating for a new framework for competition law enforcement is that they generally ignore the purpose of competition laws, which is not to rein in big companies or enforce specific outcomes. Rather, their purpose is to protect consumers by protecting competition and to foster economic welfare. Size in and of itself is not a competition law violation and reports that note rising concentration

lack this critical nuance. My colleague, former Acting Chairman of the US Federal Trade Commission, Maureen Ohlhausen, rightly noted that industrial concentration statistics cannot serve the same role as defining markets for competition law enforcement.<sup>40</sup> These statistics, for example, are misleading because they cannot discern whether the consolidation arose to achieve economies of scale, which would benefit consumers and economic welfare.

Furthermore, while inequality, fairness and political power are legitimate concerns, stretching the traditional competition framework to try to address these problems is not an appropriate solution.<sup>41</sup> Competition law enforcement is most effective when the goal is clear. Relying on an established economic standard such as consumer welfare provides a clear, transparent and predictable goal post for competition agencies and the businesses that have to comply with competition laws. This approach ensures that an agency's enforcement action helps consumers rather than harms them. I expressed a similar sentiment in my remarks on the EU's approach to Dow/DuPont: "What is remarkable about this argument is that in no way does it require linking innovative activity to specific innovative products that benefit consumers; instead, the argument holds that the reduction in innovative activities itself constitutes harm to competition" (*emphasis in the original text*).<sup>42</sup> In contrast, the Bureau's approach in the *Toronto Real Estate Board (TREB)* case shows that the traditional framework is capable of capturing harm to consumers that go beyond price to include non-price effects such as quality and innovation. In that case, we were able to identify specific innovative business practices and services that TREB's conduct was preventing consumers from accessing.

Rather than changing the approach to competition law enforcement, one way to introduce more competition into the economy that the 'concentration debate' does not emphasize enough, is to make markets more open for both domestic and international competitors. An open economy can limit market power by making markets more contestable. Despite this fact, Canada remains a relatively closed market in a number of key sectors, such as telecommunications, transportation, banking and energy, with foreign investment barriers preventing change that is essential for a modern, thriving economy. These sectors frequently have oligopolistic market structures and are further guarded by vertical integration. Government price control and other regulations remain in Canadian markets that have been unshackled in other countries. These include the sale of alcoholic beverages, dairy, poultry, taxi services and,

in some provinces, retail gasoline. This over-regulation and protection of markets, particularly where inputs are concerned, harms Canadian competitiveness and productivity, disadvantaging Canadian firms in the global marketplace. I strongly support the proposition that public restraints to competition can do much more harm to the economy than private restraints.

Despite their differences, I believe that both sides of the debate on industrial concentration would agree that consumers are better off with stronger competition agencies that can conduct more vigorous enforcement. With the recognition of the challenges that modern competition agencies like the Bureau are facing comes the understanding that these agencies must be given sufficient resources and independence to face them head-on.

### **Bureau Approach**

In the face of these continually shifting undercurrents, and a virtually non-existent policy role, the Bureau's approach has been to hold firm to its principles of strong enforcement; strategic competition advocacy; alignment with Government of Canada priorities; providing unflinching policy advice; and continuing to operate in an open, transparent and collaborative manner. This approach has enabled the Bureau to rise to not only meet these challenges but succeed in spite of them.

### **Strong, Principled Enforcement**

For the Bureau, strong, principled enforcement means focusing efforts in areas where the work will have the greatest impact and deliver the most significant results for Canadian consumers. This means, from a criminal perspective, targeting the most egregious offences in antitrust—hard-core cartels directed at price fixing, bid rigging, market allocation and output restriction. During my tenure the Bureau focused its efforts on behaviour of this nature and the result was impactful. For example, the Bureau's investigation into gasoline price-fixing in the province of Quebec resulted in 33 individuals and eight companies either pleading or being found guilty, over \$4 million in fines levied and six sentences of imprisonment totalling over 54 months. There remains one accused awaiting trial in this longstanding case. Similarly noteworthy, its investigation into bid-rigging in the auto parts sector has resulted in over \$84.7 million in fines imposed by the courts since April 2013, including the largest single fine for bid-rigging in the history of Canada. Moreover, the

work on Nishikawa in particular, was significant in demonstrating the value of international cooperation in producing both effective outcomes and avoiding duplicative, costly work.<sup>43</sup>

It is impossible to discuss cartel enforcement without discussion of the immunity and leniency programs which, as I have noted, have proven to be the Bureau's most effective tools in detecting, deterring and eliminating cartel behaviour. While commentators have expressed doubts about the continued efficacy of these programs, particularly following the less than ideal conclusions of the Bureau's chocolate and Durward investigations, these have not been realized. The most recent example of this is the Bureau's ongoing investigation into alleged bread price-fixing in Canada's grocery sector, which came to the Bureau's attention when Loblaw availed itself of the Immunity program. The incentives to cooperate with the Bureau are powerful and the existence of the program itself acts as a strong deterrent against the formation of cartels. Having said this, the unsuccessful conclusion of both the aforementioned cases were a strong signal that improvements were needed. That is why the Bureau moved forward with updating and improving its immunity and leniency programs.

On the mergers front, in the last half-decade the Bureau witnessed a number of momentous 'firsts'. The Parkland/Pioneer retail gasoline merger was perhaps one of the most significant cases, as it resulted in a number of firsts: the first time in the history of the Tribunal that a consent agreement was negotiated through mediation, which sent a strong signal about the Bureau's new shared compliance approach; the first case of the Tribunal ordering an injunction on a contested basis in a merger application – a tool that ultimately expedited the resolution of the matter; and the first time that coordinated effects formed part of the Bureau's theory-of-harm in a merger case brought before the Tribunal.

In a similar vein, our collaborative work on the Bell Astral merger – the first transaction to land on my desk as Interim Commissioner – sent an important signal to practitioners and business about my approach. We resolved the matter outside of litigation, using a mix of structural and behavioural remedies. It is well accepted among antitrust authorities, that, where available, structural remedies are preferable. The underlying rationale is well-known – in particular, behavioural remedies require ongoing monitoring and potentially ongoing involvement by the competition authority, and can remain inflexible as market conditions

change. Creating a new competitor through a divestiture process is the most effective way to ensure an ongoing competitive marketplace, with the market driving competition. However, there have been circumstances where behavioural relief may be needed to effectuate or bolster a structural remedy. The Bureau has only had two remedies during my tenure where the behavioural components were not used to strengthen a structural remedy, only one of which was a purely behavioural remedy. The Staples/Office Depot merger review represented another first: the Bureau's first joint filing. It was the first simultaneously litigated challenge to a merger in Canada and the US, and was a strong endorsement of our ability to collaborate with international counterparts to protect competition within Canadian borders. It was also an example of an efficient enforcement approach, which was bolstered by our existing relationship with the US Federal Trade Commission (FTC) and our agreement on best practices on cooperation in cross-border merger investigations.

Superior/Canexus remains an important case for the Bureau going forward. First, it exemplifies the Bureau's collaborative approach, as it worked closely with its U.S. counterparts during the course of the review. Second, and perhaps more importantly, our decision to not move forward with a challenge, unlike our U.S. counterparts, serves as a living example of the way in which the *Act's* efficiency defence is both misaligned with our international partners, and harmful to Canadian businesses and consumers.<sup>44</sup>

The Postmedia/Sun Media review was also significant for the Bureau, given the importance that Canadians place on competitive media markets, and the concerns being raised about the diversity of voices within those markets. Although our review concluded there would not be significant anti-competitive effects arising from the above proposed transaction, we subsequently opened up an investigation into Postmedia/Torstar when evidence was uncovered that suggested potential violations of the cartel provisions of the *Act* on the part of the merging parties. The Bureau thus demonstrated that, true to its word, it would not hesitate to act.

Finally, the Loblaw/Shoppers transaction is an example of the Bureau acting as a single, unified organization. In this case, the merger review turned into a civil review that ultimately led to the Bureau's bread price-fixing investigation. This ongoing investigation, uncovered through the Immunity program, is probing the largest alleged conspiracy in the history of Canadian competition law enforcement as measured by the

affected volume of commerce and duration.<sup>45</sup> This case is a testament to both the persistence of the Bureau and its newly adopted “one Bureau” approach that has seen the removal of silos to enable more effective enforcement.

## Enforcement in the Digital Economy

The Bureau’s focus on enforcement in the digital economy was done with the recognition that the digital economy is fast becoming *the* economy and not merely a subset of it<sup>46</sup>. We understood the important role that strong, principled enforcement in this area would play in building trust in the digital marketplace for consumers and businesses. And so, during my tenure, we advanced a number of noteworthy cases in the digital economy under both the abuse of dominance and deceptive marketing provisions of the *Act* and demonstrated that the Bureau was not afraid to take on significant players.

### Abuse of Dominance

The Bureau’s case against the Toronto Real Estate Board (TREB) – which was found to have prevented its members from offering data through innovative brokerage models – was an important milestone in terms of enforcement generally and for innovation specifically. It underscored the crucial link between competition and innovation and the Bureau’s role in upholding both. In this case, the Bureau identified specific innovative business practices and services that the conduct was directly stopping.

In a completely different part of the digital economy, the Bureau’s e-books investigation, which concluded that an anti-competitive arrangement between four publishers and Apple led to higher e-book prices for Canadian consumers, reached a successful conclusion following a decision by the Federal Court, in relation to the main part of our case, to uphold the initial consent agreements.

### Deceptive Marketing Practices

The Bureau also took on a number of significant deceptive marketing cases within the digital economy - tackling issues like drip pricing (i.e. hidden fees), astroturfing (i.e. fake reviews), and misleading advertising, and also making history through our joint work with plaintiffs and defendants on the Volkswagen file.

## Astro-Turfing

In order to shop online with confidence, consumers must have assurances that reviews and ratings of a product or service are accurate. During my tenure, the Bureau also took on Bell Canada for its role in encouraging employees to post positive reviews and ratings of the free MyBell Mobile App and Virgin My Account app on the iTunes and Google Play stores. This was a precedential and important case as it was the first that did not involve the sale of a product or service. As part of an agreement reached with the Bureau, Bell Canada affirmed its commitment not to direct, encourage or incentivize its employees or contractors to rate, rank or review apps in app stores. In addition to correcting the behaviour, this sent a message early on in my tenure that the Bureau would not be afraid to take on big players or tackle complex issues in the digital space.

## Drip Pricing

Drip pricing refers to the practice of adding additional fees to advertised prices later in the payment process so that consumers end up paying significantly more than they expected. The Bureau has found this conduct to be prevalent in digital markets and particularly harmful to consumers and competition.

The Bureau successfully reached consent agreements with Avis, Enterprise, Budget, Hertz and Dollar Thrifty for what the Bureau concluded were false or misleading advertising for prices and discounts on car rentals, via its websites, mobile apps, and through emails. The total penalty paid by these companies is in excess of \$5 million, with a further \$250,000 toward the Bureau's investigative costs. The companies involved have also agreed not to engage in this behaviour going forward.

The Bureau continued to show that it was not afraid to take on big players in the digital economy in early 2018, when it took legal action against Ticketmaster and its parent company, Live Nation, to stop them from allegedly making deceptive claims to consumers when advertising prices for sports and entertainment tickets. The Bureau recognized that this was long-standing issue for consumers who rightfully expect that the price they are presented with is the price they will pay.

## Misleading Advertising

The Bureau investigated Amazon Canada for misleadingly comparing

its discounted prices to a higher “list price” without verifying that those list prices were the prevailing market price. The Bureau ultimately obtained a consent agreement, which resulted in Amazon correcting its pricing practices, not only in Canada but also in other jurisdictions.

### Volkswagen

On January 12, 2018, the Bureau participated in a class action settlement with Volkswagen related to false and misleading claims about fuel economy. In tandem with the class action settlement, the parties, following a Bureau investigation, entered into a consent agreement with the Commissioner. This was historic work for the Bureau that, once approved by the courts, will provide up to \$290.5 million in compensation to consumers in the Volkswagen, Audi and Porsche emissions case. In total, the Bureau’s investigation of this case resulted in \$2.39 billion in compensation for Canadian consumers and \$17.5 million in administrative monetary penalties.

### Advocate for greater competition

Reinvigorating the Bureau’s advocacy work was perhaps one of the more significant aspects of my mandate. Prior to my assuming the role of Commissioner, the Bureau had, for a number of years, stepped back from promoting competition, thereby reducing the important role it plays in advocating for more competitive markets in Canada<sup>47</sup>. It was my firm belief then, as it is now, that advocacy is a critical part of the Bureau’s mandate and an effective tool for increasing competition within the Canadian economy. We began our reinvigorated approach to advocacy by first reaching out to Canadians to gain insight about where they felt the Bureau could play a meaningful, albeit targeted role in advocating for greater competition. Based on the insight we gleaned, we embarked on a series of regulatory interventions in key areas of the Canadian economy, beginning with providing advice and recommendations that informed the development of the CRTC’s Wireless Code. The Bureau’s next advocacy initiative dealt with regulations governing the taxi industry. We began by providing a submission to the City of Toronto’s review of taxi cab regulations, later broadening our advocacy by releasing a white paper that served to guide the development of regulations in a number of municipalities. The Bureau then launched a market study examining technology-led innovation in the financial services sector (FinTech). This in-depth study of FinTech continues to inform the development of

policy at the federal and provincial level. Most notably, the most recent federal budget incorporated a number of the Bureau's recommendations.

I believe this advocacy approach has prepared the Bureau well for the future; it has a strong record of important advocacy work over the last five years – work and experience that will serve it well as it continues to be faced with the challenges presented by a technology-driven economy.

### Aligning Priorities with the Government of Canada

Since 2011, when the Bureau's policy function was claimed by ISED, its formal policy role has been largely non-existent. This placed the Bureau in the unenviable position of having to ensure its continued relevance in the context of the department it reports to. The Bureau's approach to this has been to align its overarching priorities to reflect those of the department, and, more broadly, those of the Government of Canada, particularly around the subject of innovation. At the same time, the Bureau has continued to provide intrepid policy advice through enforcement, such as its case against the Toronto Real Estate Board, which paved the way for greater innovation in the real estate sector, through advocacy initiatives such as our Fintech market study, which provided sweeping recommendations to support the growth of innovation and competition in the financial services sector, and by providing guidance on areas of growing interest, such as big data and the government's planned Innovation Superclusters.

Beyond this, the Bureau has played a role in supporting economic growth by helping to attract foreign investment through a modern, principled and predictable competition law and shared compliance enforcement. The Bureau also provided reactive input into ongoing policy processes, such as the joint venture provisions included in Bill C-49<sup>48</sup> and the government's examination of diversity of voices in the news media. While supporting ISED in this manner, the Bureau has continued to advocate for a comprehensive retooling of current competition policy. As I have said in the past, the current tools available in the Act can work, but it has been 10 years since they were last revised, and by any objective measure, they are overdue for a review. We can do better.

At this juncture, failure to examine and revise the Act means Canada risks lagging our counterparts and being unable to meet the needs, or adapt to the pace, of a marketplace that is evolving daily. Having said this, I firmly believe that the required amendments – which I will outline

below – consist of fine tuning rather than a drastic overhaul. In particular, Canada must not succumb to the growing, vocal calls of the so-called ‘hipster antitrust movement’ and amend its legislation to include a public interest function for the Bureau. Canada’s current competition law, soundly based on normative economic principles, is well placed to continue to serve its valuable role. Any efforts to revise it to include considerations put forward by the populist antitrust movement would severely undermine it.

### **Recommendations for Reform – Moving Forward**

I must preface my recommendations by repeating that, from a legislative perspective, I believe strongly that Canada’s competition law must continue to be grounded in the well-established economic theory that open markets are the most effective means of allocating resources, promoting efficiencies, improving productivity, spurring innovation and increasing economic growth.

From an institutional perspective, it is my belief that the Bureau should continue with the modern vision of an open, transparent and collaborative agency, building upon the principle of shared compliance through the issuance of more guidance documents and embracing early dialogue with merging parties and during the pre-inquiry stage of other civil matters under the *Act*. Given the rapid pace of change in the digital marketplace, the Bureau must become more innovative and more efficient in its investigative process to maintain its economic relevance. It should focus its work on investigations that are meaningful and relevant in their impact on consumers, reduce its default adherence to traditional investigative processes and use greater enforcement discretion to shape its agenda and the disposition of files. In short, it must move more rapidly away from a largely technocratic approach to a more nimble one.

***Recommendation Highlights:*** Establish governance that is more independent of government control - the Bureau should reside outside the department whose primary responsibility is industrial policy. Amend the *Act* to give express authority to the Bureau to conduct market studies and to establish a regular 5 year review of the legislation to ensure its continued adaptability in the face of a rapidly evolving marketplace. Make the Commissioner the competition policy “lead”, as is the case in other leading jurisdictions. Allow the Commissioner to comment independently and publicly on potential

*legislative reforms to the Bureau's statutes, as well as other pieces of government legislation. Increase the Commissioner's independence by strengthening terms of the Commissioner's appointment, through independent funding and autonomy over spending decisions. Revisit the idea of an independent Canadian Competitiveness Council.*

## **Recommendation 1 - Reform to Improve Governance, Resource Allocation and Independence**

### **Independence**

Simply put, the Bureau's independence is the single most important issue it faces going forward. The significance of independence as it relates to competition authorities has been underscored by myriad academics, independent think-tanks, past heads of agencies and observers<sup>49</sup>.

Beyond the broad international consensus that competition authorities should be independent from the executive branch of government to deter political interference with their enforcement and advocacy mandate, there is support for this approach within Canada's own borders. In 2008, our Competition Policy Review Panel recommended the creation of an independent "Canadian Competitiveness Panel", responsible for the function of competition advocacy. In making this recommendation, the panel argued that this function had no place within federal government bureaucracy, as there was a strong chance that competition would "become just one of many factors considered" and that the perception of independence – an element it considered crucial – would be tainted by housing this function within government.<sup>50</sup>

Additionally, there is the very real concern, as articulated by Dr. Jenny, that perceived political interference via the executive branch in a competition authority's activities may "discourage investment" for fear that the playing field will not be level.<sup>51</sup> Competition agencies require the freedom "to make comments and otherwise participate in government and regulatory matters and, in the course of such advocacy activities to take positions that are independent of those held by others in the public and private sectors."<sup>52</sup> Furthermore, "[i]t is much more difficult for an authority to be captured when its decisions are public and open to scrutiny by academics or the press."<sup>53</sup> "There is a common perception that important decisions have been subject to political pressures to protect 'national champion' interests."<sup>54</sup>

When one looks at Canada, it is difficult to argue that this “common perception” does not exist. The Minister of ISED has consistently been the most lobbied figure in the Canadian federal government.<sup>55</sup> This strongly illustrates the level of concerted effort on the part of industry to influence the government’s economic policy. It goes without saying that one of the obvious roles of an independent law enforcement agency like the Bureau is to serve as counterbalance to this heavy lobbying. This has been underscored by Dr. Jenny, who wrote: “Competition authorities are seen as among the few public bodies (and sometimes the only one) that are not ‘captured’ and can counteract economic lobbies.”<sup>56</sup> It is an apparent conflict of interest for the Bureau to report to ISED, and to have competition policy functions housed within ISED, given that their primary role appears to be to advance industrial policy, to promote the growth of specific domestic businesses and to advance national champions.

Australia is a natural experiment in how unleashing a country’s competition authority can result in substantial, concrete and measurable benefits to its economy. In the early 1990s, Australia found its economy suffering under the weight of heavy regulation and ineffective competition policy. Subsequent competition law reform, including the establishment in 1995 of the ACCC – an independent statutory authority<sup>57</sup> of the government of Australia – and other related initiatives assisted in raising the country’s economic ranking from 15<sup>th</sup> in 1990 to 8<sup>th</sup> in 2002<sup>58</sup>.

In 2008, the Australian Productivity Commission recommended sweeping changes to the country’s consumer policy framework – that included creating stand-alone consumer protection legislation – and was later described as the most comprehensive law reform initiative to date in Australia.<sup>59</sup> In assessing the net benefit of these reforms to the Australian economy, the Commission estimated these to be between \$1.5 billion and \$4.5 billion each year.<sup>60</sup>

Other jurisdictions that have measured the impact of their competition agency’s work have also found substantial benefits. For instance, the UK Competition and Markets Authority (UKCMA) estimates that between 2014-17 it produced £1,228 million in benefits to consumers against £88 million in costs.<sup>61</sup>

### Autonomy

The Commissioner should be provided with the full weight of independence from the executive branch of government, and ideally, by

operating as an independent officer of Parliament, in the same manner as the Privacy Commissioner, Information Commissioner and Lobbying Commissioner. Independence, in my view, includes returning the policy lead to the Bureau (as in the case of the Bank of Canada as it relates to setting the country's monetary policy). The Bureau ought to function as an elite economic framework institution, and not as it is currently situated – as a “program” within ISED. With all of this in mind, I therefore put forward the following options to the federal government for consideration to establish greater independence for the Bureau:

#### Option 1

##### Conversion of Bureau to a Separate Entity

Return the policy function to the Bureau where the expertise for this complex subject area resides. Allow the Commissioner to comment independently and publicly on potential legislative reforms and report directly to Parliament for all its functions under the Competition Act. The Competition Bureau should become a separate entity with separate employer status and should be granted full authority to manage its financial affairs within spending authorities approved by Parliament. This would mirror the approach of independence from the executive that has been adopted by a number of the Bureau's counterparts, including the U.S. FTC, the ACCC, the Autorité de la concurrence in France, and Germany's Bundeskartellamt.

#### Option 2

##### Bureau to report to another Department

Follow the European Union's model and establish a new federal government department of competition and the marketplace with its own minister, which would have authority over the Bureau. Additionally, following the recommendations of the Competition Policy Review Panel, the government should create an independent policy body with responsibility for competition policy and advocacy. It should be further noted that this was a critical component of changes in Australia. While this would not directly increase the Bureau's policy role, it could provide an indirect means of ensuring greater attention to competition policy concerns. Or create a model wherein the Bureau reports to the Department of Justice, as is done in the US with the Antitrust Division, and the competition policy framework is developed in line with recommendations made by the Competition Policy Review Panel.

### Option 3 Bureau made a Portfolio Partner within ISED

Enable the Bureau to operate as a satellite or “portfolio partner” of ISED which is the governance model employed by the Competition Tribunal, Statistics Canada and 15 other federal departments and agencies. A portfolio partner is a separate division or branch created by statute or by Order in Council designated a responsible Minister. Pursuant to the Financial Administration Act they are treated as a department with their level of independence from the department determined in their constituting arrangement.<sup>62</sup> In addition to employing this separation to ensure Bureau independence, under this model the government would also establish an independent policy body as outlined above under options 2.

The OECD,<sup>63</sup> among other commentators has noted with concern the current governance structure of the Bureau as part of a government department that holds responsibility for both advancing industry interests as well as enforcing regulations against these same businesses. Structural and operational autonomy are of particular importance for a law enforcement body, as these are the primary means to protect against allegations of political interference. The Bureau not only needs to be independent and impartial in practice, but must also be perceived to be adhering to these fundamental values by its stakeholders. Ultimately, the perception of these values is one of the most important elements of ensuring trust in public institutions like competition authorities. The SCC itself noted that “preserving the appearance of integrity and the fact that the government is fairly dispensing justice, are, in this context as important as the government possesses actual integrity and dispenses actual justice.”<sup>64</sup>

In addition to the aforementioned recommendations, I would recommend that the government amend the *Act* to establish a mandatory 5 year review of the *Act*, and include a defined role for the Commissioner in this process. The Bureau’s independence could also be further bolstered by strengthening the terms of the Commissioner’s appointment. For example, the Commissioner currently serves at the pleasure of the Governor-in-Council, but amending this so that a Commissioner may only be removed for cause would provide greater latitude to freely express objective views on competition policy, as well as strengthening enforcement independence.

Lastly, given our unique law enforcement digital forensic requirements

from the technology requirements of ISED and Shared Services Canada and given our work with sensitive business data, the Bureau requires independent procurement authority for its IT requirements. The delays in necessary IT upgrades as a result of the Bureau's enhanced confidentiality protection and unique forensic equipment requirements, has presented real challenges for the Bureau. This has been deepened by the ever-looming threat by Shared Services Canada to subsume the Bureau's customized forensic labs, a move that could decrease the Bureau's effectiveness and increase the risk of data confidentiality breaches.

### **Ensure Resources Meet the Demands of the Bureau's Mandate: Increase Autonomy over Spending Decisions and Self-Sufficient Funding**

Since I assumed the office of Commissioner in 2013, the Bureau's core budget has been frozen, and will be further decreased by 5% for the coming three years. This contrasts with many of our international counterparts who have seen their budgets increase recently, and this includes the UK CMA, the ACCC as well as the Brazilian and Mexican competition authorities. The Bureau's budget for the fiscal year 2017-18 is \$47.9 million and this includes 364 full-time employees (FTEs), numbers that have decreased steadily since the 2011-12 fiscal year, when the budget and FTEs were \$51.4 M and 400, respectively. The Bureau has a vast mandate to enforce and promote competition and innovation across all sectors of the economy, and to protect all Canadians against deceptive marketing practices. It is clear that it cannot fully meet the demands of that mandate under its current fiscal constraints. The increasing complexity of merger cases and changes to the manner in which the PPSC operates have placed additional financial constraints on the Bureau within the past five years. The Bureau is further constrained by its budget in its ability to attract and retain the skill level that is required of the economists, lawyers and other professionals that are needed to support the Bureau's work. Recruiting and retaining highly skilled staff has been a consistent challenge for the Bureau given the relative pay of qualified economists, lawyers and other skilled staff. This was further exemplified in an internal report prepared for the Bureau in 2004 which found that Canada lags behind its counterparts in the US, UK and Australia on expenditures per capita.

This is compounded by the fact that the Bureau serves an revenue centre for the Canadian government, generating fines, administrative monetary penalties and that are contributed to the government's

Consolidated Revenue Fund – the sum of which was \$123M in the last 3 years alone.

### 2016 Comparison of Competition Agencies' Budgets<sup>65</sup>

Country	Budget (Millions of Euros)	Size of Staff
United States	270.4	1,068
(Department of Justice)	144	705
(Federal Trade Commission)	126.4	363
European Union (DG Comp)	103	779
Japan	93.4	748
Italy	55.2	351
Australia	48	259
United Kingdom	39	259
Germany	30.4	243
Canada	28.76	170
France	21.74	121

A myriad of Bureau stakeholders including current and past Members of Parliament, the Canadian Chamber of Commerce, the Canadian Bar Association, the Public Policy Forum, the OECD, consumer groups, and representatives of small businesses have publicly criticized the Bureau's chronic underfunding<sup>66</sup>. For example, the OECD stated in its 2004 study of Canada's competition policy regime that: "The Bureau should be allocated a permanent budget increase, enabling it to complete law enforcement investigations with greater dispatch and fulfill its mandate more effectively."<sup>67</sup> In addition, establishing greater autonomy over spending decisions and introducing more self-sufficient funding models would serve to further strengthen the Commissioner's independence and ability to express independent views on policy matters. The current model creates an apparent conflict of interest, stifling the Commissioner's ability to critique the policies of ISED and, more broadly, the government through which it receives its funding.

Given the broad mandate of the Competition Bureau to enhance the prosperity of Canadians by achieving compliance with competition laws, and its stated objective of attaining compliance through timely and

efficient enforcement, competition policy, information dissemination and increasing market transparency, it is not surprising that stakeholders are asking for a review of Bureau funding and functions. In addition to securing adequate funding, the Bureau must ensure access to and/or deliver training programs for its personnel. Under its current structure, the Commissioner, with limited resources, must play the multiple roles of competition enforcer, advocate and policy advisor to ISED, while taking on primary responsibility for the day-to-day operations of the Bureau, which includes negotiating and securing budgets and staffing within departmental and Treasury Board restraints. In my view, generally accepted principles of good corporate governance would suggest that a review of the Bureau's current structure is necessary.

## **Recommendation 2: Legislative and Regulatory Reform to Support a Modern Bureau**

### **Converge Laws to Reflect International Standards.**

Consumer welfare should become the sole objective of the Act. This is consistent with our German counterparts, where the competition authority determines the competition-focused considerations in a given matter and the public interest considerations are assessed in another part of government. This approach is also consistent with the Canadian government's revised approach to airline joint-ventures contained in Bill C-49<sup>68</sup>. The statutory efficiencies defence in merger review, which is found in no competition legislation other than South Africa's, should be repealed and replaced with the international standard for efficiencies claims.<sup>69</sup> In other words, efficiencies should be one factor considered among many economic factors to determine whether a merger is anticompetitive. The unintended consequence of the efficiencies defence, which was designed to promote competitive exports by Canadian firms, is that anti-competitive mergers with effects in Canada only produce benefits at the expense of other Canadian businesses, consumers and jobs.

Furthermore, the SCC's decision in *Tervita* narrows the application of the *Act* by elevating quantifiable harm and favouring static price effects over competition considerations important to the digital economy. As a result, the *Tervita* decision allocates negative effects on innovation, usually a non-price effect, to a secondary consideration in the analysis of whether or not a merger should not proceed by virtue of section 92 of the *Act*. In my view, *Tervita* favours productive efficiencies over dynamic

efficiencies which will hamper Canada's competitiveness in the global economy. In addition, in an era of growing populism and income disparity, the efficiencies defence would appear to have passed its "best before" date. Some competition law experts and academics have characterized the efficiencies provisions in the *Act* as "being in the public interest"<sup>70</sup>. Further, this approach has been described as *de jure* discrimination by the Deputy Assistant Attorney General of the United States Department of Justice, Antitrust Division, who said: "Industrial policies that expressly favor domestic competitors or expressly disfavor foreign ones are perhaps the most common example of *de jure* discrimination."<sup>71</sup>

The efficiencies defence is bad for business and bad for consumers. It is inconsistent with the approach being taken by many of our country's major trading partners, including most notably, the US. Our decision not to challenge the Superior/Canexus merger, on the basis of claimed s. 96 efficiencies, is indicative of the uncoordinated result that stems from the inclusion of s. 96 in our *Act*. Canada's approach to efficiencies means we are accepting reductions in competition in exchange for static and short-run fixed cost savings, which may or may not come to fruition.

This is a problem because we know that firms that are not spurred to innovate become complacent and inefficient<sup>72</sup>. Competition—and the opportunity to become a leader—is what forces innovation and efficiency. There is considerable public evidence that firms not subject to competitive pressure become very inefficient and fail to innovate. The Canadian wine industry is a good example of this. Prior to the 1987 Canada U.S. Free Trade Agreement (FTA), Canada's wine industry had been insulated from competition. The FTA put an end to that protection, forcing growers to innovate or fold. The result was a dramatically altered and highly competitive industry boasting innovative and unique products and entirely new lines of business. There are considerable benefits to be realized for the Canadian economy and Canadians by bringing our approach to efficiencies in line with that of other jurisdictions with modern competition laws. I believe strongly that Canada should move forward with doing so.

### Return Express Market Study Powers to the Bureau

For the Bureau to be an effective advocate of competition for Canadian consumers, it needs to have formal powers to conduct market studies, including the power to compel information to conduct the studies.

The lack of formal market study powers is another way that Canada's competition regime falls below international standards. In a recent survey by the OECD, it found that 68% of the competition agencies had specific powers to undertake market studies.<sup>73</sup> Formal market study powers backed by the ability to compel information would allow the Bureau to study issues that currently cause substantial harm to Canadian consumers. For example, these powers would enable the Bureau to conduct a comprehensive market study into the harm to consumers caused by Canada's supply management system. The inability of the Bureau to currently conduct such a study is another sign that it is not truly independent from government.

### New and Stronger Consumer Protection Law to Instill Trust in the Online Marketplace

Competition laws require finer tools and must be more nimble to fight digital abuses. Moreover, recent issues around companies' use and misuse of personal data have only served to deepen consumers concerns about how and by whom their personal information is being used. Ultimately, these concerns erode consumers' trust in the online marketplace and negatively impact competition. The government should establish new and stronger consumer protection legislation to address this. For example, the government could develop regulations to "cover online apps and services offered for free in exchange for gaining access to the user's personal data"<sup>74</sup>.

### Greater Private Access to the Competition Tribunal

In terms of other legislative amendments, changes should be considered to increase private access to the Tribunal. Increased access should include the abuse of dominance provisions and providing the Tribunal the ability to impose damages. This would provide an added deterrent against anticompetitive behaviour and generate more case law and guidance for the Bureau, the legal community and businesses. It would have the benefit of alleviating budget pressure on the Bureau; allowing them to pursue other cases, in addition to those brought by private parties. Amendments to widen private access also represent an opportunity to merge monopolistic practices provisions in the *Act*, rather than having separate provisions for matters like exclusive dealing, tied selling and market restriction.

## Repair Inefficient Cartel Enforcement Model

Respected antitrust researcher and professor emeritus at Purdue, John M. Connor, has said of Canada's anti-cartel enforcement: "The negative features (of Canada's anti-cartel enforcement) include...very slow investigations, a long standing inability to indict a large share of injurious cartels, weak penalties for individuals, and recovery of overcharges that is far below what is needed for deterrence."<sup>75</sup>

In short, the current system is inefficient and ties up Bureau resources. There are a number of mechanisms for improving the existing system, many of which have already been adopted and have met with success by our counterparts in other agencies, both domestic and international. I recommend that the government:

a) Modify current competitor collaboration provisions in the Act to enable the Bureau to proceed against hard-core cartels using a "dual track" approach. This is consistent with the Australian model. New civil provisions should also capture vertical agreements and permit the Tribunal to impose Administrative Monetary Penalties (AMPs). A dual track would provide the Bureau with much needed flexibility. In cases where the cartel conduct is less egregious and warrants a lesser penalty, the Bureau would not have to go through the more time consuming and costly criminal process to impose a monetary penalty and could instead proceed civilly.

b) Require government procurement authorities to produce bidding information on request from the Bureau and to use independent bid certificates in the tendering process. A database of bidding information would allow the Bureau to emulate agencies, such as Brazil's Administrative Council for Economic Defense, that have deployed advanced, sophisticated tools to screen for bid-rigging.

c) Improve the Bureau's IT tools and online forensic skills, which would also support the Bureau's efficacy in detecting and prosecuting cartels. Brazil's development of effective bid rigging screening technology serves as a great example of what can be done when an agency is given the necessary technological resources<sup>76</sup>.

d) Revise PPSC processes and require it to issue guidance around settlements. This would include modifying the due diligence requirements to speed up guilty pleas for leniency applicants and reducing the time from

marker to plea by imposing a firm one-year time limit from receipt of the marker to the time of registering a guilty plea. Failure to comply with this time limit should result in the loss of the leniency marker and the place in line. Applicants would be provided with only one opportunity to re-apply under the program.

e) Establish a stand-alone “whistleblower” program that would operate as its own office within the Bureau and would provide significant financial rewards to whistleblowers who provide information and meet certain eligibility requirements. This program should mirror the Ontario Securities Commission’s “Office of the Whistleblower”, which is a fully-resourced office within the OSC that handles allegations of securities violations. In the US, the Securities and Exchange Commission (SEC) has returned hundreds of millions of dollars to investors in the last 6 years as a result of its wildly successful whistle-blower program.<sup>77</sup> Such a program would be an extremely effective enforcement tool for the Bureau to address cartel activities, which are known to be the most egregious and most challenging type of anti-competitive behaviour to detect. In this same vein, consideration should be given to increasing credit for co-operating parties with effective corporate compliance programs. I hope that the proposal to do so that was included in the Bureau’s draft revised Leniency program will be included in the final version.<sup>78</sup>

f) Enable the Bureau to employ more outside legal agents to support the expeditious resolution of cartel cases and to co-locate the PPSC again with the Bureau, which would increase collaboration and support an improved relationship.

g) Facilitate the increased use of alternative dispute settlement mechanisms to get cases out of the courts, thereby expediting the resolution of these cases and reducing backlog in the courts.

### Create a Formal Notification Procedure for Pay-For Delay Agreements

Another issue that the Bureau cannot currently effectively address—but that is likely substantially harming Canadian consumers—is pay-for-delay settlements.<sup>79</sup> These are patent litigation settlements between branded and generic pharmaceutical companies in which the generic company agrees to delay entry into the market in return for a large payment by the branded company. These agreements result in taxpayers and consumers paying substantially more for vital pharmaceutical

products. In the US, the *Medicare Modernization Amendments Act* of 2003 requires that these agreements be notified to the antitrust agencies. As a result, the FTC has been able to track pay-for-delay agreements and has noticed a steady increase in recent years. It is unsurprising, then, that the FTC has been vigorously taking enforcement action to prevent pharmaceutical companies from harming US consumers through these agreements. The Bureau, in contrast, lacks the necessary powers to challenge these agreements. This contrasting situation is all the more bizarre in light of Canada's strained public healthcare system. One would think Canadian legislators would be eager to grant the Bureau powers that could contribute to reducing public expenditures on healthcare.

### **Recommendation 3 - Structural Institutional Reforms & Improvement of Procedural Fairness**

#### **Speed up Bureau Investigations and Tribunal Adjudication Processes to Remain Relevant with the Pace of Change in the Digital Marketplace**

The Bureau should be given new tools, for example, streamlined injunction powers, which will allow it to dispose of cases in a more expeditious manner. Such tools would allow the Bureau to be better equipped at handling competition issues in rapidly changing digital markets. This recommendation is informed by the Bureau's success at using alternative dispute resolutions such as the use of mediation by the Tribunal to more rapidly resolve the Parkland/Pioneer dispute. In addition, final offer arbitration, appears to be an effective and timely method of resolving disputes by the CRTC further to the Vertical Integration Code, could be considered by the Competition Tribunal.

#### **Provide Express Authority to "Name and Shame"**

Relatedly, the Bureau could receive expressed authority to use "name and shame" techniques to avoid the need for costly litigation and speedier resolutions to anti-competitive behaviour. For example, the U.S. Food and Drug Administration has published a list of pharmaceutical companies accused of bogging down the development of low cost generic drugs. The judicious use of naming of companies accused of competition law offences provides for an efficient means for the Bureau to change marketplace conduct. Similarly, the Bureau could increase its use of warning letters to companies accused of competition law offences

to improve its effectiveness. Several of the Bureau's international counterparts, such as the UK CMA, routinely make use of warning letters.

### Earlier Engagement with Targets and Merging Parties

The Bureau should continue to engage earlier in the process with targets and merging parties with the goal of narrowing issues and early resolution. A formal process requiring notification to the target of a complaint to the Bureau for certain offences could be considered to initiate this early dialogue. The Bureau, as a standard enforcement practice, should issue state of play letters during key stages of complex merger reviews and over the course of inquiries for other non-criminal offences, with the goal of tightening timelines, increasing transparency and due process considerations. Increased use of these techniques would only require the Bureau to modify its existing enforcement practices.

### Create a Chief Technology Officer Position within the Bureau

ISED should allow the Bureau to create the position of Chief Technology Officer (CTO), to provide leadership on digital issues. The roles of the CTO would be to enlighten the Bureau on emerging digital issues such as the use of machine learning by companies, algorithms, digital platforms and Big Data. The CTO would also provide expert industry advice to the Bureau for investigations involving e-commerce. In an increasingly digitized world, it is becoming essential that agencies have the technical expertise on-hand to provide input on matters involving digital markets in a similar way that economists currently provide input on competition matters more broadly. The FTC has long had a Chief Technologist, the UK CMA announced the creation of a Chief Data and Digital Insights Officer and the ACCC announced the establishment of a data analytics unit. Implementing this recommendation would thus bring the Bureau in line with its key international counterparts and better prepare it to investigate the digital economy.

### Conclusion

During my tenure, I strived to build trust in the Bureau among Canadians, their public representatives, governments in Canada, businesses, stakeholders such as the Canadian Bar Association, and our partners including the international antitrust community. Trust is difficult to build and requires enormous dedication, both in time and

in resources. Conversely, trust is easy to lose. Without trust, the Bureau would not be able to fulfill its important mandate to enable economic growth in Canada and to function as an elite economic framework institution. As mentioned earlier, I am immensely proud of the work done by the Bureau. The achievements that have been attributed to me should also be attributed to the Bureau's staff and management, without which none of them would have been attained. Accordingly, I make my recommendations with a view to ensuring that the Bureau continues to enjoy and build upon the trust of its stakeholders and the public, which it serves. These recommendations will allow the Bureau to better serve Canadians, a simple yet powerful guiding principle that I believe is shared by Parliament and the broader public service.

### Endnotes

<sup>1</sup> I would like to thank Kristen Fraser, Duy Pham and Majid Charania from the Competition Bureau for their meticulous editing of this paper. All views expressed and errors are solely those of the author.

<sup>2</sup> This is supported by a growing body of research that includes: Canada, Competition Policy Review Panel, *Compete to Win: Final Report June 2008*, (Ottawa: Industry Canada, 2008) at 103 [Competition Policy Review Panel] ("competition drives the policy that ultimately sustains our incomes, jobs and quality of life"); Ontario, Task Force on Competitiveness, Productivity and Economic Progress, *Realizing our prosperity potential*, Third Annual Report, November 2003, (Toronto: The Institute for Competitiveness & Prosperity) at 5 (a lack of adequate competitive pressure in the province was a significant contributor to Ontario's lower productivity levels when compared with other provinces).

<sup>3</sup> See: William W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability*, (Chicago: University of Chicago Press, 2004) at 103 (when government policies limit competition, more efficient companies cannot replace less efficient ones, economic growth slows and nations remain poor).

<sup>4</sup> See generally: Michael Porter, *The Competitive Advantage of Nations*, (London: Macmillan, 1990) at 665 (the impact of competitiveness on overall domestic productivity and growth including the finding that protected firms have greater difficulty competing abroad).

<sup>5</sup> Competition Policy Review Panel, *supra* note 2 at 97.

<sup>6</sup> In 2007, the Bureau undertook market studies of: (i) the generic drug sector in response to several studies that found the price of prescription generics to be high in Canada compared to other countries; and (ii) certain professions, as studies had demonstrated that Canada's professions were more regulated than their counterparts in other countries, possibly affecting their productivity and Canada's economic growth. In 2008, the Bureau announced a follow on

study of dentistry. In 2014 the Bureau reinvigorated its work on advocacy – authoring a white paper on the ride-sharing industry, and more recently, a market study on ‘fintech’ and competition within the financial services sector.

<sup>7</sup> This is other than the Minister’s ability under s.10 of the *Competition Act* to direct the Commissioner to commence an inquiry, which is rarely employed.

<sup>8</sup> This paper uses the term “competition policy” to include advocacy, regulatory intervention, legislative reform, research, publicity and related means by which the Bureau promotes reliance on competition for economic organization.

<sup>9</sup> Ian Jack, “Watchdog wants independence: Competition Bureau reliant on federal government”, *Financial Post* (21 June 2001) 25.

<sup>10</sup> *Ibid.*

<sup>11</sup> James Baxter, “More freedom for Competition Bureau urged: Perception is watchdog controlled by cabinet, says chamber head”, *National Post* (11 September 2001) A8.

<sup>12</sup> Michael Den Tandt, “Bank report should feed shredder”, *The Globe and Mail* (28 March 2003) B2.

<sup>13</sup> OECD, Regulatory Reform Programme, Canada – *The Role of Competition Policy in Regulatory Reform 2002*, OECD Reviews of Regulatory Reform, (Paris: OECD, 2002) at 19 [OECD].

<sup>14</sup> *Ibid* at 43.

<sup>15</sup> Edward M. Iacobucci & Howard I. Wetston, “Is it Time to Give the Commissioner of Competition a Competition Commission?” in D. Conklin, ed, *Canadian Competition Policy: Preparing for the Future*, (Toronto: Pearson Education Canada, 2002).

<sup>16</sup> Calvin S. Goldman & Navin Joneja, “The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner” (2010) 41: 3 Loy U Chicago LJ 535 [Goldman & Joneja].

<sup>17</sup> C Goldman, RK Winter & K Lawal, “Institutional Design Issues – Competition Bureau and Competition Tribunal: Synopsis of Recent Perspectives and Issues Going Forward”, (May 2002) [unpublished, archived at Loyola University Chicago Law Journal].

<sup>18</sup> Competition Policy Review Panel, *supra* note 2 at 99.

<sup>19</sup> *Ibid* at 98.

<sup>20</sup> Canada, Competition Bureau, *Competition and Compliance Framework*, (Ottawa: Innovation, Science and Economic Development Canada, 2015), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html>>.

<sup>21</sup> Ana Paula Martinez, *Competition Policy in Developing Societies: A Tool for Sustained Growth?*, (Saarbrücken: Lambert Academic Publishing, 2013) at 30-31 [Martinez].

<sup>22</sup> Warren Grover & Jack Quinn, “Recent Developments in Canadian Merger Law” in Khemani and Stanbury, eds, *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 225.

<sup>23</sup> *Director of Investigation and Research v Laidlaw Waste Systems Ltd* (20

January 1992), CT-1991-002, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-1991-002\\_0072\\_38LSM-4132004-2121.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1991-002_0072_38LSM-4132004-2121.pdf)> at 87.

<sup>24</sup> See: OECD, OECD Competition Committee, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels*, Doc No C(98)35/FINAL – C/M(98)7/PROV, (Paris: OECD, 1998) at 1 (“[H]ard core cartels are the most egregious violations of competition law”).

<sup>25</sup> D Martin Low QC & Casey W Halladay, “Key Issues for Canadian Cartel Enforcement in 2012”, (Paper delivered at the American Bar Association International Cartel Workshop, 1-3 February 2012), online: <[https://mcmillan.ca/Files/140935\\_Low\\_Halladay2012\\_Cartel\\_Workshop\\_Published.PDF](https://mcmillan.ca/Files/140935_Low_Halladay2012_Cartel_Workshop_Published.PDF)>.

<sup>26</sup> Competition Policy Review Panel, *supra* note 2.

<sup>27</sup> *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 92 DLR (4th) 36.

<sup>28</sup> Bill C-49, *An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, (assented to 23 May 2018, SC 2018, c 10) [Transportation Modernization Act].

<sup>29</sup> Shawn CD Neylan, “John Pecman Appointed as Canada’s Interim Commissioner of Competition” (28 September 2012), *The Competitor* (blog), online: <<https://www.stikeman.com/en-ca/kh/competitor/john-pecman-appointed-as-canada-interim-commissioner-of-competition>>.

<sup>30</sup> “Too much of a good thing”, *The Economist*, (26 March 2016), online: <<https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing>>.

<sup>31</sup> US, Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power*, (Washington, DC: White House, April 2016), online: <[https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf)>.

<sup>32</sup> Lina M Khan, “Amazon’s Antitrust Paradox” (2017) 126 Yale LJ 710 at 737.

<sup>33</sup> *Ibid* at 737-38.

<sup>34</sup> US, Democratic Party Leader, *A Better Deal: Better Jobs, Better Wages, Better Future*, (2017), online: <<https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf>>.

<sup>35</sup> *Ibid* at 1-2.

<sup>36</sup> See e.g. Margrethe Vestager, “Fairness and competition” (Speech delivered at the GCLC Annual Conference, 25 January 2018), online: <[https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en)>; Margrethe Vestager, “Fighting for European values in a time of change” (Speech delivered at the Europa Lecture, Leiden University, 14 June 2017), online: <[https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fighting-european-values-time-change\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fighting-european-values-time-change_en)>.

<sup>37</sup> European Commission, Press Release, “Mergers: Commission clears merger between Dow and DuPont, subject to conditions” (27 March 2017), online: <[http://europa.eu/rapid/press-release\\_IP-17-772\\_en.htm](http://europa.eu/rapid/press-release_IP-17-772_en.htm)>.

<sup>38</sup> EC, Directorate-General for Communications Networks, Content &

Technology, *Inception Impact Assessment: Fairness in platform-to-business relations* (25 October 2017), online: <[https://res.cloudinary.com/gcr-usa/image/upload/v1509115796/DG\\_Connect\\_r75pjz.pdf](https://res.cloudinary.com/gcr-usa/image/upload/v1509115796/DG_Connect_r75pjz.pdf)>.

<sup>39</sup> Samuel Gibbs, “European parliament votes yes on ‘Google breakup’ motion”, *The Guardian* (27 November 2014), online: <<https://www.theguardian.com/technology/2014/nov/27/european-parliament-votes-yes-google-breakup-motion>>.

<sup>40</sup> Maureen K Ohlhausen, “Does the US Economy Lack Competition?” (2016) 1 *The Criterion J on Innovation* 47 at 50-52.

<sup>41</sup> See D Daniel Sokol, “Tensions between Antitrust and Industrial Policy” (2015) 22 *Geo Mason L Rev* 1247 at 1249 (“An antitrust regime that makes economic analysis of competitive effects the sole method for analyzing consumer harm removes political factors from the analysis, shifting discretion from antitrust authorities to the market”).

<sup>42</sup> John Pecman, “Growing the new economy: the integral relationship between competition and innovation” (Speech delivered at the Vancouver Competition Policy Roundtable, 18 January 2018), online: <[https://www.canada.ca/en/competition-bureau/news/2018/01/growing\\_the\\_new\\_economytheintegralrelationshipbetweencompetition.html](https://www.canada.ca/en/competition-bureau/news/2018/01/growing_the_new_economytheintegralrelationshipbetweencompetition.html)>.

<sup>43</sup> Competition Bureau, News Release, “Unprecedented cooperation with US antitrust enforcement authority leads to major cartel crackdown” (20 July 2016), online: <<https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html>>.

<sup>44</sup> See Recommendation 2 below at page 29 for further discussion.

<sup>45</sup> John Pecman, “Competition Bureau: What Canadians need to know about price-fixing probes”, *The Globe and Mail* (2 February 2018), online: <<https://www.theglobeandmail.com/report-on-business/rob-commentary/competition-bureau-what-canadians-need-to-know-about-price-fixing-probes/article37830190/>>; See Information to Obtain (Search Warrant), Ontario Superior Court of Justice, Ottawa, Criminal Desk, File no. 17-13302.

<sup>46</sup> Innovation, Science and Economic Development Canada, News Release, “Innovation Minister says the digital economy is the economy” (17 November 2016), online <<https://www.canada.ca/en/innovation-science-economic-development/news/2016/11/innovation-minister-says-digital-economy-economy.html>>.

<sup>47</sup> Michael Koch & David Rosner, “Top Five Recent Developments in Canadian Competition Law”, Goodmans LLP (blog), online: <[http://www.goodmans.ca/Doc/Top\\_Five\\_Recent\\_Developments\\_in\\_Canadian\\_Competition\\_Law](http://www.goodmans.ca/Doc/Top_Five_Recent_Developments_in_Canadian_Competition_Law)>.

<sup>48</sup> Transportation Modernization Act, *supra* note 28.

<sup>49</sup> See e.g. Frédéric Jenny, “Competition Authorities: Independence and Advocacy” in D Daniel Sokol & Ioannis Lianos, eds, *The Global Limits of Competition Law* (Stanford: Stanford Law Books, 2012) at 159 (“There is wide agreement that competition authorities should be independent both from the executive branch of government and from the business community”) [Jenny].

<sup>50</sup> Competition Policy Review Panel, *supra* note 2 at 99.

<sup>51</sup> Jenny, *supra* note 49 at 160.

<sup>52</sup> *Ibid* at 162.

<sup>53</sup> *Ibid* at 163.

<sup>54</sup> OECD *supra* note 13 at 1.

<sup>55</sup> Derek Abma, “Bains most lobbied cabinet minister since Trudeau won power in 2015, hands down”, *The Hill Times* (27 March 2017), online: <<https://www.hilltimes.com/2017/03/27/bains-attracts-lobbyists-interface-industry-leader-innovation-agenda/100681>>.

<sup>56</sup> Jenny, *supra* note 49 at 167.

<sup>57</sup> A statutory authority is an Australian body with the right to enact legislation.

<sup>58</sup> Russell Miller, “On the Road to Improved Social and Economic Welfare: The Contribution to Australian Competition and Consumer Law and Policy Law Reform” in Ron Levy et al, eds, *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Canberra: ANU Press, 2017) 37 at 40.

<sup>59</sup> *Ibid* at 42.

<sup>60</sup> *Ibid* at 43.

<sup>61</sup> UK, Competition & Markets Authority, *CMA impact assessment 2016/17* (2017), online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627060/cma-impact-assessment-2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627060/cma-impact-assessment-2017.pdf)>.

<sup>62</sup> Canada, Privy Council Office, *Guide Book for Heads of Agencies: Operations, Structures and Responsibilities in the Federal Government* (August 1999), online: <<https://www.canada.ca/en/privy-council/services/publications/guide-book-heads-agencies-operations-structures-responsibilities-federal-government.html>>.

<sup>63</sup> OECD, *supra* note 13 at 19.

<sup>64</sup> *R v Hinchey*, [1996] 3 SCR 1128, 142 DLR (4th) 50.

<sup>65</sup> Global Competition Review, “Rating Enforcement 2017” (July 2017), online: <<https://globalcompetitionreview.com/edition/1001035/rating-enforcement-2017>>.

<sup>66</sup> See e.g. Goldman & Joneja, *supra* note 16; Calvin S Goodman, Robert E Kwinter & Crystal L Witterick, “Enhancing the Efficiency, Effectiveness and Accountability of the Competition Bureau: A Proposal for Change” (Remarks delivered at the Competition Law Roundtable of the Law and Economics Program at the University of Toronto, 13 December 2002) at 7-9; Additionally, Members of Parliament, Michael Chong and Brian Masse have, on multiple occasions highlighted insufficient funding as a problem for the Bureau.

<sup>67</sup> OECD, Country Studies, “Canada – Updated Report 2004” (2004 at p.20)

<sup>68</sup> Transportation Modernization Act, *supra* note 28.

<sup>69</sup> I note that South Africa appears to have moved away from its implementation.

<sup>70</sup> Martinez, *supra* note 21.

<sup>71</sup> Roger Alford, “The Public Interest Standard and the Dangers of Discrimination” (Remarks delivered at the Global Semiar Series in Düsseldorf,

Germany, 8 May 2018), online: <<https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-global-seminar-series-d>>.

<sup>72</sup> Harvey Leibenstein, “Allocative Efficiency vs. “X-Efficiency”” (1966) 56:3 *The American Economic Review* 392, online: <<https://msuweb.montclair.edu/~lebelpl/LeibensteinXEffAER1966.pdf>> (the concept of x-inefficiency tells us that firms that are not spurred to innovate become complacent and inefficient).

<sup>73</sup> OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *The Role of Market Studies as a Tool to Promote Competition* (Paris: OECD Secretariat, 2016) at 9, online: <[https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf)>.

<sup>74</sup> OECD, News Release, “Consumer protection laws need updating to improve consumer trust in e-commerce” (30 March 2016), online: <<http://www.oecd.org/internet/consumer/consumerinthedigitaleconomy.htm>>.

<sup>75</sup> John M Connor, “Canada’s International Cartel Enforcement: Keeping Score” (2014) World Competition draft article at 7.

<sup>76</sup> OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Latin American and Caribbean Competition Forum Session III: Promoting Effective Competition in Public Procurement: Contribution from Brazil*, DAF/COMP/LACF(2016)19, (2016), online: <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2016\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)19&docLanguage=En)>.

<sup>77</sup> Robert E Connolly & Kimberley A Justice, “It’s a Crime There Isn’t a Criminal Antitrust Whistleblower Statute”, *Antitrust Law Daily* (5 April 2018), online: <[http://business.cch.com/ald/ALD\\_Criminal-Antitrust-Whistleblower-Statute\\_04-05-2018\\_final\\_locked.pdf](http://business.cch.com/ald/ALD_Criminal-Antitrust-Whistleblower-Statute_04-05-2018_final_locked.pdf)>.

<sup>78</sup> At the time of drafting, the draft revised Immunity and Leniency program was in its public consultation phase.

<sup>79</sup> Competition Bureau, “Patent Litigation Settlement Agreements: A Canadian Perspective” (Paper delivered at the Global Antitrust Institute, George Mason University School of Law Conference: Global Antitrust Challenges for the Pharmaceutical Industry, 23 September 2014), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03816.html>>.

# ARTICLES

## CHALLENGES AND PITFALLS IN CARTEL FINING\*

Marcel Boyer<sup>1</sup>, Anne Catherine Faye<sup>2</sup>, Éric Gravel<sup>3</sup>,  
Rachidi Kotchoni<sup>4</sup>

*We analyze challenges and pitfalls faced by antitrust authorities in the fining of cartels. We review economics and legal approaches to cartel fining and the sometimes-conflicting objectives of restitution, deterrence, and proportionality. We also discuss various theoretical and empirical hurdles that antitrust authorities and courts must overcome to determine appropriate cartel fines, namely regarding cartel impact duration, but-for prices, and overcharges.*

*Nous analysons les défis et les pièges rencontrés dans l'imposition des amendes de cartel. Nous passons en revue les approches économique et juridique relatives à la détermination des amendes et les objectifs parfois contradictoires de restitution, dissuasion et proportionnalité. Nous discutons des obstacles théoriques et empiriques à surmonter pour déterminer les amendes appropriées, à savoir la durée de l'impact, les prix contrefactuels et les surprix.*

### 1. Introduction

Antitrust authorities around the world use punishment instruments, and in particular fines and prison terms, to prevent the formation of cartels or destabilize operating cartels. Cartel fines are usually higher than those set for other infringements of competition laws, reflecting the consensus that price fixing, limitation of production, and market allocation cases (the so-called naked cartels) are serious antitrust offenses that should be punished severely. By imposing relatively high cartel fines, antitrust authorities hope to achieve two objectives: restitution and deterrence.

Statistics show that the average amount of fines imposed on cartel participants has increased substantially over the last decade, even reaching record amounts in the U.S. and Europe.<sup>5</sup> One of the factors behind the recent increase in fines is the willingness of antitrust authorities to strengthen a deterrence objective as recognized, for example, by the European Commission in its 2006 Guidelines.<sup>6</sup> Recent trends also suggest that for most jurisdictions, including the newcomers to antitrust policy, achieving deterrence supersedes the objective of restitution.<sup>7</sup>

Economic analysis has played a substantial role in the development of antitrust public policy from the pioneering contributions of economists in the 1960s to recent advances in evaluation methods and econometrics. The economic approach developed by Gary S. Becker (1968) and William M. Landes (1983) constitutes the dominant theory underlying the deterrence of criminal activities. The basic proposition of this approach is that a firm will refrain from cartel activity if its expected net incremental profit of so doing is negative, i.e., if the expected cartel profit is lower than the expected loss upon detection, provided by the anticipated fine multiplied by the probability of detection and conviction.

The importance of economic analysis in the development and implementation of antitrust policy is continuously reaffirmed. Boyer, Ross, and Winter (BRW 2017) draw a historical overview of how economics was gradually integrated into competition policy. While suggesting that fifty years ago economists were playing a minor role in the antitrust world, typically collecting statistics under lawyers' instructions, they argue that "[t]he economic basis for competition policy towards cartel pricing was understood from the start [and] the basic proposition was clear: cartels lead to higher prices to the detriment of consumers and the economy."

BRW characterize recent developments as an effort to incorporate into competition policy a more holistic vision of economics, organizations, and institutions: "Economists had significant influence in promoting a two-pronged approach that distinguished between naked cartels and cooperation between competitors, in strategic alliance and joint ventures for example that can be beneficial and should not be caught up in anti-cartel law. This dual track approach was formally adopted in Canadian competition policy with amendments to the *Competition Act* in 2010." In such a world, economists and policy makers attempt to draw a somewhat blurred line between collaboration mechanisms that could enhance efficiency and wealth creation and the outright exercise of market power.

In this paper, we review key aspects of cartel policies, raise issues of methodological importance in setting optimal cartel fines, and propose solutions using economic reasoning and econometric techniques. Our review provides perspectives on how economics, law, and antitrust practices and rules can converge towards the common goal of setting optimal cartel fines.

The remainder of this paper is organized as follows. Section 2 presents a general public policy overview of collaboration between competitors

through a brief historical account of antitrust law, a discussion of antitrust guidelines and leniency programs, and a review of private versus public control of cartels. Section 3 reviews the sometimes conflicting objectives of antitrust policies and discusses specific challenges and pitfalls in the setting of cartel fines, namely the identification of the relevant period of cartel activity, the estimation of cartel overcharge, and the modeling of cartel dynamics. We conclude in Section 4.

## **2. Collaboration between Competitors and Cartel Policy**

We briefly review how collaborative agreements among competitors, the extreme form of which are cartels, were put under scrutiny and recognized as criminal activities in the 19<sup>th</sup> century in North America, and subsequently elsewhere in the world. We then discuss the reliance on leniency programs as primary tools of discovery of cartels, based on advanced game theoretic analysis, and their impact on deterrence. Finally, we briefly discuss the two pillars of anti-cartel policies, namely public and private enforcement instruments.

### **A. The Perception of Cartels**

In response to profound changes in the economic landscape around the mid-19<sup>th</sup> century – e.g., international trade, increased globalization with significant movement of labor and capital, and enhanced market power in many industries - competition policy began to emerge culminating in competition legislation in 1889 in Canada and in 1890 in the U.S.<sup>8</sup> The 1889 Canadian Act established cartels as criminal activities, with possible sanctions upon conviction reaching up to two years of imprisonment, while the U.S. 1890 Sherman Act set a maximum penalty of one year.

Halladay (2012) characterizes as follows the debates that rocked the Canadian Parliament at that time: “While the governing Conservatives and opposition Liberals both publicly supported the goal of restraining combines, they were sharply divided in their methods. The Liberals accused [the Conservatives] of trying to “*chew meal and whistle at the same time*” and argued that the true evil was the Conservatives’ protective tariff regime, known as the National Policy. According to the Liberals, Canadian combines thrived because they were protected from foreign competition. The Conservatives responded that many of the industries suffering from a lack of combines control were not subject to

tariffs and, in any case, removing the Canadian tariffs would only drive the combines “jackals” out of Canada and replace them with “*a horde of American wolves*”.

In Canada, the maximum imprisonment penalty remained at the two-year level until 1976 when it was increased to five years. It was increased to fourteen years in 2010, the “highest of any anti-cartel regime in the world.”<sup>9</sup> As these developments towards increasing efforts to prevent cartels through larger fines and longer prison terms as well as increased prosecution capabilities were taking place in different jurisdictions, some jurisdictions held different views on cartels. For instance, Austria, Denmark, Finland, Norway, and Sweden allowed firms to engage in cartel formation and activities such as price fixing, market allocation, and/or restrained production levels, as well as engage in other anti-competitive practices.<sup>10</sup> However, to be considered legal, cartels had to register their agreements with a government authority.<sup>11</sup>

In Austria, this pro-cartel policy, dating back to 1951, rested on the Austrian version of corporatism called Social Partnership, in which price ceilings or increases were effectively regulated. As unregistered cartel agreements were subject to criminal law, registered cartels served to implement regulated prices such that firms could reach price ceilings and avoid their undercutting. Moreover, those registered cartels were allowed to implement policies aimed to enforce cartel agreements, namely inter-firms compensation schemes, reporting requirements, rules for entry and exit, and quick and credible punishment upon deviations.

The Austrian model could be seen as validating collaboration between competitors although it goes beyond the types of collaboration generally allowed in vertical integration schemes, strategic alliances, and international business relationships. However, distinguishing between so-called naked cartels aimed at price-fixing, limiting production, and allocating markets, which are serious antitrust offenses, and bona fide collaboration between competitors, is a difficult endeavour.

Recent changes in the treatment of valuable pro-competition and pro-efficiency collaboration between competitors and the treatment of hard-core cartels followed significant contributions over the years by economists advocating for a more rigorous treatment of naked cartels and a balanced analysis of non-naked ones. For instance, Kennish and Ross (1997) combined previous economic contributions and claimed that the law had to make room for the benefits of cooperation among

competitors. They wrote “[i]n some cases, productive activities are best undertaken within the walls of a single firm and in others it is best for independent organizations to serve each other through markets. In still other cases, firms surrender some of their independence as part of a co-operative endeavour to undertake some productive activity. This co-operation could involve jointly-conducted research and development, shared distribution facilities, agreement on product standards or a number of other things.” Although models of value chains and networks are challenging competition policy at its roots, applying the rule of reason to competitor collaboration, including soft or non-naked cartels, that may reduce competition intensity but improve efficiency in resource allocation, need not be done at the detriment of strengthening criminal provisions on hard-core cartels through a *per se* liability.<sup>12</sup>

## B. Antitrust Guidelines and Leniency Programs

A comparative review of guidelines highlights similarities and differences in the methods used by antitrust authorities to deter cartels and punish cartel members. In Europe, participation in a cartel is punished mostly through fines. The methodology followed by the Directorate-General for Competition of the European Commission when setting fines in cartel cases can be divided into two sequential steps. First, a basic amount is set by reference to the total value of relevant sales. As a rule, the fine will be set at a level of up to 30% of the value of sales, depending on the gravity of the illicit practice, multiplied by the number of years of duration of the cartel. Second, adjustments are made according to aggravating and mitigating circumstances. In any case, the total fine must not exceed 10% of the total annual turnover of an undertaking, which may be much larger than the affected sales.<sup>13</sup>

In Canada, the Competition Bureau is responsible for the administration and enforcement of the *Competition Act*. Section 45 of the Competition Act provides the relevant provisions, which considers a cartel a criminal offense or conspiracy punishable by a fine of up to \$25 million, or imprisonment for a term of up to 14 years, or both.<sup>14</sup>

In the U.S., cartel activity is punished with criminal sanctions including fines and imprisonment. Most criminal antitrust cases are prosecuted pursuant to the Federal Sentencing Guidelines (USSG), which recommends the imposition of a base fine of 10% of the affected volume of commerce of a firm convicted of participation in a cartel plus another

10% for the harm inflicted upon consumers. Although these sentencing guidelines are merely advisory, sentencing courts are required to consider their provisions and tailor the sentences accordingly based on each case's specific factors. Usually, the Antitrust Division of the Justice Department settles cartel cases with plea agreements. The basic amount of the fine is the greatest of: a) the amount based on the level as recommended by the USSG; b) the infringing firm's pecuniary gain from the offence; or c) the pecuniary loss to consumers (harm) resulting from the offence.<sup>15</sup>

Over the last decades, leniency programs have proliferated in many jurisdictions where competition authorities are eager to dismantle cartels by encouraging self-reporting and cooperation from cartel participants. There are currently over 40 jurisdictions around the world with active leniency programs.<sup>16</sup>

These various leniency programs have the common goal of deterring antitrust violations and detecting cartel offences earlier by using the pledge of less severe sanctions. Cartel participants may turn themselves in and cooperate with authorities to receive full immunity from prosecution or fine reductions. Competition authorities in Australia, Canada, the European Union, and the U.S. continue to bring cartel members to justice through the valuable cooperation of whistleblowers.<sup>17</sup> Although a progressively convergent approach in leniency programs has been taking place over the last years in these jurisdictions, some differences remain on how infringing firms and their executives receive a more lenient treatment.

Fine reductions in Canada and in the U.S. follow a procedure distinct from the leniency program. Cartel enforcement authorities in these countries offer applicants who have lost the race for full immunity the possibility to benefit from reduced sentences (fines) in exchange for their guilty plea and full cooperation.

For antitrust authorities around the world, leniency programs are an increasingly important tool to deter or detect and break cartels. Since the launch of the first program by the U.S. Department of Justice in 1978, several jurisdictions have followed suit by introducing in their antitrust legislation different versions of leniency policies.<sup>18</sup> With the introduction of leniency programs in antitrust legislation of Australia, Canada, the European Union, and the U.S., the number of cartels detected in these jurisdictions has considerably increased in the last decade compared to previous ones and most of these cartels were detected through immunity applications.

However, this increase in the number of cartels detected, often reported as an apparent success of leniency programs by competition authorities, may also be due to an increase in cartel activity. In fact, the economic literature related to the impact of leniency programs on detection rates is somewhat ambiguous. Leniency programs typically reduce cartel stability by creating a prisoner's dilemma situation among cartel participants and inducing confessions;<sup>19</sup> by allowing whistleblowers to gain a competitive advantage on competitors, which incur cost increases through fines and compliance costs;<sup>20</sup> and by allowing cartel members to apply for immunity and leniency while having taken advantage of the collusion.<sup>21</sup> Researchers have also found that leniency programs induce collusive arrangements, insofar as the program is not restricted to the first reporting firm, which can cause a decrease in deterrence because of reductions in expected fines.<sup>22</sup>

Nevertheless, leniency programs contribute to hastening the investigation and prosecution of cartels as cooperating participants provide substantial evidence on their activities. Further benefits include that authorities can also redirect public resources to the detection of other non-reported cartels. In any case, antitrust officials in many jurisdictions have praised the importance of their respective leniency programs.<sup>23</sup>

The granting of leniency to cartel members for their cooperation in legal proceedings may not be the end of the story for those successful leniency applicants. As we discuss next, other penalties, outside public authorities' power to grant leniency, such as loss of reputation and private disbarment, class actions, and private litigation, may turn out to be significant.<sup>24</sup>

### **C. The Private vs. Public Control of Cartels: Review and Policy**

Public enforcement and private enforcement are two complementary competition law instruments. For instance, private enforcement has long driven antitrust enforcement in the U.S. In contrast, European enforcement of antitrust laws relies more on public enforcement.<sup>25</sup> Both private and public enforcement are expensive, ranging from the cost of detecting an infringement, to seeking punishment, to the compensation of victims.

Public resources are used for competition authorities and courts while private parties direct their own financial resources to pursue costly litigation. From an economic perspective, both public enforcement and

private enforcement serve deterrence objectives, and private enforcement is usually perceived as favouring a compensation objective. Whether used in combination or alone depending on the type of antitrust violation, the benefits and costs of the two enforcement approaches need to be carefully assessed to design the optimal competition law enforcement system.

The U.S. is the OECD jurisdiction with the most extensive experience with private enforcement. Both individuals and businesses may bring about civil actions in relation to various antitrust violations such as monopolization, cartels, and other horizontal conspiracies and vertical arrangements. Class actions are also broadly available in the U.S. If the civil actions are successful, relevant parties can benefit from different forms of compensation including treble damages, i.e., damages three times the estimated amount of loss, in addition to legal fees.

In the European Union, private enforcement has historically been more limited than in the U.S. although European law does allow for persons affected by antitrust violations such as anticompetitive arrangements and abuse of dominance to recover damages.<sup>26</sup> The use of class actions is also less prevalent in Europe. In Canada, various class actions mostly related to price-fixing conspiracies have been initiated over the years.

### **3. Challenges and Pitfalls in Cartel Fining**

Below, we review important issues related to the theoretical design and empirical implementation of an optimal fining rule. Two major difficulties arise when it comes to evaluating empirically the overcharge imposed by cartels: (a) the precise identification of the period covered by the collusion and (b) the lack of reliable data to estimate the but-for price accurately, hence the difficulty to evaluate the price increase or overcharge due to the cartel. As for the cartel overcharge estimates available in the empirical literature, they are typically subject to estimation biases.

#### **A. Restitution, Deterrence, Punishment, and Legal Proportionality**

Becker (1968) put forth an economic approach to crime and punishment and determined optimal policy tools to fight criminal offenses. In this paradigm, the reduction of crime can take place through different channels including the increase in wages and profits in the legal sector, the reduction of benefits in the criminal sector, the increase in

the probability of detection and conviction, and the punishment then imposed. According to Becker, the government could reduce policing costs, hence the probability of discovery, and simultaneously increase the level of punishment as long as socially costless means of punishment (such as fines) are available.<sup>27</sup>

Landes (1983) built on the pioneering research of Becker to analyze the theoretical foundations of an optimal antitrust penalty and applied his findings to various antitrust violations including predatory pricing and cartels. Landes suggests punishing antitrust violations in such a way that proper behaviour is encouraged: harm-based rather than gain-based penalties. A large body of the economic literature on the deterrence of cartel activities relies mainly on the theory developed by Becker and Landes: The optimal fine should equal the harm caused by the cartel divided by the probability of detection and conviction. In principle, the harm caused by a cartel includes not only the damages incurred by competitors and clients but also the resources devoted by antitrust authorities and courts in their fight against cartels. However, the bulk of this harm imposed by a cartel is epitomized by the price overcharge.

The Becker-Landes rule aims for the return of the cartel excess profits to all stakeholders in the economy that have been harmed by the activity of cartels. This rule is designed such that the expected net gain of a firm contemplating joining a cartel is equal to zero. At the aggregate level, the rule guarantees that the “cartel game” clears: Firms found guilty of price-fixing behaviour pay for those that remain unnoticed forever.

Another approach to setting cartel fines consists of aiming for dynamic deterrence, as opposed to the explicit goal of compensation or indemnification. This approach advocated by Allain, Boyer, Kotchoni, and Ponsard (ABKP 2015) is compatible with a dynamic view of the game faced by firms who are contemplating joining or remaining in a cartel. Indeed, cartel members play a repeated game where at periodic times each member decides whether to continue with the cartel agreement or deviate. In this paradigm, the optimal fine equals the minimum amount needed to trigger a deviation and destabilize the cartel.

A third philosophy to setting cartels fines is based on the idea that individuals who engage in illegal behaviour should be punished by punitive or exemplary fines beyond the harm that they have caused to society. Admissible fines may therefore be an inflated version of the optimal fine under restitution or even deterrence. In practice, the severity

of the punishment is determined by accounting for aggravating and mitigating factors. As discussed above, the notion of punishment goes beyond financial penalties and may include a jail sentence for convicted individuals as provided, for instance, by the USSG.

The concept of punishment is more legal than economic as is the concept of proportionality, which stipulates that a sanction should be set in proportion to or be of the same order as the harm caused. A fining rule that is aiming at deterrence à la Becker-Landes will often violate the principle of proportionality. However, a fining rule aiming at dynamic deterrence (via the destabilization of cartels) à la ABKP may be more in line with the principle of proportionality.

### **B. Assessing the Probability of Cartel Detection and Conviction**

The probability of detection plays a central role in the economic theory of optimal crime deterrence. Economic theory suggests that a cartel fine should increase according to the harm caused to society by the cartel and be inversely related to the probability of its detection and conviction.

Bryant and Eckard (1991) postulate a statistical birth-and-death process to assess the duration of cartels. The authors use a database of 184 convicted cartels in the U.S. between 1961 and 1988 to calibrate their model and find an estimated probability of detection that lies between 13% and 17%. Combe, Monnier, and Legal (2008) calibrate a version of this model using a database of 86 cartels convicted in Europe between 1969 and 2007 and find a probability of detection of around 13%.

However, these estimates are only based on the data available on detected cartels. Consequently, they only represent the probability of a cartel being detected conditional or based on those cartels being “eventually detected”. The unconditional probability of cartel detection remains unknown and is probably lower than the estimates found by Bryant and Eckard (1991) and Combe, Monnier, and Legal (2008). The unconditional probability coincides with the conditional one only if all cartels are detectable *ex ante*.

Moreover, the probability of detection and overcharge estimates used in the optimal fine formula must be defined over the same length of time. For instance, assume that a cartel makes a constant cartel profit  $\Delta\pi$  above the competitive level in every period and that it has a probability  $\alpha$  of

being detected in every period. If the cartel operates for  $N$  periods before being detected and convicted, its cumulated cartel profit is equal to  $N\Delta\pi$  and the ex-ante probability that it will be detected is  $1 - (1-\alpha)^N$ . In this case, the optimal fine based on the Becker-Landes rule is:

$$F_N = \frac{N\Delta\pi}{1 - (1 - \alpha)^N}$$

The denominator  $1 - (1-\alpha)^N$  is larger than the per-period probability of detection  $\alpha$ . Intuitively, the longer a cartel operates, the more likely it will end up being detected. A significant mistake here would be to divide the cumulative overcharge  $N\Delta\pi$  by the one-period probability of detection  $\alpha$ . Replacing the denominator  $1 - (1-\alpha)^N$  by the smaller value  $\alpha$  would lead to overestimating the optimal fine, and the severity of the overestimation is increasing in the number of periods  $N$ . As the Becker-Landes rule treats the cartel game as a static one, the fine implied by this rule is equal to the *cumulative overcharge* of the cartel over its lifetime divided by the *cumulated probability of detection*.

A (misapplied) static framework has a major drawback: It does not account for the dynamic nature of the interaction between the firms participating in the cartel, nor does it account for the strategic nature of the decision of each firm to join and remain a cartel member. These cartel dynamics are discussed below.

### C. The Proper Assessment of Cartel Dynamics

In real life, firms make strategic decisions in a dynamic environment with the objective of maximizing their profit or value. Although cartel members (implicitly or explicitly) agree to abide by the rules for an indefinite period, each of them can decide to deviate at any point in time if it perceives a deviation as more profitable than the status quo. This has implications for the formation of cartels, their stability over time, as well as the optimal fining rule. Analyzing such implications requires a dynamic framework.

Allain, Boyer, Kotchoni, and Ponsard (ABKP 2015) consider an infinitely repeated game where a number of symmetric firms communicate at the beginning of each period to decide whether to form or continue a cartel or not. By assumption, the consent of all firms is needed for the cartel to be created or maintained. In each period, any given firm can decide to participate and abide by the rules of the cartel or deviate. There

is no simple way to characterize the dynamic environment of cartels but the ABKP proposed formulation is sufficiently general to be representative of most cases. In each period, firms first communicate and agree or not to form or continue the cartel (stage 1) and then, if the cartel is agreed upon, each firm decides (stage 2) whether to abide by it or not. If one or more firms do not agree to participate (stage 1), the cartel does not proceed. If all firms agree to participate, then each firm may either follow the cartel strategy or deviate (stage 2) – if one firm deviates, all firms observe the deviation at the end of the current period and the cartel dissolves for all future periods.

When assessing its different options, a firm typically considers three levels of possible one period profit: its cartel profit, its deviation profit, and its no-cartel profit. ABKP makes the usual assumption that the deviation profit level is the largest, followed by the cartel profit level, and the no-cartel competitive one. Assuming that all other firms abide by the cartel agreement, a given firm will abide by it if its value under the cartel is larger than its value under deviation, and will deviate otherwise. Its value under the cartel is the present value of the forever sequence of cartel profit levels. Its value under deviation is the larger one-period deviation profit plus the present value of the forever sequence of lower no-cartel profit levels starting next period.

Assuming that antitrust authorities can discover a cartel only if it is active, then the expected fine, given by the probability of detection and conviction  $\alpha$  – typically considered to be of the order of 15% – times the fine level  $F$ , reduces the value of the firm under the cartel abiding strategy. If the firm deviates, the cartel dissolves and the authorities will never discover it and impose a fine on cartel members. Comparing the two discounted firm values leads ABKP to characterize the fine level  $F^*$  which, given  $\alpha$ , induces the firm to deviate and makes the cartel disintegrate. ABKP show that  $F^*$  equals the difference  $\Delta\pi$  between the cartel profit and the competitive profit levels divided by  $\alpha$ . In other words, the expected fine must be larger than or equal to the difference in profit levels:  $\alpha F^* \geq \Delta\pi$ . The fine  $F^*$  is radically different from what we find in the usual  $N$ -period cartel framework à la Becker-Landes, where the optimal fine  $F_N$  is equal to the cumulative difference between the cartel and the competitive profits  $N\Delta\pi$  divided by the probability of detection over  $N$  periods  $(1 - (1 - \alpha)^N)$  as we showed above. It is of course quite different for the standard but false application of the Becker-Landes static

approach where the  $N$ -period cartel excess profit  $N\Delta\pi$  is divided by the one-period probability of detection  $\alpha$ .

ABKP conduct a firm level analysis of European cartels between 2005 and 2012. For each cartel case, they collect data on the cartel duration, size of annual sales of firms involved, and the firm level fines imposed before adjustments, resulting in a database of 138 firms. For each firm, they compare the actual fine with the deterrence fine level in their dynamic model under several scenarios of cartel overcharges, competitive mark-ups, and demand elasticities. They find that a significant proportion of fines imposed in the EU is above the deterrence benchmarks (between 30% and 80% of fines depending on the scenario considered).

#### **D. Identification of the Beginning and End of the Cartel Episode**

Harrington (2006) developed a set of collusive indicators, which if present, can help distinguish between collusion and competition. In particular, Harrington argues that certain price markers are especially relevant in informing whether a cartel may be in operation. These include: a higher list (or regular) price and reduced variation in prices across customers; a series of steady price increases preceded by steep price declines; price rises and imports decline; whether firms' prices are strongly correlated; whether there is a high degree of uniformity across firms in product price and other dimensions including the prices for ancillary services; whether there is low price variance across customers; and whether prices are subject to regime switches. Although these price-based markers may also be characteristics of competitive markets reacting to changes in their environment, they are nevertheless useful starting points. Their most important drawback is that to be estimated, these price-based markers require detailed data gathering on specific markets. The number of such markets may also be very large.

The knowledge of the period during which a cartel operated is important for a precise calculation of its cumulative overcharges and resulting damages. Econometric-based methods (including the simplest regression-based approach) require a dummy variable  $I_t$  that takes the value 1 if  $t$  belongs to the cartel episode and 0 otherwise. Sometimes, the detailed data needed to calculate the overcharge (e.g., marginal cost, markup, etc.) are available only for one year. If it is clearly established that the cartel operated during  $N$  years, these data may be used to estimate the overcharge for that particular year. The latter estimate can then be

multiplied by  $N$  to obtain an estimate of the total cumulative overcharge of the cartel.

In general, antitrust authorities have to rely on information collected by investigators or on the conclusions of experts in order to estimate the duration of cartels. Unfortunately, cartel members tend to understate the true duration of the cartel in their statements to investigators. In some cases, cartels continue to operate several months after investigations have started in order to cast ambiguity on the but-for price, hence the level of the actual overcharge, since keeping a high price after the “legally defined” end of the cartel would raise the but-for price. Lowering the price immediately after the beginning of an investigation would contribute to proving that an effective and successful cartel was in fact in operation.

Unless they recognize the cleverness of cartel members, antitrust authorities may end up underestimating the cartel overcharge. It is therefore important to distinguish between the legal collusion period as defined in the indictment and the relevant period for purposes of estimating the effect of the collusion. This relevant period is the period during which coordination between the parties had or could have an influence on prices. The collusion may have started before or may have continued beyond the legal period. If the analysis is performed on the wrong period, economic experts may find insignificant cartel price overcharges despite the overwhelming evidence that a cartel operated during the alleged period.

This problem is well known. The American Bar Association (ABA 2014) econometric textbook explicitly warns analysts about the common mistake of simply taking the legal period as the relevant period for estimating cartel damages. The ABA summarizes the distinction to be made between the legal or alleged period and the relevant period as follows:

*“When assessing damages using a before-during or a before-during-after approach, the beginning and end points of the damages period must be identified. However, the beginning and the end of the damages period alleged in many cases may not accurately reflect the actual beginning or end of the alleged unlawful conduct. For example, in price-fixing class action cases, the plaintiff’s attorneys often choose the beginning and end dates for the ‘class period’ before discovery is undertaken. Moreover, the beginning or end of the*

*effects of the alleged unlawful conduct may not coincide with the beginning or end of the conduct itself. The effects might occur later, end earlier, or last longer than the conduct. Experts should rely on the evidence developed in discovery, market facts, and the analysis of liability experts when determining the relevant starting and ending dates for calculating damages.”*

Hüschelrath and Veith (2016) write about a cartel in the cement industry in Germany:

*“After the breakdown of the cartel, the cartel members might have incentives to (strategically) reduce transaction prices to a larger degree than list prices as the former is much more difficult to observe and competition authorities, courts or private parties may therefore be forced to use the higher list price data to, e.g., estimate cartel damages.”*

The following two cartel cases provide striking empirical examples of the difference between the legal or alleged period of collusion as indicated in prosecution documents and the relevant period of collusion for damages evaluation.

### The retail gasoline cartel in Québec

The Competition Bureau investigated retail gasoline markets in Sherbrooke, Thetford Mines, Victoriaville, and Magog and obtained proof of collusion through wiretaps over the period spanning from early 2004 to mid-2006. Criminal prosecution for the price-fixing conspiracy were launched in 2008.<sup>28</sup> The case is ongoing with more trials forthcoming.<sup>29</sup>

Available data on price volatility between retailers suggested a relevant period of cartel operation between January 2001 and June 2006, while the indictment filed by the Public Prosecution Service of Canada had defined a legal period from January 2004 to June 2006. A sharp reduction in price volatility across sellers can be considered a marker revealing cartel behaviour. Retail gasoline prices in the cities of Sherbrooke, Thetford Mines, Victoriaville, Saint-Hyacinthe, and Montréal for the period 1993-2006 were collected for all individual retail stations on a quarterly basis in the first four cities and a bi-monthly basis in Montréal. Although the dates on which prices are observed vary from city to city, prices for a given city are collected on the same day over a short time span (at most a few hours) every quarter or every two months.<sup>30</sup>

The data show that for the first three cities the volatility (standard error) of prices across retailers dropped significantly in early 2001 and remained low and stable afterwards. In contrast, the price volatility observed in Saint-Hyacinthe and Montréal did not drop during the period and in fact increased continuously with price increases, as one would expect in a normal competitive market. The following Figures 1 and 2 present the data for Sherbrooke and Montréal-Center.

The statistical tests on differences between the variances and the averages are significant.<sup>31</sup> Those results suggest the presence of a price-fixing collusion starting in early 2001 in the first three cities namely Sherbrooke, Thetford Mines, and Victoriaville.<sup>32</sup> As a result, in estimating the effect of the cartel on prices, the data from January 2001 to December 2003 (3 years of data), even if outside the legal or alleged period of collusion as mentioned in the indictment, could not be considered as a period free of collusion. In order to avoid falling into a Type II analytical error, i.e., discharging as not guilty a harmful cartel, three years of data prior to the legal period were dropped from the econometric analysis.

### Fixing passenger fuel surcharges (PFS) by British Airways and Virgin Atlantic Airways

British Airways (BA) and Virgin Atlantic Airways (VA) were involved in a conspiracy related to the fixing of passenger fuel surcharge (PFS) in the mid-2000s.

The UK Office of Fair Trading (OFT 2012) investigated this conspiracy and found that: “[VA and BA] infringed Article 101 and/or the Chapter I prohibition by participating between August 2004 and January 2006 (the ‘Relevant Period’) in an agreement and/or concerted practice by which they coordinated their pricing in relation to their respective passenger fuel surcharges for long-haul flights (‘PFS’) through the exchange of pricing and other commercially sensitive information regarding the PFS, with the object of preventing, restricting or distorting competition (the ‘Infringement’)” (par. 3). This is a peculiar case. Why would BA and VA find it advantageous to coordinate their decisions on the fuel surcharge, which accounts for less than 10% of the ticket prices, but not on the final ticket prices?

Figure 1. Price variation dynamics between retailers in Sherbrooke<sup>33</sup>

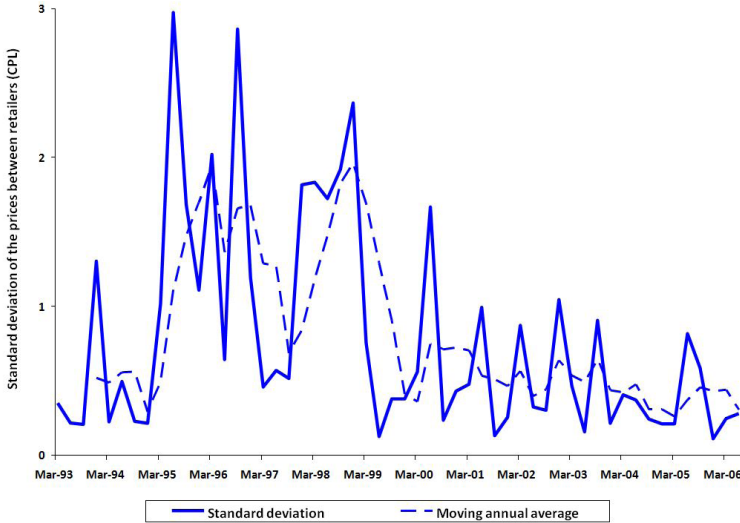
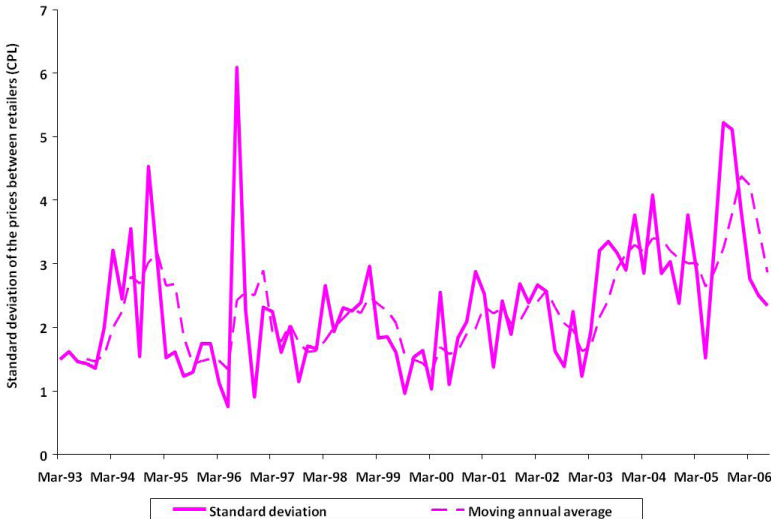


Figure 2. Price variation dynamics between retailers for Montréal-Centre



BA and VA are facing competition from several other carriers not part of the conspiracy. Moreover, according to the OFT inquiry, managers at BA and VA were aware that their strategy was at risk of being discovered by the competition authorities and, as a result, could lead to antitrust actions in the United Kingdom, Canada, and the United States, among others, and likely penalties (fines and class actions), exclusions,

disbarment, and prison sentences. Clearly, the competence and analytical capacity of BA and VA executives who conceived this conspiracy on fuel surcharge and who implemented it despite the risks incurred must not be underestimated.

Where is the value or the profitability of this strategy? A possible answer to this question is that there was a “relevant market” in which BA and VA had some market power, making a coordination strategy to fix PFS jointly beneficial despite the risks involved. Indeed BA and VA were or might have been the main competitors and dominant suppliers in a particular non-negligible market, which is the most plausible “relevant market” in this case: the British citizens and organizations showing a preference for travelling on their national airlines. Those British citizens and organizations would most likely perceive a fuel surcharge imposed and announced in a coordinated way to all travelers as the result of a market phenomenon outside the control of their preferred national carriers. Uncoordinated announcements, possibly heavily covered in the British press, could have given rise to unfavourable reactions and reduced allegiance of their British customers for BA and VA.

In this conspiracy case, VA was a successful leniency applicant and benefited from total immunity, while BA admitted participating in the cartel in exchange for a reduction in penalties from the original fine of £121.5 million to a final £58.5 million. The fine was based on a “conservative approach to market definition which is favourable to the Parties”, namely the markets where VA and BA overlap, which is a subset of affected markets. The OFT claims that the fine “will be sufficient in this case to meet the twin objectives of the OFT’s policy on financial penalties: (i) to impose penalties which reflect the seriousness of the infringement; and (ii) to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.” More importantly, the OFT states that: “Managing the tone of media coverage of the PFS was clearly very important for both Parties throughout the Relevant Period.” Clearly, VA and BA must have perceived the potential gains from the strategy to be greater than the potential losses in other markets where the market power of VA and BA is less important or non-existent.

The OFT describes the positions of the two cartelists as follows (*passim*). From BA’s perspective, the PFS mechanism was particularly problematic because negative stories in the UK media were more likely to focus on BA than on other airlines; For VA, the media and consumers’ reaction

to its PFS action was a significant business concern as its reputation as the “*the customers’ champion and underdog*” was at stake. The advantages of such a concerted strategy were twofold: a reduction in uncertainty regarding the competitor’s actions and reactions (BA and VA) and “a less hostile reaction in the media than would be the case if they were to risk announcing an increase that may not be followed by the other Party.” Both advantages were expected to generate profits for the airlines.

One should not underestimate the sophisticated reasoning of BA’s strategists, once the cartel was exposed. In that vein, one cannot but consider unlikely that BA would adjust its prices to competitive levels immediately after the raiding of its offices by investigators of the Office of Fair Trading (OFT) in June 2006. Two factors suggest that this was not the case. First, the fuel surcharge was increased in April 2006 to a level that remained unchanged until January 2007. Second, Boyer (2017) has found that it is only from November 2006, not from June 2006, that ticket prices fell and became more volatile and the co-movement of prices and fuel costs became less direct and stable. This indicates that the relevant period of collusion insofar as the impact of the conspiracy on ticket prices is concerned may have extended until November 2006, that is, five months after the OFT’s raid at BA offices (June 2006) and three quarters after the end of the legal or alleged conspiracy period (February 2006). Whether this is the appropriate period or not is in good part an empirical question but a significant one in estimating cartel damages.<sup>34</sup>

### **E. Estimating the But-For Price**

The but-for price is the price that would prevail on the alleged cartelized market in a hypothetical world where the cartel is absent. This counterfactual world is difficult to characterize because the trajectory of observed prices over time is the result of several causes. For instance, an inelastic demand may grant a firm significant market power that translates into high mark-ups. Product differentiation can create and maintain the conditions for an oligopolistic competition.

Oligopolistic mark-ups are quite substantial for some industries even in the absence of coordination between firms. For instance, Morrison (1990) found that mark-ups in most U.S. manufacturing firms have increased over time and tend to be countercyclical. Hall (1988) noted that the ratio of price to marginal cost is in the range of 2 to 4 in U.S. industries. Antitrust authorities may decide to ignore the market power that would prevail in the counterfactual competitive markets when

evaluating the cartel fine, notably by assuming that the but-for price is equal to the marginal cost. However, this would lead to overestimating the overcharge, hence the fine level.

It is well-known how biased an overcharge (expressed as a percentage of the but-for price) obtained from the conversion of a Lerner index is relative to the fair overcharge if the but-for world was properly modeled. The estimation bias is proportional to the ratio of the mark-up over the marginal cost. Note that this ratio is higher when the market power is more important. Intuitively, the outcome of an oligopolistic or monopolistic competition game is closer to that of a collusion than to that of pure and perfect competition. As an implication, firms that operate in oligopolistic sectors where market power is high would have a higher likelihood of incurring inflated fines, that is, fines larger than those justified by the formulae applied to firms that were more competitive prior to colluding.

The estimation risk associated with the conversion of a Lerner index is avoided by considering alternative methods such as “before-and-after” or “with-and-without/yardstick” methods (Connor, 2010). In the before-and-after method, one estimates the overcharge as the difference between the sample averages of prices observed during and outside the periods covered by the cartel episode. In the “with-and-without/yardstick” method, one compares the average price that prevailed on the cartelized market with the average price on a yardstick market that operated under competitive conditions during the same period. However, these other methods have their own estimation risk.

Besides the fact that the period covered by the cartel is difficult to identify with precision, the before-and-after method is not robust to shifts in firms’ cost structure and shifts in market conditions that naturally change prices in a competitive environment. Moreover, a cartel may start or end by a price war that pushes prices below the marginal cost.<sup>35</sup> As to the with-and-without/yardstick method, it must take into account that the increase in price caused by the cartel can cause a demand shift toward nearby (yardstick) markets. Similarly, neighbouring firms that are not participating in the collusion may tend to follow the cartel price (the so-called “umbrella effect”).<sup>36</sup>

Given the complexity of the estimation of the but-for price, simplistic overcharge calculation methods will often be biased. Carefully specified econometric models are needed to handle the complexity of the real

world and mitigate any estimation bias. Econometric methods can be used to simulate an oligopolistic competition (e.g., Cournot and/or Bertrand), predict the Lerner index of market power, or estimate demand and cost functions that account for dynamic strategic interaction among firms. The econometric approach can be structural or of reduced form. However, structural models require internal accounting data that may not be available to the experts in charge of damages calculation.

### F. Characterization and Reliability of Average Overcharge Estimates

Given the hurdles identified above, the estimation of a cartel overcharge would be tedious and costly if antitrust authorities had to conduct detailed investigations on a case-by-case basis. Antitrust authorities therefore need a reference interval that can be used in cases where the exact evaluation of the cartel overcharge is overly costly.

Antitrust authorities are aware of this matter. As discussed above, the USSG prescribe a base fine of 10% of the affected volume of commerce for a firm that is convicted of cartel activity, plus another 10% for the harms “inflicted upon consumers who are unable or for other reasons do not buy the product at the higher price.” This yields a recommended fine of 20% of affected sales, subject to further adjustments for aggravating and mitigating factors. The total cartel fines generally range from 15% to 80% of affected sales in the U.S.

Similar rules apply in Europe as well as in other jurisdictions. The European Commission sets the base fine in the range of 0% to 30% of affected commerce. To this base fine, 15% to 25% may be added as a dissuasive measure. However, the total fine must be kept under 10% of the worldwide group turnover in the financial year preceding the decision.

Certain academic researchers have questioned whether the fines implied by these guidelines are too high or too low. For instance, Cohen and Scheffman (1989) argue that an increase of 1% of a price above its competitive level will likely result in a reduction of sales of more than 1%. Based on this, they concluded with respect to the USSG that “*at least in price-fixing cases involving a large volume of commerce, ten percent is almost certainly too high.*” More recently, Adler and Laing (1997, 1999) and Denger (2003) also judge that fines imposed to cartels in the U.S. are “*astronomical*” or “*excessive.*”

Connor and Lande (2008) examine a large number of overcharge estimates available in previous studies and conclude that: “*the current Sentencing Commission presumption that cartels overcharge on average by 10% is much too low*”. Indeed, they find an average overcharge in the range of 31% to 49% and a median in the range of 22% to 25%. Connor (2010, 2014) reaches similar conclusions by using an extended sample of overcharge estimates.<sup>37</sup>

Connor and Bolotova (2006) conduct a meta-analysis of overcharge estimates in order to check whether they are sensitive to bias factors such as the estimation method or the publication source. They find that the overcharge estimates are indeed biased, but the bias factors do not explain much of the  $R^2$ . However, Boyer and Kotchoni (2015) point out that some characteristics of the overcharge estimates have been ignored by Connor and Bolotova. First, the overcharge data consists of estimates previously published by different experts and researchers. Therefore, they are potentially subject to model errors, estimation errors, and sample selection. Second, the sample contains a number of influential observations that distort the descriptive statistics. For instance, roughly 1% of overcharge estimates are larger than 400%. When the 5% largest observations are left out, the sample average drops from 49% to 32%. These outliers must be treated carefully when using OLS regressions. A bias-correction methodology developed by Boyer and Kotchoni (2015) that appropriately deal with the previous data problems is reviewed in more detail below.

In criticizing the Canadian Competition Bureau, Kearney (2009) endorses the view of Connor and Lande (2008) by writing that “[t]he assumption of an average overcharge of 10 percent also has been put into question by economic survey evidence which suggests that the median long-run overcharge is much greater than 10 percent.”

Combe and Monnier (2011, 2013) analyze 64 European cartels and conclude that the fines imposed against cartels by the European Commission are too low. However, Allain, Boyer, and Ponsard (2011) using a dynamic rather than static model of cartel stability to reassess those results find that fines imposed by the European Commission in these 64 cartels are on average above the deterrence level.

Boyer and Kotchoni (2015) re-assess the study of Connor and Bolotova (2006) using an extended version of their database. This database contains some 1,119 overcharge estimates as well as several variables that

describe the cartel episode (e.g., duration, scope, geography, etc.). The database also includes variables that describe facts that are posterior to the cartel episode (e.g., estimation method or publication source). While the first group of variables is likely related to the true overcharge, the latter group clearly does not, but may capture potential estimation biases.

Boyer and Kotchoni (2015) employ a more appropriate econometric methodology that involves a trimming of the dataset in a first stage to remove unrealistically large estimates, and so-called influential observations,<sup>38</sup> and a Heckit (Heckman, 1979) regression analysis in a second stage to control for the potential truncation bias.

They find mean and median bias-corrected overcharge estimates of 16.7% and 16.2% for the subsample of effective cartels (with strictly positive overcharge estimates), and of 15.5% and 16.0% for the whole sample. These representative bias-corrected overcharge values are significantly lower than the corresponding mean and median of the raw overcharge estimates data. Building on those results, Allain et al. (2015), considering a more recent database at the firm level, conclude that the majority of firm-level fines imposed by the European Commission over the period 2005-2012 are above the deterrence level.

#### **4. Conclusion**

We presented and discussed challenges and pitfalls faced by public policymakers and antitrust authorities in their fight against naked cartels through the determination of financial fines, namely the sometimes conflicting objectives of restitution and deterrence, the identification of the relevant cartel duration, the characterization and estimation of but-for prices and typical cartel overcharges, the assessment of the probability of detection and conviction, and the proper modeling of cartel dynamics.

Both the harm caused by cartels – or the illicit profits gained – and the probability of detection pose significant measurement problems and are sources of challenges and pitfalls. In fact, a 2017 ICN report also recognizes that “the link between the theory of optimal fines for deterrence, and actual methodologies used to set fines is often tenuous, partly because the statistical information needed to set fines at an economically optimal level (amount of excess profit gained, likelihood of detection) is very difficult to obtain.”

We showed that the bias-corrected estimation of cartel overcharges and

the modeling of cartel dynamics have significant impacts and lessons on the level of deterrent fines. Those developments bring theoretical and empirical support to the administrative rules used by European and American antitrust authorities, among others, in determining cartel fines.<sup>39</sup>

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## Endnotes

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<sup>1</sup> Corresponding Author. Emeritus Professor of Economics, Université de Montréal; Fellow of CIRANO, and Associate Member of Toulouse School of Economics; Email: marcel.boyer@umontreal.ca

<sup>2</sup> Manager and economic consultant at Analysis Group

<sup>3</sup> Managing partner, StatLog Econometrics

<sup>4</sup> Maitre de Conférences at EconomiX (UMR CNRS 7235), Université Paris Nanterre

<sup>5</sup> The U.S. Department of Justice, Antitrust Division levied record criminal fines of \$3.6 billion in 2015 (See criminal enforcement trend charts at <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>). The European Commission has imposed during the 2005-2014 periods aggregate cartel fines of \$15.5 billion nearly five times higher than those of \$3.4 billion

imposed during the 1995-2004 periods (See cartel statistics at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>).

<sup>6</sup> EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ, C 210/02 at 2-5 [EC Guidelines].

<sup>7</sup> International Competition Network, “Setting of Fines for Cartels in ICN Jurisdictions” (Report to the 16<sup>th</sup> ICN Annual Conference in Porto, May 2017) at 5-6: “Several competition authorities noted that their fining policy in cartel cases pursues multiple goals (deterrence, retribution, recovery of excess cartel profits), and these are not mutually exclusive. Having said this, the vast majority of responding agencies have indicated that fines are intended to deter the addressees from engaging in the same illicit conduct in the future (i.e. specific deterrence), as well as to dissuade other potential infringers from forming or joining anticompetitive cartels (i.e. general deterrence). Some agencies mentioned other aims in addition to deterrence, others did not.”

<sup>8</sup> The Canadian law *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, 52 Vict C 41 (1889, “The Combinations in Restraint of Trade Act” and post-1910 “The Combines Investigation Act”) received royal assent and entered into force on 2 May 1889. The US law *An act to protect trade and commerce against unlawful restraints and monopolies*, c 647, 26 Stat 209 (1890, “The Sherman Act”) entered into force on 2 July 1890.

<sup>9</sup> CW Halladay, “The Origins of Canada’s Cartel Laws” (2012) 25 Can Comm L Rev at 157-163.

<sup>10</sup> In Austria, registered cartels were classified according to their main cartel instrument (production quotas, product specialization, price agreement, payment conditions) and according to their orientation (buyer, seller, import, and export cartels) with some cartels having more than one orientation. Most cartels were seller cartels (97%), followed by buyer cartels (13%) and export cartels (11%), with some falling in more than one orientation. Proposed cartels needed to be justified; most were formed to allegedly solve a lack of job security (35%), a lack of security of supply (29%) and the presence of excessive competition (27%) (Fink, NP, Schmidt-Dengler, P, Stahl, K & Zulehner, C, “Registered Cartels in Austria - An Overview” (2015) Mimeo, December).

<sup>11</sup> The United States, at the time of the National Industrial Recovery Act (NIRA) of 1933 had a similar policy.

<sup>12</sup> See Canada, Canadian Competition Bureau, *Competitor Collaboration Guidelines* (December 2009).

<sup>13</sup> EC Guidelines at 2-5.

<sup>14</sup> Competition Bureau Canada, “What are the penalties” (2 January 2018) online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04265.html>>

<sup>15</sup> United States Sentencing Commission, Guidelines Manual, §3E1.1 (November 2016).

<sup>16</sup> A O’Brien, “Cartel Settlements in the US and EU: Similarities, Differences & Remaining Questions” (13<sup>th</sup> Annual EU Competition Law and Policy Workshop, Florence, Italy, 2008).

<sup>17</sup> In Canada, the Competition Bureau's immunity program is currently under revision.

<sup>18</sup> The idea that it may be socially desirable to grant criminals some form of immunity or leniency if they turn in and testify successfully against their accomplices dates back a few centuries: "From at least the 12th century it has been recognized that a man accused of a crime in medieval England could confess his guilt and turn king's evidence: provide the Crown with full details of his criminal activities, including the names and whereabouts of his accomplices. The success of the approvers' appeal as a system for prosecution was enshrined in the Crown's willingness to barter for information by offering discharge to suspected felons. In the 12th century the system was fairly mercenary and huge sums of money were paid to special 'king's approvers', some of whom seem to have been retained on a professional basis. In late medieval this mutually convenient expedient, far from demonstrating the weakness judicial system, actually proved remarkably effective: any such offer of freedom was usually a fiction. For the Crown, the approver offered the means of prosecuting crimes which otherwise might have gone undetected. The information provided could be useful in breaking up professional criminal gangs and putting the finger on highway robbers and their confederates." (AJ Musson, "Turning King's Evidence: The Prosecution of Crime in Late Medieval England" (1999) 19:3 Oxford J L Stud 467)

<sup>19</sup> G Spagnolo, "Leniency and whistleblowers in antitrust". In: P Buccirosi, Editor, *Handbook of Antitrust Economics* (Cambridge, MA: MIT Press, 2008).

<sup>20</sup> C Ellis & W Wilson, "Cartels, price fixing, and corporate leniency: What doesn't kill us makes us stronger" (2003) University of Oregon, Department of Economics.

<sup>21</sup> G Spagnolo, "Divide et Impera: Optimal Leniency Programs" (2005). Stockholm School of Economics and C.E.P.R.

<sup>22</sup> E Motchenkova, "The effects of leniency programs on the behaviour of firms participating in cartel agreements" (2004). Tilburg University, Manuscript.

<sup>23</sup> See, for instance, "We have in place a successful leniency policy, so that nowadays the majority of the Commission's cartel decisions are the result of leniency applications by parties to cartels." (Keynote address by Philip Lowe, Director General DG Competition, on "Reflections on the past seven years, Competition policy challenges in Europe", GCR 2009 Competition Law Review, Brussels, 17 November 2009.); and "Leniency programs provide unparalleled information from cartel insiders about the origins and inter-workings of secretive cartels. In the United States, companies have been fined more than \$5 billion for antitrust crimes since Fiscal Year 1996, with over 90 percent of this total tied to investigations assisted by leniency applicants. The Antitrust Division typically has approximately 50 international cartel investigations open at a time, and more than half of these investigations were initiated, or are being advanced, by information received from a leniency applicant." (Presentation by Scott Hammond, Deputy Assistant Attorney General, on "The Evolution of Criminal Antitrust Enforcement Over the Last

Two Decades”, 24th National Institute on White Collar Crime, February 25, 2010.).

<sup>24</sup> An early example of private law enforcement against successful leniency applicants can be found in Leighton (1876). He writes that, in the famous November 1828 trial of innkeepers William Burke and Helen McDougal for three murders (corpses were sold at good prices to surgeon-doctors at the Edinburg medical school), William Hare and his wife were “received as King’s evidence in the character of *socii criminis*”, that is, as witnesses bringing evidence to the court as accomplices in the crimes. For such testimony leading to the hanging in public of the accused, they benefited of immunity and escaped the gallows. However, the people of Edinburg were upset to the point of preventing at numerous times their release from jail by blocking roads around the prison in order to capture and hang those *socii criminis* who finally had to rely on the significant decoying help of authorities to escape from the crowd and allegedly disappeared never to be heard of again.

<sup>25</sup> Z Juska, “The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement” (2017) 62(3) *The Antitrust Bulletin* 603.

<sup>26</sup> Things are changing though. See EC, *Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, [2013] OJ, L 201/60, online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>>

<sup>27</sup> This argumentation is convincing although astronomical fines are not socially costless if they can cause a firm to go bankrupt. Moreover, natural justice considerations might be a constraint (e.g. punishments should fit the crime).

<sup>28</sup> The period during which the cartel was operative was before the 2010 amendment to the Competition Act that made naked cartels per se criminal. Before 2010, cartel activities were illegal only if they generated an undue lessening of competition. It was therefore necessary for the Government to prove that the cartel led to an undue lessening of competition.

<sup>29</sup> To date, 39 individuals and 15 companies have been charged under section 45 of the Competition Act (making it the largest cartel criminal case in Canadian history with respect to the number of defendants), of which 33 individuals and seven companies have pleaded or were found guilty. Of the 33 individuals who have pleaded or were found guilty, six have been sentenced to terms of imprisonment totalling 54 months. Several trials are still ongoing before the Criminal and Penal Division of the Québec Superior Court.

<sup>30</sup> M Boyer, “The Retail Gasoline Cartel in Québec: Background and Damages” (Canadian Economics Association Meeting, May 2015, 29 pages). (The original report, filed in court in 2008, is: Boyer, M, “Collusion présumée des essenceries de plusieurs villes du Québec: analyse de données et évaluation d’impact économique”, 126 pages).

<sup>31</sup> The price variation level between retailers has gone from an average level of 1.02 CPL before 2001 to 0.44 CPL after 2001, which represents a decrease

in the price dispersion of more than 50%. This decrease in the dispersion over time also saw an important stabilization, since the standard deviation variance went from 0.69 to 0.09 during the same period. The average price dispersion level between retailers was 1.98 CPL between 1993 and 2000, whereas that same average reached 2.79 CPL between 2001 and 2006, a statistically significant difference. The variation of this dispersion over time has however remained stable, only varying between 0.91 and 0.89, which is a non-significant difference.

<sup>32</sup> In his 2015 Superior Court decision for one of the trials in this case (R c Pétroles Global Inc. Cour Supérieure - Chambre criminelle et pénale, 450-73-000633-085 (002), 15 avril 2015), Justice Tôth writes (free translation): “[61] Professor Boyer observed from 2001 a price dynamics in the target markets that contrasted with the reference markets and which could not be explained by local conditions. The collusion was the most plausible explanation, confirmed by the Competition Bureau’s investigations and searches. [62] The evidence at trial, particularly the testimony of Pierre Bourassa [one of the defendants], demonstrated that Professor Boyer was right. The collusion began at that time.”

<sup>33</sup> The moving annual average (dotted line) simply illustrates the average of the last 4 observations, to show a more even and aggregated annual view of the overall dynamics.

<sup>34</sup> An econometric model developed in Boyer, M, “Rapport sur l’estimation des dommages dans le cadre de l’action collective Option consommateurs v. British Airways” (2017) Superior Court of Quebec, District of Montreal, 500-06-000410-072, to explain the evolution of London-Montréal ticket prices between August 2004 and December 2012, using all available data potentially impacting ticket prices (with an  $R^2$  of 94.9%), indicates that the price increase specifically due to the collusive factor reputedly operating from August 2004 to November 2006 is of the order 11.2% of BA ticket prices. The trial has yet to take place in this matter.

<sup>35</sup> Connor (2014) warns that “*Shifts in buyer preferences, appearance or the disappearance of substitutes, or changes in the cost of production of the cartelized product during the affected period can cause overstatement or understatement of the overcharge.*” (Connor, JM, “Price-fixing Overcharges” in *The Law and Economics of Class Actions: Research in Law and Economics*, Volume 26 (2014) 249). This lack of robustness is also pointed out by Finkelstein and Levenback (1983): “[...] *This estimate, however, meets the immediate objection that it is likely to be incorrect because changes in factors affecting price other than the conspiracy would have produced changes in competitive prices if there had been competition during the conspiracy period.*” (M Finkelstein & H Levenback, “Regression Estimates of Damages in Price-Fixing Cases” (1983) 46 *Law and Contemporary Problems* 145. More recently, Boyer, Lasserre and Moreaux (2012) show that over the dynamic development of an industry, episodes of tacit collusion investments and prices may follow episodes of more intensely competitive investments and prices and vice versa, raising doubts on the

validity of the “before and after” method (M Boyer, P Lasserre & M Moreaux, “A Dynamic Duopoly Investment Game without Commitment under Uncertain Market Expansion” (2012) 30 *International Journal of Industrial Organization* 663.

<sup>36</sup> Other methods include the “Cost-Based” method, which is based on the observation that changes in price should reflect changes in costs. The direct way to apply this method is to estimate the production costs by using the (accounting) information on firms involved in the cartel. In the lysine cartel case for example, prosecutors introduced confidential production and sales records of ADM as exhibits, now publicly available (JM Connor, “Our Customers Are Our Enemies: The Lysine Cartel of 1992-1995” (2001) 18 *Review of Industrial Organization* 5). However, economic experts do not usually have access to such confidential information. Typically, the overcharge is thus approximated by subtracting a “reasonable margin” from the actual cartel profit and dividing by the production volume. Also the group of “Econometric” Methods, which gathers all methods using more or less sophisticated econometric models to assess the but-for price. Econometric methods can be used to simulate an oligopolistic competition (Cournot, Bertrand), to predict the Lerner index of market power, or to estimate a demand and cost function that account for dynamic market conditions. See E Appelbaum, “Testing Price Taking Behavior” (1979) 9 *Journal of Econometrics* 283, and LM Froeb, RA Koyak & GJ Werden, “What Is the Effect of Bid-Rigging on Prices?” (1993) 42 *Economics Letters* 419.

<sup>37</sup> Some authors have shown that fines based on sales encourage cartels to set higher prices while fines based on overcharges would encourage lower prices. See among others V Bageri, Y Katsoulacos & G Spagnolo, “The Distortive Effects of Antitrust Fines based on Revenue” (2013) 123 *The Economic Journal* 545, and Y Katsoulacos, E Motchenkova & D Ulph, “Penalizing cartels: the case for basing penalties on price overcharges” (2015) 42 *International Journal of Industrial Organization* 70.

<sup>38</sup> Based on the Kullback-Leibler divergence between two distributions (see S Kullback & RA Leibler, “On Information and Sufficiency” (1951) 21:1 *The Annals of Mathematical Statistics* 1.), which tells how dissimilar those distributions are. The probability of an overcharge estimate being larger than some value  $\theta$  conditional on variables that describe the cartel episode and the same probability conditional on both those variables and variables that are posterior to the episode are quite close for  $\theta \in [0\%, 65\%]$  but diverge sharply for  $\theta > 65\%$ . The divergence analysis thereby suggests that the presence of biases is an important problem for estimated overcharges above 65%.

<sup>39</sup> An additional and important factor, which falls outside the scope of this article, is the efficiency of antitrust authorities and courts in avoiding Type I (convicting a law-abiding party) and Type II (releasing a guilty party) errors. The higher this efficiency is, the larger the deterrence effect of a given level of punishment will be. See M Boyer & D Porrini, “The Impact of Court Errors on Liability Sharing and Safety regulation for Environmental/Industrial

Accidents” (2011) 31 *International Review of Law and Economics* 21, who analyze the related effect of court efficiency in avoiding Type I and Type II errors in determining the level of firms’ liability in industrial or environmental accidents.

# DEVELOPMENTS / DÉVELOPPEMENTS

## LOOKING BACK: REFLECTIONS ON COMPETITION POLICY DEVELOPMENTS

CCLR Editorial Team

*In the interest of preserving professional memory about developments in competition policy, the Editorial Team of the Canadian Competition Law Review introduces a new feature with this issue. We will invite prominent senior leaders of the field in Canada to “tell their story” – to take us through significant competition-related developments or events through the perspective of someone centrally involved.*

*The Editorial Team is extremely pleased to present the first of these accounts here. Our first author is J.J. Camp Q.C. of Camp Fiorante Matthews Mogerman in Vancouver. As most of you will know well, J.J. has been a central figure in the development of a competition class action regime in Canada. Together with others from his and partner firms, he has been involved in many of the major competition class actions in Canada, typically on behalf of victims of anticompetitive behaviour. There were many important questions about class actions under Canadian law that J.J. and his fellow pioneers (on both sides) had to litigate along the way, so the work was not easy --- as he explains below. J.J. has had a distinguished career apart from competition law as well, for example representing plaintiffs in numerous product liability and aviation cases. He is very well known for actions securing major damage awards for victims in hepatitis C and asbestos cases. He has argued approximately 15 matters before the Supreme Court and served as president of the Canadian Bar Association in 1991-1992.*

*Afin de préserver le souvenir qu'à notre profession de l'évolution des politiques sur la concurrence, l'équipe de rédaction de la Revue canadienne du droit de la concurrence y va d'une nouveauté dans ce numéro : elle invite des sommités canadiennes dans le domaine à « raconter leur histoire » – que ce soit en nous narrant des épisodes marquants du droit de la concurrence ou en présentant, de leur point de vue, des événements auxquels ils ont activement participé.*

*L'équipe de rédaction est on ne peut plus fière de publier les premiers de ces récits dans ce numéro. Notre premier auteur est J. J. Camp, c.r., de chez Camp Fiorante Matthews Mogerman, à Vancouver. Comme beaucoup*

*de vous le savent, M<sup>e</sup> Camp a grandement contribué à l'encadrement des recours collectifs en droit canadien de la concurrence. Il a participé, avec des collègues de son cabinet et de firmes associées, à bon nombre des actions collectives majeures qu'a vues le Canada, défendant habituellement les victimes de pratiques anticoncurrentielles. Nombreuses sont les questions cruciales au recours collectif en droit canadien que M<sup>e</sup> Camp et ses collègues précurseurs (de part et d'autre de la salle d'audience) ont dû faire trancher en justice pour la première fois. La tâche n'était donc pas facile – comme nous l'expliquera M<sup>e</sup> Camp. Et sa brillante carrière ne se borne pas au droit de la concurrence; il a aussi représenté des demandeurs dans de multiples dossiers d'aviation et de responsabilité associée aux produits. Il est également connu pour avoir œuvré à obtenir des dommages-intérêts considérables pour les victimes dans des affaires d'amiante et d'hépatite C. Enfin, il a plaidé environ 15 causes devant la Cour suprême et siégé à la présidence de l'Association du Barreau canadien en 1991-1992.*

## A HISTORICAL PERSPECTIVE OF A MADE-IN-CANADA REMEDY FOR ANTICOMPETITIVE BEHAVIOUR

J.J. Camp, Q.C.\*

*This paper is better described as a colloquy rather than an in-depth legal treatise. It is a perspective of living through and litigating the formative years of anticompetitive class action cases in Canada. In particular, it describes the “legal quagmire” created by the US Supreme Court in anti-trust cases whereby indirect purchasers (consumers) were disenfranchised at the federal court level in the US and how this legal quagmire could be avoided in Canada. The paper tracks several of the early consumer anticompetitive class action cases in Canada and in particular the Microsoft case which was successful at the certification level, lost at the British Columbia Court of Appeal level and restored by the Supreme Court of Canada. The outcome of the Microsoft case determined that contrary to the US Supreme Court, consumers can pursue damages claims for anticompetitive conduct in Canada. Hence, the US legal quagmire was avoided.*

*Cet article se veut davantage une discussion qu’une analyse juridique en profondeur. Mon point de vue est façonné par mon vécu et ma pratique durant les années formatives que furent les recours collectifs contre des agissements anticoncurrentiels au Canada. Plus précisément, je décris le borbier juridique qu’a créé la Cour suprême des États-Unis dans des affaires antitrust concernant des acheteurs indirects (consommateurs) brimés dans leurs droits à la cour fédérale. Dans mon article, j’explique comment le Canada peut éviter de s’empêtrer de la sorte. Je fais un retour sur certains des premiers recours collectifs contre des agissements anticoncurrentiels au Canada, notamment le recours contre Microsoft, pour lequel les auteurs ont eu gain de cause en première instance, ont été déboutés par la Cour d’appel de la Colombie-Britannique, mais à qui la Cour suprême du Canada a définitivement donné raison. L’arrêt contre Microsoft a établi, contrairement au jugement de la Cour suprême des États-Unis, que les consommateurs canadiens peuvent réclamer des dommages-intérêts pour agissements anticoncurrentiels. C’est ainsi qu’on a pu éviter ce borbier juridique américain.*

### Introduction

**T**he Competition Act and its antecedents makes certain anticompetitive behavior illegal, generally speaking.<sup>1</sup> Horizontal price fixing, in particular, is condemned as akin to

fraud or theft and criminalized.<sup>2</sup> The plaintiffs' bar in Canada was not very active in pursuing anticompetitive cases until the advent of class actions and, more particularly, until the advent of pan-Canadian class actions. Prior to the emergence of Canadian class actions, there were very few anticompetitive cases brought and the only significant modern anticompetitive case about civil damages was *Cement LaFarge v. B.C. Lightweight Aggregate*, which reached the Supreme Court of Canada in 1983.<sup>3</sup> This case is notable because it determined the parameters of the tort of conspiracy. The respondent was left out of the price-fixing cement conspiracy and was driven out of business. The appellants, who pleaded guilty to a charge of conspiring to prevent or unduly lessen competition in the production of cement, had made it impossible for the respondent to continue operating in the field. The Supreme Court of Canada overturned the lower courts and found that the conspirators were not liable. A number of commentators were surprised by the decision of the Court and the factual and legal reasoning.

The Supreme Court of Canada did lay down the law that the tort of conspiracy exists: (1) if the predominant purpose of defendants' conduct is to cause plaintiff injury, whether or not defendants' means were lawful; or (2) where defendants' conduct is unlawful and directed towards the plaintiff (alone or with others) and in circumstances that the defendants should know that injury to the plaintiff is likely to, and does, result.

### **Class Action Legislation and the First Pan-Canadian Class Actions**

In 1978, Québec was the first province in Canada to legislate class proceedings.<sup>4</sup> In 1992 Ontario followed suit,<sup>5</sup> and although there was no express provision enabling national class actions, it did not take Ontario judges very long to find that Ontario class proceedings cases could be asserted on a pan-Canadian basis.<sup>6</sup> In 1996 British Columbia passed class proceedings legislation.<sup>7</sup> Because these three jurisdiction covered more than 75% of the Canadian population and because the Ontario courts ruled that Ontario class proceedings could be asserted on a pan-Canadian basis, the formative Canadian plaintiffs' class action bar started to form a consortium of counsel to bring class actions for anticompetitive conduct on a pan-Canadian basis. This was accomplished by these counsel and law firms commencing parallel actions in each of these three jurisdictions, with the Ontario class action covering the rest of Canada. Most Canadian jurisdictions now have class action legislation

and several of these jurisdictions have provisions in their legislation allowing pan-Canadian class actions.<sup>8</sup> British Columbia has recently passed amending legislation to allow for pan-Canadian class actions.

### **Why Class Actions?**

Class actions can provide an effective and efficient means of litigating mass claims. They also improve access to justice for individuals who would otherwise be unlikely or unable to assert their claims. Furthermore, effective class actions can lead to behavior modification of actual or potential wrongdoers who might be tempted to ignore their obligations to the public. While anti-competitive conduct often results in modest damages per class member, the number of class members can be very large and, on occasion, can comprise the majority of both the Canadian population and Canadian businesses. For example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (“DRAM”) was a case based on a price-fixing conspiracy of the DRAM memory chips in desktop computers, laptop computers, servers and a whole host of other electronic equipment.<sup>9</sup> Approximately 10 years after the case was started, it was settled by a consortium of class counsel and firms for more than \$80 million. Certain large purchasers had very significant individual claims. In addition, because DRAM was so ubiquitous, the administration of the settlement provided for each household in Canada to claim \$20 compensation by way of an electronic declaration alone. An excess of 880,000 Canadian households came forward and received funds.

### **The Difficulties and Dilemmas Facing Class Counsel at the Outset**

To understand the difficulties and dilemmas facing Canadian class action counsel at the time we embarked on this journey, it is necessary to understand the differences between both the statutory class proceedings regimes that exist in the United States and the differences in the law that developed. These differences are not only very considerable but include a very radical United States Supreme Court ruling that, in my respectful opinion, undermined consumer recovery in antitrust class actions in the United States. The pioneer class action counsel in Canada felt very strongly that we needed to develop a “made in Canada” approach to the private prosecution of antitrust class actions. We enjoyed a substantial head start because of the very hard and good work performed by the Ontario Law Commission in their seminal study.<sup>10</sup> Their recommendations were largely accepted by

the Ontario legislature and the Ontario *Class Proceedings Act* has been used as a template for all other Canadian jurisdictions except Québec.

There are appreciable differences between class action law in Canada and the United States, especially in regards to class certification. Canadian jurisdictions have a lower threshold for certification, which is intended to function as mechanism for screening claims. The Supreme Court of Canada has said that the certification stage is not to be a battle front of opposing experts and only “some basis in fact” is needed to support the constructs of a class action.<sup>11</sup> This level of scrutiny is consistent with the fact that there is no pre-certification discovery as a matter of right in Canadian jurisdictions. While Canadian courts have largely avoided weighing evidence and trying the merits of an action at the certification stage, U.S. courts engage heavily with expert evidence at this step.<sup>12</sup> The U.S. Supreme Court has said that class certification should only be granted if the trial court is satisfied after a “rigorous analysis” that the statutory requirements for certification have been met, and that “such an analysis will frequently entail overlap with the merits of the plaintiff’s underlying claim.”<sup>13</sup> This inevitably increases the costs associated with pursuing class certification. As one class action lawyer writes, the potential results of the U.S. approach to certification “weigh heavily against access to justice and effectively turn certification into a mini-trial.”<sup>14</sup>

The higher U.S. standard for certification is also attributable to specific class certification requirements under the U.S. Federal Rules of Civil Procedure. Most antitrust class actions are brought under Rule 23(b)(3), because plaintiffs can recover treble damages.<sup>15</sup> One requirement for certification under this rule is that the common issues “predominate” over individual issues. By contrast, Canadian class action legislation has not adopted this same predominance requirement.<sup>16</sup> A second requirement for certification under Rule 23(b)(3) is that a class action be “superior” to other available methods of adjudicating the controversy. In Canadian common law jurisdictions, the corresponding requirement is the “preferability” of a class action, which lowers the threshold for certification compared to the United States.

In spite of the substantial statutory and common law differences between Canada and the United States on the class action front, it was essential for the pioneers pursuing private enforcement of Canadian anticompetitive class actions to have close regard to U.S. antitrust and class action law. The first and foremost reason for this was that in the

beginning of anticompetitive class actions in Canada, the U.S. plaintiffs' class action bar had almost invariably started cases in the U.S. litigating the same facts and circumstances that underlay parallel anticompetitive conduct in Canada. Indeed, those of us who were at the forefront of pursuing Canadian anticompetitive class actions liaised with law firms in the U.S. who were prosecuting parallel class actions. Second, U.S. class action law had a very long historical record compared to the very immature Canadian class action jurisprudence. Although this could be said to be a truism, it does not mean that the U.S. got it right with respect to one of the most important pillars of class action law.

### **Indirect Purchasers: The U.S. "Legal Quagmire"**

The United States got into a legal quagmire on the core issue of who was entitled to sue price-fixing conspirators. Reaching back into the 1960s, U.S. price-fixing conspirators were enjoying a considerable level of success in defending claims on the basis that the plaintiffs who were suing them could not prove where the harm fell as between direct purchasers, intermediaries and consumers. This issue was a significant roadblock for consumers to take advantage of the governing U.S. federal legislation that permitted a court to triple the amount of actual/compensatory damages.<sup>17</sup> This overarching issue occupied the attention of the U.S. Supreme Court in the *Hanover Shoe* decision in 1968,<sup>18</sup> and again in the *Illinois Brick* decision in 1977.<sup>19</sup>

In *Hanover Shoe* the plaintiff was a shoe manufacturer and a customer of the defendant and alleged that the defendant had monopolized the shoe machinery industry in violation of U.S. antitrust law, which resulted in an overcharge. The defendant argued that the plaintiff class had passed on some or all of the overcharge and, therefore, was not entitled to recover damages. The court rejected this defence, holding that the passing on defence was not available. In making its decision, the court determined that if the passing on defence was permitted, treble damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.<sup>20</sup>

In *Illinois Brick*, the state of Illinois brought a class action on behalf of consumers against the manufacturers and distributors of concrete block in the greater Chicago area. The state alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers causing them to suffer a loss. The majority

of justices on the U.S. Supreme Court held that the passing on theory must be applied uniformly for plaintiffs and defendants alike. The Court referred to *Hanover Shoe*, where the Court found that the defendants could not resort to a passing on defence and equity required a quid pro quo, finding that only indirect purchasers had standing to pursue a class action claim of this nature. Thus, the Court in *Illinois Brick* held that only the direct purchasers, and not distributors or others in the manufacturing chain, could be considered injured and assert recovery rights. The majority relied on two key arguments in support of their decision. The first argument was that determining exactly where the harm was suffered was difficult, time-consuming and an uncertain process. The second argument was that deterrence was better served by letting only the direct purchasers sue for the full amount of damages even if this meant they were being overcompensated.

Although *Illinois Brick* is still applied at the federal level, many states have passed legislation repealing its effect at the state level. Approximately 3 dozen jurisdictions have “*Illinois Brick* repealer laws” restoring the rights of citizens in those states who are indirect purchasers to pursue actions to recover antitrust damages under state antitrust laws.<sup>21</sup> These repealer states contain approximately 50% of the population of the United States.

Since *Illinois Brick*, there has been profound criticism from many quarters with respect to this facet of antitrust law in the United States.<sup>22</sup> Most critics prefer the dissent in *Illinois Brick* which said that the majority decision “... severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court’s decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.”<sup>23</sup> Another criticism levelled by the defendants in U.S. antitrust litigation is that they face the unsavoury possibility of paying triple damages to the direct purchasers in federal court and then single compensatory/actual damages to indirect purchasers in the state courts.

The legal artifice of *Illinois Brick* still exists today in spite of fairly intense criticism by legal and economic scholars. In 2007, the U.S. Antitrust Modernization Commission weighed the arguments for and against allowing indirect purchaser actions in antitrust litigation and recommended that the U.S. Congress should enact a statute that would overrule *Illinois Brick* and allow both direct and indirect purchasers to sue for recovery of damages.<sup>24</sup>

## Indirect Purchaser Claims in Canada

Several senior Canadian counsel, notably, Harvey Strosberg, Q.C., Scott Ritchie Q.C. and J.J. Camp Q.C., who were becoming engaged in similar and often parallel antitrust cases in Canada wanted to ensure that the Canadian courts avoided this U.S. legal quagmire. This issue came to a head in the vitamins case.

### The Vitamins Case

*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* was predicated upon an international price-fixing conspiracy by the large international manufacturers of vitamins and related products from the beginning of 1988 until the end of 1999.<sup>25</sup> A compendium of price-fixing cases in Canada and the United States collectively alleged damages of several billion dollars against those manufacturers. Over time, many of the defendants pled guilty in the United States, Canada and the European Union to price-fixing the prices of various vitamin products.

A host of vitamins class actions were commenced across Canada and a carriage motion was litigated in Ontario to determine which class actions would proceed and which would be stayed.<sup>26</sup> The senior counsel group noted above and their respective firms were awarded carriage. In preparing for this carriage motion, we conferred on several occasions and eventually agreed upon a legal strategy to avoid the U.S. legal quagmire. Our solution was to act for a class of all Canadian persons and entities in the supply chain who may have suffered damages, including direct purchasers, intermediaries, and consumers. We retained expert economists who opined on two important matters. First, expert economists proposed a workable methodology for assessing the global vitamins priced-fixed damages for the Canadian economy as a whole. Second, they proposed a workable methodology for assessing the vitamins priced-fixed damages at each level in the distribution chain. If we could convince Canadian courts that these econometric models were viable,

we would overcome one of the principal arguments that the majority judges in the United States Supreme Court adopted in *Illinois Brick*. In our view, we were supported by the flexible damage assessment tools and processes outlined in the extant Canadian class action legislation.

Our legal strategy was based on two central pillars. First, all Canadian class members, wherever they were in the distribution chain, should band together to ensure that a global Canadian damage figure could be awarded. This way, none of the damages would fall through the cracks by omitting any level in the distribution chain. Second, we had to satisfy the courts that there were workable methodologies and available processes to allocate the global damage figure amongst the class members at each level in the distribution chain. To this end, we proposed to seek directions from the courts after an assessment of pan-Canadian global damages to determine the appropriate allocation amongst the various levels in the distribution chain.

Opposing counsel groups asserted that our legal strategy would create an interminable conflict of interest between the various layers in the distribution chain. This issue was litigated in a preliminary fashion in the carriage motion. Mr. Justice Cumming found that there is no divergence of interests between class members until the point when common issues are determined, including the assessment of global damages. In fact, he found that the quantification of global damages would achieve the ultimate, shared goal of a fair resolution of the claims of all class members. He also found that further economic analysis would be needed to determine the varying losses suffered by each level in the overall distribution process after global damages have been assessed. At that juncture, it may be that one given level in the distribution chain might require separate counsel, or that subclasses could be formed if appropriate.

As it turned out, our class counsel group achieved settlements on a global basis for all Canadian class members and then mediated the issue of the allocation of global damages between the various layers of class members in front of another Ontario judge. That resolution of the allocation of damages was accepted by Mr. Justice Cumming, who said in his reasons approving the settlements, “All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.”<sup>27</sup>

Our counsel group subsequently litigated, either collectively or on a firm-by-firm basis, several national price-fixing class actions using this same approach: act for all class members in the distribution chain, assess global damages on a Canada wide basis, and then agree on a mechanism to fairly allocate the damages among the various levels of class members. We thought, wrongly as it turned out, that we had successfully avoided the U.S. legal quagmire.

### The Dog Days

This historical perspective would be very misleading if the reader believed that we had the wind at our back throughout. There were periods of time where anticompetitive class actions were tenuous at best. During the dog days, one defence firm opined that class action claims by indirect purchasers were probably dead.<sup>28</sup>

In two early decisions, *Price v. Panasonic Canada Ltd.*<sup>29</sup> and *Chadha v. Bayer Inc.*,<sup>30</sup> were both successfully defended on the basis that the plaintiffs had not provided a workable method for determining liability or damages on a class-wide basis. These cases hearkened back to the concerns registered by the majority judgement in *Illinois Brick*, namely, the difficulty and complexity of proving where any price-fixed damages would come to rest in the chain of distribution.

The B.C. Supreme Court denied certification in *DRAM* based largely on successful defence arguments raised in *Chadha*. The pan-Canadian *DRAM* case was brought against the manufacturers of memory chips that were integral to the operation of computers, servers, printers and the like. When it was commenced, several of the defendant conspirators had pleaded guilty to conspiring to fix prices. This decision not to certify the British Columbia class action created a great deal of uncertainty in British Columbia, and elsewhere, as to whether anticompetitive conduct could be certified in a class action.

The British Columbia Court of Appeal reversed and certified the action. The unanimous decision recognized that there may be difficulty proving liability and damages but did not accept the argument's that it was unmanageable based on the earlier Canadian decisions. It is important to note that the *DRAM* class was composed of all distribution levels including consumers. Leave to appeal to the Supreme Court of Canada was refused.<sup>31</sup>

## Along Comes Microsoft

In 2004 class-actions were commenced against Microsoft on a pan-Canadian basis. The actions were commenced in three jurisdictions, Ontario, Québec and British Columbia, with the British Columbia class action taking the lead. The action was brought only on behalf of final consumers of Microsoft products as opposed to aggregating all persons and entities in the chain of distribution. Class counsel had concluded that virtually all of the recoverable damages were passed on through the distribution chain to the final consumers. The Microsoft case did however give rise to the neat legal issue of whether Canadian courts would buy into the Illinois Brick doctrine, discussed above, that only direct purchasers were entitled to bring price-fixing actions.

It was alleged that beginning in 1988 Microsoft engaged in unlawful conduct which enabled Microsoft to overcharge for its operating systems and some of its applications software. It was further alleged that as a direct consequence of Microsoft's unlawful conduct, the class members paid higher prices for the Microsoft operating systems and applications software in issue, then they would have paid absent the unlawful conduct.

As noted, the class is made up of consumers who acquired the Microsoft products from resellers and these consumers therefore fall into the category of indirect purchasers. Preliminary legal skirmishes resulted in the Court ruling that the class action could proceed for claims for conspiracy, international interference with economic interests, restitution for waiver of tort, unjust enrichment and constructive trust. The certified cause of action for constructive trust was struck by the Supreme Court of Canada.<sup>32</sup> Mr. Justice Myers took over case management and presided over the trial. He found that the remaining certification requirements set out in the British Columbia Class Proceedings Act were met and certified the common issues for trial.<sup>33</sup>

Microsoft appealed certification and a majority of the British Columbia Court of Appeal allowed the appeal, set aside the certification order and dismissed the action on the basis that indirect purchaser actions were not available as a matter of law in Canada. A strong dissent was filed by Mr. Justice Donald.<sup>34</sup>

The majority reasons were a thunderbolt. The majority followed the logic of the U.S. Supreme Court in *Hanover Shoe* and *Illinois Brick* concluding that indirect purchasers of a price fixed product had no valid

cause of action and stated: “Any passing on of the charge did not give rise to a cause of action for its recovery by those whom the charge was in whole or in part said to have been passed on.”<sup>35</sup> This outcome could be fairly described as a death knell for recovery rights by consumers or any other indirect purchasers of price fixed goods or services. As one defence firm published in a newsletter, “[a]s a result, future class sizes and claims will decrease as indirect purchasers are left with the losses and no cause of action.”<sup>36</sup>

Again, for the period of time from when the British Columbia Court of Appeal handed down its reasons in *Microsoft* until this decision was reversed by the Supreme Court of Canada, a great deal of uncertainty prevailed across Canada. For example, several price-fixing certification applications were adjourned in various Canadian jurisdictions pending the Supreme Court of Canada decision in *Microsoft*.

Unanimous reasons written by Mr. Justice Rothstein overturning the British Columbia Court of Appeal were handed down by the Supreme Court of Canada in October, 2013, nine years after the actions were commenced.<sup>37</sup> The central question was whether indirect purchasers have the right to bring an action to recover losses that were passed on to them as a result of a price-fixing conspiracy. Put another way, the central issue was whether indirect purchasers had a cause of action against the party who caused the overcharge at the top of the distribution chain that allegedly injured them indirectly as a result of the overcharge being “passed on” down the distribution chain to them. *Microsoft* argued the rationale set forth in the *Hanover Shoe* and *Illinois Brick* cases noted above. The Supreme Court of Canada was not persuaded.

The Supreme Court of Canada dealt with the arguments that prevailed in the *Hanover Shoe* and *Illinois Brick* cases. The Court first dealt with the argument that allowing indirect purchasers to recover creates the potential for double or even multiple recovery. It held that practically speaking the risk of duplicate or multiple recoveries can be managed by the courts. It would be open to the defendants to bring evidence of this risk before the trial judge to modify any award of damages accordingly. The Supreme Court of Canada agreed with the dissenting opinion of Mr. Justice Donald of the British Columbia Court of Appeal in *Sun-Rype*, that “the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided.”<sup>38</sup> *Microsoft* did

not produce any evidence to show a serious risk of double or multiple recovery.

Next, the Supreme Court of Canada dealt with the arguments of remoteness and complexity that also animated the U.S. Supreme Court cases. Microsoft argued that complexities with tracing the loss down the distribution chain and the remoteness of proof associated with passing on give rise to confusion and uncertainty which militate in favour of the U.S. approach. The Court preferred the dissent in *Illinois Brick* and said that the same concerns can be raised in most antitrust cases and should not stand in the way of allowing indirect purchasers an opportunity to make their case. The Court held that the indirect purchasers carry the burden of establishing their loss, which may well require expert testimony and complex economic evidence, but indirect purchaser actions should not be barred solely because of the complexity of proving damages.

The Supreme Court of Canada also dealt with the deterrence argument relied upon in the U.S. cases and found that allowing indirect purchaser actions would not frustrate the deterrence objectives of Canadian competition laws. The Court again followed the dissenting reasons in the U.S. *Illinois Brick* case and held that there is just as much to be said for indirect purchaser actions reinforcing these deterrence objectives.

The Court went on to note that allowing indirect purchaser actions is consistent with the remediation objective of restitution law. It allows for compensating the parties who have actually suffered the harm, rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge. The Court also noted that approximately three dozen states have passed repealer statutes or otherwise allowed for indirect purchasers to recover by way of judicial decisions. The Court also recognized the significant body of academic authority in favour of repealing the decision in *Illinois Brick* in order to best serve the objectives of the antitrust laws.<sup>39</sup>

## Conclusion

The pioneers in anticompetitive class actions in Canada needed to figure out a “made-in-Canada” legal strategy to overcome the U.S. legal quagmire that precluded consumers bringing anticompetitive class actions in federal court. We did devise such a strategy that had the imprimatur of the Ontario courts and a few other courts, until the British Columbia Court of Appeal in *Microsoft* reversed. The Supreme Court

of Canada in turn reversed the British Columbia Court of Appeal and it can now be safely concluded that in Canada, antitrust class actions can be prosecuted by anyone in the distribution chain including consumers. This journey took approximately two decades and at various times the pioneers in anticompetitive class actions in Canada were either enjoying the heights of exultation or the depths of despair along the way. From our perspective, it had a happy ending.<sup>40</sup>

## Endnotes

\* Associate Counsel, Camp Fiorante Matthews Mogerman, Vancouver. I wish to express my appreciation for the assistance and helpful comments made by Scott Ritchie Q.C. and the constructive comments of Reidar Mogerman. In particular, I wish to thank our summer student, Kelly Firth, who worked long and hard in both helping me shape the paper and doing the legal research and footnoting.

<sup>1</sup> RSC, 1985, c C-34.

<sup>2</sup> *Canada v Maxzone Auto Parts (Canada) Corp.*, (2012) FC 1117 at para 54.

<sup>3</sup> *Cement Lafarge v BC Lightweight Aggregate*, [1983] 1 SCR 452, 145 DLR (3d) 385.

<sup>4</sup> *Code of Civil Procedure*, CQLR c C-25.

<sup>5</sup> *Class Proceedings Act*, 1992, SO 1992, c 6.

<sup>6</sup> See e.g. *Nantais v Telectronics Proprietary (Canada) Ltd.* (1995), 127 DLR (4th) 522, 25 OR (3d) 331; *Carom v Bre-X Minerals Ltd.* (1999) 43 OR (3d) 441, 30 CPC (4th) 133; *Menegon v Philip Services Corp.* (1999) 11 CBR (4th) 262, CPC (4th) 287; *Webb v K-Mart Canada Ltd.* (1999) 45 OR (3d) 389, 45 CCEL (2d) 165.

<sup>7</sup> *Class Proceedings Act*, RSBC 1996, c 50 [“BC Act”].

<sup>8</sup> *Saskatchewan Class Actions Act*, SS 2001, c 12.01; *Newfoundland Class Actions Act*, SNL 2001, c C-18.1; *Manitoba Class Proceedings Act*, CCSM c C130; *Alberta Class Proceedings Act*, SA 2003, c C-16.5; *New Brunswick Class Proceedings Act*, SNB 2006, c C-5.15; *Nova Scotia Class Proceedings Act*, SNS 2007, c 28; *Federal Court Rules*, 1998, SOR/98-106, as amended by *Rules Amending the Federal Court Rules*, 1998, SOR/2002-417, s 17, as amended by *Rules Amending Certain Rules Governing Practice and Procedure Applicable to the Federal Court (Representative Pleadings, Class Proceedings and Other Amendments)*, SOR/2007-301 [collectively the “Acts”].

<sup>9</sup> 2008 BCSC 575 (certification denied), rev'd 2009 BCCA 503; 2012 BCSC 1136; 2013 BCSC 316, (partial settlement and fee approval); 2014 BCSC 1936 (settlement and fee approval); 2015 BCSC 1846 (distribution) [“DRAM”].

<sup>10</sup> Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982).

<sup>11</sup> *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [Microsoft];

*Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [“*Sun-Rype*”].

<sup>12</sup> For more detailed comparison of Canadian and U.S. class actions, see Charles Wright, “The Canadian Perspective on Competition Law Class Actions” (23 August 2010), *Siskinds* (blog), online: <<https://www.siskinds.com/the-canadian-perspective-on-competition-law-class-actions/>>.

<sup>13</sup> *Comcast Corp v Behrend*, 133 S Ct 1429 at para 1432 (2013).

<sup>14</sup> *Supra* note 12.

<sup>15</sup> Plaintiffs can recover damages under Rule 23(b)(3). The *Sherman Act* and *Clayton Act*, *supra* note 16 permit recovery of treble damages.

<sup>16</sup> While not a prerequisite for certification, factors relating to predominance may be relevant to determining whether a class action is the preferable procedure. See e.g. BC Act, s 4; Alberta Act, s 5; Newfoundland Act, s 5.

<sup>17</sup> *Sherman Act*, 15 USC § 1 (1890); *Clayton Act*, 15 USC § 15.

<sup>18</sup> *Hanover Shoe, Inc v United Shoe Machinery Corp*, 392 US 481 (1968) [“*Hanover Shoe*”].

<sup>19</sup> *Illinois Brick Co v Illinois*, 431 US 720 (1997) [“*Illinois Brick*”].

<sup>20</sup> *Hanover Shoe*, *supra* note 18 at para 494.

<sup>21</sup> *Ibid* at 268-269. Starting with California in 1978, many states have passed statutes that specifically authorize indirect purchasers to recover damages under state antitrust laws. In some states, courts have interpreted state laws to allow recoveries by indirect purchasers.

<sup>22</sup> See e.g. Donald I. Baker, “Hitting the Potholes on the *Illinois Brick* Road” (Fall 2002) *Antitrust* 14.

<sup>23</sup> *Illinois Brick*, *supra* note 19 at para 749.

<sup>24</sup> US, Antitrust Modernization Commission, *Report and Recommendations* (April 2007) at 18, online: <<https://govinfo.library.unt.edu/amc/>>.

<sup>25</sup> *Vitapharm v F Hoffmann-La Roche* (2000), [2000] OJ No 4594, 101 ACWS (3d) 472 [“*Vitapharm Carriage Motion*”]; (*sub nom Ford v F Hoffman-La Roche*) [2005] OJ No 1118, 74 OR (3d) 758 [“*Vitapharm Certification Settlement Approval*”].

<sup>26</sup> *Vitapharm Carriage Motion*, *supra* note 25.

<sup>27</sup> *Vitapharm Certification Settlement Approval*, *supra* note 25 at para 23.

<sup>28</sup> Steven Rosenhek, “The Death of Indirect Purchaser Claims in Canada?” (18 October 2011), *Fasken* (blog), online: <<https://www.lexology.com/library/detail.aspx?g=12a98597-1a70-4249-98d3-f18e53c22b63>>.

<sup>29</sup> [2002] OJ No 2362, 22 CPC (5th) 379 (SC) [“*Chadha*”].

<sup>30</sup> [2003] OJ No 27, 223, DLR (4th) 158 (CA).

<sup>31</sup> *Infineon Technologies AG v Pro-Sys Consultants Ltd*, 2010 CanLII 32435 (SCC).

<sup>32</sup> *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57.

<sup>33</sup> *Pro-Sys Consultants Ltd v Microsoft Corp*, 2010 BCSC 285.

<sup>34</sup> *Pro-Sys Consultants Ltd v Microsoft Corp*, 2011 BCCA 186.

<sup>35</sup> *Ibid* at para 75.

<sup>36</sup> *Supra* note 28.

<sup>37</sup> *Supra* note 32.

<sup>38</sup> *Supra* note 32 at para 41, citing *Sun-Rype*, *supra* note 11 at para 30.

<sup>39</sup> *Supra* note 32 at para 51.

<sup>40</sup> Of final note, the Microsoft case has been resolved and, depending on the participation of class members, the total package of benefits may exceed \$500 million.

# 2017 JAMES H. BOCKING MEMORIAL AWARD WINNER / LAURÉATE DU PRIX COMMÉMORATIF JAMES-H.-BOCKING 2017

## LOYALTY DISCOUNTS AND REBATES: A COMMENTARY ON CANADA PIPE AND ABUSE OF DOMINANCE IN CANADA

Corinne Xu, Blake, Cassels & Graydon LLP

*In this paper I will review the abuse of dominance provisions under the Competition Act<sup>1</sup> (the “Act”), discuss the diverging approaches between the US and EU with respect to loyalty discounts and rebates, and critique the Federal Court of Appeal’s decision in Canada (Commissioner of Competition) v. Canada Pipe Corporation Ltd.<sup>2</sup> I will argue that while the US rebuttable presumption of legality with respect to loyalty discounts and rebates is preferable to the EU approach of near per se illegality, a detailed economic analysis of the market and the specific incentive program at issue should be made on a case-by-case basis. I will also argue that the Federal Court of Appeal’s framework in Canada Pipe for assessing whether the impugned practice is anti-competitive is problematic. By limiting paragraph 79(1)(b) solely to an assessment of intent, practices that substantially lessen competition yet lack a predatory, exclusionary, or disciplinary purpose against competitors will not be caught. In my view, paragraph 79(1)(b) should involve a threshold balancing of whether the anti-competitive effects of a practice might outweigh its efficiency benefits. I will conclude that while the impugned practice in Canada Pipe was likely anti-competitive under paragraph 79(1)(b), it arguably did not amount to a substantial lessening of competition under paragraph 79(1)(c).*

*Dans cet article, je vais examiner les dispositions sur l’abus de position dominante telles qu’elles figurent dans la Loi sur la concurrence<sup>3</sup> (la Loi), discuter des approches divergentes adoptées par les États-Unis et l’Union européenne quant aux abattements de fidélité, et lire avec un regard critique l’arrêt rendu par la Cour d’appel fédérale dans l’affaire Canada (Commissaire de la concurrence) c. Tuyauteries Canada Ltée<sup>4</sup>. Je vais soutenir qu’alors que la présomption réfutable de légalité des ristournes et abattements de fidélité adoptée aux États-Unis est préférable à l’approche*

européenne d'illégalité pratiquement automatique, il faudrait effectuer une analyse économique détaillée au cas par cas du marché et du programme d'incitation particuliers qui sont en cause. Je soutiendrai aussi que le cadre utilisé par la Cour d'appel fédérale pour évaluer, dans l'affaire Tuyauteries Canada, si la pratique dénoncée est anticoncurrentielle pose problème. En limitant l'alinéa 79(1)b) à la seule évaluation de l'intention, les pratiques qui réduisent sensiblement la concurrence tout en manquant, à l'égard des concurrents, d'intention abusive, ou ne visent pas une exclusion ou une mise au pas, ne seront pas sanctionnées. À mon avis, l'alinéa 79(1)b) devrait comporter un seuil d'équilibre entre les effets anticoncurrentiels d'une pratique et ses avantages du point de vue de l'efficacité. Je conclurai que bien que la pratique contestée dans l'affaire Tuyauteries Canada ait probablement été anticoncurrentielle en vertu de l'alinéa 79(1)b), on peut alléguer qu'elle ne causait pas une diminution sensible de la concurrence conformément à l'alinéa 79(1)c).

## I. Abuse of Dominance in Canadian Competition Law

The abuse of dominance provisions in the Act establish the “bounds of competitive behavior” for dominant firms.<sup>5</sup> The Competition Tribunal (“**Tribunal**”) is empowered to issue corrective orders if it determines that a firm’s dominant position is being used abusively to substantially lessen competition in the relevant market. Subsection 79(1) of the Act requires three criteria to be met prior to the Tribunal’s corrective order: (a) the organization must have market control; (b) the organization must be engaged in an anti-competitive practice; and (c) the practice must prevent or lessen competition substantially.<sup>6</sup>

While the Act does not define an “anti-competitive act”, section 78 provides a non-exhaustive list of anti-competitive acts that *could* lead to an anti-competitive practice finding under paragraph 79(1)(b). The Tribunal held in *Canada (Director of Investigation & Research) v. NutraSweet Co*<sup>7</sup> that the unifying theme across the listed acts in section 78 is an “intended negative effect...that is predatory, exclusionary, or disciplinary”.<sup>8</sup> To determine whether an act not listed in paragraph 78 is anti-competitive, a predatory, exclusionary, or disciplinary *intent* must be found. This intent is determined by the firm’s subjective motive for engaging in the impugned practice as well as the reasonably foreseeable effects of the practice on competition.<sup>9</sup> However, a negative impact on competition is not necessary for a practice to be anti-competitive under paragraph 79(1)(b). Furthermore, the exclusionary, predatory

or disciplinary act need not be directed at the firm's own competitor. A subsection 79(1) order can be made against an organization who controls a market otherwise than as a competitor if the act is exclusionary, predatory or disciplinary vis-à-vis one or more competitors in that market.<sup>10</sup>

The last step of an abuse of dominance analysis is to determine whether the impugned practice substantially lessens or prevents competition.<sup>11</sup> It is important to undertake a detailed and contextual economic analysis of the relevant market before finding an abuse of dominance, as practices that have substantial anti-competitive effects in some circumstances may be more benign in others. Relevant considerations include market shares, barriers to entry, as well as possible efficiency rationales.<sup>12</sup> The standard for finding a "substantial" lessening of competition is variable: smaller anti-competitive impacts could indicate an abuse of dominance from firms with high degrees of market power, whereas larger impacts may be required in markets where barriers to entry are very low.<sup>13</sup>

## **II. Loyalty Discounts and Rebates**

Loyalty discounts and rebates refer to incentive schemes granted by suppliers to consumers for purchases of specified products that exceed a certain volume threshold or individualized share target. Individualized share targets usually involve all or most of a customer's demand.<sup>14</sup>

The effects of loyalty discounts and rebates on market competition varies greatly depending on market factors, as well as the structure of the particular incentive scheme. In markets with high fixed costs, loyalty discounts and rebates may reduce a supplier's per-unit costs by increasing total sales, leading to the more efficient allocations of resources.<sup>15</sup> They can also offset double marginalization, as well as reduce hold-up and free riding distortions by aiding coordination in the production chain.<sup>16</sup> Finally, loyalty discounts and rebates can induce a dominant firm to compete more aggressively for contested sales, leading to lower prices and increased consumer welfare.<sup>17</sup>

Loyalty discounts and rebates may also have anti-competitive effects by raising switching costs for consumers and strengthening barriers to entry and expansion for competitors. This is particularly likely if the incentive scheme is structured to apply retroactively to entire purchases within a reference period.<sup>18</sup> Such incentive schemes have a "suctioning" effect: when a customer is close to the threshold amount, a small increase

in purchases will trigger a rebate for all the purchased units so far.<sup>19</sup> Switching within a reference period would increase the average price of all purchases, as the rebate would not be realized.

Loyalty discounts and rebates have given rise to divergent antitrust policies between the US and the EU. Courts in the EU have generally taken the position that loyalty discounts and rebates are nearly always *per se* illegal. The mere potential of an incentive scheme to induce loyalty is sufficient to find an abuse of dominance, regardless of their actual impact on competition or consumer welfare.<sup>20</sup> Purchasers must be able to “change supplier without suffering any appreciable disadvantage”,<sup>21</sup> whereas loyalty discounts and rebates “tend to remove or restrict the buyer’s freedom to choose his own sources of supply” which hinders a rival firm’s access or expansion in the relevant market.<sup>22</sup> The underlying rationale for the EU presumption of near *per se* illegality is the “special responsibility” of dominant firms to not raise the barriers of entry in a given market.<sup>23</sup>

In contrast, jurisprudence in the US has generally presumed loyalty discounts and rebates to be pro-competitive. So long as the discounted price is above cost, the plaintiff must overcome “a strong presumption of legality by showing other factors indicating that the price charged is anti-competitive”.<sup>24</sup> For example, the Court in *Concord Boat Corp v. Brunswick Corp*<sup>25</sup> held that the impugned price cuts represented “the very essence of competition”.<sup>26</sup> This presumption of legality stems from a fear of chilling price competition that, in part, reflects the view that loyalty discount and rebate schemes are not well understood in economics literature.<sup>27</sup> The presumption is rebuttable if the plaintiff can show “tangible exclusionary effects to the detriment of consumers”.<sup>28</sup>

The *British Airways*<sup>29</sup> case starkly juxtaposes the respective treatment of loyalty rebate and discount programs by jurisprudence in the US and EU. Virgin Atlantic brought action alleging that British Airways engaged in predatory business practices with respect to its incentive agreements with travel agencies and corporate clients, which impeded Virgin Atlantic’s efforts to expand service from London’s Heathrow Airport to several key markets in the US.<sup>30</sup> The legality of these incentive agreements was litigated on both sides of the Atlantic. The US Appeals Court held that British Airways’ rebate scheme to be lawful as “rewarding customer loyalty promotes competition on the merits”.<sup>31</sup> The Court of First Instance, in contrast, found against British Airways and held that the

discounts infringed EU competition law because they had, as their object and effect, “the reward of the loyalty of those agents to BA”.<sup>32</sup>

### III. Summary of *Canada Pipe*

*Canada Pipe* is a Federal Court of Appeal case that arose in the context of a loyalty-rebate program in Canada. It is significant due to its extensive discussion of the appropriate legal approach to finding an abuse of dominance.<sup>33</sup> However, the status of loyalty discounts and rebates in Canadian competition policy remains unclear due to the settlement agreement between Canada Pipe and the Competition Bureau prior to the Tribunal’s re-determination proceedings.

#### A. Overview

Canada Pipe is a seller and manufacturer of cast iron drain, waste, and vent products (“DWV” products). At issue in this case was its loyalty-based rebate program, referred to as the Stocking Distributor Program (the “SDP”). The SDP provided significant point-of-purchase discounts as well as quarterly and annual rebates to distributors who purchased all of their cast iron DWV products from Canada Pipe. These distributors were free to stock non-cast iron DVW products from other companies, and could opt out of the SDP at any time without penalty.<sup>34</sup>

The Commissioner of Competition (“**Commissioner**”) brought action alleging that the SDP contravened the exclusive dealing and abuse of dominance provisions in the Act. In particular, the Commissioner claimed that the SDP induced the vast majority of distributors of cast iron DWV products to deal exclusively with Canada Pipe, because the switching costs of withdrawing from the SDP was prohibitively high, and Canada Pipe’s competitors were unfairly prejudiced from attracting distributors to deal with them.<sup>35</sup>

Canada Pipe argued that the SDP was pro-competitive because it encouraged wholesalers to stock cast iron, which helped cast iron compete against other materials. The SDP also leveled the playing field between smaller and larger distributors since, rather than requiring a volume-based threshold, distributors were only required to meet individualized targets to participate in the incentive program.<sup>36</sup> Canada Pipe also argued that the SDP did not lock in distributors because there was no long-term commitment required or penalties for withdrawing and prior point-of-sale purchases would not need to be repaid upon withdrawal.

The most significant discounts offered by the SDP were the point-of-sale discounts: participating distributors paid 55% of the list price, whereas non-participating distributors would pay 94% of the list price. In contrast, the quarterly discounts rebates were 7-15% and the annual rebates 1-4%. Therefore, switching to a new supplier merely indicates that the distributor found a better deal elsewhere.<sup>37</sup>

Finally, Canada Pipe argued that it had a valid business justification for implementing the SDP. The SDP's purpose was to protect Canada Pipe's investments in all of its product lines. Increasing the sales of its cast iron products enabled Canada Pipe to lower its cost of production. This allowed Canada Pipe to continue to maintain a full product line by manufacturing and selling less popular products.<sup>38</sup>

## B. The Tribunal Decision

The Tribunal found that Canada Pipe was a dominant firm in the relevant market under paragraph 79(1)(a) of the Act. In determining whether the SDP was an anti-competitive practice under paragraph 79(1)(b), the Tribunal heard evidence from several distributors about what the switching cost to another supplier would have meant for them. Emco testified that switching out of the SDP was not worthwhile due to the relatively small and eroding market for cast iron DWV products. A larger market would encourage it to search elsewhere based on the returns they would get for the added expense.<sup>39</sup> Crane Supply stated that due to the SDP, it would not be advantageous to switch suppliers for a portion of their cast iron DWV demand—they would either move all of their business, or none.<sup>40</sup> However, Octo Group, one of two major buying groups in Canada, testified that Canada Pipe did not supply all of its members' demand for cast iron DWV products. Rather, members that did not participate in the SDP were supplied by members that did. As such, all members could benefit from the SDP discounts regardless of whether they purchased all of their cast iron DWV products from Canada Pipe. This secondary market offset the cost of switching suppliers for members within the buying group, and indicated that there was flexibility in the SDP's application.<sup>41</sup>

The Tribunal found that while the SDP may discourage small-scale entry, it would not prevent entry or expansion of larger competitors that could imitate the incentive scheme. Since a distributor that leaves the SDP would not reimburse Canada Pipe for any prior point-of-purchase discounts, competitors need only to offer a better deal. Switching costs

would be prohibitively high only if distributors switched a portion of their demand from Canada Pipe elsewhere. Because the entire SDP discount would be lost, competitors would have to offer much more than that discount on their portion of the sales to offset that cost.<sup>42</sup>

The Tribunal concluded that the SDP was not an anti-competitive practice, as the requisite “link between the practice and its alleged anti-competitive effect” had not been found.<sup>43</sup> The presence of new entrants, such as Vandem and Sierra, indicated that the program did not bar entry into the relevant markets. The fact that several distributors had in fact switched suppliers indicated that the switching costs were not prohibitively high. This distinguished the SDP from other contracts in abuse of dominance cases, in which “non-performance would lead to heavy penalties.”<sup>44</sup> The decision to switch out from the SDP “boil[ed] down to a cost-benefit analysis,” and the SDP did not prevent the analysis from being acted upon if a more competitive supplier was found.<sup>45</sup> Furthermore, the Tribunal accepted Canada Pipe’s business justification that the SDP allowed it to maintain important but less profitable products in its inventory, which had consumer-enhancing effects.<sup>46</sup>

The Tribunal also found that the SDP did not substantially lessen competition under paragraph 79(1)(c) of the Act, as there was “significant evidence of competitive pricing, notwithstanding the SDP” in Western Canada and in Ontario, which represented 75% of Canada Pipe’s cast iron DWV market.<sup>47</sup> Furthermore, the “steadily increasing” presence of imports, and the emergence of a new competing manufacturer “for the first time in thirty years” suggested that an increase in competition.<sup>48</sup> For Quebec and the Maritimes, which represented 25% of the market, prices did not appear to be constrained by competition. However, due to the lack of market data prior to the 1998 implementation of the SDP, there was “insufficient evidence” to conclude that the SDP was responsible for a substantial lessening or prevention of competition.<sup>49</sup>

### **C. The Federal Court of Appeal Decision**

The Federal Court of Appeal found that the Tribunal had erred in law in its analysis of whether the SDP was anti-competitive under paragraph 79(1)(b) of the Act. Rather than requiring proof of a link between the SDP with an anti-competitive effect, the Tribunal should have solely evaluated the *intended* impact of the SDP on Canada Pipe’s competitors under paragraph 79(1)(b).<sup>50</sup> In coming to this decision, the Federal Court of Appeal emphasized the Tribunal’s judgement in *NutraSweet* that

an anti-competitive act must be identified by reference to its predatory, exclusionary, or *disciplinary intent*.<sup>51</sup> An anti-competitive practice need not actually decrease competition nor cause detriment to the consumers. The SDP's impact on consumers should only be considered in the last step of the abuse of dominance analysis—whether the practice led to a substantial lessening of competition.<sup>52</sup> Furthermore, while a valid business justification could counterbalance a practice's alleged anti-competitive effects, improved consumer welfare is not sufficient to establish a valid business justification on its own.<sup>53</sup> A business justification for an impugned practice must provide a pro-competitive rationale that is linked to the respondent and benefits the respondent in some way.<sup>54</sup> As such, Canada Pipe's submission that the purpose of the SDP was to benefit its customers as well as the end-consumers by allowing Canada Pipe to lower production costs and stock a full product line was insufficient to preclude a finding that the SDP was an anti-competitive practice. The Federal Court of Appeal concluded that the issue should be returned to the Tribunal for reconsideration "in light of the correct legal test".<sup>55</sup>

The Federal Court of Appeal also held that the Tribunal erred in its analysis of whether the SDP substantially lessened competition under paragraph 79(1)(c) of the Act. The Tribunal focused on barriers to entry and expansion and compared the current level of competition with the 1998 competition level prior to the SDP's implementation. Instead, the Tribunal ought to have conducted a relative assessment of whether the current level of competition would be even greater "but for" the SDP.<sup>56</sup> The Federal Court of Appeal cited the Tribunal's decision in *Laidlaw*<sup>57</sup> that a substantial lessening of competition "need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness as present" because "[s]ubstantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence".<sup>58</sup> Factors to be considered for this relative assessment might include: i) whether the entry or expansion of competitors could be substantially faster but for the SDP; ii) whether switching would be more frequent; and iii) whether prices might be substantially lower.<sup>59</sup> Mere evidence of entry or expansion by competitors into the market "subsisting in the presence of the impugned practice" is insufficient for the purposes of paragraph 79(1)(c).<sup>60</sup> The Federal Court of Appeal noted that this "but for" analysis could potentially require "the construction of a hypothetical comparator model, a market identical to reality in all aspects except that the impugned practice is absent".<sup>61</sup>

## IV. Analysis and Critique of Canada Pipe

### A. An Anti-Competitive Practice under Paragraph 79(1)(b)

In my view, the Federal Court of Appeal's restriction of paragraph 79(1)(b) to an analysis of only the intended impacts of the impugned practice by the dominant firm is problematic. Since all three criteria under subsection 79(1) must be satisfied prior to a finding of an abuse of dominance, practices that significantly lessen competition could be excluded if they lack the requisite predatory, exclusionary, or disciplinary intent. This is particularly troublesome as a company might in good faith engage in practices that nonetheless have significant unanticipated anticompetitive effects due to, for example, new innovations or technological developments that rapidly change the conditions of a market. Furthermore, as discussed by Ralph A. Winter (2014), a dominant firm could raise prices in the market by softening competition to the benefit of all competitors without being caught under paragraph 79(1)(b), even though such practices significantly decrease market efficiency and lower consumer welfare.<sup>62</sup>

Parliamentary debate on the Act also indicates that paragraph 79(1)(b) should not be restricted to intention. Upon introduction, Bill C-91—which replaced the *Combines Investigations Act* (the “CIA”) with the *Competition Act*—initially contained an explicit intention requirement in (what is now) paragraph 79(1)(b). The applicable provision stated: “that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and the object of the practice is to lessen competition”.<sup>63</sup> This intention requirement was later removed by the House Select Committee in response to a number of witnesses who argued that this requirement was “in effect...an additional test and renders proof more difficult”<sup>64</sup> and, were it to remain, abuse of dominance “would be extremely difficult to establish”.<sup>65</sup> Upon Bill C-91's enactment, the revised provision simply stated: “that person or those persons have engaged in or are engaging in a practice of anti-competitive acts”.<sup>66</sup>

At minimum, Parliament's removal of the intent requirement indicates that paragraph 79(1)(b) should be broader in scope than just the intended effects of the impugned practice. Abuse of dominance was previously a criminal matter under the CIA. However, the standard of beyond a reasonable doubt had been very difficult to meet, as evidenced by the fact that only a single contested proceeding resulted in a conviction

for criminal abuse of dominance.<sup>67</sup> The move from a criminal to a civil regime under Bill C-91 was intended to strengthen the legislation. In this context, many considered that the intent requirement hindered the underlying purpose of the new legislation. As stated by the Canadian Federation of Independent Business at a Standing Senate Committee Proceeding:

Our principal concern is with the concept of object or intent, which are principally criminal notions and we feel do not belong in the civil section of the act. The transfers of mergers and abuse of dominant position to civil jurisdiction has not been completed until the notion of object or intent has been removed; otherwise perhaps this section will remain unenforceable. It would be very difficult to get convictions. The idea of the move is to increase the ability to get convictions which has just not happened under the present [CIA].<sup>68</sup>

Furthermore, it is notable that Canada is in the small minority of countries globally that require proof of intent for abuse of dominance. In 2009, the Unilateral Conduct Working Group prepared a report for the International Competition Network with respect to abuse of dominance policies relating to loyalty discounts and rebate schemes.<sup>69</sup> Of the 34 countries surveyed, only 3—Canada, Croatia and Mexico—required proof of intent, whereas 17 countries reported that intention was a relevant factor in assessing the effects of the practice.<sup>70</sup>

At the heart of an abuse of dominance analysis lies a balancing between the pro-competitive and anti-competitive effects of an impugned practice. To address the gap created by the current judicial interpretation of paragraph 79(1)(b), I believe that a determination of whether a practice is anti-competitive should involve a threshold balancing analysis of whether there is a real possibility that its anti-competitive effects outweighs its pro-competitive or efficiency benefits. Both the intended effects of the impugned practice on consumers and on competitors of the relevant market should be considered. If such a possibility is found, the analysis would then move to paragraph 79(1)(c), in which a detailed contextual economic assessment would be made to determine whether the lessening of competition is substantial. While a dominant firm's predatory, exclusionary, or disciplinary intent towards competitors in the relevant market would be a factor in determining whether the overall character of a practice is more pro-competitive or anti-competitive under paragraph 79(1)(b), it should not be determinative.

I also disagree with the Federal Court of Appeal's decision that the impugned practice's effects on consumer welfare should be excluded from the paragraph 79(1)(b) analysis, and that a business justification must be linked to the respondent (i.e. obtained by the respondent itself). Ultimately, the purpose of the abuse of dominance provisions in the Act, and of competition law more generally, is to maintain and encourage competition in Canada for the purposes of promoting the efficiency and adaptability of the Canadian economy.<sup>71</sup> As stated by Michael Trebilcock (2007), the purpose of competition law is "not the protection of competitors (including less efficient competitors) or maximizing the number of competitors in a market, but rather protecting the competitive process so that the ultimate goal of competition policy—the efficient utilization of resources in a market economy—is maximized".<sup>72</sup> This view is reflected by Hon. Michael Coté (Minister of Consumer and Corporate Affairs and Canada Post)'s opening remarks at second reading during the House of Commons Debates for Bill C-91:

The purpose of Bill C-91, as stated in the purpose clause in the Bill, is to maintain and encourage competition in Canada. However, the clause makes it abundantly clear that competition is not to be considered an end in itself. Rather, competition is sought for its effects on the Canadian economy.<sup>73</sup>

The effects of an impugned practice on both the competitors and consumers of a market are indicators of how the practice affects the Canadian economy. Unlike in the EU, where the protection of small competitors is a "special responsibility" of dominant firms,<sup>74</sup> there is no compelling reason that paragraph 79(1)(b) must be limited to the intended effects on competitors and that other indicators of market efficiency, such as consumer welfare could not also be considered.

### **B. A Substantial Lessening of Competition under Paragraph 79(1)(c)**

The "but for" test proposed by the Federal Court of Appeal with respect to paragraph 79(1)(c) does not largely affect the traditional balancing analysis that lies at the heart of the abuse of dominance analysis. I agree with the Federal Court of Appeal that it is preferable to assess the change in the relative rather than absolute level of competition to determine whether an impugned practice substantially lessens competition in the relevant markets. It is entirely possible for market conditions to vary over time, from (for example) changes in government

regulation; innovations in a relevant field; technological advances; or socioeconomic developments. It is conceivable that the absolute level of competition after the implementation of an impugned practice is unreflective of the impugned practice's effects and that, were it not for the practice, the competition level would be even higher. However, I believe that such cases are rather rare. They would occur, for example, if recent technological innovation lowered the costs of market entry; if changing socioeconomic factors spiked demand; if there had been recent major changes in relevant government regulation; if the practice has been in place for such a long time that market conditions have most likely changed; and so forth. In contrast, with respect to practices that have been in place for short periods of time in markets with relatively stable conditions, evidence of an absolute comparison between the current competition level with the level prior to the practice's implementation would serve as circumstantial evidence for the "but for" assessment.

In my view, the Tribunal's substantial lessening of competition analysis mostly conformed with the Federal Court of Appeal's proposed test, and the results of the Tribunal's analysis will inform the conclusion of the latter. The SDP had only been implemented for 4 years (between 1998-2002) in a market that was small and eroding before the Commissioner brought action for abuse of dominance. There is little reason to believe that market conditions would have changed during those years such that a comparison to market competition levels prior to 1998 would be substantially divergent from a comparison to market competition levels "but for" the presence of the SDP.

In their article "The High Price of Loyalty: Abuse of Dominance after *Canada Pipe*", Nicholson and Ermak express outrage towards the requirement for a relative, "but for" assessment in determining whether a practice substantially lessens competition in the market.<sup>75</sup> Their main criticism of *Canada Pipe* is that the absence or presence of barriers to entry and expansion can no longer be a reliable indicator to dominant firms about whether their conduct is an abuse of dominance.<sup>76</sup> Nicholson and Ermak claim that firms may have to "undertake a costly economic analysis" to determine whether their conduct potentially violates section 79 of the Act as a result.<sup>77</sup> Furthermore, the "but for" test is inconsistent with other provisions of the Act that have a substantial lessening of competition requirement, including section 77 (exclusive dealing) and section 92 (mergers).<sup>78</sup> This may cause the potential complications as "a company whose merger was approved based on the effective remaining

competition in the relevant markets may find itself subject to an abuse of dominance complaint under the same market conditions”<sup>79</sup>

It should be noted, in response, that it is the Commissioner, rather than the defendant firm, that bears the burden of proving on a balance of probabilities that the market would have been substantially more competitive “but for” the impugned practice. In addition, while the Federal Court of Appeal suggested that a “hypothetical comparator model” could conceivably be involved in applying the “but for” test to assess the relative effect of the impugned practice on the competition level, in practice I believe that the actual economic analysis involved in finding a paragraph 79(1)(c) substantial lessening of competition will remain largely the same for the above reasons.<sup>80</sup>

### **C. Was the SDP an Abuse of Dominance?**

Economic studies have indicated that the effects of loyalty discounts and rebates on competition vary widely depending on the relevant market as well as the specific structure of the incentive scheme.<sup>81</sup> For example, Adrian Majumdar and Greg Shaffer (2008) modeled the behavior of a dominant firm and a non-dominant firm that supplied substitute goods with a buyer with private information about demand. They assumed that the dominant firm had a monopoly over product A (in the uncontested market segment) whereas product B was competitively supplied in the contested market segment. Upon examining the effects on competition of a dominant firm’s market-share contracts (differentiated prices with respect to individualized targets), Majumdar and Shaffer concluded that the welfare effects of market-share contracts in and of themselves are ambiguous.<sup>82</sup> If the ratios of buyers’ contested to uncontested purchases are known, a dominant firm would not compete in a contested market against an equally efficient firm in a single price equilibrium with inelastic demand. Market share contracts can be pro-competitive as they induce the dominant firm to compete for product B sales, leading to lower prices and enhanced consumer welfare.<sup>83</sup> On the other hand, market share contracts may also have anti-competitive effects as firms with a large enough uncontested market may be able to exclude equally efficient but smaller competitors without engaging in predatory below-cost pricing by tying the discounts on its uncontested product to the purchase of its contested product, essentially “bribing” consumers to purchase its contested product at a premium.<sup>84</sup>

The complex effects of loyalty discounts and rebates on competition

support the more circumspect approach in the US rather than the EU presumption of illegality.<sup>85</sup> As discussed by Sean Durkin (2017), loyalty discounts and rebates will generally always reduce the profits of a capacity-constrained competitor in comparison to the single-price equilibrium.<sup>86</sup> The premium a buyer pays for a dominant firm's non-contested units will be higher if the buyer purchases contested units from the less-preferred firm. The competitor must lower its prices to win the contested sales. Nonetheless, the analysis of whether a particular discount scheme is an abuse of dominance should be determined within the context of the ultimate purpose of competition policy of market efficiency and maximizing total surplus. As such, a detailed assessment of the impact a particular incentive scheme has on market competition is needed to strike the balance between prohibition in cases of substantial exclusion, and noninterference in cases of effective competition.

For the paragraph 79(1)(b) threshold balancing analysis, it is important to consider whether an equally efficient firm may conceivably be constrained from gaining entry or expansion into the market, due to the impugned practice.<sup>87</sup> Previous commentators have noted that less-efficient entrants can nonetheless be pro-competitive by increasing output, which leads to decreased prices and increased consumer welfare.<sup>88</sup> However, the pro-competitive effects of such entrants are much less significant if the goal of competition policy is to maximize total surplus rather than consumer surplus, as is the case in Canada. As discussed by Roger Ware (2017), a potential price decrease triggered from a new entrant creates a large transfer from producer surplus to consumer surplus as well as a small reduction in deadweight loss. Both magnitudes are factored into the consumer surplus standard, whereas only the reduction in deadweight loss would be considered in the total surplus standard.<sup>89</sup> As such, the equally efficient competitor test remains important in Canadian competition policy, since there is a substantially smaller gain from the entry of additional competitors as compared to jurisdictions in which consumer surplus is the primary goal.

In my view, the SDP was likely an anti-competitive practice as it raised barriers to entry such that smaller entrants with limited capacity and narrower product lines could potentially be disadvantaged if they could not fulfill a buyer's entire demand. Switching costs were high if distributors switched a portion of their demand elsewhere, whereas such costs were low if distributors switched their entire demand, which was the more likely scenario.<sup>90</sup> As such, while larger competitors that were

able to imitate the SDP and offer a better deal would induce distributors to switch, smaller competitors unable to fulfill a buyer's entire demand could be significantly constrained. The SDP's potential for competitive harm arises not because it was predatory, but because it could potentially constrain or foreclose equally efficient competitors that were unable to reach their minimally efficient scale or cover their fixed costs.

With respect to paragraph 79(1)(c), a detailed contextual economic assessment should be made to determine whether the lessening of competition was substantial. It is arguable (although not conclusive), that paragraph 79(1)(c) was not met because Canada Pipe lacked an uncontested market segment upon which to tie the purchase of its contested items. A key feature of many economic models purporting to demonstrate the anti-competitive effects of loyalty discounts and rebates relies on the existence of an uncontested market segment.<sup>91</sup> As discussed above, an uncontested market segment allows a dominant firm to tie discounts on its uncontested product to the purchase of its contested product, essentially "bribing" a consumer to purchase the contested product at a premium and shutting out a smaller competitor. In *Canada Pipe*, the Tribunal identified the product market as cast iron pipes, fittings, and mechanical joint couplings.<sup>92</sup> Both Canada Pipe and its competitor, Vandem, produced cast iron pipes and fittings, whereas neither produced mechanical joint couplings.<sup>93</sup>

Furthermore, the parameters of Majumdar and Shaffer's above mentioned study with respect to market share contracts are similar to the facts in *Canada Pipe*, in that the SDP was also a market share contract (involving 100% of individual demand). As the effects of such contracts were found to be ambiguous on consumer welfare without additional information, it is at least *possible* that the SDP did not substantially lessen competition. Additionally, the parameters of Majumdar and Shaffer's economic model that differed from the facts in *Canada Pipe* indicate an increased likelihood that the SDP was not an abuse of dominance. In their paper, Majumdar and Shaffer assumed that the retailer would forfeit a large discount if it breached the contract and failed to purchase the required shares.<sup>94</sup> In *Canada Pipe*, however, the point-of-purchase discounts were only lost for future purchases, as there was no penalty for breach. This results in lower switching-costs of the SDP as compared to Majumdar and Shaffer's model and a higher likelihood that the practice was not anti-competitive.

Finally, the SDP had only been implemented for 4 years (between 1998-2002) in a market that was small and eroding before the Commissioner brought action for abuse of dominance. There is little reason to believe that market conditions would have changed during those years such that a comparison to market competition levels prior to 1998 would be substantially divergent from a comparison to market competition levels “but for” the presence of the SDP. As such, I believe that the Tribunal’s paragraph 79(1)(c) analysis is informative. The entry of Vandem—a much smaller competitor with less than 10% market share—as well as evidence that some distributors had, in fact, switched suppliers, suggests that barriers to entry were not prohibitively high. Evidence of secondary markets within members of a buying group also indicated that the application of the SDP was flexible,<sup>95</sup> and Canada Pipe’s business justification that the SDP allowed the company to maintain its important but less profitable products to the benefit consumers weighed against the SDP being an abuse of dominance.<sup>96</sup>

## V. Conclusion

At the heart of an abuse of dominance analysis lies a balancing between the pro-competitive and anti-competitive effects of an impugned practice. I believe that the Federal Court of Appeal erred in *Canada Pipe* by restricting a paragraph 79(1)(b) analysis to the intended effects of the impugned practice on competitors in the relevant market. Rather than focusing on intent, paragraph 79(1)(b) of the Act should involve a threshold balancing analysis of whether there is a real possibility that the anti-competitive effects of a practice might outweigh its efficiency benefits. Whether an equally efficient firm could be constrained from gaining entry or expansion into the market due to the impugned practice should be considered at this stage of the analysis, as well as the effects of the practice on both consumers and on competitors of the relevant market. If such a possibility is found, the analysis would then move to paragraph 79(1)(c), in which a detailed economic assessment would be made to determine whether the lessening of competition is substantial.

With respect to the loyalty discounts and rebates, in my view, the US rebuttable presumption of legality is preferable to the EU’s approach of near *per se* illegality. However, a detailed contextual analysis of the relevant market and the specific structure of the incentive program at issue should be made on a case-by-case basis prior to an abuse of dominance determination.

## Endnotes

- <sup>1</sup> *Competition Act*, RSC 1985, c C-34 [Competition Act].
- <sup>2</sup> *Canada (Commissioner of Competition) v Canada Pipe Corporation Ltd*, 2006 FCA 233 [Canada Pipe FCA].
- <sup>3</sup> *Loi sur la concurrence*, LRC 1985, c C-34 [Loi sur la concurrence].
- <sup>4</sup> *Canada (Commissaire de la concurrence) c Tuyauteries Canada Ltée*, 2006 CAF 233 [Tuyauteries Canada CAF].
- <sup>5</sup> Competition Bureau, “Enforcement Guidelines on the Abuse of Dominance Provisions” (20 September 2012), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html>> , s 1.3.
- <sup>6</sup> *Competition Act*, *supra* note 1, s 79(1).
- <sup>7</sup> *Canada (Director of Investigation & Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp Trib) [NutraSweet].
- <sup>8</sup> *Ibid*, at para 34.
- <sup>9</sup> *Commissioner of Competition v The Toronto Real Estate Board* (2017 FCA 236), at para 56.
- <sup>10</sup> *Ibid*.
- <sup>11</sup> *Competition Act*, *supra* note 1, s 79(1)(c).
- <sup>12</sup> *Ibid*.
- <sup>13</sup> *Canada (Director of Investigation and Research) v Tele-Direct (Publications) Inc Ltd* (1997), 73 CPR (3d) 1 (Comp Trib), at paras 247 and 248.
- <sup>14</sup> Gianluca Faella, “Antitrust Assessment of Loyalty Discounts and Rebates” (2008) 4(2) J. Competition L. & Econ 375 at 375 [Faella].
- <sup>15</sup> Faella, *supra* note 14 at 382.
- <sup>16</sup> *Ibid* at 377.
- <sup>17</sup> Sean Durkin, “The Competitive Effects of Loyalty Discounts in a Model of Competition Implied by the Discount Attribution Test” (2017) 81: 2 antitrust lj 475 [Sean Durkin].
- <sup>18</sup> Frank P Maier-Rigaud, “Switching Costs in Retroactive Rebates: What’s Time Got to Do with it”, 26 Eur Competition L Rev 272 (2005).
- <sup>19</sup> *Ibid*.
- <sup>20</sup> See, for example, EC, *Commissioner Decision of 29 March 2006 relating to proceedings under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/E-1/38.113- Prokent-Tomra)* [2006], OJ, C 734/07; Article 102 of the Treaty of the Functioning of the European Union [TFEU].
- <sup>21</sup> *Michelin II*, 2003 ECR II-4071, at para 240.
- <sup>22</sup> Faella, *supra* note 14 at 383 and 384.
- <sup>23</sup> *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, 1983 C-322/81 [Michelin].
- <sup>24</sup> *Concord Boat Corp v Brunswick Corp*, 207 F. 3d 1039, 1061 (8th Cir. 2000) [Concord Boat].
- <sup>25</sup> *Ibid*.
- <sup>26</sup> *Ibid* at 1061.

<sup>27</sup> Faella, *supra* note 14 at 375. See also the discussion of *Virgin Atlantic v British Airways* in Office of Fair Trading (2005), Annex B.

<sup>28</sup> *Ibid* at 383.

<sup>29</sup> *Virgin Atlantic*, 257 F3D [*Virgin Atlantic*]. Also see *BA/Virgin*, 2003 ECR II-5917 [*BA/Virgin*].

<sup>30</sup> *Virgin Atlantic*, *supra* note 29.

<sup>31</sup> *Ibid* at para 265.

<sup>32</sup> *BA/Virgin*, *supra* note 29.

<sup>33</sup> Note that the *Toronto Real Estate Board* provided the clarification that an intended exclusionary, predatory or disciplinary act need not be directed at the party's own competitor, so long as the act is exclusionary predatory or disciplinary vis-à-vis a competitor in that market.

<sup>34</sup> *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 3 [*Canada Pipe Tribunal*], at paras 44-47.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* at para 167.

<sup>37</sup> *Ibid* at para 168.

<sup>38</sup> *Ibid* at para 170.

<sup>39</sup> *Ibid* at paras 230 and 231.

<sup>40</sup> *Ibid* at para 232.

<sup>41</sup> *Ibid* at para 233.

<sup>42</sup> *Ibid* at para 232.

<sup>43</sup> *Ibid* at para 261.

<sup>44</sup> *Ibid* at para 256.

<sup>45</sup> *Ibid* at para 260.

<sup>46</sup> *Ibid* at para 212.

<sup>47</sup> *Ibid* at para 265.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid* at para 260.

<sup>50</sup> *Canada Pipe FCA*, *supra* note 2 at paras 77-83.

<sup>51</sup> *NutraSweet*, *supra* note 7.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Canada Pipe FCA*, *supra* note 2 at para 90.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* at para 92.

<sup>56</sup> *Ibid* at paras 37 and 38.

<sup>57</sup> *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp Trib).

<sup>58</sup> *Ibid* at para 346.

<sup>59</sup> *Canada Pipe FCA*, *supra* note 2 at para 58.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* at para 46.

<sup>62</sup> Ralph A Winter, "The Gap in Canadian Competition Law Following *Canada Pipe*" (2014) 27: 2 CCLR 293.

<sup>63</sup> Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 1st Sess, 33rd Parl, 1985 (first reading 17 December 1985) at s 51(1)(b), (emphasis mine).

<sup>64</sup> *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 8 (8 April 1986) at 12011 (Sheila Finestone).

<sup>65</sup> House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91*, 33rd Parl, 1st Sess, No 11 (21 May 1986) at 1630 (André Ouellet). Witnesses in favor of removing the intention element from the abuse of dominant position in Bill C-91 included: the Canadian Federation of Independent Businesses, the Petroleum Marketers Association of Canada, the Consumers' Association of Canada, the Canadian Labour Congress, and a number of professors including Professor Stanbury and Professor Thompson.

<sup>66</sup> Competition Act, *supra* note 1 at s. 79(1)(b). Also see: Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 1st Sess, 33rd Parl, 1986 (assented to 17 June 1986), SC 1986, c 26 at s 79(1)(b).

<sup>67</sup> Library of Parliament, Research Branch, *Mergers and abuse of dominant position: legal aspects* 91-3E (Current Series Review), (1991, revised 1998).

<sup>68</sup> Senate, Standing Committee on Banking, Trade and Commerce, *Proceedings*, 33rd Parl, 1st Sess, No 46 (7 May 1986) at 6.

<sup>69</sup> The Unilateral Conduct Working Group, *Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws*, online: International Competition Network (June 2009), online: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc357.pdf>>

<sup>70</sup> *Ibid.*

<sup>71</sup> Competition Act, *supra* note 1 at s 1.1.

<sup>72</sup> Michael Trebilcock, "Abuse of Dominance: A Critique of Canada Pipe" [2007] Canadian Competition Record 1 at 7.

<sup>73</sup> *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 8 (7 April 1986) at 11927 (Hon Michael Coté).

<sup>74</sup> Michelin, *supra* note 23.

<sup>75</sup> Mark J. Nicholson & Yana Ermak, *The High Price of Loyalty: Abuse of Dominance after Canada Pipe* (March 2007), online: Cassels Brock & Blackwell LLP, <[http://www.casselsbrock.com/files/file/docs/AbuseOfDominance\\_NicholsonErmak\\_March2007.pdf](http://www.casselsbrock.com/files/file/docs/AbuseOfDominance_NicholsonErmak_March2007.pdf)>.

<sup>76</sup> *Ibid* at 14.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* at 15.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Canada Pipe FCA*, *supra* note 2 at para 46.

<sup>81</sup> See, for example, Adrian Majumdar & Greg Shaffer, "Market-Share Contracts with Asymmetric Information" (2009) 18(2) J Econ Manag Strateg 393 [Majumdar & Shaffer].

<sup>82</sup> *Ibid.*

<sup>83</sup> Note: this would only be the case if the quantity of uncontested and contested goods were known.

<sup>84</sup> *Majumdar & Shaffer*, *supra* note 81.

<sup>85</sup> *Ibid* at 394.

<sup>86</sup> Sean Durkin, *supra* note 17.

<sup>87</sup> Roger Ware, “The Economics of Multiproduct Loyalty Programs” (2017) 30:1 CCLR 112 at 123 [Roger Ware].

<sup>88</sup> Thomas Ross, “Scholars Panel on Loyalty Programs: Introduction” (2017) 30:1 CCLR 40 at 43-44 [Thomas Ross].

<sup>89</sup> Roger Ware, *supra* note 87.

<sup>90</sup> *Canada Pipe Tribunal*, *supra* note 34 at para 215.

<sup>91</sup> Roger Ware, *supra* note 87 at 127. Also see Thomas Ross, *supra* note 88 at 41.

<sup>92</sup> *Canada Pipe Tribunal*, *supra* note 32 at para 54.

<sup>93</sup> *Ibid*, at para 33.

<sup>94</sup> *Ibid* at para 415.

<sup>95</sup> *Ibid* at para 261.

<sup>96</sup> *Ibid* at para 212.

# SCHOLARS PANEL ON ESSENTIAL FACILITIES / GROUPE D'EXPERTS SUR LES INSTALLATIONS ESSENTIELLES

## INTRODUCTION

Renée Duplantis

*For the CBA Competition Law Fall Conference in 2017, the CCLR put together a scholars panel of experts to prepare and discuss original papers about a cutting-edge topic. This year's Scholars Panel addressed the topic of essential facilities in Canada. The term essential facilities (or the essential facilities doctrine) means different things to different people. According to the OECD, the term 'essential facilities doctrine' originated in commentary on United States antitrust case law and now has multiple meanings, each having to do with mandating access to something by those who do not otherwise get access.<sup>1</sup> The variations in definitions are great." Bork and Sidek summarized it best: "The essential facilities doctrine is the unicorn of antitrust law. Everyone knows what it looks like, but precious few have seen one in the flesh."<sup>2</sup> In the panelists' papers, which we are pleased to publish here, Michael Osborne discusses his views on the expansionist phase of the essential facilities doctrine in Canada, while Jeffrey Church "documents the successful, if lamentable, rise of a made-in Canada essential facilities doctrine," both based on the recent enforcement actions in the Vancouver Airport Authority and TREB cases, even though the Tribunal determined that TREB was not an essential facilities case.<sup>3</sup> The CCLR Editorial Team would also like to thank Daniel Sokol for his own spirited discussion of essential facilities in the Scholars Panel session at the Fall Conference.*

*À l'occasion de la Conférence d'automne de l'ABC en droit de la concurrence en 2017, la Revue a réuni un aréopage d'experts pour préparer, puis débattre, des écrits inédits sur un sujet de pointe. Le thème de la Table ronde des chercheurs cette année? Les installations essentielles au Canada. D'une personne à l'autre, la notion d'« installations essentielles » (et la doctrine qui la sous-tend) ne revêt pas le même sens. D'après l'OCDE, le terme tirerait son origine d'un commentaire sur la jurisprudence antitrust aux États-Unis et aurait acquis depuis plusieurs acceptions, qui toutes se rattachent à l'idée selon laquelle l'accès à quelque chose doit être obligatoirement assuré à*

ceux qui, sans cela, n'y accéderaient pas<sup>4</sup>. Les définitions sont extrêmement diverses. Bork et Sidek résument parfaitement la situation : [TRADUCTION] « La doctrine des installations essentielles est la licorne du droit de la concurrence. Tout le monde a une idée d'à quoi elle ressemble, mais rares sont ceux qui l'ont déjà vue en vrai »<sup>5</sup>. Notre équipe est heureuse de publier ici les textes de nos experts. Michael Osborne exprime son point de vue sur la phase d'expansion de cette notion au Canada, tandis que Jeffrey Church « traite de l'implantation – malheureusement réussie – d'une doctrine canadienne des installations et équipements essentiels »; les deux se penchent sur les mesures coercitives récemment menées dans les affaires *Administration de l'aéroport de Vancouver* et *Toronto Real Estate Board (TREB)*, même si dans cette seconde affaire, le Tribunal a déterminé qu'il ne s'agit pas d'un cas d'installation essentielle<sup>6</sup>. Pour finir, l'équipe de rédaction de la Revue souhaite remercier Daniel Sokol, étincelant de verve dans sa discussion de la notion lors de la Table ronde des chercheurs à la Conférence d'automne.

## Endnotes

<sup>1</sup> OECD, Policy Roundtables, *The Essential Facilities Concept*, (1996).

<sup>2</sup> Robert H. Bork & J. Gregory Sidak, "What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?" *Journal of Competition Law and Economics*, (2012).

<sup>3</sup> In the *Commissioner of Competition v The Toronto Real Estate Board*, The Competition Tribunal CT-2011-003, Reasons for Order and Order (2016) at paras 208-213.

<sup>4</sup> OCDE, *The Essential Facilities Concept*, 1996, « Les tables rondes sur la politique de la concurrence ».

<sup>5</sup> Robert H. Bork et J. Gregory Sidak, « What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google? », *Journal of Competition Law and Economics*, 2012.

<sup>6</sup> *La commissaire de la concurrence c. The Toronto Real Estate Board et l'association canadienne de l'immeuble*, Tribunal de la concurrence, affaire CT-2011-003, Motifs de l'ordonnance et ordonnance (Traduction), 2016, par. 208-213.

## THE LAMENTABLE RISE OF AN EXPANDED ESSENTIAL FACILITIES DOCTRINE IN CANADA: THE TROUBLING ECONOMIC FOUNDATIONS OF THE TORONTO REAL ESTATE BOARD DECISION†

Jeffrey Church

Professor, Department of Economics, University of Calgary

*This paper documents the successful, if lamentable, rise of a made-in-Canada essential facilities doctrine. This made-in-Canada essential facilities doctrine is a consequence of recent enforcement of the abuse of dominance provisions of the Competition Act in the Toronto Real Estate Board case. The analysis in this paper finds that the rise of the made-in-Canada essential facilities doctrine is one implication of the developing jurisprudence of the Federal Court of Appeal and the Competition Tribunal with respect to all three of the elements required for a finding of abuse of dominance: control, practice of anticompetitive acts, and a substantial prevention or lessening of competition. This paper explains the error made in the Toronto Real Estate Board case for all three of these required elements and how they combine to result in the made-in-Canada essential facilities case. The policy and economic incoherence of this made-in-Canada essential facilities doctrine are fully manifested in the current abuse of dominance case against the Vancouver Airport Authority. This paper explains that this made-in-Canada essential facilities doctrine is inconsistent with the economics of vertical foreclosure and the economic foundations of the abuse of dominance provisions in the Competition Act. The problem in both of these cases is not conduct that creates, enhances, or maintains market power, but instead exclusion downstream is possible because of market power upstream and it may enhance efficiency.*

*Cet article traite de l'implantation – malheureusement réussie – d'une doctrine canadienne des installations et équipements essentiels, résultat de la récente application de dispositions de la Loi sur la concurrence concernant les abus de position dominante dans l'affaire du Toronto Real Estate Board. À la fin de cette analyse, je conclus que l'implantation de la doctrine des installations et équipements essentiels au Canada est une conséquence de la jurisprudence qui émerge à la Cour d'appel fédérale et au Tribunal de la concurrence en ce qui concerne les trois critères permettant de conclure à un abus de position dominante : contrôle, agissements anticoncurrentiels, empêchement ou diminution sensible de la concurrence. J'explique l'erreur commise dans l'affaire du Toronto Real Estate Board pour ces trois critères*

*et en quoi leurs effets combinés donnent vie à la doctrine canadienne des installations et équipements essentiels. L'incohérence économique et politique de cette doctrine se manifeste pleinement dans l'affaire actuellement en instance d'abus de position dominante intentée contre l'administration de l'aéroport international de Vancouver. J'explique aussi pourquoi cette doctrine est contraire aux dispositions de la Loi sur la concurrence concernant la dynamique économique de forclusion verticale et les fondements économiques de l'abus de position dominante. Dans ces deux cas, le problème n'est pas qu'il y a conduite qui crée, augmente ou maintient l'emprise sur le marché, mais plutôt qu'une emprise en amont rend possible une exclusion en aval, malgré que cela puisse entraîner un gain d'efficacité.*

## 1 Introduction

The thesis of this paper is that the recent decision by the Competition Tribunal in *Toronto Real Estate Board* (“*TREB Redetermination*”) and the subsequent application by the Commissioner of Competition against the Vancouver Airport Authority (“*YVR*”) represent a made-in-Canada version of the essential facilities doctrine.<sup>1</sup> While the Commissioner has prevailed, at least to date, in the Toronto Real Estate Board matter, the theory of vertical foreclosure advanced and accepted by the Competition Tribunal in the *TREB Redetermination* and the Commissioner’s application in *YVR* are inconsistent with the economics of foreclosure and the economic foundations of the abuse of dominance provisions in the *Competition Act*. Fundamental errors of economics made by the Competition Tribunal in the *TREB Redetermination* provide the foundation for this made-in-Canada essential facilities doctrine. Those fundamental errors are discussed in detail in this paper. The Tribunal’s fundamental errors incorporate all three requirements for a finding of abuse of dominance: control, practice of anticompetitive acts, and a substantial lessening or prevention of competition. The negative implications of the Tribunal’s findings for future enforcement include, but are not limited to, the made-in-Canada essential facilities doctrine. The fundamental errors have the potential to result in successful enforcement in any abuse of dominance case being inconsistent with consumer welfare or efficient resource allocation.

The Commissioner’s application against the Toronto Real Estate Board (“*TREB*”) was initially dismissed by the Competition Tribunal on the basis that *TREB* did not compete in the provision of residential real estate brokerage and hence its conduct could not harm a competitor,

it did not exercise market power in this market, and if it did not have market power in the residential real estate brokerage market its conduct could not create, enhance, or preserve that market power.<sup>2</sup> The initial decision by the Tribunal was overturned by the Federal Court of Appeal (*FCA 2014*) on the basis that the anticompetitive conduct did not have to be directed against a competitor and that it was possible to “control” a market without being a participant, i.e., it was possible to have market power in a market without participating in that market.<sup>3</sup> On remand, a second panel was constituted to reconsider the Commissioner’s application. The second panel’s decision (*TREB Redetermination*) found that the Toronto Real Estate Board had abused its dominant position by not including in its data feed made available by brokers on their websites, so called Virtual Office Websites (“VOWs”), some listing data found in its multiple listing service database. In particular information on the historic sold price of a listing, pending listings, and withdrawn, expired, suspended, and terminated listings (“confidential price data”) were excluded from the TREB data feed, and there were restrictions on displaying this information on websites by brokers.<sup>4</sup>

Sections 78 and 79 of the *Competition Act* establish the reviewable offense of abuse of dominance. Under these provisions the Competition Tribunal can make an order enjoining the conduct of a firm if, upon application by the Commissioner of Competition, the Tribunal finds that a firm has control of a market, has engaged in a practice of anticompetitive acts, and the practice has had, or is likely to have, the effect of substantially preventing or lessening competition in a market.<sup>5</sup>

The fundamental problem in TREB and YVR is that the conduct at issue is the exercise of market power in an upstream market, the effect of which is to raise prices and reduce output in a downstream market. The means by which prices increase and output is reduced in the downstream market is indeed a negative effect on the costs and quality of competitors in the downstream market. But this is not a substantial lessening or prevention of competition because there is no maintenance, creation, or enhancement of market power, instead it is the result of the exercise of market power upstream. The conduct by the upstream supplier in these two cases, restricting access to the confidential price data in the case of TREB and restricting airport access in the case of YVR, did not, and does not, affect the ability of any firm, either upstream or downstream to exercise market power. Negatively affecting the costs, quality, and number of downstream firms, real estate brokers in the case of TREB, and suppliers

of galley handling services and caterers to airlines in the case of YVR, is not the same as a negative effect on competition in the downstream market, rather it is the effect of the exercise of market power upstream.

The exclusion of downstream suppliers in the two cases does not negatively effect competition in the downstream markets: it does not create, enhance, or maintain market power in the downstream market. In TREB this is obvious: the provision of residential real estate brokerage services in the Greater Toronto Area is close to textbook competitive, with thousands of agents and very low entry barriers. This is true whether the confidential price data is supplied to brokers as part of the data feed or not and with, or without, restrictions on their ability to share it with their clients on a website. The effect of not supplying the confidential price data and permitting it to be searchable by clients of a broker is to reduce the supply of residential brokerage services—perhaps quality adjusted—and hence to change the competitive equilibrium in residential real estate brokerage, perhaps raising prices and lowering quality, but it has no effect on market power in the supply of real estate brokerage. The reason, as explained *infra*, for the restrictions on access, lies not in creating, enhancing, or maintaining market power but instead in realizing efficiencies, including in this particular case preventing free riding and providing incentives for investment by protecting quasi-rents.<sup>6</sup>

The YVR case is not quite as obvious as the TREB case. The difference lies in the extent of competition in the downstream market. In YVR there are only two suppliers authorized to provide service, so surely allowing more suppliers to access planes to supply catering would reduce the market power of the two existing suppliers? The answer is obviously yes. But the question is wrong: the market power of the downstream firms does not exist independently of YVR's monopoly power in the upstream input. If service requires airport access—it is essential—then the number of downstream firms depends on YVR. The source of YVR's market power is the scarcity of the upstream input, the inability or unwillingness of downstream firms to substitute to other inputs, and the unwillingness of consumers in the downstream market to substitute to other goods that do not use the upstream input controlled by YVR, e.g., flights out of YVR without catering or flights from a different airport. If YVR is truly a monopolist in the supply of access to airplanes, then YVR has the ability to be the only supplier of catering if it precluded supplying access to other catering firms. Allowing more competitors downstream does not change YVR's market power: instead it exercises it upstream in

the market for airplane access rather than downstream in the provision of catering.

YVR might open up access, perhaps limited access, because by doing so it can extract more profit from its monopoly: independent suppliers may have lower costs or access to other inputs that allow them to create surplus above and beyond what YVR can do on its own and which may also benefit consumers in the downstream market. Indeed the Chicago School's single profit theorem suggests that YVR should never restrict access. But if the simple conditions of the single profit theorem do not hold, then to insure that more of this extra surplus is captured by it, and not downstream consumers, YVR will have an incentive to manage competition between suppliers of catering.

In both the TREB and YVR case the ability to exclude downstream competitors by foreclosing access to an input upstream arises only if TREB and YVR have market power in the supply of the input. In the absence of monopoly power in the supply of the input, downstream firms could substitute to other inputs and not be disadvantaged in the supply of the downstream product. In both cases, the "exclusion" of some downstream suppliers does not create, enhance, or maintain market power, but instead reflects the exercise of market power upstream and the form in which the exercise occurs, exclusion, will both be optimal for the upstream monopoly and often efficiency enhancing and beneficial for downstream consumers. To be clear, the upstream owner of the essential facility is using its market power upstream to restrict access to downstream competitors but it does so to realize efficiencies, not to create, enhance, or maintain its market power either upstream or downstream.

The thesis advanced here is that the effect on competition in the downstream market is not relevant for whether the exclusion is anti-competitive.<sup>7</sup> The thesis of this paper is that a well-founded enforcement action against either TREB or YVR under the abuse provisions of the *Competition Act* for their exclusionary conduct requires evidence that it creates, enhances, or maintains the market power of TREB in the market that includes the confidential price data and YVR in the market for access to airplanes, i.e., *the upstream market defined around the essential facility*. This can either be because the conduct restricts the competitive discipline of alternatives to the essential facility upstream or the competitive discipline of alternatives in the downstream market that do not use the essential facility.

The analysis in this paper shows a degree of economic illiteracy that is troubling. The failure to properly understand and apply the relevant economic concepts and analysis results in errors of analysis and economic incoherence. This economic incoherence makes the application of any provisions in the *Competition Act* requiring a demonstration of a negative economic effect problematic, with resulting costs to Canadians from the ensuing uncertainty and it is likely to weaken support for competition policy enforcement in the long run.

The confusions identified in this paper include not just appreciating the difference between the exercise of market power and conduct that creates, enhances, or maintains market power, but also encompass a failure to correctly (i) define market power; (ii) define and identify anticompetitive conduct; and (iii) define and identify a substantial prevention or lessening of competition.

The Tribunal incorrectly: defines market power as the ability to exclude competitors; determines whether conduct is anticompetitive by assessing its purpose; and identifies a substantial lessening or prevention of competition by assessing the effect of conduct on prices or quality, not market power. Beyond this, it does not incorporate the overall effects of the conduct on consumer welfare or the efficiency of resource allocation.

The result of these errors of economics and law results in a made-in-Canada version of the essential facilities doctrine.<sup>8</sup> The made-in-Canada essential facilities doctrine created by the FCA and the Tribunal in TREB maps the following into an abuse of dominance:

- The Commissioner must establish that a firm supplies an input that is necessary for production in a downstream market. This involves establishing that the firm is dominant in the input market, i.e., an upstream monopolist. Hence upstream monopolists will be found to control downstream markets that use their input.
- If the upstream monopolist discriminates in the supply of an input or excludes some downstream firms from supply, it will be found to have engaged in a practice of anticompetitive conduct. If conduct is explicitly exclusionary, then its intent is to harm downstream rivals and prevent them from using the input and competing downstream; in the case of discrimination, the intention is to limit rivals' ability to compete. Consideration of the effect of the

exclusion or discrimination on consumer welfare or resource allocation is irrelevant.

- If the result of the exclusion or discrimination of downstream rivals is a marked increase in prices; a marked reduction in product quality and diversity; or a marked reduction in innovation in the downstream market there is a substantial prevention or lessening of competition. The Tribunal will likely have a high prior that the effect of exclusion will be these effects if the exclusion is “widespread”.
- The remedy is an order requiring non-discriminatory access.

The made-in-Canada version of the essential facilities doctrine is particularly troubling since under it the Commissioner of Competition can ask the Competition Tribunal to order access to the assets of an upstream supplier if control of those assets provides it with dominance in the supply of an input to a downstream market. In making this determination the Competition Tribunal will not consider whether a denial of access or discriminatory access will create market power or even whether it would result in an increase in consumer welfare or total welfare (efficiency). That is, the Tribunal will not consider that mandating access to the assets of a firm will have negative ramifications on incentives for investment or other efficiency justifications for why a supplier of an input upstream might restrict competition in the market for services that use its input.

Section 2 is a review of Sections 78 and 79, the relevant provisions of the *Competition Act*. Section 3 is a first-principles discussion of the economics of abuse of dominance and develops an economic implementation of the abuse of dominance provisions of the *Competition Act*. Section 4 is a review of the relevant economics of vertical foreclosure and monopoly power in the supply of an input. Section 5 is a critique of the Federal Court of Appeals first TREB decision (“*FCA 2014*”), as well as the Competition Tribunal’s second TREB decision (“*TREB Redetermination*”). Section 6 maps the cumulative impact of these decisions into a Canadian essential facilities doctrine and discusses the Commissioner’s application in *YVR*.

## **2 Abuse of Dominance: the Legal Framework**

The abuse of dominance provisions are Sections 78 and 79 of the *Competition Act*. Section 79(1) specifies the requirements that must be met

for the Competition Tribunal to make an order upon application by the Commissioner of Competition. The three sections of Section 79(1) are:

- 79(1)(a) requires a demonstration that one or more persons substantially control a class or species of business throughout, or within a particular region of, Canada;
- 79(1)(b) requires demonstration that the person or those persons are engaged in or have engaged in a practice of anti-competitive acts; and
- 79(1)(c) requires demonstrating that the practice has had, is having, or is likely to have the effect of substantially preventing or lessening competition in a market (“SPC” or “SLC”).

An interpretation of these three requirements had developed prior to TREB. The interpretation by section:

- (a) *Control*. The requirements for control had been interpreted to mean dominance. Dominance in turn meant the sustained exercise of substantial market power in a relevant market.
- (b) *Practice of Anticompetitive Acts*. A practice of anticompetitive acts involved establishing conduct that is exclusionary or predatory and which does not have a legitimate business justification.
- (c) *Substantial Prevention or Lessening of Competition*. The Commissioner must establish that the conduct that creates adverse effects on a competitor has also harmed competition in a relevant market. In the usual case, the requirement is that the conduct at issue creates, preserves, or enhances the market power of the dominant firm in the same market in which it is dominant. However, that need not be the case: the conduct could create, preserve, or enhance the market power of the dominant firm in another market.

For an order the *Commissioner* must establish all three conditions—dominance, anticompetitive practice, and substantial lessening or prevention of competition.

### **3 Abuse of Dominance: the Economic Framework**

This section builds up an economic interpretation of the abuse of dominance provisions. The objective is to develop an economic implementation of Sections 78 and 79 that identifies circumstances when

enforcement of the *Competition Act* will increase consumer welfare or enhance efficiency. That is, the concern is identifying conduct that creates, enhances, or maintains market power (a condition necessary to establish abuse of dominance), where the effect of the increase in market power is to reduce consumer welfare or the value of output (efficiency).

### **3.1 Understanding the Source and Consequences of Market Power**

The abuse provisions—and indeed all of the provisions—of the *Competition Act* embody an important distinction: they are not intended to address the exercise of market power, but conduct that under certain conditions enhances, maintains, or creates market power.<sup>9</sup>

#### **3.1.1 Market Power**

Market power is typically defined as the ability of a firm to profitably raise price above competitive levels.<sup>10</sup> In the case when the products of firms are homogenous, a firm has market power if the market price increases when it reduces its supply below competitive levels and the increase in the market price increases its profits. In the case of differentiated products, the profit of the firm rises when it raises its price over competitive levels. More generally, a firm has market power if it can profitably alter other aspects of its behavior away from competitive levels, such as quality, advertising, innovation, variety, and, importantly, restrictions on the use of its product.

#### **3.1.2 Determinants of Market Power**

The substitution alternatives available to the customers of a firm determine its market power. Customers discipline, and thereby constrain, the market power of a firm by substituting away from its products when it raises its price. When a firm increases its price, it gains increased revenues from its higher price on inframarginal sales (sales it continues to make), but loses the profits on marginal sales (sales no longer made). A price increase will be profitable if the gain in revenues from the inframarginal units exceeds the loss on marginal units. The loss on marginal units equals the product of the reduction in volume from consumers substituting to other alternatives and the firm's prevailing profit margin on those sales. The greater the losses at the margin are the more effective substitution by consumers is in limiting the profitability of the firm raising its price. The decrease in sales of a product when a firm

increases its price depends on its elasticity of demand.<sup>11</sup> The greater the firm's elasticity of demand and the greater its margin, the greater its profit loss at the margin from raising its price and the less its market power.

The extent of demand substitution depends on whether a firm's customers are willing, or able, to divert their demand. Consumers may be able to switch, or divert their demand, to other products or other suppliers of the same product. Their *willingness* to switch to other products depends on how close a substitute consumers view alternative products. Their *ability* to substitute to another supplier of the same product depends on whether other suppliers of the same product will find it profit maximizing to increase their output.

The more the possibilities for substitution are limited, the greater the ability of a firm to exercise market power. Conduct that creates, enhances, or maintains market power must, therefore, restrict the possibilities for substitution. Conduct that increases market power does so by reducing the willingness and ability of consumers to substitute away from a firm that attempts to exercise market power.

For market power to persist in the long run there must be barriers to entry and asymmetries that provide incumbent firms with a competitive advantage vis-à-vis entrants. Barriers to entry are factors that tend to reduce the profitability of entry. In the absence of asymmetries that provide incumbents with a competitive advantage, economic profits from the exercise of market power (pricing above competitive levels) will, in the long run, attract entry of either other producers of the same product or the development of new substitute products. Both types of entry will create additional avenues of substitution for a firm's customers, reducing or even potentially eliminating its returns in excess of a competitive level and the exercise of market power. Any barriers to entry will limit the number of firms, but the number of firms will adjust such that prices reflect long-run average costs and firms earn competitive returns. Asymmetries between entrants and incumbents post entry can result in situations where entry is not profitable, but incumbents are able to exercise market power and earn monopoly profits.<sup>12</sup>

Canadian competition law has avoided the potentially problematic aspects of the classic U.S. Supreme Court definition of monopoly power in *du Pont* as the "power to control prices or the power to exclude competitors" (emphasis added).<sup>13</sup> Instead it is understood in Canada that dominance involves substantial and durable market power. In assessing

market power, the requirement to exclude competitors is incorporated in the definition of market power by including a time dimension: the ability to raise prices above competitive levels for a “considerable period of time.” The Tribunal in its decisions in assessing market power has typically considered barriers to entry in assessing market power.<sup>14</sup>

In fact, as is discussed in academic commentary on the U.S. definition and indeed in the *du Pont* decision itself, there are not two separate tests for market power in the U.S., but instead the two components are to be treated as one. As commentators have observed, it is the exclusion of competitors that is the source of the power to raise price over competitive levels. Without the exclusion of competitors, a firm will not be able to maintain its power to control prices.<sup>15</sup> The source of its market power is exclusion of competitors. The asymmetries that in conjunction with entry barriers exclude competitors and maintain a firm’s market power and above average profitability are often due to its control of a unique input. The source of a firm’s market power is its ability to exclude other firms from using the input that they cannot replicate. The firm’s source of market power in the production of goods and services that use the input is its control of the input. For it to have the power to exclude, it must also have market power in the input. That is implied by the inability of other firms to replicate it, or enter downstream and compete using other inputs. Market power upstream provides the firm in these circumstances with the ability to exclude entry downstream.

The less competitive downstream firms are that use other inputs, the greater the market power of a firm that controls an input that cannot be replicated. In an essential facilities case, presumably, competition from downstream firms that use other inputs is virtually non-existent and the upstream firm is a monopoly or dominant in both the upstream and downstream markets.

Exclusion of entrants is an important source of market power downstream and it can be informative regarding the existence of market power (that is, it can be used as evidence for the existence of market power), but the power to exclude entrants is not market power in the market from which they are excluded, rather it is the source of market power in the downstream market. Consequently, entry deterrence—or “the power to exclude”—is necessary but not sufficient alone to infer a substantial and durable exercise of market power in a downstream market.

### 3.1.3 The Effects of Market Power

For markets in which the product is sold to final consumers, the effects of the exercise of market power—the increase in price above competitive levels—are two-fold.<sup>16</sup> First, there is a transfer of some of the gains from the production and exchange of the inframarginal units from consumers to the firm exercising market power. Consumers pay higher prices on units they continue to purchase, so consumers will receive less benefit and the firm more. Second, there is a loss in economic value as consumers reduce their purchases of the good. The lost value arises because less of a good for which market power is exercised is produced relative to competitive production.

The lost value from the substitution by consumers to their second-best choice when market power is exercised, and the price of the good rises above the competitive outcome, is called the deadweight loss. It is a quantitative measure of the allocative inefficiency created by the exercise of market power and is equal to the extent to which the value of production has not been maximized (as it would be if markets were perfectly competitive). The deadweight loss arises because the gain to the firm from exercising market power arises from the transfer on inframarginal units, but the total loss to consumers includes both the loss on inframarginal and marginal units. The inefficiency of market power results from this quantity distortion: the exercise of market power raises prices and induces a reduction in consumption and output, with a diversion of resources to less valued alternatives.

Many products are inputs and are traded in wholesale, or upstream, markets where the buyer is a firm who uses the input to produce a product it sells in a downstream market. In the simplest case the downstream market involves sales to final consumers and the downstream suppliers are perfectly competitive. As with retail markets, there are two effects from the exercise of market power in an upstream input, or wholesale, market. The first is a transfer of profits from downstream firms to the upstream supplier on inframarginal units—the units that the downstream firms continue to purchase even though price has risen. The second is the loss in economic value as downstream firms reduce their purchase of the input.

The downstream firms reduce their demand for two reasons. First, as the price of the input rises, they may substitute to alternative inputs. Second, to the extent they pass through the price increase of the input to

their customers, downstream demand will fall, reducing the demand for the input by the downstream firms. Hence when the good in question is an input, there is the possibility of direct substitution by the downstream firms to another input, and indirect substitution by consumers downstream who divert demand to goods that do not use the input.

The lost value as firms and consumers in the downstream market substitute to their second-best choice when the price of the input rises again gives rise to a deadweight loss and inefficiency. This inefficiency is from the exercise of market power in the upstream market. The deadweight loss from the exercise of market power in an input market is the change in total surplus (the harm) in the downstream market that uses the input less the increase in profits in the supply of the input.<sup>17</sup>

The increase in the upstream price from the exercise of market power does harm the downstream market: it results in higher prices and lower quantities. The higher prices downstream are a result of the higher marginal costs downstream from the exercise of market power upstream. If the market downstream is competitive, the exercise of market power upstream raises marginal costs downstream and shifts the supply curve downstream up and in, leading to higher prices and reduced output downstream. But this occurs without a change in market power in the downstream market. Instead it reflects the exercise of market power in the upstream market. A similar causal effect from the exercise of market power upstream would result in higher prices and less output downstream even if the market downstream is not perfectly competitive.<sup>18</sup>

### 3.1.4 Classic vs. Exclusionary Market Power

In recognizing the potential for raising rivals' cost strategies, Steven Salop and his coauthors introduced the notion of exclusionary market power, in contrast to classic market power.<sup>19</sup> Exclusionary market power is defined as the power to raise prices above competitive levels by raising the costs of rivals and thereby reducing their output. Classic market power is the ability of a firm to profitably raise price by reducing *its* output.

But in fact a closer examination of exclusionary market power indicates that this distinction is misleading. Exclusionary market power has two aspects. First, it involves conduct by firms to create market power in an input or upstream market. This often involves vertical integration and foreclosure: a downstream firm acquires an upstream supplier and

by ceasing to supply its downstream rivals creates market power for the remaining suppliers of its downstream rivals. Second, the result is an increase in the price of the input used by its competitors in the output or downstream market. The increase in the price of the input arises from the exercise of market power that arose from the *conduct* that created, enhanced, or maintained market power in the input market. It raises the costs of rivals in the downstream market, relaxing the constraint they exert on market power in the downstream market. Raising rivals' costs therefore involves conduct that creates, enhances, or maintains market power in an input market and the exercise of that market power in the supply of the input to downstream rivals.<sup>20</sup> Exclusionary market power involves the creation and the exercise of classic market power.

Calling the exercise of market power in an upstream market exclusionary because of the effect of its exercise on rivals in the downstream market obscures the two-step nature of exclusionary market power: (i) some conduct that creates, enhances, or maintains market power in the upstream market and (ii) the effect of the exercise of that market power on the downstream market. It also obscures that the market in which the firm acquires market power is an upstream market and that the conduct that therefore should be the focus of an antitrust analysis is the conduct that creates, enhances or maintains market power upstream, i.e., the conduct that gives market power over the input price paid by its rivals.

### 3.2 Anticompetitive Conduct

The objective of legal prohibitions on unilateral conduct is to deter firms with substantial antitrust market power—market power that is significant and durable—from engaging in certain kinds of conduct that creates, enhances or maintains market power. Conduct that does this typically reduces the extent to which customers are willing or able to substitute. If the conduct increases the market power of a firm, the firm's elasticity of demand should be reduced, i.e., it becomes more inelastic as consumers response to an increase in price falls.<sup>21</sup> Typically, the conduct increases a *firm's* market power by reducing the extent to which *its* customers are willing or able to substitute, reducing *its* demand elasticity.<sup>22</sup>

The conduct that Section 79 seeks to enjoin either reduces the attractiveness of the products of a dominant firm's competitors, thereby reducing the willingness of its consumers to substitute; raises the costs of its competitors, thereby reducing the extent to which its consumers can substitute; or both. Conduct is anticompetitive if it enhances, creates, or

maintains market power by targeting rivals or reduces the likelihood of entry and hence future rivals. To enhance, create, or maintain market power, conduct must reduce the extent to which a firm's customers are able to substitute to rivals by reducing the ability or incentives of rivals to expand their output in response to an attempt to increase price, or customers' willingness to substitute by reducing the quality of the products of rivals.

Decreasing the ability of a rival to respond to the exercise of market power typically involves reducing the elasticity of supply of rivals by raising their marginal costs of production, reducing their capacity, preventing their entry, or inducing their exit. By reducing the profitability of output expansion, increases in a firm's marginal cost will typically make it less willing to expand output in response to a reduction in output or increase in price by its rivals. Decreasing a firm's available capacity reduces its ability to increase production, and therefore, the ability of consumers to substitute.

Alternatively, conduct that reduces the willingness of consumers to substitute to the products of competitors may also reduce the elasticity of firm demand and thereby increase market power. Conduct that reduces the quality of competitors' products is an example. For instance, where the willingness to pay for one good ("hardware") depends on the variety of compatible complements ("software"), reductions in the variety of software available to a rival—by merger and foreclosure—may increase the market power of the integrated firm.<sup>23</sup>

Notice that it is not harm to the rival per se that defines anticompetitive conduct. The relevant harm is to the rival's ability to discipline the exercise of market power, either by reducing its ability to expand or reducing the willingness of consumers to substitute to its products. Moreover, it is insufficient to establish only a negative effect on the ability of a rival to respond. It is also typically required that the negative effect on a rival allows the firm whose conduct is at issue to exercise *more* market power. That is the negative effect on the rival must also translate into a negative effect on the market, resulting in a SPC or SLC.

### **3.3 Substantial Lessening or Prevention of Competition**

The premise of competition law and enforcement is that competition for market power, competition for the market (Schumpeterian competition), results in innovation and investment whose benefits dominate

price competition and is therefore to be encouraged. Market power that is the result of enhancing choices and providing value superior to competitors is the cost of progress. Competition policy is directed at market power that results instead from eliminating competitors or agreeing not to compete. The logic of Section 79 is that 79(1)(b) requires that a dominant firm engages in a practice of anticompetitive acts that harms rivals in a way that reduces their ability to discipline the dominant firm's ability to exercise market power; 79(1)(c) is a check to make sure that the effect matters in the market.

The abuse provisions require that the effect of the conduct on competition be substantial. This requires measuring and comparing the extent of competition with, and without, the conduct. The concern for why a market outcome may not be competitive, or the operation of the market not competitive, is the exercise of market power. The extent to which the market outcome is not competitive depends on the ability of firms to exercise market power. The extent to which firms can exercise market power is a measure of the extent to which the market is not competitive.

Changes that reduce competition increase market power: a positive effect on market power, all else unchanged, is a reduction in competition. This is reflected in changes to prices and qualities relative to their competitive level, but not necessarily observed changes in price levels. An increase in price or reduction in quality is consistent with an SLC if they are the result of an increase in market power. Changes in price or quality may indirectly signal an increase, maintenance, or enhancement of market power. But the inference from increases in price or lower quality depends on the competitive level not changing. If the competitive level changes, then any inference from a change in prices or quality to market power is subject to error. This is a key error in the logic of the Tribunal in the *TREB Redetermination*, as discussed *infra*, and opens the door to the made-in-Canada essential facility doctrine.

A corollary that follows is that without an effect on market power, the anticompetitive practice cannot result in a substantial lessening or prevention of competition. As indicated above the effect of the exercise of market power in an upstream market is to raise the marginal costs of production downstream and reduce supply, resulting in an increase in price in the downstream market. But the negative effects arise from the exercise of market power upstream, not an increase in market power in the downstream market. The negative effects are a consequence of the

exercise of market power upstream, not an increase in market power in the downstream market from exclusionary conduct. The change in prices downstream do not reflect a change in market power downstream, but instead a change in the downstream equilibrium from the exercise of market power upstream. They reflect a change in the competitive level downstream, not an increase in market power downstream.

Finally, it may be the case that the conduct of the dominant firm both reduces the competitive constraint of rivals and increases the competitiveness of the dominant firm. In these instances, the efficiency benefits of the conduct must be traded off against its anticompetitive effects. This can be done by considering the net effect of the conduct on consumer welfare or total surplus (depending on the standard adopted). But it cannot be done by determining the intent or purpose of the conduct. Ultimately what should matter if the goal of antitrust enforcement is to promote efficiency or consumer welfare is the net effect of the conduct.

For instance, a dominant firm might enter into an exclusive supply agreement with a significant supplier of an input. In particular, in exchange for a lower price and agreement that the supplier will not supply other downstream firms it agrees to purchase a minimum volume. This allows the supplier to achieve economies of scale, lowering its average cost. Both the dominant firm and the supplier are made better off from this agreement. The lower costs and minimum volume also give the dominant firm an incentive to increase its output in the downstream market, benefiting the customers of the dominant firm. If this was all there was, then the conduct would be efficiency enhancing.

However, it could be the case that since the exclusive supply arrangement precludes other downstream firms from supply, there is an increase in the market power of the other input suppliers. As a result, there may be an increase in the input price to the rivals of the dominant firm downstream, raising their costs and reducing their ability to discipline the market power of the dominant firm.

Which of the two effects dominates, the efficiency effect of lower costs on the dominant firm or the anticompetitive effect of raising rivals' costs, will determine the net effect on the price in the downstream market. If it rises, consumers are likely harmed, but if it falls, consumers would likely benefit. Even if consumers are harmed because the downstream price rises, total surplus might still increase if the cost savings from the economies of scale upstream are sufficiently large.

As discussed *infra*, the Tribunal's treatment of efficiencies has been dominated by concerns over intent rather than effect. This is particularly problematic when the conduct is exclusion from accessing services made possible by investment, as in an essential facilities case. The made-in-Canada essential facilities doctrine has been developed out of jurisprudence that does not adequately recognize and incorporate that the same conduct can have competing effects and gives short shrift to efficiencies.

What matters is that the Tribunal does determine the overall balancing of the effect of the conduct that simultaneously increases market power and achieves efficiencies. The ruling interpretation by the Federal Court of Appeal, reflected in the *TREB Redetermination* prohibits a balancing of effects—see discussion *infra*. But there are two alternatives, that the overall effect be considered in whether the conduct is an anticompetitive practice (79(1)(b)) or that an SLC requires not only an increase in market power (a necessary condition), but also that the conduct results in a harm to consumers (under a consumer welfare standard) or a reduction in efficiency (under a total welfare standard). Failure to even consider the benefits to consumers and efficiency of denying access to competitors of a firm's input is a particularly problematic aspect of the made-in-Canada essential facility doctrine that has been fashioned by the Federal Court of Appeal and the Competition Tribunal.

### 3.4 Abuse of Dominance: Conceptual Summary

If the objective of the abuse provisions is to control conduct by dominant firms that maintains, enhances, or creates market power, with a negative effect on consumer welfare or total welfare, then the economic review suggests the following are the requirements for the Commissioner to make a successful application to the Competition Tribunal:

- For dominance, it must be the case that the firm whose conduct is alleged to harm competition must have significant market power that is durable, i.e., it should be earning monopoly returns and able to maintain its return in excess of competitive levels in the long run. To maintain its market power, i.e., its control over price, competitors must be excluded. Without exclusion of competitors, the dominant firm will not be able to maintain its control over price or otherwise exercise market power.
- The alleged conduct by the dominant firm must reduce the

competitive discipline or constraint on market power of competitors. This occurs, typically if, the conduct reduces the ability and willingness of consumers to substitute.

- The conduct must have a substantial effect on the exercise of market power. That is, in the absence of the conduct, market power would be substantially less.
- An increase in market power is only a necessary condition for a negative effect on consumer welfare or efficiency. In some cases, the conduct may have *both* a negative effect on rivals that materially reduces their ability to restrain the exercise of market power *and* a positive effect on the costs or quality of the dominant firm. Welfare consistent enforcement will require that these two effects be traded off appropriately, i.e., does consumer surplus or total surplus on net increase.

#### 4 The Economics of Vertical Foreclosure

Mandated access to an input of a firm to its rivals typically involves the following fact pattern. There is an upstream supplier of an input that is vertically integrated downstream or has a commercial interest in some of the downstream firms. The integrated firm then engages in vertical foreclosure by denying access or refusing to supply the input to its unintegrated rivals, places restrictions on the use of the input by its unintegrated rivals, or otherwise discriminates between its use or access to the input and the use or access of all or some its unintegrated rivals in the downstream market.<sup>24</sup> The alleged conduct is full or complete foreclosure: the integrated firm's denial of access means that potential downstream rivals cannot enter the market. It is this that makes the input "essential": without access downstream rivals are either ineffective or precluded from competing.

In TREB the allegation is that "full information" Virtual Office Websites ("VOWs") require access to confidential price data, data that was not provided in the VOW data feed provided by TREB to realtors, including historic sold prices.<sup>25</sup> Without access to the confidential price data, the website of a broker cannot provide the data to its clients and any results in response to a search done by the client will not include these listings or information. Thus without the confidential data in the VOW feed and permission to include this data on their websites, "full information" VOW brokerages allegedly cannot exist. Similarly, in YVR,

without access to the airport, competing galley handling and caterers cannot provide service.

There are two threshold issues with regard to an allegation of complete vertical foreclosure. The first is whether the vertically integrated firm has the power to foreclose: this will require it to have market power in the supply of the input. The second is whether it has the incentive to do so. In this section both of these issues are addressed.

#### **4.1 Monopoly Power in the Supply of an Input**

In an essential facilities case, the incumbent firm must provide a unique input: it is essential for rivals to have access if they are going to compete in the downstream market. This means that the two types of substitution, both direct and indirect, are very limited, providing the input supplier with monopoly power. Limited direct substitution means that some downstream firms are unable or unwilling to substitute to alternative inputs. Dominance in the provision of the services provided by the upstream input, the essential facility, also implies that competitors cannot profitably duplicate the “same” facility and discipline the market power of the monopolist upstream.

For an input to be essential, it must not be duplicable. What this means is that there must be sufficient barriers to entry that duplication is not economically possible. That is, an entrant that tried to duplicate the input would not earn revenues equal to the opportunity cost of its inputs. Hence while it might be physically possible to replicate the input, it is not economically feasible. The Competition Bureau has suggested that it is not enough for entry to be profitable, it must also be effective—that is, even if entry is profitable, the entrant must be an effective competitor, capable of disciplining the market power of the incumbent input supplier.<sup>26</sup>

It is important to recognize that even if there are some firms in the downstream market whose ability to substitute to other inputs when denied access is limited, this does not mean that the input supplier is a monopolist whose input is essential. The possibility exists for indirect substitution to discipline the exercise of market power by the only supplier of an input. This might be the case when the downstream products are differentiated in part by their use of different inputs. If so, then the extent of competition between differentiated products downstream will be an important determinant of the elasticity of demand downstream, and hence the elasticity of demand for the input. When the supplier of

an input exercises market power, it raises the costs of suppliers in the downstream market that utilize its input. They in turn pass through some of this increase in costs to their buyers in the downstream market by increasing their prices. If the buyers in the downstream market can substitute to other suppliers who provide service without utilizing the input, and can do so sufficiently, then indirect substitution will discipline the exercise of market power by the input supplier. Its input will not be essential.

As an example, consider a local telephone network that provides wholesale access to its network. Assume that only the local telephone network provides access to entrants, either voluntarily or by regulation, which allows the entrants to provide broadband service to their residential retail customers. Under this assumption the local telephone network operator is the sole provider in the wholesale market for network access. However, demand by entrants for access may be quite elastic if they face competition from other networks. In these circumstances, demand for wholesale access may be elastic if homeowners are sufficiently able and willing to substitute to broadband access over an alternative network, such as a cable television network or a wireless network. An increase in the wholesale price, to the extent it is passed on by entrants to downstream consumers, will raise the entrants' price, and result in consumers substituting to the other networks. Indirect substitution in this case undercuts the alleged market power in the upstream input.

More importantly, competitors cannot invest in an alternative input that would permit supply by downstream competitors that would discipline the market power of a vertically integrated firm that controlled the alleged essential facility. That is, suppose the owner of the essential facility was vertically integrated downstream and did not supply any other downstream firms. The key issue is would there be other differentiated inputs available that downstream competitors could access, either in wholesale markets or by self-supply, that would allow them to compete and discipline the market power of the vertically integrated firm in the downstream market. If there is no "dominance" in the downstream market, the input is not essential upstream, and the integrated firm is not dominant in the upstream market: indirect substitution downstream disciplines the market power upstream and means that the market upstream includes the alternative inputs used by downstream competitors.<sup>27</sup>

The example of the competition from cable companies in the provision

of local telephony and broadband services with the telecommunication services providers should at least indicate that the copper loop network of the latter is not obviously an essential facility. Indeed it has been argued that the circumstances are such that relative to the direct and indirect costs of regulation, competition between the two networks (cable and telco) in Canada means that the telco networks are not essential facilities and that the optimal governance structure is deregulation at both the wholesale and retail levels.<sup>28</sup> With approximately equal market shares in the provision of local telephony, starting from telco shares of 100%, and active rivalry to provide network services to a location, it is very difficult to argue that the telco copper loops are an essential facility.<sup>29</sup>

## 4.2 The Effects of the Exercise of Market Power Upstream

The effect of the foreclosure in the downstream market from the denial of access will be an increase in costs or a reduction in quality of downstream firms. It is important to recognize that in many instances the effect of a reduction in quality is formally identical to an increase in costs. If foreclosure prevents the introduction of higher quality products, the effect on downstream consumers is often that they must consume *more* of a lower quality product. This increases the cost to them, just as an increase in an input price from an exercise of market power would raise the price paid by consumers in the downstream market.

To understand the effects of the exercise of market power upstream, consider two cases. In the first case, the downstream market is perfectly competitive both with and without the exercise of market power upstream. In the second case, the exercise of market power upstream, by discriminating or excluding some firms downstream, does affect market structure downstream and market power.

### 4.2.1 Competition Downstream

Suppose that an input supplier has monopoly power. Suppose further that they are not vertically integrated into the downstream market, but that they discriminate between downstream suppliers. If the downstream suppliers are competitive, then this discrimination will simply be a manifestation of the exercise of market power. The exercise of market power upstream will reduce the number of suppliers (those excluded) or effectiveness of some suppliers (those discriminated against) and as a result the supply curve downstream will shift up and to the left. The

result will be an increase in the price downstream, a decrease in output, and possibly a reduction in quality.

The difference between the downstream outcome with, and without, foreclosure is the difference between one competitive equilibrium and another. The rise in the equilibrium price and reduction in quality is the result of the exercise of market power upstream and its effect on reducing supply in the downstream market. Certainly, consumers in the downstream market are harmed and there is a reduction in output downstream, but this is the *effect* of the exercise of market power upstream. There is not an increase in market power downstream and there is no antitrust harm. The increase in price downstream is not the result of conduct that creates, enhances, or maintains market power, but the effect of the exercise of market power *upstream*.<sup>30</sup>

#### 4.2.2 Oligopoly Downstream

It might be the case that the upstream monopolist affects the extent of competition downstream when it discriminates against, or refuses to supply, some downstream firms. The question that arises is whether the conclusion in the preceding section is robust to situations when downstream firms have “market power”. The answer, developed below, is that it is robust, because the source of market power is control of the essential facility, and while increasing the number of firms downstream might appear to decrease their market power, it has no effect on the market power upstream, i.e., in the supply of the services of the essential facility. Instead the monopolist of the input may find that allowing some competition downstream increases the profitability of its upstream monopoly, i.e., enhances its ability to extract profits from its upstream monopoly relative to it being vertically integrated and being a monopolist downstream.

The owner of the alleged essential facility could simply extend its monopoly downstream by vertically integrating and never supplying any rivals downstream with access. There would not be any market transactions: there would not be discrimination in the terms of supply or some downstream firms provided with access and others precluded. If the vertically integrated firm has not provided wholesale access to any rivals that provide service in the downstream market, it is difficult to argue that antitrust enforcement should play the role that regulators might, identifying essential facilities, mandating unbundling, and setting regulated access prices and terms of service, in order to control the exercise

of market power. If there was a policy issue with the exercise of market power in the downstream market, the response would be regulation, either of downstream prices or mandated wholesale access at regulated prices to the input, not antitrust enforcement.<sup>31</sup>

Why would the owner of an essential facility provide supply to non-affiliated downstream firms at all? It would if providing supply or access to unaffiliated downstream firms creates value, i.e., by lowering costs or increasing quality. That is, relative to zero access to unaffiliated firms, limited or discriminatory access may increase the profits of the monopolist and value for final consumers. In doing so, the monopolist might discriminate or restrict access to some downstream firms, but it is doing so not to create, enhance, or maintain its market power but to create and extract more value from the supply chain it controls because of the essential facility.

The most obvious cases of when a monopolist upstream would invite some downstream firms to supply are when they have lower costs or can provide higher quality. But, the monopolist could limit supply downstream or discriminate in the terms of access to internalize competition and service externalities between downstream firms. Internalizing or restricting these externalities is intended to align incentives and restrict dissipation of value. For instance, if there are economies of scale downstream, the monopolist will have an incentive to restrict entry to avoid higher average costs and prices downstream. The monopolist could do this by either explicitly limiting the number of downstream firms it supplies or by setting an optimal two-part tariff. A two-part tariff involves both a usage charge per unit of service supplied and a fixed fee. The fixed fee when set optimally transfers profits from the downstream firms to the upstream monopolist. It implicitly controls the number of downstream suppliers: too many suppliers mean that there is too much competition and insufficient profits to pay the fixed fee. Hence the number of suppliers downstream reacts to the level of the fixed fee and makes sure that the competition downstream is sufficiently restricted to generate sufficient quasi-rents. If the downstream firms are differentiated or provide services that enhance quality, the upstream monopolist will have an incentive to optimize the range and diversity of products available downstream: it could easily do so by restricting and discriminating its terms of access.

There is a well-known and accepted distinction that conduct that is extractive, which more effectively utilizes existing market power

is acceptable, but conduct that extends market power, conduct that enhances, maintains, or enhances market power, is the legitimate target for antitrust enforcement.<sup>32</sup> That same principle is illustrated here: discrimination or exclusion by an upstream monopolist in the supply of an input to downstream firms is not conduct that extends market power, but instead it is extractive and may increase efficiency. It does not create, enhance, or maintain the monopolists' upstream market power.

There are two points worth emphasizing. First restrictions on downstream competition do not affect the market power of the essential facility. Hence there is not an antitrust case based on conduct that has extended the market power of the upstream dominant firm. Second, in terms of welfare, the relevant comparison is between consumer or total welfare with some access and some exclusion relative to consumer or total welfare when the owner of the essential facility monopolizes the downstream market. That is in assessing the welfare consequences of conduct that enhances extraction, the use of existing market power, this is the relevant comparison.

#### 4.2.3 Summary of the Economics of Monopoly Upstream

This section can be summarized as follows:

- If a facility is essential, then its owner has monopoly power and it is dominant, not only upstream but also downstream.
- Conduct that appears to restrict competition in the downstream market can easily be the exercise of market power upstream. If it is, then it is not conduct that should be reachable under the *Competition Act*. Exclusion downstream is possible because of market power upstream, but the exclusion downstream might well enhance efficiency.
- Conduct that restricts access to the essential facility should only be reachable under the *Competition Act* if it creates, enhances, or maintains market power. This has to be the market power of the dominant upstream supplier in the upstream market defined around the essential facility. This can either be because the conduct restricts the competitive discipline of alternatives to the essential facility upstream (direct substitution) or the competitive discipline of alternatives in the downstream market that do not use the essential facility (indirect substitution).

### 4.3 Regulation vs. Antitrust Enforcement

There is an important distinction between the role that monopoly power or dominance in the supply of an input (an essential facility) plays in antitrust enforcement under Section 78 and 79 of the *Competition Act* and the role that it plays in regulation. In a regulatory context the policy choice to regulate involves, as a necessary condition, the establishment of monopoly power in the downstream market. The issue is then whether retail rates are regulated, as was done traditionally, or instead access to some facilities or services of the incumbent mandated with regulated terms and prices of service.

If the market power downstream is because of control of an essential facility upstream, then market power downstream might be better controlled through enabling competition from rival service providers by mandating access to the essential facility. Hence downstream regulation at retail is replaced by wholesale regulation. The monopoly power of the incumbent—necessarily attributable to the control of the essential facility—is controlled by regulating the facility and not the services that are enabled by access to it. The benefit from providing access is the entry downstream enabled and its disciplining effect on the market power in downstream services provided by the vertically integrated firm. An advantage of mandated access in the wholesale market to control market power in the downstream market is that providing downstream competitors with access to the essential input might—and this is a big might—spur innovation and product diversity downstream, as well as lead to lower prices. The competition created downstream by mandating access is the goal of the regulatory intervention and it is enabled by regulating the upstream market power of the vertically integrated firm. In the absence of regulation, the upstream market power might not be reflected in high wholesale prices for the access charged to downstream rivals but rather in high, unregulated retail prices and no supply of access to downstream rivals. This is likely to be the case if independent downstream providers do not add much value.

In the case of enforcement under the *Competition Act*, the objective of the *Act* is not to regulate the exercise of market power. Instead its objective is to prevent conduct that creates, enhances, or maintains market power. Hence from the perspective of the *Competition Act*, the importance of denial of service is whether it creates, enhances, or maintains market power upstream relative to the but-for world. Unlike in the

context of regulatory mandated access and unbundling that creates a market and access is priced at competitive levels, the relevant but-for is access to the input provided by a monopolist.<sup>33</sup> The focus of antitrust enforcement should be on how the refusal to provide access creates, enhances or maintains the market power of the monopolist upstream, not whether access reduces its ability to exercise market power.

#### **4.4 Anticompetitive Conduct by the Monopoly Supplier of an Input Upstream**

Anticompetitive conduct by a monopoly supplier of an input must, therefore, involve conduct that creates, enhances, or maintains its market power in the relevant upstream market. There are two possible scenarios:

- The conduct reduces the constraint, actual or potential, of other suppliers in the upstream market. The conduct reduces the extent of direct substitution by downstream firms.
- The conduct reduces the constraint of other suppliers in the downstream market who do not use the essential input in a downstream market. The conduct reduces the extent of indirect substitution by downstream consumers and this increases the market power of the firm in the upstream market.

An upstream monopolist without the threat of entry or actual competition upstream is unlikely to have an incentive to foreclose access to its input for market power reasons. First, coherent theories—i.e., explanations that are consistent with profit maximization and that identify market power creation, enhancement, and/or maintenance to explain conduct that harms competitors downstream—are scarce. The Chicago School critique of leveraging based on the single profit theorem must be refuted or shown to be inapplicable. The single profit theorem states that profits arise because of the single monopoly, it is upstream, and hence market power and profits are unlikely to be enhanced by foreclosing competition downstream. If foreclosure is observed, it is because of efficiency reasons or to more effectively exploit the market power it has by facilitating price discrimination, not to extend market power. Second, the few coherent post-Chicago theories that exist are often not consistent with the facts.

##### **4.4.1 Single Profit Theorem**

The single profit result is based on the observation that by appropriate choice of the wholesale price, the upstream monopolist can ensure the

price in the competitive market downstream is identical to the price a vertically integrated monopolist would set, and its profits in the upstream market equal the profits of the vertically integrated monopolist.<sup>34</sup> The vertically integrated monopolist can monopolize the downstream market by refusing to supply the input to the other downstream firms. If its monopoly price is  $P^M$ , then its integrated profit margin will be  $I=P^M-c-d$ , where  $c$  is the unit cost of production upstream and  $d$  are the additional costs downstream to transform a unit of the upstream good into a unit of the downstream good.<sup>35</sup>

In the absence of vertical integration, the price in the perfectly competitive downstream market will equal the marginal cost of production downstream:  $P^C=w+d$ , where  $w$  is the monopolist's wholesale price. The unintegrated monopolist can earn the same profit as if it were vertically integrated by setting its wholesale or upstream price such that the downstream price under competition is the same as it would be if there were vertical integration. Setting  $w=P^M-d$  insures that  $P^C=P^M$  and yields the same profits as integration and foreclosure. The assumption of fixed proportions ensures that sales of the upstream input equal sales of the downstream good, and hence the quantity demanded will be the same as the vertically integrated quantity. The upstream monopolist's profit margin will also be the same as if it were integrated ( $I=P^M-c-d$ ). The downstream price, quantity, and the profits of the monopolist are identical whether the monopolist integrates or not.

If it integrates, it provides the downstream services and incurs cost  $d$  to do so. If there is vertical separation, competitive downstream firms provide the downstream services for the monopolist at a cost of  $d$ . The monopolist earns the monopoly profit by realizing the monopoly margin in the wholesale market. Because of fixed proportions and competition downstream, this margin is simply passed on to final consumers by the downstream sector. Vertical integration does not increase profits, and a vertical merger is not required to realize monopoly profits.

Since increased profits and market power are not the reason for the vertical merger, the argument is that the rationale for the vertical merger must be based on realizing efficiencies that lead to lower per unit costs or integration and foreclosure can be a means to implement price discrimination. Lower per unit costs, whether upstream or downstream, lead to an increase in the monopolist's profits on its prevailing sales. It can

further increase its profits by increasing sales. It can only increase sales by lowering the price to consumers, thereby making them better off as well.

#### 4.4.2 Anticompetitive Conduct by an Upstream Input Monopolist

Coherent theories of anticompetitive conduct by an upstream input monopolist are not impossible, just scarce. These theories escape the Chicago School critique based on the single profit theorem by assuming that competition is imperfect downstream, i.e., downstream firms have market power. The coherent theories typically involve integration and foreclosure by an upstream monopolist downstream to prevent entry by a rival upstream, thereby preserving market power upstream. At the core of these theories is the interaction between economies of scale upstream and denial of demand downstream by integration. The integration and foreclosure by the incumbent monopolist reduces demand downstream for a rival by foreclosing customers and, if there are economies of scale, this can make entry unprofitable for it.<sup>36</sup>

Even if the result is entry deterrence and maintenance of the foreclosing firm's upstream monopolist, it might benefit consumers downstream and increase total welfare. The reason is that with imperfect competition downstream, there will be double marginalization: in the absence of integration the upstream monopolist will charge a wholesale price above its marginal cost and the downstream firms when they exercise their market power will mark up over their marginal cost, which will include the upstream monopolist's mark up. Hence there is double marginalization. A vertically integrated firm will have lower marginal costs downstream, since it will transfer the upstream input at marginal cost *not marginal cost plus a mark up*: this provides it with an incentive to lower prices and expand output relative to its unintegrated rivals. The effect of internalizing double marginalization from integration can make integration and foreclosure good for consumers or increase total surplus.<sup>37</sup> Vertical integration and foreclosure is an example of conduct that can both create market power (by reducing the competitive constraint of rivals) and lower costs (improving resource allocation and creating incentives to lower prices downstream).

### 5 Errors in Economics: the FCA and Tribunal in *TREB*

In this section, the interpretation of the abuse provisions in *TREB* by the Federal Court of Appeal and the Tribunal (second panel) are assessed

based on the economic framework of the preceding section. The errors of economics committed by the FCA and the Tribunal establish the foundation for the made-in-Canada essential facilities doctrine.

## 5.1 Control

Since the first abuse of dominance application, *NutraSweet*, the Tribunal has interpreted control of a class or species of business to mean market power in a relevant antitrust market.<sup>38</sup> In *Canada Pipe* the Tribunal observed:<sup>39</sup>

A “class or species of business” has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression “Canada or any area thereof” is to be understood as the geographic market, while “control” has been found to be synonymous with market power (*Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.*; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.*; *Canada (Director of Investigation and Research) v. NutraSweet Co.*; *Canada (Director of Investigation and Research) v. Tele-Direct*).

The Commissioner alleged that TREB controlled the downstream market, residential real estate brokerage, because it (a) controlled the multiple listing service, including setting the rules for access to the multiple listing service, and (b) without access to the multiple listing service, realtors cannot provide residential real estate brokerage.

The FCA endorsed the possibility that the requirement for control could be satisfied if a supplier of an input could use the terms of access to affect competition in the downstream market. The sole discussion of this in the FCA decision is a single paragraph:<sup>40</sup>

The Commissioner takes the position that a person that is not a competitor in a particular market nevertheless may control that market substantially within the meaning of paragraph 79(1)(a) by, for example, controlling a significant input to competitors in the market, or by making rules that effectively control the business conduct of those competitors. In my view, the Commissioner’s position reflects an interpretation of paragraph 79(1)(a) that its words can reasonably bear, given the statutory context.

The Tribunal in the *TREB Redetermination* agreed with the Commissioner that market power includes the power to exclude if excluding competitors profitably influences prices and goes onto observe that it is the “exercise of the power to exclude that facilitates a dominant firm’s

ability to profitably influence the dimensions of competition referred to in *Tervita*.<sup>41</sup>

The Tribunal correctly observes that the exclusion of competitors is a necessary condition for classic market power, but conflates the exclusion of competitors with market power. As discussed above, in an essential facilities scenario, market power upstream gives the power to exclude downstream, but it is not market power downstream. Exclusion of competitors is not market power, but it can give rise to the ability to exercise market power. It can be the case that the exclusion of competitors does not give rise to classic market power. Hence evidence on exclusion is not sufficient to conclude that a firm has market power.

This is the case in *TREB*: the realtors in the downstream market do not have market power. Indeed, it is hard to imagine a market that more closely resembles that of textbook competition. There were over 36,000 realtors in Toronto, there was lots of entry and very low entry barriers, concentration levels by neighbourhood were very low, market shares were unstable and there was considerable turnover of the market leader.<sup>42</sup> The Tribunal agreed:<sup>43</sup>

[500] The Tribunal acknowledges that individual real estate brokers and agents in the Relevant Market do not have market power.

...

[501] The Tribunal also acknowledges that there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data-sharing vehicles.

Given the almost free entry and exit into the downstream market, realtors and brokers do not earn profits above the competitive level and the conduct by TREB did not increase the profits of some brokers and realtors above competitive levels. In asserting that TREB's conduct "profitably influenced dimensions of competition" in the downstream market, the Tribunal appears to confuse quasi-rents and Ricardian rents with above average returns attributable to the exercise of market power.<sup>44</sup>

Moreover, the Tribunal and Commissioner do not understand that the power to exclude or affect competition in the downstream market only exists if the upstream supplier has market power in the upstream market.

The input supplier can only “control” the downstream market if it has market power in the supply of the input, otherwise downstream firms could ignore the rules and restrictions regarding the use of the input. As usual, buyers can evade the exercise of market power if they can substitute to alternatives. And, of course, determining whether the input supplier has market power will require defining an upstream market where the input supplier is dominant. If it is not, then the facility is not essential, and the upstream firm cannot affect competition in the downstream market.<sup>45</sup>

The Tribunal’s mistake of conflating market power downstream with the power to exclude arises because it does not recognize that the power to exclude arises only if there is market power upstream. Moreover, it is also not supported by the legal precedents it relies upon. The economic foundations for defining market power to include the power to exclude are incorrect and likely so too is its legal foundation.

The Supreme Court in *Tervita* defines market power as the following:<sup>46</sup>

Generally, a merger will only be found to meet the “lessen or prevent substantially” standard where it is “likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms” (O. Wakil, *The 2014 Annotated Competition Act* (2013), at p. 246). Market power is the ability to “profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition” (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, at para. 7, aff’d 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii). Or, in other words, market power is “the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable” (*Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), at p. 314);

The definition of market power used by the Supreme Court in *Tervita* is in the context of defining when a merger will lessen or prevent competition. As the first sentence makes clear the concern is that the merged entity will be able to exercise market power and a firm has market power, therefore when it—made clear by the third sentence—can profitably influence or maintain price above competitive levels or other dimensions of competition away from competitive levels. The Supreme Court is defining classic market power: the ability to profitably raise prices above competitive levels.

This is made clear by the full text of the decisions cited by the Supreme Court in *Tervita*. In *Hillsdown* the full cite is:<sup>47</sup>

Market power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable. In a competitive market, prices will tend towards marginal cost. Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing.

In *Waste* the full cite identifies the key concern as the ability of the merged entity to exercise more classic market power post transaction:<sup>48</sup>

The main issue to be decided by the Tribunal is to determine whether the acquisition of the Ridge is likely to result in a substantial prevention and/or lessening of competition, or in other words, whether the merger will create or enhance market power. Market power is the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition.

Moreover, the definition used by the Tribunal in *Waste* is identical to that from the *Merger Enforcement Guidelines* (“MEGs”) in force at the time:<sup>49</sup>

*Market power refers to the ability of firms to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition in the manner described below. In evaluating whether the market power of the merging parties is likely to be greater than if the merger does not proceed, the focus is primarily on the price dimension of competition.*

The MEGs identify that “the manner described below” is either a unilateral increase in the market power of the merged entity or a coordinated effect:<sup>50</sup>

A merger can lessen competition in two different ways. The first is where it is likely to enable the merged entity to unilaterally raise price in any part of the relevant market. The second is where it is likely to bring about a price increase as a result of increased scope for interdependent behaviour in the market.

This further makes clear that the Tribunal and the Supreme Court are defining classic market power: an SLC arises when the merged entity has a greater ability to profitably raise prices above competitive levels.

The FCA in *Canada Pipe (Market Power)* provides a summary of the

jurisprudence that had developed at that time on the relationship between market power and control, i.e., the requirements of Section 79(1)(a). The FCA made two observations. First that market power, though not mentioned in Section 79(1)(a), was necessary for control,<sup>51</sup> and, second, citing the FCA in *Southam*, that market power is classic market power:<sup>52</sup>

“market power is recognized as the ability to profitably raise prices above competitive levels without losing a significant portion of business to rival firms or firms that may become rivals as a result of the price increase”

The result of the FCA’s cursory analysis and the Tribunal’s mistake in the *TREB Redetermination* is economic mischief. Instead of substantial and durable market power in a well-defined antitrust market, control now also encompasses a monopoly supplier of an input in an upstream firm if it uses the price and terms of supply to limit competition in the downstream market. If it uses the terms of supply to limit or set the rules of competition downstream, the input supplier is deemed to have market power *in the downstream market, when its ability to do so arises because it has market power upstream*. The Tribunal will find that monopoly power upstream means dominance downstream since any exercise of monopoly power will “limit” competition downstream.<sup>53</sup> The FCA and the Tribunal fall into the trap of mistaking the effect of an exercise of market power upstream for market power in the downstream market.

## 5.2 Practice of Anticompetitive Acts

### 5.2.1 The Canada Pipe Rule

The ruling interpretation of 79(1)(b) was established by the Federal Court of Appeal in *Canada Pipe (SLC)*. The so-called Canada Pipe rule defines anticompetitive conduct as conduct that has “an intended predatory, exclusionary, or disciplinary negative effect on a competitor.”<sup>54</sup> The Canada Pipe rule requires conduct that (i) is exclusionary, predatory, or disciplinary and (ii) against a competitor.

The Federal Court of Appeal in *FCA 2014* rejected the Canada Pipe rule that an anticompetitive practice required conduct that was exclusionary, predatory, or disciplinary against a *competitor* on two grounds:

- Competitor does not necessarily mean a competitor of the dominant firm, defined as the target of the Commissioner’s application.<sup>55</sup>
- Section 78(1)(f) is an example of an anticompetitive practice that

is “not necessarily taken by a person against that person’s own competitor.”<sup>56</sup> Section 78 lists a non-exhaustive list of examples of anticompetitive acts. Section 78(1)(f) includes “buying up of products to prevent the erosion of existing price levels” in the list of anticompetitive acts. The presence of Section 78(1)(f) provides the latitude to conclude that the intention of Parliament was *not* to limit the application of Section 79 to actions taken by a dominant firm against its competitors.<sup>57</sup> Such an interpretation, that the action has to be directed against a competitor, would be “manifestly wrong” due to “flawed reasoning.”<sup>58</sup>

The second prong of the FCA’s rationale suggests the first part of the Canada Pipe rule is also in doubt. Just like the FCA’s finding that Section 78(1)(f) is not necessarily directed at a competitor, and indeed perhaps more so, Section 78(1)(f) is also not necessarily disciplinary, exclusionary, or predatory.

Section 78(1)(f) is exclusionary if the conduct involves overbuying of an input to raise the costs of a rival.<sup>59</sup> But it might involve buying up the output of competitors, its most straightforward interpretation.<sup>60</sup> A dominant firm might find it profitable to purchase the product of its rivals to prevent price erosion if by doing so it reduced the competitive constraint of those rivals on its ability to exercise market power. In such circumstances, its competitors will likely benefit from higher prices as a result of this conduct.

It is not so apparent therefore, that Section 78(1)(f) undermines the *competitor* portion of the Canada Pipe rule. If the overbuying is in an input market and raises the cost of a rival, there is clearly a competitor that is (partially) excluded. If the overbuying is in the output market, it must be from, or involve, a competitor or it does not benefit the dominant firm. Indeed, to the extent the dominant firm buys some or all of the output of its competitor, the competitor is partially or fully *excluded* from the market but it is not harmed.

Section 78(1)(f), does, however, serve as *sufficient* grounds for rejecting the “exclusionary, predatory, or disciplinary” part of the Canada Pipe rule, *at least if exclusionary means that the competitor is harmed*. Overbuying in the downstream market can benefit rivals, i.e., result in a higher price and profits, even though it reduces their competitive constraint on the dominant firm.

The reason that a dominant firm would engage in any of the conduct

listed in Section 78 is not because the harm is “experienced by a competitor”. Instead what is relevant is that for all of the eight acts where there is a predatory, exclusionary, or disciplinary object or purpose, the intent is to reduce the ability of competitors to constrain the exercise market power by the dominant firm. Within the logic of the abuse of dominance provisions, the conduct that is to be deterred is conduct that creates, maintains, or enhances the market power of the dominant firm by reducing the ability and willingness of its customers to substitute, where this effect arises from reducing the ability of competitors to expand output or by reducing the quality or attractiveness of competitors’ products. All of the acts listed have the feature that they involve reducing the ability of consumers of the dominant firm to substitute to competitors by preventing or impeding the ability of competitors to expand or eliminating them from the market. From this perspective it is not that the common purpose has a negative effect on a competitor per se that is important, but that it has a negative effect on the ability of a competitor to constrain the market power of the dominant firm by removing their output from the market.

In this context Section 78(1)(f), “buying up of products to prevent the erosion of existing price levels”, has exactly the same effect. A dominant firm would only purchase the product of its rivals to prevent price erosion if by doing so it reduced the competitive constraint of those rivals on its ability to exercise market power. Buying up product in the downstream market—by buying it from suppliers who are competitors (to it or an affiliated/related firm)—so that the price does not fall in the downstream market prevents consumers from benefiting from competition, i.e., prevents competitors from competing. By taking the output of its rivals off the market, it is able to reduce the ability of its customers to substitute to alternatives when it exercises market power and raises its price. This will be profitable if the value of the purchases is less than the gain in profits from being able to raise prices. In this sense, the conduct in 78(1)(f) is similar to a merger: it involves eliminating the competitive constraint of the dominant firm’s competitors. Instead of buying the firm, i.e., the capability to product output, as in a merger, the dominant firm instead buys its rival’s output.

Without an effect on competition between firms there cannot be an effect on competition. Without an effect on competitors of the dominant firm or *related affiliates* there is not an anticompetitive incentive for the dominant firm to engage in the conduct. So, the conduct or act must

negatively affect the incentives or ability of a firm that competes with the dominant firm or a related entity. This means that the FCA's first ground for excluding the competitor requirement discussed above is economically illiterate, the conduct must affect a competitor of the dominant firm or a related firm. Anticompetitive conduct must ultimately benefit the dominant firm (or related firms) from increasing market power and monopoly profits or its purpose is not anticompetitive.

This interpretation would incorporate conduct that softens price competition between rivals.<sup>61</sup> Conduct that softens price competition does so by making demand more inelastic and to do so it must reduce the ability of consumers to substitute. For instance, the expansion in sales from a price reduction may be much less when there are best price clauses, since the effect is to reduce the price of all suppliers. A common price decrease will not be met with the same expansion in volume if it is matched by all suppliers. As a result demand for all firms will be less elastic with best price clauses.

### 5.2.2 Legitimate Business Justifications

The Tribunal in the *TREB Redetermination* followed the jurisprudence developed by the Federal Court of Appeal in *Canada Pipe* and *FCA 2014*. In the Tribunal's view the legal requirement is that the conduct's purpose must be exclusionary, predatory, or disciplinary on a competitor.<sup>62</sup> Following *FCA 2014*, the conduct need not be against a competitor of the party engaged in the conduct, but the party engaging in the conduct must have a plausible interest in competition in the market where its conduct negatively affects a competitor because it is exclusionary, predatory, or disciplinary.<sup>63</sup> The purpose or intent of the conduct can be established by reference to evidence of subjective intent or from the reasonably foreseen effects of the conduct.<sup>64</sup>

The FCA in *Canada Pipe* determined that in assessing the purpose of conduct, the Tribunal is to consider whether it has a legitimate business justification. Indications, whether subjective or based on the effects of the conduct, that it has a legitimate business justification are to be weighed against the evidence suggesting the motivation for the conduct was predatory, exclusionary, or disciplinary. A legitimate business justification "essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein."<sup>65</sup>

The Tribunal in *TREB Redetermination* summarized its view of how it was to determine whether conduct was anticompetitive:<sup>66</sup>

In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were *more important to the respondent* than the desire to achieve efficiencies or to pursue other pro-competition goals.

The FCA, with some considerable clarification by the Tribunal in the *TREB Redetermination*, defined a legitimate business justification to be “a credible efficiency or pro-competitive rationale”.<sup>67</sup> This means that the conduct must lead to efficiencies or other advantages for the firm that enable it to more effectively “compete on the merits”.<sup>68</sup> Both the FCA and the Tribunal, however, require that the business justification be independent of the anticompetitive effect of the practice.<sup>69</sup>

As has been remarked in the United States by Judge Posner, the focus on intent is very unfortunate in and of itself:<sup>70</sup>

The importance of intent in such fields as tort and criminal law makes it natural to suppose statutory tort. But here is an insoluble ambiguity about anticompetitive intent that is not encountered in the ordinary tort case . . . If firm A through lower prices or a better or more dependable product succeeds in driving competitor B out of business, society is better off, unlike the case where A and B are individuals and A kills B for B's money. In both cases the ‘aggressor’ seeks to transfer his victim's wealth to himself, but in the first case we applaud the result because society as a whole benefits from the competitive process. That Western Union

wanted to ‘flush those turkeys’ tells us nothing about the lawfulness of its conduct.

But perhaps more important is the view that the business justification must be independent of the anticompetitive effect and therefore in instances where the conduct both has an efficiency enhancing effect and an anticompetitive effect, the business justification is not relevant for determining whether the intent was anticompetitive. While there is an inherent problem of balancing two competing explanations underlying intent to determine which dominates, there is an even more significant problem that renders this balancing of intent impossible and harmful when the same conduct has both effects, i.e., it enhances a firm’s efficiency and it reduces the competitive constraint of rivals.

The problem created in the context of an upstream facility for which access is “essential” for competition downstream is that exclusion of others from the asset protects the flow of quasi-rents that justifies the investment in the asset. Firm investment in the real world often involves expenditures on capital that is specific in terms of where it can be used and what it can produce. This specificity gives rise to sunk costs, i.e., the opportunity cost of the investment is much less than its historic cost. The difference between unrecovered historic cost and the salvage value of the asset, its value in its next best alternative use, is the sunk cost of the investment. These sunk costs are recovered, if at all, from using the asset in its specific use. Using the asset in its specialized use generates quasi-rents, the difference between revenues and avoidable costs. For the firm to break even, including earning a competitive rate of return on its investment, the quasi-rents earned will have to equal its sunk expenditures.

Mandated access, to the extent it leads to lower prices from more competitors, will reduce quasi-rents. An expected reduction in quasi-rents will reduce the expected returns from the investment. This would be expected to reduce the incentives to invest in a facility that might be deemed *ex post* essential. And for facilities that already exist, mandating access that has the effect of reducing quasi-rents to incumbents is regulatory hold up: it is a change in policy that makes sunk investments unrecoverable. Developing a reputation for changing the rules after investment is sunk will make firms wary to invest, resulting in both higher rates of return and limits on investment.

The relationship between private property rights—which typically include the right to exclude others—and incentives for investment is

both well understood and obvious. It may be the case that others could benefit from accessing a firm's assets. But there must be a very high hurdle for efficient competition policy to mandate access to the assets of either an individual or a group of individuals. The essence of competition is investment in production of a good or service that is valued higher or has lower cost than competitors. The expectation of sales provides the incentive for the investment and implicit in the expectation of sales is providing at least some consumers a better option than their next best alternative. Competition is driven by the investment incentives created by offering consumers a cheaper, better mousetrap. Mandating sharing of the mousetrap is, as Judge Hand observed years ago, akin to urging a firm to win the race, but then penalizing them when they do.<sup>71</sup>

The exclusion of others from accessing the assets and facilities of a firm is intended to exclude them and to maximize the benefits from the investment. The Tribunal's approach in *TREB Redetermination* suggests that exclusion of others from using an asset will be deemed an anticompetitive act, just because it is intended and has the effect of exclusion, regardless of its efficiency benefits. Indeed, the Tribunal used the evidence that some brokers were concerned about an increase in competition from entry by full information VOWs and the effect on commissions to justify the TREB VOW policy as evidence that it was intended to be anti-competitive.<sup>72</sup> Exclusion to protect quasi-rents and exclusion to protect monopoly rents from market power should not be treated the same.

There may be other efficiency rationales besides protecting the returns to investment of the upstream firm that may underlie restrictions imposed by it on downstream competition. As discussed above, these may involve internalizing externalities, avoiding rent dissipation, and providing incentives for downstream firms to make investments.

Not only does the framework developed by the FCA and the Tribunal for assessing whether conduct is anticompetitive or not prohibit an objective balancing of the effects of the conduct on resource allocation, which is especially problematic when the conduct both relaxes the competitive constraint of rivals and benefits consumers or realizes efficiencies, it does not even recognize that the exclusion may not have any effect on market power.

The Tribunal and the FCA have held that information regarding the exercise of market power cannot be used to assess whether conduct is anticompetitive. For instance, the FCA in *Canada Pipe (SLC)* was critical

of the Tribunal in *Canada Pipe* for looking for a link between the conduct and a decrease in competition.<sup>73</sup> The Tribunal in *TREB Redetermination* summarizes this as follows:<sup>74</sup>

To the extent that past pronouncements of the Tribunal may have suggested that it is necessary for an adverse impact on competition be demonstrated before it can be concluded that impugned conduct is anti-competitive within the meaning of paragraph 79(1)(b), (e.g., *Canada Pipe CT* at para 171; *Nielsen* at p. 257; *Laidlaw* at p. 333), they should be disregarded.

This refusal to look at the ultimate effect of the conduct on competition leads to incorrect categorizations of conduct and decision errors. The most obvious error occurs in *TREB*. The consensus of the evidence (shared by the Tribunal) is that there is no exercise of market power downstream by realtors either with, or without, the restrictions on the confidential data. Thus, there is no way that the restrictions on the confidential price data should be deemed an anticompetitive practice. Without market power downstream, there is no way that those restrictions can relax the competitive discipline on brokers, creating, maintaining, or enhancing their market power. In the absence of market power downstream, the rationale for the exclusion must be efficiency enhancing: it cannot be anticompetitive. And the efficiency rationale in *TREB*, as in any, essential facility case included the preservation of incentives for investment by protecting quasi-rents and preventing free riding by competitors.

### 5.3 Substantial Lessening or Prevention of Competition

The Tribunal in the *TREB Redetermination* and the Commissioner have eviscerated Section 79(1)(c) by adopting a new definition of an SLC. Traditionally an SLC was assessed by observing the effect of the conduct on market power. Was market power enhanced, created, or maintained by the conduct? And the effect had to be substantial. The Commissioner's burden was to show a link from the anticompetitive practice to an effect on the market. In *TREB Redetermination* the Commissioner and the Tribunal look from an effect *possible* from an increase in market power to presume such an increase. They thus ignore that there might be other reasons for the assessed effects they rely upon to find an SLC.

The logic of the Tribunal in the *TREB Redetermination* is to (i) observe exclusion; (ii) conclude that by definition there must be a decrease in

product diversity and innovation; and therefore (iii) that there must be a SLC.

But this is wrong on the face of it since the Tribunal agrees that there is no market power in the downstream market either before or after the conduct. Instead the exclusion is based on efficiency rationales and the negative effects they believe they find on the market are attributable not to an increase in market power, but are the results of the exercise of market power upstream. Exclusion downstream is possible because of market power upstream, arises because of its exercise, and enhances efficiency. There is nothing untoward with TREB acting to protect the investments of its members by preventing the dissipation of quasi-rents from lower prices enabled by competitors accessing the investments made by its members.

### 5.3.1 Pre-*TREB* Jurisprudence on SLC

The requirement for an effect on competition of the anticompetitive conduct requires that the effect on the conduct of rivals translate into an effect on market power. The Competition Bureau recognizes this in their discussion of what constitutes a substantial lessening of competition in its *Abuse of Dominance Guidelines*:<sup>75</sup>

Generally speaking, a substantial lessening or prevention of competition creates, preserves, or enhances market power. A firm can create, preserve, or enhance market power by erecting or strengthening barriers to expansion or entry, thus inhibiting competitors or potential competitors from challenging the market power of that firm. In examining anti-competitive acts and their effects on entry barriers, the Bureau focuses its analysis on determining the state of competition in the market in the absence of these acts. If, for example, it can be demonstrated that, but for the anti-competitive acts, an effective competitor or group of competitors would likely emerge within a reasonable period of time to challenge the market power of the firm(s), the Bureau will conclude that the acts in question result in a substantial lessening or prevention of competition.

The FCA in *Canada Pipe* confirmed the relationship between the requirements for an SLC or SPC and an effect on market power, noting the Tribunal's findings in *NutraSweet*:<sup>76</sup>

“The factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that NSC [NutraSweet Co.] has market power [that is, market share and entry barriers]. In essence, the question to be

decided is whether the anti-competitive acts engaged in by NSC preserve or add to NSC's market power."

And, in Nielsen:<sup>77</sup>

"The central issue to be decided in determining whether the Director has satisfied this third element [of subsection 79(1)] is the effect of the exclusives with retailers and the long-term contracts with customers on the conditions of entry into the market. Or, to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen [D & B] preserve or add to Nielsen's market power. "

The FCA in *Canada Pipe* confirmed the assessment of the meaning of Section 79(1)(c) in the academic literature and its assessment is consistent with the economic discussion *supra*.<sup>78</sup>

The focus of the Commissioner's appeal in *Canada Pipe* was the Tribunal's finding that there could not be a substantial lessening of competition during the time period of the alleged anticompetitive practice (the Stocking Distributor Program (SDP)) because despite the practice there was evidence of competitive pricing due to increases in the extent of imports and entry.<sup>79</sup> The FCA overturned the Tribunal on the basis that it had not done a "but-for analysis". Under a but-for analysis the Tribunal must compare the extent of market power given the practice against the extent of market power in a counterfactual that assumes away the practice. In the words of the FCA:<sup>80</sup>

In summary, the Tribunal should have turned its mind to the question of whether, in each of the relevant markets, *competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice*. In other words, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive. Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater. In this regard, identification of the occurrence of entry, or reference to evidence of competition subsisting in the presence of the impugned practice, is insufficient. I conclude therefore that the Tribunal erred in law in its analysis, for the purposes of paragraph 79(1)(c),

as to whether the SDP has had, is having or is likely to have the effect of preventing or lessening competition substantially in the relevant markets.

The lower prices and greater quality in the but-for world indicate an SLC only if the higher prices and lower quality are the result of an *increase in market power relative* to the but-for world. That is, they, as well as the other considerations mentioned, are relevant *only* because they may be indirect signals of an increase, maintenance, or enhancement of market power. This is the import of the but-for test, highlighted in the first sentence: how has competitiveness changed relative to the but for? *Competitiveness or the state of competition is not measured by service levels or the level of prices.* Instead the state of competition is measured by market power. In this regard, an SLC or SPC is based on an increase in the difference between the levels of these indicators and their competitive level, not from a change in their competitive level.

The logic of Section 79 is that under 79(1)(b) a dominant firm engages in a practice of anticompetitive acts that reduces the ability of rivals to discipline the dominant firm's ability to exercise market power; 79(1)(c) is a check to make sure that the effect matters in the market. Hence the Bureau's traditional focus on barriers to entry and expansion. But it is only if these barriers to expansion and entry have an effect on the market that there will be an SPC or SLC. This is reflected in changes to prices and qualities relative to their competitive level. If the *competitive level* does not change, then it is possible to just to ask what happens to the prices and qualities and infer this is caused by a change in market power.

But the conduct could change both prices and non-price outcomes without affecting market power. Conduct can result in higher prices or a reduction in non-price competition without first creating, enhancing, or maintaining market power. As discussed above prices could be higher and product diversity and innovation lower not because the conduct is anticompetitive but because it is the exercise of market power upstream and competitors downstream are excluded for efficiency reasons. The inference from higher prices or reduced innovation and product diversity to anticompetitive behavior can therefore easily result in a false positive: a finding of an SLC or SPC under this approach does not require the creation, enhancement, or maintenance of market power either upstream or downstream. In particular higher prices downstream or a reduction in innovation and product diversity downstream can occur without a change in market power or competition upstream and even if there is no market power downstream by actual suppliers in the

downstream market. This is the error made by the Tribunal in the *TREB Redetermination*.

### 5.3.2 Tribunal Assessment of SLC in *TREB Redetermination*

The Tribunal started well in its *TREB Redetermination* deliberations. It observes that the requirement for liability is a materially greater exercise of market power as a result of the conduct.<sup>81</sup> But then the Tribunal falls into the trap discussed above and makes the fundamental error of inferring an effect on market power by looking at the outcome in the downstream market from the conduct:<sup>82</sup>

When assessing whether competition with respect to *prices* has been, is or is likely to be prevented or lessened *substantially*, the test applied by the Tribunal is to determine whether prices were, are or likely would be, materially higher than in the absence of the impugned practice. With respect to *non-price* dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita* at para 80; *CCS* at paras 123-125 and 376-377).

The reference to the Supreme Court is not supportive of the Tribunal's position that it can rely on whether the level of one or more dimension of competition has been lowered. The referenced paragraph and the beginning of the next discuss using a "but for analysis" to assess the effect of the conduct, in *Tervita* a merger, on market power:<sup>83</sup>

[80] The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with *Tervita*.

[81] The Tribunal concluded that the merger "is more likely than not to maintain the ability of [*Tervita*] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)).

Similarly, the Tribunal's approach in the same matter also clearly

identifies that the effect on price must be a result of an increase in market power from the merger.<sup>84</sup>

[377] Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger.

The Tribunal in discussing the “but for approach” correctly observes that it is required to compare the “state of competition” with and without the conduct.<sup>85</sup> But it again immediately confuses evidence on the level of prices and non-price competition with that state of competition, i.e., the level of market power:<sup>86</sup>

That is to say, the Tribunal compares, on the one hand, the level of competition that exists, or would likely exist, after the implementation of the impugned practice, and on the other hand, the level of competition that likely would have existed “but for” the impugned practice. As stated in the preceding section of these reasons, the test contemplated by this paragraph is whether the difference between those two levels of competition is, was, or would likely be, *substantial*; and this test is met when the price of the relevant product is likely to be materially higher, or the level of one or more significant dimensions of non-price competition is likely to be materially lower, than in the absence of the impugned practice.

The Tribunal does appear to recognize the link between market power and an SPC. In particular, its test in the *TREB Redetermination* focuses on the effect of exclusion from the confidential data (the essential facility in this matter) on market power in the downstream market (real estate brokerage):

[475] Where the respondent is a trade association, the Tribunal will consider whether the impugned practice is likely to facilitate the exercise of new or increased market power by some or all of the members of the association, or to preserve their market power, relative to the situation that would likely have prevailed in the absence of the respondent’s impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented or lessened at all, let alone substantially.

The Tribunal, moreover, “acknowledges that individual real estate brokers and agents in the Relevant Market [residential real estate brokerage do not have market power.”<sup>87</sup> That should have been enough to deny

the application, since if the downstream firms do not have market power, there cannot be any increase in market power, and without an increase in market power there cannot be an SLC or SPC.<sup>88</sup>

Instead the Tribunal insists that if the conduct by TREB, on behalf of its members, has prevented “a material increase in quality, variety or innovation, or a material reduction in price,” it has prevented “a material reduction in one’s market power”, i.e., there is an SPC.<sup>89</sup> The Tribunal found that denial of the confidential information resulted in an SPC precisely because of the negative effects on quality, variety, and innovation.<sup>90</sup>

The Tribunal implicitly acknowledges the inconsistency of determining that TREB has acted on behalf of its members to preserve their market power in the downstream market even though they do not have any. For instance, in the *TREB Redetermination*, the Tribunal states:

- “When a group of rivals, whether through their trade association or otherwise, insulates itself from increased competition, they are in essence exercising a cognizable form or market power.”<sup>91</sup>
- “the Tribunal is satisfied that TREB has exercised, and continues to exercise, such market power on behalf of its Members who sought to be insulated from innovative forms of competition.”<sup>92</sup>
- “However, to the extent that the VOW Restrictions insulate TREB’s Members from increased competition from new entrants and from Members who would like to provide additional service offerings through their existing VOWs, or through new VOWs, those restrictions are maintaining what is in essence the *collective market power* that TREB’s Members are able to exercise through their control of TREB and its rule-making functions. This *collective market power* is manifested in the form of materially less brokerage service offerings, innovation, quality and variety than would exist “but for” the VOW Restrictions.”<sup>93</sup>

The Tribunal in its justifications is actually acknowledging that the SPC it has found is not because there is an increase in market power downstream, but instead the effects on competition in the downstream market arise from the exercise of market power by TREB in the upstream market, the supply of the confidential price data.

The effect of raising the cost of provision of full information VOWs in the downstream market (if any) is simply the result of the exercise of market power by TREB in the relevant market that contains the

confidential price information. The exercise of market power (if any) could result in a reduction in competitive supply in the downstream market, with higher prices and lower quality in the competitive downstream equilibrium. But this is not conduct that creates, enhances, or maintains market power in the upstream market or the downstream market. Hence there cannot be a substantial lessening or prevention of competition even if TREB has market power, exercises it and it materially affects the costs of full information VOWs.

The Tribunal started by looking for an increase in market power: unfortunately in the case of denial of access to an essential facility for a well-founded case it should have been looking for an increase, maintenance, or creation of market power in the market in which the essential facility provides services, i.e., the upstream input market. When the downstream market, with and without mandated access to the essential facility downstream is competitive, as in *TREB*, finding an increase in market power in the downstream market is going to be an illusion.

### 5.3.3 Efficiencies and Denial of Access to the Confidential Data

The Tribunal agreed with the evidence that there is no market power in the downstream market either before, or after, the conduct. The question then arises as to why TREB would restrict the use of the confidential data. The typical Chicago School answer would be in this case that there must be an efficiency rationale for the restrictions on the use of the data. Of course the efficiency restrictions can only have an effect if TREB has market power in the confidential data: without market power the downstream firms could ignore the restrictions by substituting to substitute data provided by other suppliers. But the important point is that the restrictions are not anticompetitive: the exclusion by TREB is part and parcel of realizing efficiencies.

The negative effects the Tribunal found in the downstream market are attributable not to an increase in market power, but are the results of the exercise of market power upstream that are joint with realizing efficiencies. In the case of TREB's restrictions on the confidential price data, the exclusion is based on promoting investment and protecting quasi-rents, lowering costs of the MLS, and promoting trade and liquidity.<sup>94</sup>

Real estate agents make a number of investments. These include investments in building up their reputation, acquiring and valuing

listings, and developing and operating the multiple listing service (MLS). In particular agents incur costs in acquiring listings and valuing properties. These investments create de facto property rights in listings, which include the confidential price data. The agents then contribute those listing to the MLS database.

Mandating access to the confidential price data, under the theory of the Commissioner and the belief of the Tribunal, will result in full information VOWs that will have a significant impact on the revenues of existing agents. Existing agents will see decrease in prices and their sales. Thus the full information VOWs will benefit from the investments in listings at the expense of existing agents. That is free riding.

Moreover the agents have made their investments in the context of TREB's Rules, without considering that revenues would be reduced by facilitating movement to a more competitive equilibrium by enabling brokerages with full information VOWs. Free-entry by agents means that the marginal entrant expected zero economic profits. If revenues are reduced by providing access to VOWs with display and search of all MLS information then existing agents are held up and suffer financial losses to competitors that require their cooperation and access to their inputs. This is *not* the normal dynamics of a competitive market. In competitive markets firms do not have to share inputs in which they have property rights with competitors even if the result is lower prices. The transfer of revenues to brokerages with full information VOWs and consumers by mandating access is regulatory holdup—expropriation of sunk investments by changing the framework. The risk of holdup, as discussed above, both reduces the extent of investment and raises the required rate of return.

The MLS is a two-sided platform: more participants on one side benefit participants on the other side, i.e., the more buyers, the more attractive for sellers to participate and vice versa. Restrictions that promote liquidity on the MLS may be pro-competitive if they limit negative effects that reduce participation by buyers or sellers. Listing of the confidential price data might give rise to privacy concerns, strategic interference and bargaining advantages, and create a mix of price and non-price competition that reduces the pool of buyers and sellers. The concern with the latter is that full information VOWS might encourage price competition for inframarginal participants instead of non-price competition for marginal participants.

Mandating equal access transforms the MLS into a non-discriminating

joint venture. Non-discriminating joint ventures are fragile: they have to reconcile opposing interests between different groups. If they are unable to do so, then they may splinter and larger firms could go it alone, with the result that there is competition between competing pools of listings and the efficiency advantage of a single MLS are lost.

Information can be copied at low cost, use of it is non rivalrous and hard to monitor, and there are incentives to use the confidential price data for commercial purposes. In these circumstances TREB has an incentive to limit distribution of the confidential price data. If access is required for the public instead of the 35,000 agents, then searching will be provided by TREB not on mirrored servers and will be costly.

The extensive theoretical discussion of efficiencies is not matched by the same degree of supporting factual evidence. This is because many of the costs associated with mandated access are not observable without mandated access *and* a large effect on the market for residential brokerage from full information VOWS. In Toronto there has not been mandated access to the confidential information, the available evidence suggested a limited impact, a limited impact borne out by the experience in the U.S. The U.S. experience shows the irrelevancy of VOWS and the importance of search portals such as Zillow.

## **6 A Made-in-Canada Essential Facilities Doctrine**

### **6.1 Is *TREB* an Essential Facilities Case?**

The Tribunal in *TREB Redetermination* held that this was not an essential facilities case, since realtors that would like to offer full information VOW services still had access to the confidential price data, just not in the VOW data feed and there were restrictions regarding what they could do with the data.<sup>95</sup> Hence the Tribunal found that “this is not a case in which an upstream input supplier is denying customers *access* to an input.”<sup>96</sup> The irony is that the Tribunal determined that TREB’s VOW policy resulted in a substantial prevention of competition because it reduced the extent of innovation and product diversity. This must mean that it was the Tribunal’s view that the existing access to the confidential data was not a good substitute for including the confidential data in the VOW feed and relaxing the rules on how brokers would manipulate and display that data. That is, precisely *because* the two inputs, data under the TREB VOW policy and data not subject to the TREB VOW policy, are not sufficiently good substitutes, that data not subject to the TREB

VOW policy is required to allow for a different downstream product, full information VOWs. The existing input that was available for which there was access did not allow for downstream brokers to offer full information VOW products, i.e., without access to the confidential price data full information VOWS are foreclosed from the downstream market.<sup>97</sup>

The Tribunal cannot have it both ways: there is a glaring logical inconsistency between finding that restricting access to the confidential price data results in a substantial prevention of competition because it makes it impossible for the product—full information VOWS—to be offered downstream and a finding that this is not a case about denying downstream firms access to an input. The prevention of competition in the Tribunal's view arises from the inability of full information VOWS to enter because they do not have access to an input, the confidential price data without restrictions.<sup>98</sup>

## **6.2 Mapping the *TREB Redetermination* into a Made-in-Canada Essential Facilities Doctrine**

The made-in-Canada essential facilities doctrine created by the FCA and the Tribunal in *TREB* maps the following into an abuse of dominance:

- The Commissioner must establish that a firm supplies an input that is necessary for production in a downstream market. This involves establishing that the firm is dominant in the input market, i.e., an upstream monopolist. Hence upstream monopolists will be found to control downstream markets that use their input.
- If the upstream monopolist discriminates in the supply of an input or excludes some downstream firms from supply, it will be found to have engaged in a practice of anticompetitive conduct. By the nature of its conduct, exclusion, the intent is to harm downstream rivals and prevent them from using the input and competing downstream, or in the case of discrimination it is to limit their ability to compete. Consideration of the effect of the exclusion or discrimination on consumer welfare or resource allocation is irrelevant.
- If the result of the exclusion or discrimination of downstream rivals is a marked increase in prices; a marked reduction in product quality and diversity; or a marked reduction in innovation in the downstream market there is an SLC. The Tribunal will likely have

a high prior that the effect of exclusion will be these effects if the exclusion is “widespread”.

- The remedy is an order requiring non-discriminatory access.

### 6.3 YVR is the Unfortunate Legacy of *TREB*

The Commissioner’s application against the Vancouver Airport Authority provides evidence of the existence of the made-in-Canada essential facilities doctrine and the unfortunate perversion of the abuse of dominance provisions by the FCA and the Tribunal in the *TREB Redetermination*. Presently YVR restricts the choice of airlines to only two suppliers of catering and galley services. The Commissioner has applied for an order from the Tribunal requiring that YVR provide open access to airplanes for other suppliers of catering and galley services.

The Commissioner’s case can be briefly summarized as follows:<sup>99</sup>

- YVR is a monopoly supplier of airside access and hence it has control of the downstream market (catering and galley handling).
- YVR has denied access to entrants.
- There is likely an SLC since the conduct has reduced competition in the downstream market (catering and galley handling) because competitors have been excluded.
- The Commissioner is requesting an order as remedy that YVR provide non-discriminatory access.

The YVR case demonstrates that the concerns over the errors made by the FCA and the Tribunal in the *TREB Redetermination* have opened the door for further applications by the Commissioner which fundamentally are incompatible with the economic foundations of the abuse of dominance in the *Competition Act* and, more importantly, the welfare of Canadians and efficient resource allocation.

The effect of the exclusion on downstream competition, in catering and galley handling, is irrelevant: the focus of an abuse case should be on whether the conduct by YVR creates, enhances, or maintains its market power in airside access, the upstream market. The exclusion downstream is possible because it has market power upstream and likely creates value for either it, the airlines, or both.

The application of the abuse provisions, in these made-in-Canada

essential facilities cases, substitute antitrust enforcement for regulation of market power. In doing so the Commissioner and the Tribunal have expanded their jurisdiction with unfortunate consequences. The objective of the *Competition Act* is not the regulation of market power, but some types of conduct that creates, enhances, or maintains market power, conduct in particular that does not benefit consumers or the efficient allocation of resources. The remedy under the *Competition Act* achieved in *TREB* and sought in *YVR* appears to be costless, but it is not.

There are two important costs that are ignored. The first is that the remedy is behavioural: access is to be open and non-discriminatory. This will require that the price, quality, and terms of service be determined and enforced. Industry-specific regulators find the task of setting efficient access prices difficult, if not impossible. How the Competition Bureau or Tribunal are to do so is not clear. Second, a successful application under the abuse framework does not provide for the “balancing” between controlling market power through widening access versus the benefits of denying and restricting access. Those benefits include incentives for investment in the essential facility and exercising market power upstream to limit the number of competitors, or otherwise discriminate against some competitors, downstream to realize efficiencies.

## 7 Conclusion

This paper has provided an economic critique of the Tribunal’s *TREB Redetermination* decision. It has explained why the analysis by the Tribunal in the *TREB* matter is incorrect with respect to the three requirements for an order under the abuse of dominance provisions in the *Competition Act*: control of a market, anticompetitive practice, and SLC or SPC. While of concern in its own right regarding the foundation for all Section 79 applications and other provisions requiring demonstration of market power and economic effect, the paper has highlighted how these errors have resulted in a made-in-Canada essential facilities doctrine, an assessment confirmed by the Commissioner’s application in *YVR*. This doctrine is unlikely to be consistent with enforcement that makes consumers better off or increases the efficiency of resource allocation. In particular, the doctrine makes it far too easy for an order requiring access to the assets of a dominant firm: the short-run benefits of increasing competition in the downstream market are the only factor considered. The effect on the incentives of the dominant firm to make the investments in the first place are not considered. In the long run

consumers will not benefit and political support for competition policy will be undermined.

It is possible to distinguish *TREB* and *YVR*, though the enforcement action by the Commissioner does not. In *YVR* the upstream facility is owned only by *YVR* and the exclusion is unilateral. In *TREB*, the upstream asset, the confidential price data, is an aggregation of the assets of the members of *TREB*, i.e., the listings of each agent, and the refusal to allow access is concerted. There is clearly something more going on in the *TREB* matter than in *YVR*, but by proceeding under the abuse provisions and treating *TREB* as if it was a vertically integrated firm and ignoring the conduct that creates the confidential price database, the cases are considered under the same economic and legal framework. Traditionally there has been more support for mandated access to facilities that are created by pooling the assets of competitors: the focus of such a case is on whether the benefits of the pooling, the efficiency advantages, exceed the cost associated, where the cost is the market power created by the combination of assets of the competitors, a pooling that happens by agreement.<sup>100</sup>

## Endnotes

<sup>†</sup> This paper was part of the Scholars Panel at the Fall 2017 Canadian Bar Association Competition Law Fall Conference. My thanks to Michael Osborne and Tom Ross for the invitation to participate. An early airing of the ideas in this paper occurred at the 2016 Forum on Competition Law. This paper has benefited from the comments and observations of Andy Baziliauskas, Renée Duplantis, Tom Ross, Ralph Winter, Kalyan Dasgupta, and participants at the CBA Fall Conference and the Forum on Competition Law. My comments in this paper are my own and do not necessarily reflect their views or the views of the Toronto Real Estate Board.

<sup>1</sup> *The Commissioner of Competition v The Toronto Real Estate Board and the Canadian Real Estate Association* (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](http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20For%20Order%20and%20Order_238_38_4-15-2013_3949.pdf)> [*TREB I*]; *The Commissioner of Competition v The Toronto Real Estate Board*, 2014 FCA 29, 456 NR 373 [*FCA 2014*]; *The Commissioner of Competition v The 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](http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_66_4-27-2016_7296.pdf)> [*TREB Redetermination*]; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*FCA 2017*]; The Toronto Real Estate Board appealed the most recent Federal Court of Appeal decision upholding the Competition Tribunal's

2016 decision to the Supreme Court of Canada, see: <<https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37932>>; *The Commissioner of Competition v Vancouver Airport Authority*, CT-2016-015 (Notice of Application filed 29 September 2016), online: <[http://www.ct-tc.gc.ca/CMFiles/CT-2016-015\\_Notice%20of%20Application\\_2\\_66\\_9-29-2016\\_5321.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2016-015_Notice%20of%20Application_2_66_9-29-2016_5321.pdf)> [YVR].

<sup>2</sup> *TREB I*, *supra* note 1 at paras 23-25.

<sup>3</sup> *FCA 2014*, *supra* note 1 at paras 13, 20.

<sup>4</sup> I provided two expert reports on behalf of the Toronto Real Estate Board and I appeared before the Competition Tribunal twice.

The second panel observed in their decision that I was less helpful than the expert on the other side and occasionally evasive and prone to speculation. See: *TREB Redetermination*, *supra* note 1 at paras 108-109. No evidence in the decision of my evasiveness is provided, but two instances of speculation are discussed in relation to market definition, see: *TREB Redetermination*, *supra* note 1 at paras 229, 248-249. Market definition is based on identifying reasonable substitutes, which based on the hypothetical monopolist test involves identifying those products that make a small, but significant and non-transitory increase in price above competitive levels non-profit maximizing. The first instance of speculation identified by the Tribunal was demonstrating that the database of the largest corporate franchise group contained virtually the same information as the entire TREB multiple listings dataset. Using information from it alone to estimate a hedonic pricing model versus using the entire MLS database resulted in an average difference in predicted house values of less than 4%. To me this suggested that the data of the larger brokerage groups should be considered a substitute for the entire database. Second, I observed that the absence of alternative suppliers of the confidential price data to brokers that would like to display and have it searchable on their websites might be attributable to a lack of demand by consumers. That agents might demand it does not necessarily mean that home buyers and sellers will be influenced by its availability when selecting a real estate agent. There might be other reasons why an agent might demand this data that is independent of their competitive position in the market for real estate brokerage: in particular they might instead demand it to be “the” web destination for anyone interested in real estate values and hence be a supplier of eyeballs to advertisers.

The panel in the *TREB Redetermination* engaged with my evidence on market definition, in particular whether it was required to define two markets, an upstream market that includes the input (the confidential price data) and a downstream market where the input is used (residential real estate brokerage) and the evidence regarding whether there are alternatives to the confidential price data. My evidence on whether the denial of access to the confidential data resulted in a substantial lessening or prevention of competition is not discussed in the *TREB Redetermination*, though the Tribunal notes that the Commissioner’s expert “did not have a good understanding of the legal test for what constitutes a “substantial” prevention or lessening of competition”

and the Tribunal “refrained from accepting” the evidence of the expert on that issue. See: *TREB Redetermination*, *supra* note 1 at para 108. The Federal Court of Appeal remarked that “Dr. Church’s evidence on the issue of whether the prevention of competition was “substantial” is neither referred to nor mentioned in the Tribunal’s reasons.” See: *FCA 2017*, *supra* note 1 at para 174. This paper does not comment on the factual findings in the *TREB Redetermination*: its focus is on the economic logic of the decision and its ramifications, in particular the foundations for a made-in-Canada essential facilities doctrine. Just as the evidence is not supportive that full information Virtual Office Websites (“VOWS”), i.e., brokerages who provide electronic access to the confidential data on the multiple listing service (MLS) of the Toronto Real Estate Board, would have a material effect on commission rates (prices) in real estate brokerage (see *TREB Redetermination*, *supra* note 1 at paras 625, 639), in my view it is also not consistent with a material effect on non-price competition in the market for real estate brokerage. The evidence in my view is not consistent with realtors who operated full information VOWS being preferred by home buyers and sellers who demand residential real estate brokerage services.

The point of this paper is that the actual effect of the TREB data policy on competition in the residential real estate brokerage market is irrelevant. As a matter of economics, the TREB data policy could not result in a substantial lessening of competition in that market.

<sup>5</sup> The Tribunal is not limited to cease and desist orders. It can also impose a monetary penalty (up to \$10 million for the first order and \$15 million for subsequent orders), and/or require the firm to otherwise take actions, including divestiture of assets, to overcome the effects of the conduct.

<sup>6</sup> Quasi-rents are the difference between revenues and costs that are avoidable in the short-run. For a firm to break even quasi-rents must be at least as large as sunk costs. Firms will invest if they expect quasi-rents to be greater than sunk costs.

<sup>7</sup> If the concern is market power in the downstream market, as in *TREB*, it is sufficient that downstream competitors even with a refusal do not have market power for it not to give rise to an anticompetitive effect consistent with that concern.

<sup>8</sup> The made-in-Canada essential facilities doctrine is implied, since the Competition Tribunal in the *TREB Redetermination* found that confidential price data was not an essential facility. See discussion at Section 6.1.

<sup>9</sup> The distinction between the exercise of market power and the focus of competition law on prohibiting conduct that creates, enhances, or maintains market power is fundamental to Canadian competition policy. See generally Jeffrey R Church & Roger Ware, “Abuse of Dominance under the 1986 Canadian *Competition Act*” (1998) 13 *Rev of Industrial Organization* 85 [Church & Ware 1998]; *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233, 268 DLR (4th) 193 [*Canada Pipe (SLC)*]; Canada, Competition Bureau, *The Abuse of Dominance Provisions*, (Ottawa:

Competition Bureau, 2012), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html>>; Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at 507 [Trebilcock et al].

All discuss the Canadian distinction that monopoly power is not reachable under the *Competition Act*, only abuse, which is conduct that creates, enhances, or maintains market power.

<sup>10</sup> See Canada, Competition Bureau, *Merger Enforcement Guidelines*, (Ottawa: Competition Bureau, 2011) at s 2.3, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>>; See generally Gunnar Niels, Helen Jenkins & James Kavanagh, *Economics for Competition Lawyers* (Oxford: Oxford University Press, 2011) at 116; Dennis W Carlton & Jeffrey M Perloff, *Modern Industrial Organization* (Boston: Pearson/Addison Wesley, 2005) at 783; Jeffrey R Church & Roger Ware, *Industrial Organization: A Strategic Approach* (New York: McGraw-Hill, 2000) at 29, 603-604 [Church & Ware 2000].

The competitive price level usually refers to long-run average cost. The exercise of market power involves profitably raising price above long-run average cost and earning monopoly profits. In the long run the price in the market must at least equal long-run average cost or production will not be viable and firms will exit. Economists typically define market power as the ability to profitably raise price above marginal cost, the price that would prevail in perfectly competitive markets. However, the definition used by economists is less useful for policy analysis since many firms will be able to exercise market power based on this definition—indeed any firm whose demand curve is downward sloping—but they will not be able to raise price above average cost levels, i.e., earn greater than a competitive return. Indeed, if a firm's unit cost declines as it expands output, the firm will have to be able to profitably raise price above marginal cost in order to break even. The ability to profitably raise prices over average cost reflects the requirement of firms to break even and is a useful definition of a competitive level even when firms are not perfectly competitive. An alternative, and equivalent distinction, is to adopt the economic definition of market power and distinguish between the inefficient and efficient exercise of market power. Only the exercise of market power that raises the price above long run average cost levels is inefficient or harmful.

<sup>11</sup> The own-price elasticity of demand (which when there is no possibility of confusion with cross-price elasticity is sometime referred to as the elasticity of demand) for a firm is the percentage decrease in its sales volume (quantity) from a one percent increase in its price. The smaller is the change in sales volume, the more inelastic is its demand. The market elasticity of demand refers to changes in quantity demand in the market from a change in the market price.

<sup>12</sup> See Church & Ware 2000, *supra* note 10 at s 14.3 (for a discussion of entry

barriers and profitable entry deterrence. For market power to persist that enables prices to be above long run average cost levels, incumbents must have an advantage that entrants cannot profitably match.)

<sup>13</sup> *United States v EI du Pont de Nemours & Co*, 351 US 377 at 391 (1956).

<sup>14</sup> See *Canada (Director of Investigation & Research) v NutraSweet Co* (4 October 1990), CT-1989-002, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-1989-002\\_0176a\\_38IHV-12202004-3351.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1989-002_0176a_38IHV-12202004-3351.pdf)> at 28; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36; *Commissioner of Competition v Canada Pipe* (3 February 2005), CT-2002-006, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2002-006\\_0079b\\_38KCZ-9272006-4715.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2002-006_0079b_38KCZ-9272006-4715.pdf)> at para 65 [*Canada Pipe Tribunal*]; Dany H Assaf & Brian A Facey, *Competition and Antitrust Law: Canada and the United States*, 3rd ed (Markham: LexisNexis Butterworths, 2006) at 238-240.

<sup>15</sup> See Franklin M Fisher, “Detecting Market Power” in Wayne D Collins & Joseph Angland, eds, *Issues in Competition Law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) 353 at 359-360; George A Hay, “Market Power in Antitrust” (1992) 60 Antitrust LJ 807 at 820; Richard Schmalensee, “Another Look at Market Power” (1982) 95:8 Harv L Rev 1789 at 1795; Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 3rd ed (St Paul: Thomson/West, 2005) at 79; American Bar Association Section of Antitrust Law, *Monopolization and Dominance Handbook* (Chicago: American Bar Association, 2011) at 59 (for the definition of market power and recent case cites), 62 (for discussion of the definition of monopoly in *du Pont and* discussion indicating that it is not “either or” but an “and”), 86-89 (for the discussion on the legality of exercising market power and the definition of monopolization—“monopolization means conduct that, in violation of Section 2, unlawfully allows a firm to gain, maintain, or extend monopoly power”).

<sup>16</sup> A broader discussion of the welfare effects of market power includes its effect on cost efficiency and the costs of acquiring market power (rent seeking). See Church & Ware 2000, *supra* note 10 at ch 4.

<sup>17</sup> See Herman C Quirmbach, “Input market surplus: the case of imperfect competition” (1984) 16:3-4 Economics Letters 357 (for references for the case of perfect competition); For more recent analysis of the relationship between harm in the downstream market and the exercise of market power in the upstream market, see Frank Verboven & Theon van Dijk, “Cartel Damages Claims and the Passing-On Defense” (2009) 57:3 The J of Industrial Economics 457; Leonardo J Basso & Thomas W Ross, “Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers” (2010) 58:4 The J of Industrial Economics 895.

<sup>18</sup> There would not be a price increase downstream, but there would be an effect on output if demand downstream was perfectly elastic. There would be no effect on output if demand downstream was perfectly inelastic.

<sup>19</sup> See Thomas G Krattenmaker, Robert H Lande & Steven C Salop, “Monopoly Power and Market Power in Antitrust Law” (1987) 76 Geo LJ 241 at 249.

<sup>20</sup> See Jonathan B Baker, “Exclusion as a Core Competition Concern” (2013) 78:3 Antitrust LJ 527 at 562-564; Timothy J Brennan, “Understanding ‘raising rivals costs’” (1988) 33 Antitrust Bull 95 at 96, 99, 110; Timothy J Brennan, “Vertical Market Power as Oxymoron: Horizontal Approaches to Vertical Antitrust” (2004) 12:4 Geo Mason L Rev 895 at 902-903; David T Scheffman, “The application of raising rivals’ costs theory to antitrust” (1992) 37:1 Antitrust Bull 187 at 188-189, 196.

<sup>21</sup> If the conduct has decreased the elasticity of firm demand, then it will have increased the firm’s market power, suggesting the possibility of an SLC. In the case of a prevent case, the effect of the conduct on the elasticity of firm demand is in the future. If the conduct means that the elasticity of firm demand will decrease in the future, then the increase in the firm’s market power will be in the future, suggesting the possibility of an SPC.

<sup>22</sup> A key issue in the TREB case was whether a dominant firm’s conduct can be abusive if it increases the market power of firms in a market in which it does not participate.

<sup>23</sup> See Jeffrey Church, “Vertical Mergers” in Wayne D Collins & Joseph Angland, eds, *Issues in Competition Law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) 1455 [Church]; Jeffrey Church, “Conglomerate Mergers” in Wayne D Collins & Joseph Angland, eds, *Issues in Competition Law and Policy* (Chicago: ABA Section of Antitrust Law, 2008) 1502.

<sup>24</sup> The economics of vertical foreclosure is summarized in Church, *supra* note 23. The literature distinguishes between partial foreclosure and complete foreclosure. A vertically integrated firm engages in partial foreclosure when it charges a higher price to rivals than if it was unintegrated. A vertically integrated firm engages in complete foreclosure when it refuses to supply or provide access to its downstream rivals. The focus of the discussion here, matching the usual concern with essential facilities cases, as seen in *TREB* and *YVR*, is refusal to supply or provide access at all to at least some firms wishing to provide service in the downstream market.

<sup>25</sup> The confidential price data included not just historic sold prices for a property, but also data on pending sales and WEST listings. WEST listings are listings that have been withdrawn, expired, suspended, or terminated.

<sup>26</sup> *Telecom Public Notice: Review of regulatory framework for wholesale services and definition of essential service* (9 November 2006), 2006-14, online: CRTC <<https://crtc.gc.ca/eng/archive/2006/pt2006-14.htm>> (Evidence of the Competition Bureau filed 15 March 2007, online: <[https://crtc.gc.ca/PartVII/eng/2006/8663/c12\\_200614439.htm#4b](https://crtc.gc.ca/PartVII/eng/2006/8663/c12_200614439.htm#4b)> at 60, 61); Canada, Competition Bureau, *Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry*, (Ottawa: Competition Bureau, 2008) at s 4.2.2, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html>> [Competition Bureau Telecommunications].

<sup>27</sup> This is the rationale for the Bureau’s historical requirement for a double dominance criteria. Without dominance downstream, the input cannot be essential, and it can be an easier task analytically to assess dominance in

the downstream market than determine whether a firm is a hypothetical monopolist upstream. Hence the Bureau's further recommendation that dominance downstream should be an initial screen in essential facility cases. See *Telecom Public Notice: Review of regulatory framework for wholesale services and definition of essential service* (9 November 2006), 2006-14, online: CRTC <<https://crtc.gc.ca/eng/archive/2006/pt2006-14.htm>> (Argument of the Competition Bureau filed 23 November 2007, online: <[https://crtc.gc.ca/PartVII/eng/2006/8663/c12\\_200614439.htm#4b](https://crtc.gc.ca/PartVII/eng/2006/8663/c12_200614439.htm#4b)> at 60, 61) [Competition Bureau Argument].

<sup>28</sup> *Telecom Notice of Consultation: Review of wholesale services and associated policies* (15 October 2013), 2013-551, online: CRTC <<https://crtc.gc.ca/eng/archive/2013/2013-551.htm>> (Expert Report of Jeffrey Church, attachment 1 to the Intervention of Bell Canada filed 31 January 2014).

<sup>29</sup> *Ibid.*; Competition Bureau Argument, *supra* note 27.

<sup>30</sup> There is an old literature that considers the incentive for a monopolist upstream to integrate downstream and foreclose supply to existing downstream firms when the firms downstream are competitive, i.e., price takers, and production downstream is not fixed proportions. This means that the input ratio used to produce the downstream product can, and will, be adjusted, as input prices change. The upstream monopolist when it exercises market power in the wholesale market will be disciplined by both direct substitution (the downstream firms will substitute to other inputs) and indirect substitution (downstream consumers will substitute to other goods). When the monopolist integrates and forecloses it eliminates the direct substitution, thereby increasing its market power, but at the same time it will produce efficiently, lowering costs. Whether integration and foreclosure is harmful or beneficial depends on a trade off between these two effects: the effect on the downstream price depends on the relative magnitude of the ease of substituting inputs in production and the demand elasticity downstream, the determinants respectively of the cost reducing and market power increasing effects of integration. The policy implications do not favour antitrust enforcement:

The traditional view has been that the relationship between the two [cost decreasing effect and the market power enhancement effect] is complex and measurement problems sufficiently formidable that the trade-off implied is likely subject to considerable error. Moreover, given the incentive problems associated with internalizing transactions, a vertical merger, it is argued, is likely not the optimal response to what is primarily a pricing problem. There are other less costly vertical restraints and alternative pricing schedules that prevent inefficient input substitution and avoid the costs of vertical integration. Hence, the motivation for vertical integration is unlikely to be the elimination of input substitution and enhancement of market power, but instead the transaction is intended to realize other efficiencies.

See Church, *supra* note 23, at 1471, footnotes omitted.

<sup>31</sup> See the discussion in Section 4.3.

<sup>32</sup> Dennis W Carlton & Ken Heyer, "Extraction vs Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct" (2008) 4:2 Competition Policy Intl 285.

<sup>33</sup> Competition Bureau Telecommunications, *supra* note 26 at s 4.2.2.

<sup>34</sup> The discussion of the single profit theorem is based on, and similar, to that in Church, *supra* note 23 at 1469.

<sup>35</sup> The assumption is that downstream production technology is fixed proportions. Downstream output requires a single unit of the upstream services provided by the essential facility and one unit of other inputs whose cost is *d*. The case of variable proportions was discussed above at footnote 30.

<sup>36</sup> See Church, *supra* note 23 at s 5.3.

<sup>37</sup> *Ibid* at ss 4.1, 5.3.

<sup>38</sup> Church & Ware 1998, *supra* note 9 at 98-99.

<sup>39</sup> *Canada Pipe Tribunal*, *supra* note 14 at para 65, footnotes omitted.

<sup>40</sup> *FCA 2014*, *supra* note 1 at para 13.

<sup>41</sup> *TREB Redetermination*, *supra* note 1 at para 176.

<sup>42</sup> It is true that the top five large corporate franchises had over a 70% market share based on transactions. But that perspective is misleading. It does not recognize the distinction between franchisors (the corporate brands), the franchisees (individual brokerages), and agents, assuming that franchisees and agents under the same corporate banner do not compete with each other. In fact franchisees do compete against other franchisees operating under the same corporate brand and agents within the same brokerage do compete between themselves for transactions. The largest market share for a brokerage in the GTA was around 4%. The share of the top 20 accounted only for about 30% of transactions. See *TREB I*, *supra* note 1 (Expert Report of Jeffrey Church s 4).

<sup>43</sup> *TREB Redetermination*, *supra* note 1 at paras 500-501.

<sup>44</sup> Quasi-rents are the difference between revenues and avoidable costs in the short run. They are the contribution earned to cover the firm's sunk costs. Competitive firms break even in the long run if their quasi-rents cover their sunk costs. Ricardian rents accrue to suppliers who are low cost suppliers or high quality suppliers of the product. If the market is competitive, the market price will be determined by the low quality and/or high cost suppliers, i.e., the price equals the marginal cost of low quality output and the marginal costs of high cost suppliers such that at the market price there is sufficient supply to meet demand. Low cost suppliers and high quality suppliers will earn premiums relative to their costs that may well show up as high operating profits and be reflected in high operating profit margins. Firms with higher qualities and lower costs can be price takers: they do not necessarily have either the incentive or the ability to raise the market price by withholding output. If their ability to produce is limited relative to the size of the market, they will find it profit maximizing to produce to capacity.

If a low cost producer reduces its sales volume when its capacity is limited, the

price does not change, but its profits fall as it loses the margin on the reduced sales volume. Hence there is not the familiar trade off of a firm with market power: the gain on inframarginal units from a higher price against the loss in profits from units withheld from the market. Instead the loss in profits is always higher, the firm does not have market power, and it always produces to capacity.

The analysis is the same when there are not capacity issues, all firms produce where price is equal to marginal cost and they earn Ricardian rents on their inframarginal units. The extent of these Ricardian rents will be greater for low cost or high quality firms, since by definition they will be able to produce more than high cost or low quality firms.

The “profits” earned by a higher-quality price-taking supplier or low cost price-taking supplier are not attributable to market power, but their superior inputs that enable them to produce higher quality output or low cost output. Their above competitive profits are earned because they have control of these inputs and the profits above competitive level are really rents earned by these inputs.

These apparent profits above competitive levels are called Ricardian rents, in honour of David Ricardo, who observed in the early 1800’s that the price of vegetables sold in London were the same whether they were produced close or far away from London. The delivered, or landed, cost of distant production set the price, the difference between this price and all other costs for production close to London except for land was the rent paid for the land close to London. Thus the rent premium for land close to London relative to land far away equals the differential in transport costs—if all other costs are the same.

<sup>45</sup> The Tribunal, following the Commissioner, denies the requirement to define an upstream market around the confidential data or assess market power by TREB in its supply. Of some interest is that the Commissioner, after denying the requirement to define an upstream and downstream market in the *TREB* matter, does define upstream and downstream markets in *YVR*. See *TREB Redetermination*, *supra* note 1 at para 252; *Commissioner of Competition v The Toronto Real Estate Board*, CT-2011-003, (Further Closing Submissions of the Commissioner of Competition 12 November 2015 at para 93, online: <[http://www.ct-tc.gc.ca/CMFiles/CT-2011-003\\_Closing%20Argument%20of%20the%20Commissioner%20of%20Competition\\_358\\_38\\_11-12-2015\\_2619.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Closing%20Argument%20of%20the%20Commissioner%20of%20Competition_358_38_11-12-2015_2619.pdf)>), and *YVR*, *supra* note 1 at para 11.

<sup>46</sup> *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 44, [2015] 1 SCR 161 [*Tervita*].

<sup>47</sup> *Director of Investigation and Research v Hilldown Holdings (Canada) Limited* (9 March 1992), CT-1991-001, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-1991-001\\_0155a\\_38IEP-4142004-5100.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-1991-001_0155a_38IEP-4142004-5100.pdf)> at 314.

<sup>48</sup> *Commissioner of Competition v Canadian Waste Services Holdings Inc* (28 March 2000), CT-2000-002, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2000-002\\_0059a\\_49PXE-982004-5523.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2000-002_0059a_49PXE-982004-5523.pdf)> at para 7.

<sup>49</sup> Canada, Director of Research & Investigation, *Merger Enforcement*

*Guidelines*, (Ottawa: Industry Canada, 1991) at Part 2 (footnotes omitted and emphasis added).

<sup>50</sup> *Ibid* at Part 2.2. In Part 2.3 there is a similar discussion in the context of a prevention of competition. A prevention of competition can arise either because of a unilateral or coordinated effect.

<sup>51</sup> *Canada (Commissioner of Competition) v Canada Pipe Company Ltd*, 2006 FCA 236 at para 107, 268 DLR (4th) 238 [*Canada Pipe (Market Power)*].

<sup>52</sup> *Ibid* at para 104. The quote is from *Canada (Director of Investigation & Research) v Southam Inc*, 1995 3 FC 557, [1995] 127 DLR (4th) 236 at para 113, and omits citations.

<sup>53</sup> This discussion neglects that the Tribunal and the Commissioner focused on TREB's market power in the provision of the MLS, not the confidential price data. See *TREB Redetermination*, *supra* note 1 at paras 252 and 253. Access to the MLS and TREB's market power in the provision of the MLS is irrelevant to the conduct in the TREB matter. TREB did not deny access to MLS or tie the use of the MLS to another input it provided (there is no allegation that if a realtor used outside information it would be excluded from use of the MLS). It is the ability to impose restrictions on the use of the confidential price data that was relevant. These rules can only result in "harm" to realtors if they cannot be avoided. That requires market power by TREB in the provision of the confidential price information.

<sup>54</sup> *Canada Pipe (SLC)*, *supra* note 9 at para 66.

<sup>55</sup> *FCA 2014*, *supra* note 1 at para 17.

<sup>56</sup> *Ibid* at para 19.

<sup>57</sup> *Ibid* at para 20.

<sup>58</sup> *Ibid* at para 20.

<sup>59</sup> See Trebilcock et al, *supra* note 9 at 535-536.

<sup>60</sup> This possibility is explicitly noted by the Tribunal in the first *TREB* decision. See *TREB 1*, *supra* note 1 at para 16.

<sup>61</sup> An implication is that post *FCA 2014* there may no longer be a gap in the *Competition Act* with respect to facilitating practices that are adopted unilaterally by firms, i.e., without an agreement. See Ralph A Winter, "The Gap in Canadian Competition Law Following *Canada Pipe*" (2004) 27:2 *Can Competition L Rev* 293 for a discussion of this gap.

<sup>62</sup> *TREB Redetermination*, *supra* note 1 at para 272.

<sup>63</sup> *Ibid* at para 279.

<sup>64</sup> *Ibid* at para 274.

<sup>65</sup> *Canada Pipe (SLC)*, *supra* note 9 at para 87.

<sup>66</sup> *TREB Redetermination*, *supra* note 1 at para 293, emphasis added.

<sup>67</sup> *Ibid* at para 294 and *Canada Pipe (SLC)* at paras 73 and 90-91.

<sup>68</sup> *Ibid* at para 304.

<sup>69</sup> *Ibid* at para 294; *Canada Pipe (SLC)*, *supra* note 9 at para 90.

<sup>70</sup> *Olympia Equipment Leasing Co v Western Union Telegraph Company*, 797 F2d 370 at 379 (7th Cir 1986).

<sup>71</sup> Judge Hand observed in the famous *Alcoa* decision, "The successful

competitor having been urged to compete, must not be turned on when he wins the race.” *United States v Aluminum Corporation of America*, 148 F2d 416 at 427 (1945).

<sup>72</sup> *TREB Redetermination*, *supra* note 1 at paras 332, 344, 362, 371, 390, 391.

<sup>73</sup> *Canada Pipe (SLC)*, *supra* note 9 at paras 80-81.

<sup>74</sup> *TREB Redetermination*, *supra* note 1 at para 276.

<sup>75</sup> See Canada, Competition Bureau, *Abuse of Dominance – Enforcement Guidelines*, (Ottawa: Competition Bureau, 2012) at 13.

<sup>76</sup> *Canada Pipe (SLC)*, *supra* note 9 at para 43, emphasis original.

<sup>77</sup> *Ibid* at para 43, emphasis original.

<sup>78</sup> The FCA confirmed the assessment in the academic literature. See Trebilcock et al, *supra* note 9 at 78 (distinguishing control (market power) from a substantial lessening in competition (increase in market power)).

<sup>79</sup> *Canada Pipe (SLC)*, *supra* note 9 at para 49.

<sup>80</sup> *Ibid* at para 58, emphasis added.

<sup>81</sup> *TREB Redetermination*, *supra* note 1 at para 460 and at paras 473-474 where the test for an SLC and SPC focuses, correctly, on market power.

<sup>82</sup> *Ibid* at para 464.

<sup>83</sup> *Tervita*, *supra* note 46 at paras 80-81.

<sup>84</sup> *Commissioner of Competition v CCS Corporation et al* (29 May 2012), CT-2011-002, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2011-002\\_Reasons%20for%20Order%20and%20Order\\_189\\_38\\_5-29-2012\\_5291.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf)> at para 377 (The Commissioner’s challenge was to the acquisition by CCS Corporation of Complete Environmental. By the time the case was considered by the Supreme Court of Canada, CCS had changed its name to Tervita).

<sup>85</sup> *TREB Redetermination*, *supra* note 1 at paras 478-479.

<sup>86</sup> *Ibid* at para 480.

<sup>87</sup> *Ibid* at para 590.

<sup>88</sup> The Commissioner’s allegations and the Tribunal’s findings do not consider whether there was an effect of TREB’s conduct on the market power of TREB in the supply of the confidential data. Of course even with such a finding, that the market power of the downstream firms was enhanced by the exclusion, perhaps as in *YVR*, this is not sufficient or necessary for the exclusion to be an abuse of dominance. What is necessary is an effect on the market power of the upstream firm.

<sup>89</sup> *TREB Redetermination*, *supra* note 1 at para 500.

<sup>90</sup> *Ibid* at para 702.

<sup>91</sup> *Ibid* at para 500.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid* at para 709, emphasis added.

<sup>94</sup> For extensive discussion, see *The Commissioner of Competition v The Toronto Real Estate Board and the Canadian Real Estate Association* (15 April 2013), CT-2011-003, online: Competition Tribunal <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347>> (Expert Report of Jeffrey

Church, filed on 27 July 2012, ss 3.4, 10; Testimony of Jeffrey Church, Volume 12A: 2015:6-2029:5; Expert Report of Jeffrey Church, filed on 15 May 2015, s 5; Testimony of Jeffrey Church, Volume 5: 891:3-896:7).

<sup>95</sup> *TREB Redetermination*, *supra* note 1 at paras 212-213.

<sup>96</sup> *Ibid.*

<sup>97</sup> It is for this reason that it is very unclear that, despite the Tribunal's findings, TREB actually has market power in the supply of the confidential price data in the VOW feed. All brokers have access to the confidential price data and can share it with their clients in other ways. When clients have reached the valuation stage, that is when it is time to make an offer or to set a list price, the confidential price data will be important and they will have access to it, though they will have to request it from their agent and they will not have the ability to search it themselves. At the search phase, that is when clients are becoming familiar with valuations, it is not clear that there are not good substitutes for the confidential price data, in particular list prices. A very good predictor of the sale price for a property is to multiply its list price by 0.95, i.e., 95% of the list price is the likely sale price. See *The Commissioner of Competition v The Toronto Real Estate Board and the Canadian Real Estate Association* (15 April 2013), CT-2011-003, online: Competition Tribunal <<http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347>> (Expert Report of Jeffrey Church, filed on 15 May 2015 at footnote 51). The Tribunal appears to misinterpret the meaning of a regression coefficient, claiming that it is 95% of the average list price in a community. *TREB Redetermination*, *supra* note 1 at para 223.

<sup>98</sup> This inconsistency has not gone unmarked:

At the outset, the Tribunal also rejected the proposition that this was an essential facilities case (that is, a case relating to whether, and on what terms, a firm should be granted access to a competitor's facility or asset), holding that TREB was not denying access to its MLS data but merely restricting how its data could be used. It is not clear that this narrow finding is correct in principle, given that the essence of this case relates to access to inputs owned by other competitors and that the Tribunal itself held some of which (sold information) had no close substitutes. The Tribunal also provided no jurisprudential basis for its essential facilities finding (for example, no international law to support its conclusion). The Tribunal's finding, however, means that there remains no explicit decided essential facilities case in Canada (unlike in the United States, where the doctrine has been developed by lower courts). This case is, however, an essential facilities case in substance in many ways.

Practical Law Canada Competition, "Landmark TREB Abuse of Dominance Case May Open the Door for New Real Estate Models in Toronto", Case Comment, on *TREB Redetermination*, *supra* note 1, online: <[https://ca.practicallaw.thomsonreuters.com/w-002-2822?transitionType=Default&contextData=\(sc.Default\)&\\_\\_lrTS=20180705171147510&firstPage=true&hcp=1](https://ca.practicallaw.thomsonreuters.com/w-002-2822?transitionType=Default&contextData=(sc.Default)&__lrTS=20180705171147510&firstPage=true&hcp=1)> (13 May 2016).

<sup>99</sup> *YVR*, *supra* note 1.

<sup>100</sup> See the discussion in W Michael G Osborne, “Build It and You Must Share It? Essential Facilities in Canada”, *Canadian Competition Law Review* [forthcoming in 2018].

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

W. Michael G. Osborne<sup>1</sup>

*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.<sup>2</sup> 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*,<sup>3</sup> *Associated Press v US*,<sup>4</sup> and *Otter Tail Power Co v US*.<sup>5</sup>

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*.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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.*<sup>9</sup> 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”.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

## 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.<sup>14</sup>

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.<sup>15</sup>

*Associated Press* was, however, “a more doubtful case”.<sup>16</sup> 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”.<sup>17</sup> 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.<sup>18</sup>

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.”<sup>19</sup>

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.<sup>20</sup>

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.”<sup>21</sup> 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.<sup>22</sup> *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.”<sup>23</sup> 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.<sup>24</sup>

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

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 plaintiff's 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 irreparable 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.<sup>26</sup>

Another important critique was Einer Elhauge's 2003 bombshell, "Defining Better Monopolization Standards,"<sup>27</sup> 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.<sup>28</sup>

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,<sup>28</sup> assuming sharing is not more costly than the efficiency gains from competitive use of the property.<sup>29</sup>

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.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

### **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*.<sup>34</sup> 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.”<sup>35</sup>

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.<sup>36</sup>

As for *Aspen Skiing* itself, Scalia J. observed that it is “at or near the outer boundary of §2 liability.”<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

The next case is *Pacific Bell Telephone Co v Linkline Communications, Inc.*<sup>40</sup> 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).<sup>41</sup> 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.<sup>42</sup> 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<sup>43</sup> and Xerox copiers.<sup>44</sup> 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.<sup>45</sup>

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”.<sup>46</sup> 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.<sup>47</sup>

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*.<sup>48</sup> 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.<sup>49</sup> 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*";<sup>50</sup> in *Stargrove*, the Tribunal held that it was an open question whether section 76 extended to inputs, as opposed to products acquired for resale.<sup>51</sup>

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.<sup>52</sup>

### **Section 79 – Abuse of dominance**

Refusal to deal is not listed among the enumerated anticompetitive acts listed in section 78.<sup>53</sup> 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.<sup>54</sup>

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*,<sup>55</sup> 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.<sup>56</sup>

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".<sup>57</sup>

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.<sup>58</sup>

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]<sup>59</sup>

In its *2012 Abuse Guidelines*,<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

## 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.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> In 2000, it was amended to permit the imposition of monetary penalties on members for non-compliance with the rules.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

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]<sup>71</sup>

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.<sup>72</sup> 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.”<sup>73</sup>

As the Tribunal noted, this would mean Tele-Direct’s having to set up a third sales channel to deal with consultants.<sup>74</sup> 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.<sup>75</sup>

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!<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup>

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*,<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup>

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;<sup>82</sup>

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);<sup>83</sup> 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.<sup>84</sup> One witness described the data available through Stratus as “disaggregated”, requiring “brute force and hours of painstaking work” to analyze.<sup>85</sup>

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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

This is certainly correct in my view.<sup>91</sup>

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]<sup>92</sup>

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”.<sup>93</sup> 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.<sup>94</sup> 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*.<sup>95</sup>

Although the Tribunal rejected TREB’s contention that the market power analysis should focus on the Disputed Data,<sup>96</sup> the Tribunal nevertheless found that there were no acceptable substitutes for the Disputed Data.<sup>97</sup> 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”.<sup>98</sup>

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 it has a “plausible competitive interest” in that market, the Tribunal held.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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”.<sup>102</sup>

The Tribunal also found that TREB’s principal motivation was to insulate its members from disruptive competition from innovative internet-based real estate brokerages.<sup>103</sup>

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.<sup>104</sup>

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.<sup>105</sup>

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.<sup>106</sup> [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.<sup>107</sup> [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 intégrés 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*.<sup>108</sup>

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*,<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup>

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.<sup>112</sup>

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.<sup>113</sup>

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.<sup>114</sup> The upstream firm's motive to do so may come from a financial stake in the outcome of competition downstream.<sup>115</sup> 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.<sup>116</sup>

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."<sup>117</sup>

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.<sup>118</sup>

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.<sup>119</sup>

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 Elhaug'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.<sup>120</sup>

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.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup>

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.”<sup>126</sup>

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.<sup>127</sup>

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

<sup>1</sup> Michael Osborne practises competition law as a partner of Cassels Brock & Blackwell LLP.

<sup>2</sup> P Areeda, "Essential Facilities: An Ephetit in Need of Limiting Principles" (1989) 58 Antitrust LJ 841.

<sup>3</sup> *United States v Terminal Railroad Association*, 224 US 383 (1912).

<sup>4</sup> *Associated Press v United States*, 326 US 1 (1945).

<sup>5</sup> *Otter Tail Power Co v United States*, 410 US 366 (1973).

<sup>6</sup> *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].

<sup>7</sup> *Ibid* at 1132.

<sup>8</sup> *Supra* note 6 at 1132-1133.

<sup>9</sup> *Aspen Skiing v Aspen Highlands Skiing*, 472 US 585 (1985) [*Aspen Skiing*].

<sup>10</sup> *Ibid* at 600.

<sup>11</sup> *Supra* note 9 at 601.

<sup>12</sup> *Supra* note 9 at 602.

<sup>13</sup> *Supra* note 9 at 610.

<sup>14</sup> *Supra* note 1.

<sup>15</sup> *Supra* note 1 at 842.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Supra* note 1 at 844.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Supra* note 1 at 845.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Supra* note 1 at 848.

<sup>23</sup> *Supra* note 1 at 849.

<sup>24</sup> *Supra* note 1 at 850.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Supra* note 1 at 852-3. Footnotes omitted.

<sup>27</sup> Einer Elhauge, “Defining Better Monopolization Standards” (2003) 56 *Stan L Rev* 253.

<sup>28</sup> *Ibid* at 253.

<sup>29</sup> *Supra* note 27 at 296.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Supra* note 27 at 303.

<sup>32</sup> *Supra* note 27 at 308.

<sup>33</sup> *Supra* note 27 at 308-309.

<sup>34</sup> *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004) [*Trinko*].

<sup>35</sup> *Ibid* at 408.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Supra* note 34 at 409.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Supra* note 34 at 411.

<sup>40</sup> *Pacific Bell Telephone Co v Linkline Communications, Inc*, 555 US 438 (2009) [*Linkline*].

<sup>41</sup> 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](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.

<sup>42</sup> *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](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.

<sup>43</sup> *Canada (Director of Investigation and Research) v Chrysler Canada Ltd* (1989), 27 CPR (3d) 1.

<sup>44</sup> *Canada (Director of Investigation and Research) v Xerox Canada Inc* (1990), 33 CPR (3d) 83.

<sup>45</sup> 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.

<sup>46</sup> Paragraphs 76(3)(a) and (c).

<sup>47</sup> Subsections 103.1(7) and (7.1).

<sup>48</sup> *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](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.

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

<sup>50</sup> *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](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*].

<sup>51</sup> *Supra* note 48 at para 36.

<sup>52</sup> *Supra* note 50 at para 135.

<sup>53</sup> 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.

<sup>54</sup> *Competition Act*, RSC 1985, c C-34, s 78(1)(a).

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

<sup>56</sup> *Ibid* at s 4.2.

<sup>57</sup> *Supra* note 55 at Appendix III.

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

<sup>59</sup> *Ibid*.

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

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

<sup>62</sup> *Ibid* at s 3.10.

<sup>63</sup> 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>>.

<sup>64</sup> *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>>.

<sup>65</sup> *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>>.

<sup>66</sup> *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>>.

<sup>67</sup> *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](http://www.ct-tc.gc.ca/CMFiles/CT-1995-002_0132a_38IGU-6202005-5782.pdf)>.

<sup>68</sup> *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](http://www.ct-tc.gc.ca/CMFiles/CT-2013-003_Order%20Varying%20and%20Restating%20the%20A_4_38_9-11-2013_4045.pdf)>.

<sup>69</sup> *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](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)>.

<sup>70</sup> *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](http://www.ct-tc.gc.ca/CMFiles/CT-1994-003_0204a_38LFB-472004-7743.pdf)> at para 587 [*Tele-Direct*].

<sup>71</sup> *Ibid* at para 588.

<sup>72</sup> 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](http://www.ct-tc.gc.ca/CMFiles/CT-1994-003_0066d_38LFB-472004-3056.pdf)>.

<sup>73</sup> *Supra* note 70 at para 730.

<sup>74</sup> *Supra* note 70 at para 731.

<sup>75</sup> *Supra* note 70 at para 733.

<sup>76</sup> *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.

<sup>77</sup> *Supra* note 70 at para 733.

<sup>78</sup> *Supra* note 70 at para 66.

<sup>79</sup> *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](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.

<sup>80</sup> *Canada (Commissioner of Competition) v The Toronto Real Estate Board*, 2014 FCA 29.

<sup>81</sup> *Realtysellers (Ontario) Limited v Toronto Real Estate Board*, 2007 CanLII 50283 (ONSC).

<sup>82</sup> 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>>.

<sup>83</sup> *Supra* note 79 at para 239.

<sup>84</sup> *Ibid.*

<sup>85</sup> Witness Statement of John Pasalis, Realosophy Realty Inc, at paras 19-23.

<sup>86</sup> 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](http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reply_24_45_9-2-2011_3281.pdf)> at para 20.

<sup>87</sup> *Supra* note 79 at para 712.

<sup>88</sup> 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.

<sup>89</sup> Church referenced the Commissioner's submission to CRTC Proceeding: *Review of Regulatory Framework for Wholesale Services and Definition of Essential Service*, *Ibid.*

<sup>90</sup> *Supra* note 79 at para 210.

<sup>91</sup> 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.

<sup>92</sup> *Supra* note 79 at para 212.

<sup>93</sup> The Tribunal's conclusion on market definition is at para 161.

<sup>94</sup> *Supra* note 79 at para 266.

<sup>95</sup> *Supra* note 79 at para 176.

<sup>96</sup> *Supra* note 79 at para 200.

<sup>97</sup> *Supra* note 79 at para 214-251.

<sup>98</sup> *Supra* note 79 at para 245.

<sup>99</sup> *Supra* note 79 at para 279.

<sup>100</sup> *Supra* note 79 at para 281.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Supra* note 79 at para 280.

<sup>103</sup> *Supra* note 79 at para 430.

<sup>104</sup> *Supra* note 79 at para 639.

<sup>105</sup> *Supra* note 79 at paras 756-757.

<sup>106</sup> *The Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [TREB FCA], at para 176.

<sup>107</sup> *Ibid.*, at para 180.

<sup>108</sup> *Supra* note 76 at para 26.

<sup>109</sup> *Molnlycke AB v Kimberly-Clark of Canada Ltd*, (1991) 132 NR 315, 27 ACWS (3d) 794 at para 10.

<sup>110</sup> Notice of Application at para 36.

<sup>111</sup> Notice of Application at paras 45-47.

<sup>112</sup> Notice of Application at paras 52-57.

<sup>113</sup> Response at para 45.

<sup>114</sup> Neils Report at s 2.98.

<sup>115</sup> Neils Report at s 2.99.

<sup>116</sup> Neils Report at s 2.100.

<sup>117</sup> Reitman Report at 84.

<sup>118</sup> Reitman Report at 85.

<sup>119</sup> Reitman Report at 87-103.

<sup>120</sup> *Supra* note 27 at 296.

<sup>121</sup> 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.

<sup>122</sup> Bruce Ziff, *Principles of Property Law*, 6<sup>th</sup> 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”.

<sup>123</sup> Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines* (2016) at ss 3.1-3.2.

<sup>124</sup> *Supra* note 55 at Appendix III, page 34.

<sup>125</sup> *Supra* note 60 at 1.

<sup>126</sup> *Supra* note 61 at s 3.10.

<sup>127</sup> *Supra* note 55 at Appendix III, page 34.

# COMMENTS / COMMENTAIRES

## SECTION 36 REQUESTS FOR ACCESS TO INFORMATION AND THE COMPETITION BUREAU: HAST THOU FORSAKEN ME?

Mohsen Seddigh<sup>1</sup>

*The Competition Bureau has adopted an approach consisting of general opposition to requests for access to information for the purpose of private lawsuits under section 36. The Bureau has in the past resisted information requests on account of a class privilege over all information in its possession amongst other reasons. This article argues that the Bureau's general position is contrary to the governing legislation. The Bureau's reasons for its general position are not compelling because the Bureau fails to factor into the analysis the role of private enforcement within the Canadian competition regulatory scheme. The legislative history of the private right of action, Parliament's intention in creating an integrated regulatory scheme, and the realities of competition enforcement do not support the Bureau's blanket refusal to disclose. Similarly, the text of the legislation, the caselaw, and the state of the law in foreign jurisdictions do not lend credence to the Bureau's approach to private enforcement. This article proposes that cooperation with private enforcers, rather than opposition to them, is the correct approach. In the exceptional cases where the Bureau properly needs to oppose disclosure, a case-by-case study and justification of the denial of access requests for section 36 enforcement would comply with the law and would better protect the many interests involved.*

*Le Bureau de la concurrence a adopté une position d'opposition systématique aux demandes d'accès à l'information faites aux fins de poursuites privées intentées en vertu de l'article 36. Il s'est ingénié à les contrer en invoquant, entre autres motifs, un privilège générique qui met à couvert tous les renseignements en sa possession. Le présent article fait valoir que ce procédé est contraire aux dispositions législatives applicables. Les arguments que le Bureau invoque pour justifier sa position ne sont pas convaincants, son analyse ne tenant pas compte du rôle des agents d'application du droit privé dans le système canadien de réglementation de la concurrence. En effet, ce refus de divulgation systématique ne cadre pas avec l'histoire législative du droit privé d'action, ni avec l'intention dans laquelle le Parlement a créé un système de réglementation intégré, ni avec les réalités de l'application de la loi en matière de concurrence. Le libellé de la loi, la jurisprudence et l'état*

*du droit étranger indiquent eux aussi que la position du Bureau quant à l'application du droit privé ne tient pas la route. Dans cet article, j'explique pourquoi la bonne solution est de coopérer avec les agents d'application du droit privé, et non de leur résister. Dans les cas exceptionnels où le Bureau doit réellement s'opposer à la divulgation, une analyse au cas par cas et une justification du refus de la demande d'accès visant l'application de l'article 36 satisferaient aux exigences légales, et les nombreux intérêts en jeu seraient ainsi mieux protégés.*

## I. Introduction

The Commissioner of Competition has generally resisted requests for information from private parties in proceedings under section 36 of the *Competition Act*.<sup>2</sup> The Bureau's approach to these requests culminated in its 2017 bulletin titled "Requests for information from private parties in proceedings under section 36 of the *Competition Act*".<sup>3</sup> The Bureau revised and updated the 2017 Bulletin on June 11, 2018.<sup>4</sup> The general position in the two Bulletins is that the Commissioner will oppose requests for information and will take all measures necessary to withhold any information in its possession.

This paper argues that (a) the Bureau's approach is based on flawed analysis in that it wholly excludes section 36 of the Act as a factor;<sup>5</sup> and (b) given the importance of the interests involved and the scheme of the Act, a collaborative case-by-case review, not blanket opposition to disclosure, would comply with the Act and be responsive to Parliament's goals in creating a private right of action.

The Act in its broader context reveals that Parliament created a legislative/regulatory scheme for the purpose of maintaining and encouraging competition in Canada "in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".<sup>6</sup> Parliament gave the primary responsibility for the administration and enforcement of the Act to the Commissioner.<sup>7</sup> However, Parliament also saw fit to create a statutory private right of action as an enforcement mechanism to compensate victims and deter the most egregious anti-competitive conduct contrary to the Act. While Parliament created a cloak of confidentiality on the information obtained by the Competition Bureau, it also created an exception where the information is needed for the purposes of the administration or enforcement of the Act.

Section 36 proceedings are a vital element of the enforcement of the Act. Parliament considered private enforcement under section 36 to be in the public interest. Nothing in the legislation suggests that Parliament intended section 36 enforcement to be subsidiary to the broader scheme of the Act in protecting competition and Canadian consumers. In reality, civil litigation in many instances has proven far more effective in compensating victims and deterring and punishing anti-competitive behaviour than the enforcement alternatives available to the Commissioner.

Therefore, while there is no doubt concerning the special statutory position of the Commissioner or the potential significance in some circumstances of some of the factors that the Bureau typically relies upon to oppose disclosure, the Bureau's general approach fails to take into consideration the broader context of the Act and its objectives. This paper proposes that the regulatory scheme created by the Act requires cooperation from the Commissioner with private enforcers, rather than opposition. In the same vein, instead of a blanket refusal to disclose, a case-by-case analysis of information requests that balances the myriad interests and statutory considerations at issue would better comply with the Act and jurisprudence.

## **II. The Bureau's General Approach to Access Requests**

In reported cases where section 36 private enforcers have sought access to information in the Commissioner's possession, the Commissioner's general response has been unreserved, blanket opposition. For example, in *Pro-Sys Consultants Ltd v Microsoft Corporation*,<sup>8</sup> the plaintiffs brought a class action against Microsoft alleging various anti-competitive wrongs that enabled it to charge higher prices for its products. The Bureau had earlier investigated Microsoft but ultimately decided not to take enforcement action. The plaintiffs sought disclosure from the Bureau of certain correspondence, notes, research and other documents relating to the Microsoft investigation. The Bureau joined forces with Microsoft to resist the request in its entirety. In *Imperial Oil v Jacques*,<sup>9</sup> section 36 class action plaintiffs sought the disclosure of certain recordings of communications intercepted by the Bureau in the course of its criminal investigation into a gasoline price-fixing conspiracy in Quebec. The Bureau opposed the request and litigated the matter all the way up to the Supreme Court of Canada. Most recently in *Canada (Attorney General) v Thouin*,<sup>10</sup> section 36 plaintiffs sought discovery of the Bureau's price-fixing investigator on

the subject matter of the section 36 proceeding. The Bureau countered by raising the common law immunity from discovery on the ground that neither the Crown nor the Bureau was a party in the class action. While none of these cases disposed of the problematique raised in this article, they show the Commissioner's typical response has been to oppose the requests rather than cooperate with section 36 private enforcers in combating anti-competitive conduct.

The Commissioner's approach toward requests for access to information in his or her possession or control from persons contemplating, or who are parties to, proceedings under section 36 of the Act crystallized in the 2017 Bulletin and its subsequent 2018 version. The Commissioner announced his general opposition to the production of any information in the Bureau's possession regarding anti-competitive conduct. The 2017 and 2018 Bulletins describe the general position in identical terms:

[I]f served with a subpoena, the Bureau will inform the information provider so it has knowledge of, and an opportunity to intervene. The Bureau will, if appropriate, oppose a subpoena for production of information if compliance would potentially interfere with an ongoing examination, inquiry or enforcement proceeding or otherwise adversely affect the administration or enforcement of the Act. If the Bureau's opposition is unsuccessful, it will seek protective court orders to maintain the confidentiality of the information in question.<sup>11</sup>

The Bulletins failed to specify any "appropriate" circumstance where the Commissioner would not oppose an access request.<sup>12</sup> The Bulletins only dealt with reasons why information in the possession of the Commissioner must be withheld from private enforcers under section 36. As such, the Bulletins voiced a blanket statement of opposition to disclosure; a statement of opposition that was reinforced by the Bureau's pledge to seek protective court orders in the face of a subpoena.

The Bulletins provide four arguments in support of the general position. First, requests for information interfere with the Bureau's ongoing examinations, inquiries or enforcement proceedings. Second, confidentiality fundamentally contributes to the Bureau's administration and enforcement of the Act, be it in an ongoing or even closed examination, inquiry or enforcement proceedings. In this respect, the Bureau highlights its reliance on voluntarily provided information—the provision of which, the Bulletins argue, might experience a chilling effect if there is a likelihood that the information would be released to parties outside

the Bureau—and the proprietary and/or commercially sensitive nature of some of the information at issue. Third, responding to requests may become a financial burden and tie up Bureau staff in production efforts instead of other duties under the Act. Fourth, in the 2017 Bulletin the Bureau argued that a public interest class privilege attached to the information in the Commissioner's possession. In the 2018 Bulletin, in light of subsequent jurisprudence from the Federal Court of Appeal discussed below, the Bureau argued that it would assert public interest privilege on a case-by-case or document-by-document basis.

### **III. The Bureau's General Approach Is Inconsistent with the Law**

There may be cases where some of the reasons given by the Bureau could validly justify non-disclosure of certain documents or less draconian restrictions such as redactions. That possibility, however, does not end the debate. The Bulletins are more than a mere summary of reasons why in a given scenario the Commissioner may properly refuse to produce information requested for section 36 enforcement purposes. The Bulletins are a statement of policy and general position by the Commissioner who is a statutory authority. They are consistent with the Bureau's previous responses to access to information requests by section 36 enforcers.

Given the broad policy-based nature of the Bureau's approach, as summarized in the Bulletins, the Bulletins and the general policy that they advance must be based on a proper analysis consistent with the empowering legislation. In that respect, it is helpful to review the scheme of the Act and the relevant provisions.

#### **A. The Act's Relevant Provisions**

As the Bulletins indicate, at least two provisions of the Act directly apply to the policy position at issue: sections 29 and 36. Section 29 governs confidentiality under the Act. Subsection 29(1) states:

No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act ...

As such, section 29 creates a confidentiality obligation with two

exceptions. One exception concerns information that is to be used “for the purposes of the administration or enforcement of this Act”. Section 36 enforcement falls within this exception. Thus, production to plaintiffs prosecuting under that provision is not barred by the Act’s cloak of confidentiality—although some caselaw has held that this exception does not translate into an automatic right to access information by section 36 enforcers.<sup>13</sup>

Given that the Act has expressly carved out an exception to the section 29 confidentiality obligation in the case of section 36 proceedings, section 36 itself needs to be taken into account in the formulation of the Commissioner’s general position regarding production requests under section 36. Basic principles of statutory interpretation assist the analysis. Canada’s modern approach to statutory interpretation is that:

the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>14</sup>

Therefore, it is necessary to consider the wording of section 36 together with the Act’s object and Parliament’s intention to be able to properly assess the Commissioner’s general position on information requests for section 36 enforcement.

### **B. Section 36 is an Indispensable Part of the Canadian Competition Scheme**

Subsection 36(1) creates a statutory right of action for any person who has suffered loss or damage as a result of some of the most egregious anti-competitive conduct, including criminal offences under Part VI of the Act.

The provision’s legislative history helps clarify what Parliament intended.<sup>15</sup> The private right of action was created by 1975 amendments as section 31.1 of the then *Combines Investigation Act*.<sup>16</sup> In enacting section 31.1, Parliament implemented the recommendations of the Economic Council of Canada in its 1969 *Interim Report on Competition Policy*.<sup>17</sup> The Economic Council recommended a shift from the solely criminal law based enforcement of competition to civil remedies. The rationales behind this proposed shift included, among others, the flexibility of the civil process and civil remedies as well as the lower standard of proof.<sup>18</sup> The Economic Council advised that primacy should be given to deterrence and prevention, as opposed to solely criminal prosecution.<sup>19</sup> One

example of such civil remedies was the availability of treble damages for antitrust offences contrary to the *Sherman Act*<sup>20</sup> in the United States.<sup>21</sup> In that respect, the Economic Council recommended:

It would seem to be worth exploring whether the deterrent effect of the criminal law portions of the Canadian competition policy could be enhanced by opening up an avenue for single-damage suits by private parties.<sup>22</sup>

Subsequently, the parliamentary discussions on section 31.1 in 1974 and 1975 strongly pointed to the regulatory and consumer protection purposes of the private right of action. In discussing the various proposed amendments to the *Combines Investigation Act*, André Ouellet, the Federal Minister of Consumer and Corporate Affairs, said consumer protection was the “constant concern of the government and especially my department”.<sup>23</sup> Parliamentarians also debated civil enforcement as a mechanism to enhance compliance and protect Canadian consumers. Some expressed concern that the Act’s criminal enforcement provisions alone were insufficient. For example, David Orlikow stated during the parliamentary deliberations:

Over the years we have seen a large number of investigations into such illegal [anti-competitive] acts by Canadian corporations. Over the years there have been a substantial number of prosecutions. Some of them were unsuccessful; [...] In other cases the prosecutions succeeded, at which time we witnessed the spectacle of the courts assessing monetary fines of \$5,000, \$10,000 or \$20,000 on some of the largest corporations in the country.

In a recent case, as one of my hon. friends mentioned earlier in debate, a group of companies was assessed a total of \$450,000 in fines. Those fines, Mr. Speaker, were completely unsuccessful in their objective, which was to prevent corporations from combining illegally to mulct the public.<sup>24</sup>

These concerns were consistent with some of the considerations regarding flexibility, effectiveness, and deterrence effects voiced earlier by the Economic Council in 1969 and later echoed by the Supreme Court of Canada in *General Motors of Canada Ltd v City National Leasing*<sup>25</sup> discussed below.

Various parties challenged the constitutionality of the private right of action in section 31.1 of the *Combines Investigation Act*. The issue reached the Supreme Court of Canada in *General Motors*. In that case, City National Leasing (“CNL”) leased vehicles that it purchased

from General Motors dealers in competition with other national fleet leasing companies. CNL alleged that a General Motors affiliate had paid preferential interest rates to CNL's competitors contrary to the price discrimination provisions of the Act. It sued for damages under section 31.1. General Motors brought an application to declare section 31.1 *ultra vires* Parliament and therefore unconstitutional, alleging that the provision was in pith and substance legislation on matters within the exclusive legislative competence of the provinces.<sup>26</sup>

The Court upheld the constitutional validity of the provision as "an integral, well-conceived component of the economic regulation strategy found in the *Combines Investigation Act*" and "one of the arsenal of remedies created by the Act to discourage anti-competitive practices".<sup>27</sup> Regarding the interrelationship between the private right of action and the legislation as a whole, Dickson C.J. stated:

It seems to me that s. 31.1 is fully integrated into the Act, indeed, it is a core provision of the very pith and substance of the Act. As the Attorney General of Canada submits, the civil action for damages provided by s. 31.1 for an occurrence of the anti-competitive practices set out in s. 34(1)(a) is clearly as much a part of the legislative scheme regulating competition throughout Canada as is the criminal action for fines and imprisonment or the administrative action involving an inquiry or the reduction of customs duties. Together or apart, the civil, administrative, and criminal actions provide a deterrent against the breach of the competitive policies set out in the Act. In this respect s. 31.1 is part of a legislative scheme intended to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance".<sup>28</sup>

In describing the utility of the private right of action, Dickson C.J. relied on the American experience with private antitrust litigation "premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws".<sup>29</sup> Creating a private right of action also increased the flexibility needed to combat anti-competitive practices.<sup>30</sup>

### **C. Section 36 Enforcement Cannot be Divorced from Class Actions**

The 2017 Bulletin particularly addressed parties in class proceedings under section 36 of the Act, arguing that "[r]esponding to their requests

is time-consuming and requires the Bureau to incur considerable costs”.<sup>31</sup> In this respect, both Bulletins argue that “[e]ven if salary and overhead costs are repaid, the Bureau employees and counsel will not be available to carry out the Bureau’s public interest mandate. This would be contrary to the public interest”.<sup>32</sup>

The Bulletins fail to take note of the equally compelling public interest in section 36 enforcement and how class actions make section 36 enforcement viable.

From its inception, the private right of action was intertwined with class proceedings. When Parliament was deliberating on the private right of action in 1974 and 1975, some lawmakers pressed for the provision to be taken one step further and include a class action regime in order to give teeth to the right of action and better protect Canadian consumers.<sup>33</sup> Lawmakers went as far as including a class action regime as an amendment to the bill that included the proposed private right of action.

However, that proposed amendment was not enacted. This led to a period of time between the enactment of the private right of action in 1975 until the creation of class proceeding regimes in the various common law provinces during which private enforcement actions were rare.<sup>34</sup> Individual actions based on violations of the Act were and are prohibitively expensive to litigate.<sup>35</sup> Practically speaking, the average consumer could never sue for damages under section 36 as the costs of prosecuting the claim would far outweigh the potential recovery.

The advent of class proceeding regimes breathed life into section 36 enforcement. Class actions’ economies of scale<sup>36</sup> made the enforcement of the Act under section 36 viable. The advantages of behaviour modification and access to justice underlying class actions as a procedural vehicle<sup>37</sup> aligned perfectly with the substantive objectives of consumer protection and deterrence underlying section 36. The Supreme Court of Canada dealt with this issue in *Pro-Sys Consultants Ltd v Microsoft Corporation*.<sup>38</sup> In that case the plaintiffs sought to bring a class action under section 36 and some other rights of action alleging that the defendant Microsoft engaged in unlawful anti-competitive conduct by overcharging for its operating systems and software. Writing for a unanimous Court, Rothstein J. allowed the section 36 claim to proceed, stating:

[W]hile under the *Competition Act* the Competition Commissioner is the primary organ responsible for deterrence and behaviour modification,

the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives.<sup>39</sup>

As the *Pro-Sys* case illustrates, in some instances a class action under section 36 may be the only means through which the Act can be enforced. In *Pro-Sys*, the Commissioner did not intend to take enforcement action. Even in cases where the Commissioner does take enforcement action under the Act, a section 36 proceeding may prove to be the only way to obtain results in furtherance of the Act. For example, the Commissioner investigated a chocolate price fixing conspiracy by major firms including Cadbury, Hershey, and Nestlé between 2002 and 2008. The Commissioner's investigation led to criminal charges under the Act against various companies and individuals. Ultimately, some defendants were acquitted and the Crown stayed the charges against the others.<sup>40</sup> The Commissioner's attempts at enforcing the Act fell apart. Private litigants also commenced class proceedings under section 36 against the co-conspirators. Unlike the prosecutions that led nowhere, the class proceedings resulted in settlements in excess of \$23-million in favour of the consumers of chocolate in Canada.<sup>41</sup>

The Bureau itself has touted the effectiveness of competition enforcement through class actions. The Bureau participated in proposed Canadian class action settlements regarding anti-competitive conduct by Volkswagen, Audi, and Porsche relating to the diesel emissions scandal dubbed as "Dieselgate".<sup>42</sup> The Bureau stated that its investigation had found that the automakers misled consumers by promoting vehicles sold or leased in Canada as having clean diesel engines with reduced emissions that were cleaner than an equivalent gasoline engine.<sup>43</sup> Private enforcement in these cases led to settlements in favour of Canadian consumers of approximately \$2.4 billion.<sup>44</sup> In comparison, as part of the same process, the Bureau was able to negotiate monetary penalties of a total of \$17.5 million. In other words, the Bureau's monetary penalties were less than one per cent of the result obtained through private enforcement. The then Commissioner, John Pecman, stated at the time: "We are pleased that Canadians will now begin to receive compensation and that Volkswagen Canada and Audi Canada will address the impact this matter has had on the marketplace. The Bureau works to ensure that Canadians can trust advertising claims made by businesses and can be

confident in their purchasing decisions.”<sup>45</sup> It goes without saying that the compensation to Canadian consumers flowed from private enforcement not the Bureau’s statutory mandate or function.

In these circumstances, the Commissioner’s statement that responding to requests for information for class proceedings under section 36 would detract from the Bureau’s competition mandate is entirely inconsistent with not only the wording and objects of the Act, but also with the realities of enforcement under the Act. It is indeed an odd proposition that the Commissioner, a statutory authority created under the Act, should take the unqualified position that it “would be contrary to the public interest” to respond to requests for information made in furtherance of one of the core provisions of the same Act.<sup>46</sup>

Likewise, the Commissioner’s position that requests for information for section 36 enforcement could hinder another enforcement mechanism<sup>47</sup> under the Act cuts both ways because the same rationale applies to section 36 enforcement. The Commissioner’s blanket refusal to provide information for section 36 proceedings would hinder enforcement under that section of the Act. Parliament has not granted the Commissioner a monopoly on the enforcement of the Act. The Commissioner shares the enforcement role with private litigants and the private bar. The two enforcement arms must complement, not exclude, each other.

It may be true that private enforcers are not in the same statutory position as the Commissioner.<sup>48</sup> However, that proposition cannot provide grounds for blanket opposition to requests for information for section 36 enforcement. The attempt to posit the different status of the Commissioner as a ground on which disclosure ought to be refused skews the issue. The legal and policy question on requests for information is not whether the Commissioner has a different status than private enforcers. The question is whether the Act and the applicable court rules require the disclosure of information on the facts of each particular case and document. Furthermore, the individualized decision-making on disclosure must be undertaken in light of the need for both methods of enforcement under the Act to cooperate and complement each other. An approach contrary to this proposition would frustrate the regulatory scheme created by Parliament and the statutory objects of the Act.

#### **IV. Law in Foreign Jurisdictions Does Not Support the Bureau's General Approach**

Competition authorities in foreign jurisdictions do not possess the broad powers to restrict access to information that the Bulletins propose.<sup>49</sup> Their approach to information in the possession of competition authorities confirms that general opposition or a blanket cloak of confidentiality is not the only way to protect the interests at issue.

For example, in the United Kingdom, the Competition and Markets Authority promises strict confidentiality on the information provided by third parties who submit complaints of anti-competitive conduct.<sup>50</sup> However, the *Enterprise Act 2002*<sup>51</sup> specifically carves out certain exceptions to that confidentiality, including an express exception for instances where any person requests confidential information for the purposes of civil proceedings in the UK or elsewhere.

Similarly, Australia's *Competition and Consumer Act 2010*,<sup>52</sup> which creates and governs The Australian Competition and Consumer Commission,<sup>53</sup> adopts a case-by-case approach to the confidentiality of information in the possession of the Commission<sup>54</sup> rather than a blanket cloak of confidentiality or a class privilege. New Zealand follows suit. The *Commerce Act 1986*<sup>55</sup> establishes that country's Commerce Commission<sup>56</sup> responsible for business competition. The legislation gives the Commission certain powers to prohibit the disclosure of information, documents, and evidence through orders that are subject to expiry dates specified in the legislation.<sup>57</sup>

#### **V. There is No Class Privilege**

The 2017 Bulletin claimed a class-based public interest privilege attaching categorically to all the information in the Commissioner's possession.<sup>58</sup> After the release of the 2017 Bulletin, the Federal Court of Appeal held in *Vancouver Airport Authority* that the Commissioner's claim to a public interest class privilege must be rejected.<sup>59</sup> That case did not concern a request for information for section 36 enforcement. Rather, a party responding to an abuse of dominance claim sought disclosure from the Commissioner.<sup>60</sup> The Commissioner advanced some of the same arguments that are included in the Bulletin, in support of an alleged class privilege. Particularly, the Commissioner argued that the absence of blanket confidentiality would have a chilling effect on third party sources and thus hinder the Commissioner's investigations.<sup>61</sup>

The Court overruled those arguments and concluded that the blanket confidentiality coverage of a class privilege was unnecessary for maintaining the relationship between the Commissioner and third party sources and that a case-by-case public interest privilege—whose existence nobody disputed—was more appropriate.<sup>62</sup> It was after the *Vancouver Airport Authority* decision that the Bureau published the 2018 Bulletin offering a case-by-case analysis.

Other recent appellate jurisprudence also suggests that a class-based approach to information within the Commissioner's possession is not appropriate. In *Imperial Oil v Jacques*,<sup>63</sup> the Quebec Superior Court ordered the disclosure of documents that private parties requested for the purpose of a class proceeding under section 36. The documents were private communications that had been intercepted in the course of a cartel investigation and were in the possession of the Bureau and the Crown. The Bureau was involved in the cartel investigation and the Crown was prosecuting dozens of persons.<sup>64</sup> Yet, the motion judge relied on section 29 of the Act expressly providing that evidence obtained may be disclosed "for the purposes of the administration or enforcement" of the Act, which she found what was at issue in that case.<sup>65</sup> She ordered disclosure under the applicable provision of the *Code of Civil Procedure* regarding productions in the course of litigation.<sup>66</sup> The Supreme Court of Canada upheld that decision. While a public interest class privilege was not before the Court in that case, the judicial decision-making framework that the Supreme Court sanctioned long before *Vancouver Airport Authority* was one of case-by-case analysis based on the applicable rules of production, not a categorical ban on disclosure of all information in the possession of the Bureau.

## VI. Conclusion

In some limited cases, the Commissioner may be justified in refusing to disclose information to section 36 enforcers. However, the Bureau's general approach consisting of blanket opposition is untenable. The Bureau's failure to factor private enforcement of the Act into its justification analysis is fatal.

The Commissioner has no jurisdiction separate and apart from the authority and responsibilities conferred on him or her by legislation. It is a fundamental principle of the rule of law that state power must be exercised in accordance with the law,<sup>67</sup> in this instance the Act. Parliament created a private right of action and exempted it from the Act's

confidentiality obligation. Parliament did not include in the Act the blanket exemption from disclosure or the class privilege that the Commissioner has advocated.

Instead, Parliament envisioned an integrated regulatory scheme that includes both the Commissioner and private enforcement under section 36. The proper administration of this regulatory scheme requires cooperation between the Commissioner and private enforcers. The Commissioner cannot entirely neglect “a core provision of the very pith and substance of the Act”<sup>68</sup> in his or her general position regarding that core provision or in comparison with his or her other responsibilities under the Act.

Opposition to disclosure should not be the norm. In the exceptional cases where the Commissioner has valid reason to oppose disclosure, a case-by-case inquiry that also considers the role and objectives of section 36 would comply with the Act as a whole, and advance its objects to protect Canadian consumers and deter wrongdoers.

## Endnotes

<sup>1</sup> Lawyer, Sotos LLP, Toronto. The author would like to thank Alexander Dos Reis, articling student, for his helpful research assistance, and David Sterns and Jean-Marc Leclerc for their insightful comments on earlier drafts of this article.

<sup>2</sup> *Competition Act*, RSC 1985, c C-34.

<sup>3</sup> Canada, Competition Bureau, “Requests for information from private parties in proceedings under section 36 of the *Competition Act*”, (Ottawa: Competition Bureau, 2017) [2017 Bulletin].

<sup>4</sup> Canada, Competition Bureau, “Requests for information from private parties in proceedings under section 36 of the *Competition Act*”, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04314.html>> [2018 Bulletin].

<sup>5</sup> The 2017 Bulletin recognized section 36 enforcement and its compensatory and deterrence effects. The 2018 Bulletin goes further and recognizes the compensation and deterrence effects of section 36 proceedings. Neither Bulletin, however, weighs section 36 enforcement as a factor in the analysis that leads to the Commissioner’s general position.

<sup>6</sup> *Competition Act*, *supra* note 2 at s 1.1.

<sup>7</sup> *Ibid*, s 7(1)(a).

<sup>8</sup> *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2016 BCSC 97, 262 ACWS (3d) 883 [*Microsoft*].

<sup>9</sup> *Imperial Oil v Jacques*, 2014 SCC 66, [2014] 3 SCR 287 [*Imperial*].

<sup>10</sup> *Canada (Attorney General) v Thouin*, 2017 SCC 46, [2017] 2 SCR 184 [*Thouin*].

<sup>11</sup> 2017 Bulletin, *supra* note 3 at para 2; 2018 Bulletin, *supra* note 4 at para 2.

<sup>12</sup> The words “if appropriate” did not exist in the Draft for Public Consultation that the Bureau published on March 8, 2017. They were added later to the final draft of the 2017 Bulletin. See Canada, Competition Bureau, “Draft for Public Consultation”, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04204.html#Conclusion>>.

<sup>13</sup> *Microsoft*, *supra* note 8 at para 23. The Bulletins concede this point.

<sup>14</sup> *Thouin*, *supra* note 10 at para 26, citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193.

<sup>15</sup> *Ibid* at para 34.

<sup>16</sup> *Combines Investigation Act*, RSC 1970, c C-23, s 31.1.

<sup>17</sup> Canada, Economic Council of Canada, *Interim Report on Competition Policy*, (Ottawa: Queen’s Printer, 1969) [Report].

<sup>18</sup> *Ibid* at 107-109.

<sup>19</sup> *Ibid* at 189.

<sup>20</sup> 15 USC § 1 (2012). Section 4 of the *Clayton Act*, 15 USC § 15 (2012), provides for the recovery of threefold the damages sustained as a result of antitrust offences.

<sup>21</sup> *Ibid* at 191. See also Carl H Fulda, “Proposed Changes in Canadian Combines Legislation: Some Comparative Comments on the ‘Interim Report on Competition Policy’” (1970) 8:3 *Osgoode Hall LJ* 415 at 416-17.

<sup>22</sup> Report, *supra* note 17 at 191.

<sup>23</sup> *House of Commons Debates*, 30th Parl, 1st Sess, No 3 (16 October 1975) at 8270 (Hon André Ouellet).

<sup>24</sup> *House of Commons Debates*, 30th Parl, 1st Sess, No 7 (10 June 1975) at 6625 (David Orlikow).

<sup>25</sup> *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641, [1989] SCJ No 28 [General Motors].

<sup>26</sup> Prior to this decision, the jurisprudence was marginally divided on the constitutional validity of section 31.1. See e.g.: *Rocois Construction Inc v Quebec Ready Mix Inc*, [1980] 1 FC 184 (FCTD), 105 DLR (3d) 15 rev’d [1985] 2 FC 40, 25 DLR (4th) 373 (FCA); *Seiko Time Canada Ltd v Consumers Distributing Co Ltd* (1980), 29 OR (2d) 221, 112 DLR (3d) 500 (H Ct J), aff’d (1981), 34 OR (2d) 481, 128 DLR (3d) 767 (CA); *Henuset Bros Ltd v Syncrude Canada Ltd* (1980), 33 AR 199, 114 DLR (3d) 300 (AB QB).

<sup>27</sup> *General Motors*, *supra* note 25 at para 70.

<sup>28</sup> *Ibid* at para 72.

<sup>29</sup> *Ibid* at para 74.

<sup>30</sup> *Ibid* at para 75.

<sup>31</sup> 2017 Bulletin, *supra* note 3 at paras I, VI.

<sup>32</sup> 2018 Bulletin, *supra* note 4 at para 6. See also 2017 Bulletin, *supra* note 3 at para VI.

<sup>33</sup> *House of Commons Debates*, 30th Parl, 1st Sess, No 1 (22 October 1974) at 625 (John Rodriguez); *House of Commons Debates*, 30th Parl, 1st Sess, No 7 (10 June 1975) at 6611-18 (John Rodriguez); *House of Commons Debates*, 30th Parl, 1st Sess, No 8 (15 October 1975) at 8246 (John Rodriguez); *House of*

*Commons Debates*, 30th Parl, 1st Sess, 8 (16 October 1975) at 8289-90 (John Rodriguez).

<sup>34</sup> James Musgrove, ed, *Fundamentals of Canadian Competition Law*, 3rd ed (Toronto: Carswell, 2015) at 467.

<sup>35</sup> *Ibid.*

<sup>36</sup> George L Priest, “Economics of Class Actions” (2000) 9 *Kansas J of L & Public Policy* 481 at 481. Economies of scale and access to justice were also concerns that drove the parliamentary initiative to include a class action regime in the 1975 amendments, see e.g., *House of Commons Debates*, 30th Parl, 1st Sess, No 8 (15 October 1975) at 8246 (John Rodriguez).

<sup>37</sup> *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 28-29, 46, [2001] 2 SCR 534.

<sup>38</sup> *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477 [Pro-Sys].

<sup>39</sup> *Ibid* at para 141.

<sup>40</sup> See Shannon Kari, “Immunity in the spotlight”, *Canadian Lawyer* (5 March 2018), online: <<http://www.canadianlawyermag.com/author/shannon-kari/immunity-in-the-spotlight-15410/>>.

<sup>41</sup> Elise Amendola, “Canadian chocolate makers to pay \$23.2-million in price-fixing lawsuit”, *The Globe and Mail* (September 16, 2013), online: <<https://www.theglobeandmail.com/report-on-business/canadian-chocolate-makers-to-pay-232-million-in-price-fixing-lawsuit/article14361922/>>. See also: *Osmun v Cadbury Adams Canada Inc*, 2009 CanLII 72092 (Ont Sup Ct J); *Main v Cadbury Schweppes plc*, 2010 BCSC 816 (CanLii); *Osmun v Cadbury Adams Canada Inc*, 2012 ONSC 3837 (CanLii); *Main v Cadbury Schweppes plc*, 2012 BCSC 1062 (CanLii); *Roy c Cadbury Adams Canada inc*, 2012 QCCS 1607 (CanLii).

<sup>42</sup> See summary of the matter, online: US, Environmental Protection Agency, “Learn About Volkswagen Violations”, online: <<https://www.epa.gov/vw/learn-about-volkswagen-violations>>.

<sup>43</sup> Competition Bureau, News Release, “Volkswagen and Audi to pay up to \$2.1 billion to consumers and \$15 million penalty for environmental marketing claims”, (19 December 2016), online: <<https://www.canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html>> [2016 VW News Release].

<sup>44</sup> *Ibid.* See also Competition Bureau, News Release, “Up to \$290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case”, (12 January 2018), online: <[https://www.canada.ca/en/competition-bureau/news/2018/01/up\\_to\\_290\\_5\\_millionincompensationforcanadiansinvolkswagenaudiand.html](https://www.canada.ca/en/competition-bureau/news/2018/01/up_to_290_5_millionincompensationforcanadiansinvolkswagenaudiand.html)>.

<sup>45</sup> 2016 VW News Release, *supra* note 43.

<sup>46</sup> 2017 Bulletin, *supra* note 3 at para VI; 2018 Bulletin, *supra* note 4 at para 6.

<sup>47</sup> 2017 Bulletin, *supra* note 3 at paras III, IV; 2018 Bulletin, *supra* note 4 at paras 3, 4.

<sup>48</sup> The 2017 Bulletin stated: “Private plaintiffs in proceedings commenced under section 36 of the Act, despite their private enforcement of the Act, are not in the same position as the Commissioner, and are accordingly not entitled to the same information that the Bureau has in its possession or control.” (The 2018 Bulletin has removed this language.) The Bureau has also made this argument in opposing disclosure at court proceedings. See *e.g.*, *Microsoft*, *supra* note 8 at para 24.

<sup>49</sup> *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 at paras 106-108, 420 DLR (4th) 163 [*Vancouver Airport Authority*].

<sup>50</sup> Canada, Competition and Markets Authority, “Competition Act 1998: Guidance on the CMA’s investigation procedures in Competition Act 1998 cases”, ss 3.20-3.21. Online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537006/CMA8\\_CA98\\_Guidance\\_on\\_the\\_CMA\\_investigation\\_procedures.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537006/CMA8_CA98_Guidance_on_the_CMA_investigation_procedures.pdf)>.

<sup>51</sup> *Enterprise Act 2002*, c 40, s 241A.

<sup>52</sup> *Competition and Consumer Act 2010* (Cth).

<sup>53</sup> See *ibid* at Part II.

<sup>54</sup> See *e.g.*, *ibid*, ss 44ZL, 95AZA, 95ZN.

<sup>55</sup> *Commerce Act 1986* (NZ), 1986/5.

<sup>56</sup> *Ibid*, s 8.

<sup>57</sup> *Ibid*, s 100.

<sup>58</sup> The 2017 Bulletin stated that “a class-based public interest privilege attaches to information collected or created by the Bureau during the course of an examination, inquiry or enforcement proceeding”. See 2017 Bulletin, *supra* note 3 at para V. The 2018 Bulletin modified this language consistent with *Vancouver Airport Authority*.

<sup>59</sup> *Vancouver Airport Authority*, *supra* note 49 at para 63.

<sup>60</sup> *Ibid* at paras 1-3.

<sup>61</sup> *Ibid* at paras 82-97.

<sup>62</sup> *Ibid* at para 114.

<sup>63</sup> *Imperial*, *supra* note 9, aff’g *Jacques c Pétroles Irving inc*, 2012 QCCS 2954, JE 2012-1485.

<sup>64</sup> *Ibid* at para 3.

<sup>65</sup> *Ibid* at para 7.

<sup>66</sup> *Ibid* at para 27.

<sup>67</sup> *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 10-11, [2012] 1 SCR 5.

<sup>68</sup> *General Motors*, *supra* note 25 at para 72.





