

McMILLAN BINCH LLP

Canada's New Abuse of Dominance Enforcement Guidelines

by A. Neil Campbell

American Bar Association - International Antitrust Bulletin

Fall/Winter 2001

CANADA'S NEW ABUSE OF DOMINANCE ENFORCEMENT GUIDELINES

by A. Neil Campbell
McMillan Binch*

Canada's legislative framework for monopolisation is generally well-designed and well-enforced. "Abuse of dominance" is the umbrella provision for addressing monopolisation issues. With only modest jurisprudence available, the Competition Bureau's publication of Abuse of Dominance Enforcement Guidelines is a welcome initiative.¹

1. OVERVIEW

The modern Canadian treatment of monopolization was introduced in the 1976 and 1986 amendments to what is now the Competition Act.² Abuse of a dominant position (along with exclusive dealing, tied selling, market restriction (which encompasses exclusive distribution territories) and refusal to deal) is a non-criminal "reviewable practice."³ it occurs when:

- one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;
- that person or those persons have engaged or are engaging in a practice of anti-competitive acts; and
- the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market⁴.

Since the reviewable practice of abuse of dominance was enacted in 1986, the Competition Bureau has been successful in all four contested proceedings it has brought before the Competition Tribunal and has obtained two consent orders in joint abuse of dominance cases.⁵ It has also obtained undertakings or other "alternative case resolutions" in numerous cases. After Air Canada became Canada's principal national airline in 1999, additional provisions were introduced specifically to address potential abuses of dominance by a dominant air carrier and the first proceedings under this regime are now before the Tribunal.

2. DOMINANT POSITION

The Tribunal and the Bureau generally equate "control over a class or species of business" (i.e. dominance) with market power in a relevant market.⁶ Thus a determination that one or more firms hold a dominant position involves the definition of relevant product and geographic markets followed by an analysis of market shares, barriers to entry and other factors which indicate whether market power exists.

A. Definition of Relevant Markets

The approach to defining product and geographic markets set out in the ADEGs is very similar to the Bureau's Merger Enforcement Guidelines,⁷ which in turn are similar to the U.S. merger guidelines.⁸

* The author is a partner in the Competition Law and International Trade Law groups at McMillan Binch in Toronto. The assistance of Omar Wakil in the preparation of this article is gratefully acknowledged.

The main difference in approach between abuse of dominance investigations and reviews of proposed mergers is the likelihood that dominance may already exist, in which case prices would be expected to be higher than in a competitive market. Accordingly, the Bureau will consider whether there are competing suppliers which appear to be part of the product or geographic market that would not be included if lower competitive prices prevailed. In order to avoid the famous “cellophane trap,”⁹ such products or areas will be removed from the defined market as they would not be expected to discipline prices at competitive levels.¹⁰

In defining relevant product markets, the ADEGs focus on whether there are close substitutes for the product(s) in question such that buyers would turn to those substitutes if prices were raised above competitive levels by a significant amount (generally 5%) for a non-transitory period of time (normally one year). Supply-side substitutability is also considered. Quantitative techniques such as price correlation analysis, price elasticity analysis and diversion ratio analysis are often used when data is available. Relevant qualitative factors include the views, strategies and behaviours of buyers and the trade, product end uses and physical / technical characteristics, switching costs, price relationships and relative price levels.¹¹

In defining relevant geographic markets in abuse of dominance cases, the Competition Bureau will employ many of the same quantitative and qualitative tools used in defining product markets. As in merger cases, it will also consider factors such as transportation costs, shipment patterns and foreign competition.¹²

B. Market Power

Market power exists when a firm or group of firms are not constrained from pricing above competitive levels (or reducing non-price dimensions of competition below competitive levels) due to the presence of effective competition or the likelihood of competitive entry.¹³ While it can be difficult to measure market power, the ADEGs consider it to exist when prices profitably can be maintained above competitive levels for at least one year without being eroded by new entry.¹⁴

The Bureau will consider a number of factors in determining whether market power exists including technological change, recent entry or exit, industry excess capacity and countervailing market power of customers and distributors. However, the ADEGs helpfully confirm that the most important factors are market shares (and hence remaining competition) and barriers to entry.¹⁵

The ADEGs utilize market shares both as “safe harbours” and as indicators of likely market power.¹⁶ Market shares of less than 35% (or 60% in a joint dominance case) will generally be considered as indicating the absence of market power or dominance, while market shares above this level will normally prompt further examination.¹⁷ In addition, a single firm market share in excess of 50% will *prima facie* be regarded as dominance (a presumption that is precluded by statute in merger cases¹⁸). Thus abuse of dominance concerns are perceived to arise at lower levels than the [70%] market share commonly reflected in U.S. monopolization jurisprudence.¹⁹

Barriers to entry are accepted by the Tribunal and the Bureau as an essential pre-requisite in determining whether market power exists.²⁰ Without such barriers, any attempt by the dominant firm to raise prices would likely be met by new entry or expansion by existing firms. In considering barriers to entry, the Bureau will focus on whether entry is likely to be delayed or hindered by the presence of absolute cost differences between the incumbent and the new entrant as well as whether there are sunk costs involved in entering (i.e. the need to make investments which likely would not be recovered if entry is unsuccessful).²¹

3. ANTI-COMPETITIVE CONDUCT

Unlike section 2 of the Sherman Act, the Competition Act identifies several types of “anti-competitive acts”²². The list is illustrative, not exhaustive: any conduct which has a predatory / disciplinary or exclusionary / entry-detering purpose or effect may constitute an anti-competitive act.²³

A. Predatory Conduct

While various types of predation are possible, most of the discussion of predatory conduct in the ADEGs focuses on predatory pricing.²⁴ The ADEGs recognise that pricing below cost may be profitable in the long term if it enables the dominant firm to maintain or enhance market power (e.g. by eliminating competitors or disciplining any attempts they make to cut prices), thereby recouping its losses from the initial predatory behaviour.²⁵ This is consistent with the U.S. approach to predation.²⁶

The Bureau uses a two-stage approach to analyse predatory pricing allegations. First, it will consider whether the dominant firm could recoup its losses from pricing below cost by raising prices later on (by a significant and non-transitory amount) or by maintaining higher prices in other markets. If recoupment is likely, the Bureau will undertake a detailed analysis of whether the dominant firm is pricing below its “avoidable costs” (i.e., the costs which the firm would not incur by not selling the product).²⁷

Pursuant to an amendment to the Act in 2000, the Governor-in-Council has enacted regulations which specify a number of additional anti-competitive acts that apply only to the airline industry. They include predatory activity such as operating or increasing capacity on a route at fares which do not cover the avoidable costs of providing the service or using a low-cost second brand carrier to do so.²⁸ In the autumn of 2000, the Commissioner issued and the Tribunal upheld a temporary order preventing Air Canada from engaging in anti-competitive practices directed at two low cost air carriers.²⁹ The case is similar to the U.S. Justice Department’s challenge of some of American Airlines’ business practices which was unsuccessful but has been appealed¹. The pending decision on the Commissioner’s application for a permanent order is likely to make an important contribution to Canadian predation law because Air Canada’s defences include an argument that mere matching of competitors’ prices does not constitute predation, as well as challenges to the avoidable costs test being applied by the Commissioner to assess whether prices are predatory.

B. Exclusionary Conduct

Tied selling, exclusive dealing, market restriction and refusal to deal are types of exclusionary conduct that have been addressed in customised reviewable practices under Part VIII of the Act.³⁰ However, the abuse of dominance regime can also be used to challenge these or any other exclusionary or entry-detering conduct by a dominant firm.

Other types of exclusionary acts which are specifically enumerated in the Act include squeezing of unintegrated customers by vertically integrated suppliers;³¹ vertical integration by acquisition which forecloses existing or new competitors; freight equalisation on a competitor’s plant, adopting product specifications that are incompatible with products produced by another firm;³² pre-emption of scarce facilities or resources required by a competitor for the operation of its business;³³ requiring suppliers not to sell to the customer’s competitors; and buying up products to prevent the erosion of existing price

¹ [*United States v. American Airlines*] [cite TBA]

levels.³⁴ All but the latter include a requirement that the object, purpose or design is entry-detering or exclusionary.³⁵

C. Coordinated Conduct

Canada's abuse of dominance provision explicitly contemplates that firms may jointly abuse a dominant position and does not require that there be a conspiracy or agreement for such a finding to be made.³⁶ The ADEGs note that a group of unaffiliated firms may jointly possess market power even if no single member of the group is dominant by itself.³⁷ The anti-competitive acts of a group of dominant firms could include exclusionary / entry-detering or predatory / disciplinary behaviour. However, the ADEGs provide important confirmation that the Bureau does not view "conscious parallelism" as sufficient to constitute a coordinated practice of anti-competitive acts.

The Bureau's position is that coordination may be inferred by considering the following factors:³⁸

- whether the firms collectively account for a large share of the relevant market;
- any evidence that the alleged coordinated behaviour is designed to increase prices or engage in other anti-competitive acts;
- barriers to entry into the group as well as barriers to new entrants into the relevant market;
- any evidence of whether actions have been taken by group members to inhibit intra-group rivalry; and
- any evidence that a significant number of customers cannot exercise countervailing power to offset the attempted abuse.

D. Abusive Practices in the High Technology Sector

While the Competition Bureau has examined mergers and abuse of dominance / tying / exclusivity / refusal to deal issues in a variety of high technology sectors, it has brought very few cases challenging such conduct. Two of the six decided Canadian abuse of dominance cases involved information technology Industries.

- In D & B Companies, the Bureau alleged that A.C. Nielsen, which held 100% of the Canadian market for scanner-based market tracking services, had engaged in a practice of anti-competitive acts through its use of exclusive contracts with retail grocery chains to deny competitors access to scanner data. Such contracts were long-term, contained "most-favoured-nation" clauses, and specified penalties for early termination or if a retailer supplied data to a competitor. Customer contracts were also long-term and contained penalties for early termination, thus adding further impediments for competitors interested in entering the market, including IRI (A.C. Nielsen's principal competitor in the United States). The Tribunal ordered amendments to A.C. Nielsen's contracts to temper their exclusionary impact and also required the company to provide certain data to a new entrant competitor.

- The respondents in Interac, were members of Canada's sole debit card banking network which allowed on-line transactions to be made through automatic banking machines of most major financial institutions as well as point-of-sale terminals at many retail outlets. The association's by-laws contained restrictive rules relating to new members, imposed heavy fees on financial service providers who had only indirect access to the network through one of its members, and placed various limitations on price competition and new services. The Tribunal issued a consent order which required that the by-laws be amended to remove membership restrictions, indirect access be allowed on appropriate terms, pricing practices be modified, procedures for approving new network services be changed and the composition of the board of directors be altered. In effect, aspects of the network infrastructure were treated as an "essential facility" from the perspective of other firms seeking to offer certain types of electronic financial services.

4. SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

The Act does not prohibit the possession of a dominant position (i.e., market power). Nor does it prohibit conduct which constitutes an anti-competitive act. The power of the Bureau to seek, and the Tribunal to issue, a remedial order arises when one or more firms which possess market power engage in a practice of anti-competitive acts with the result that competition is likely to be lessened or prevented substantially.³⁹ This means that the anti-competitive acts must be likely to allow the exercise of market power to be continued or enhanced.⁴⁰ In practice, when the first two elements are present, the latter requirement will normally not be difficult to establish.

The ADEGs contain a very valuable recognition of the Bureau's role in differentiating between strategically-motivated complaints reflecting the private interests of other marketplace participants and situations where the public interest in competition is threatened:

The requirement of "preventing or lessening competition substantially in a market" puts the focus on the impact on competition rather than on competitors. As the Tribunal noted in Tele-Direct, "seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the market are made better off."⁴¹

Unlike the United States, the abuse of dominance provisions do not specifically condemn attempts to attain monopoly power. However, an abuse of dominance can occur in respect of a substantial lessening or prevention of competition which is "likely" to occur but has not yet occurred. This prospective approach to considering anti-competitive effects is analogous to the review of proposed mergers under the Act.

5. DEFENCES

Aside from rebutting any of the three required elements discussed above, the sole substantive defence under the abuse of dominance provisions relates to intellectual property rights. There is no formal efficiency defence.

A. Exercise of Intellectual Property Rights

Activities engaged in pursuant to the exercise of a statutory intellectual property right (patents, copyrights, trade-marks and industrial designs) derived under the various Canadian federal intellectual property statutes are not anti-competitive acts.⁴² The IPEGs take the position that this defence only protects the core rights related to intellectual property (e.g. the ability to decide whether, when, to whom

and on what terms to license such rights). An attempt by the IP owner to extend or leverage its rights beyond their statutory scope or into larger or different markets may be challenged as an anti-competitive act under the abuse of dominance provisions.⁴³

The Competition Act does contain provisions which allow the Federal Court of Canada, upon application by the Attorney General on behalf of the Competition Bureau, to make various remedial orders in cases where a holder of intellectual property rights has used its rights to lessen competition “unduly”. Such orders can include mandatory licensing of the IP rights, restraining the use of the rights and declaring void agreements or arrangements relating to such rights.⁴⁴ However, the special remedy has rarely been invoked and the Bureau has indicated that this policy will continue.⁴⁵

B. Efficiencies

The Act requires the Competition Tribunal to consider whether any lessening of competition is attributable to the “superior competitive performance” of the dominant firm(s) rather than a practice of anti-competitive acts.⁴⁶ The Bureau’s position is that this is not an efficiency defence⁴⁷ and does not require the Tribunal to balance superior competitive performance against the effects of the anti-competitive acts.⁴⁸ This is consistent with the recent hostility of the Bureau towards the efficiency defence for mergers in the Superior Propane case.⁴⁹ The ADEGs then go on to state that:

Superior competitive performance is only a factor to be considered in determining the cause of the lessening of competition, and not as a justifiable goal for engaging in an anti-competitive act. Having lower costs, better distribution or production techniques, or a broader array of product offerings can put a firm at a competitive advantage that, when exploited, will lessen competition by leading to the elimination or restriction of inferior competitors. This is the sort of competitive dynamic that the Act is designed to preserve and, where possible, enhance, as it ultimately leads to a more efficient allocation of resources.⁵⁰

It is not entirely clear from the concluding sentence that efficiencies which lead to competitive advantage will be encouraged (or whether the preservation of competitors facing elimination as a result of others’ efficiencies will be the focus B as it sometimes has been in inquiries prompted by especially tenacious complainants). The ADEGs also do not acknowledge that the efficiency levels achieved by a leading firm often spur others to improve their efficiency in order to remain competitive.

6. **REMEDIES**

There are no fines or other penalties for abuse of dominant position or other reviewable practices. There are also no private rights of action to recover damages until after a Tribunal order is made and breached.⁵¹ The focus is on preventing the continuation or emergence of anti-competitive conduct.

If the Competition Tribunal finds that there has been an abuse of a dominant position, it may make an order preventing the respondent firm(s) from engaging in the practice of anti-competitive acts. In addition, if the Tribunal concludes that such an order is not likely to restore competition in the affected market, it may make a broader order directing any actions (including the divestiture of assets or shares) that are reasonable and necessary to overcome the effects of the anti-competitive acts. However, the Act requires the Tribunal to make such an order on terms which will interfere with the rights of any person

against whom the order is directed or any other person only to the extent necessary to restore competition.⁵² In other words, such orders are to be remedial and not punitive.⁵³

In April 2001, the Government tabled proposed amendments which include an interim order regime in respect of abuse of dominant position. The amendments would give the Competition Tribunal the authority to issue a temporary order prior to the commencement of litigation to prevent harm to competition (or to a marketplace participant — an excessively broad threshold given that vigorous pre-competitive activity can reduce a competitor's revenues or market share) while an inquiry is undertaken by the Bureau.⁵⁴ While it is not been demonstrated that this occurs with any significant frequency, the length of time required to complete proceedings and obtain a remedial order from the Competition Tribunal could be problematic in cases where predatory conduct poses a risk of permanently eliminating competitors and entry barriers are present.

The Industry Committee of the Canadian House of Commons is currently considering this bill and it seems probable that the Committee will consider adding private rights of action in respect of four reviewable practices: refusal to deal, tied selling, market restriction and exclusive dealing.⁵⁵ While the Bureau has expressed support for a limited private actions regime, it has disagreed with proponents who advocate extending this to abuse of dominance as well. The need for or benefits of such a change have not been demonstrated, and there is widespread concern that it would foster unmeritorious strategic litigation.⁵⁶

ENDNOTES

¹ Competition Bureau, Abuse of Dominance Enforcement Guidelines (Ottawa: Industry Canada, 2001) (the “ADEGs”).

² Competition Act, R.S.C. 1985, c. C-34, as amended. (Prior to 1986 there was a criminal monopoly offence in the Combines Investigation Act which was difficult to enforce for a variety of reasons.)

³ Ibid., Part VIII. While predatory conduct may be addressed under the abuse of dominance provisions, predatory pricing is also a separate criminal offence: See ibid., s. 50(1)(c).

⁴ Ibid., s. 79(1).

⁵ A brief summary of each of the cases is contained in the ADEGs, Appendix IV.

⁶ See ADEGs, & 3.2.1(d) and Appendix II, including references therein to Tribunal jurisprudence.

⁷ Director of Investigation and Research, Merger Enforcement Guidelines (Ottawa: Supply and Services Canada, 1991) (the “MEGs”).

⁸ [cite DOJ/FTC 92 guidelines].

⁹ United States v. E.I. Dupont de Nemours & Co. (1956), 351 U.S. 377.

¹⁰ ADEGs, & 3.2.1(c).

¹¹ See ADEGs, & 3.2.1(a); and *cf.* MEGs, & 3.2. The Bureau has also provided some guidance as to its views on market definition for transactions or conduct involving intellectual property: see Competition Bureau, Intellectual Property Enforcement Guidelines (Ottawa: Industry Canada, 2000) (the “IPEGs”), & 5.1. In such cases, the Bureau is likely to define the market around one or more of the following: the intangible knowledge or know-how that constitutes the IP, processes that are based on the IP rights, or the final intermediate goods resulting from, or incorporating the IP. The Bureau prefers to concentrate on price or output effects and therefore generally does not define markets based on R & D activity or innovation efforts alone. However, it will examine the effects of marketplace conduct on non-price dimensions of competition including innovation where relevant.

¹² See ADEGs, & 3.2.1(b); and *cf.* MEGs, & 3.3.

¹³ See R. v. Nova Scotia Pharmaceutical Society (1992), 43 C.P.R. (3d) 1 (S.C.C.); as well as ADEGs, & 3.2.1(d) and Appendix II, including Tribunal jurisprudence cited therein.

¹⁴ ADEGs, & 3.2.1(d). Interestingly, the ADEGs do not mention the 5% price standard normally employed in merger cases. Also the use of a time standard of one year is notable given the two-year time frame used to assess entry: ibid., & 3.2.4. (Historically, the Bureau has used the same two-year time frame for market power analysis as for entry: see MEGs, & 4.6.2; and Director of Investigation and Research, Predatory Pricing Enforcement Guidelines (Ottawa: Supply and Services Canada, 1992), & 2.2.1.)

¹⁵ ADEGs, & 3.2.1(d).

¹⁶ The ADEGs do not specify the manner in which market shares will be measured. However, the Bureau generally can be expected to employ the same flexible approach used in the MEGs, & 4.2.2. They contemplate that market shares can be measured in terms of dollar sales, unit sales, production output, capacity or, in certain natural resource industries, reserves. Usually the measurement approach is determined by the most readily available data and industry practices. Overall market concentration is typically measured using a simple four-firm concentration ratio (“CR₄”). The HHI measure used

in the United States is occasionally looked at by the Bureau, but is not its primary method for analysing concentration issues.

¹⁷ ADEGs, & 3.2.1(d). When analysing the risk of interdependent behaviour in merger cases, the Bureau considers a CR₄ of less than 65% to be unproblematic: see MEGs, & 4.2.1. There is no obvious reason for adopting a different standard for joint abuse of dominance cases.

¹⁸ Competition Act, s. 92(2).

¹⁹ See, for example, the overview in Mark Leddy, [title], Canadian Bar Association Annual Fall Conference on Competition Law, Ottawa, September, 2001.

²⁰ See ADEGs, & 3.2.1(d) and Appendix II, including references therein to Tribunal jurisprudence.

²¹ MEGs, & 4.6. ● [and ADEG's?]. Examples of barriers to entry found in abuse of dominance cases to date include the existence of process patents, scale economies and long lead times (NutraSweet – artificial sweeteners), network effects and regulatory impediments (Interac – debit cards and related financial services), reputational effects and the vertical relationship of an incumbent firm to related companies (Tele-Direct – yellow pages directory advertising), and the contracting practices of the incumbent firm (Laidlaw – waste disposal; and D & B Companies – scanner data): see the summaries in ADEGs, Appendix IV.

²² Competition Act, s. 78.

²³ See ADEGs, & ● and Appendix II, including references therein to Tribunal jurisprudence.

²⁴ One of the anti-competitive acts listed in the abuse of dominance provisions is “selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor”: Competition Act, s. 78(i). The Tribunal interpreted this narrowly in Nutrasweet (*i.e.* as being limited to resale of purchased articles), but also noted that since the list of anti-competitive acts is not exhaustive, any other conduct which is predatory (or disciplinary) may give rise to an abuse of a dominant position. The Competition Act also contains a criminal predatory pricing offence which occurs when a person engages in a policy of charging unreasonably low prices with the effect of substantially lessening competition or eliminating a competitor (or which are designed to have that effect): see s. 50(1)(c). The Bureau’s 1992 Predatory Pricing Enforcement Guidelines are similar to the analytical framework in the ADEGs, but the Bureau pursues criminal prosecutions only in clear and egregious cases.

²⁵ ADEGs, & 4.3. A welfare loss to the economy would only be expected to occur if the firm engaging in the predatory conduct can raise prices above competitive levels after the predatory conduct is completed. As with other types of abuse of dominance, this generally requires that barriers to entry exist.

²⁶ See, for example, [Brooke Group v. Williamson]

²⁷ ADEGs, & 4.3.

²⁸ Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service, SOR/2000-324 (August 23, 2000), s. 1. They also define “essential facilities” (for purposes of s. 78(k) of the Act) to include slots, gates, bridges and related airport facilities, baggage handling and maintenance services, and interline arrangements: *ibid.*, s. 2. More details on the Bureau’s approach to these types of anti-competitive acts can be found in Competition Bureau, Enforcement Guidelines on: The Abuse of Dominance in the Airline Industry B Draft (February 2001).

²⁹ Canada (Commissioner of Competition) v. Air Canada, CT-2000/004, 2000 Comp. Trib. 24 (November 24, 2000) and 2000 Comp. Trib. 26 (December 7, 2000).

³⁰ See Competition Act, ss. 77 and 75. For a more detailed discussion of these reviewable practices, see A.N. Campbell, “Vertical Non-Price Restraints,” in Competition Law: Compliance in an Aggressive Marketplace (Toronto: Insight, 1993).

³¹ Given the level of complaints generated in vertically integrated industries such as gasoline marketing, the Bureau has developed additional specific guidelines on its approach to exclusionary squeezing: see ADEGs, Appendix III.

³² Canadian competition law is unlikely to stand in the way of the efficiency benefits of standard-setting. Indeed, there is a specific exemption from the conspiracy provisions relating to agreements or arrangements that define product standards in an industry: see Competition Act, s. 45(3)(b). However, sensitivities may arise if standards are exclusionary rather than open. Thus the anti-competitive act listed in Competition Act, s. 78(g), focuses on the adoption of incompatible product specifications for the purpose of preventing entry by or eliminating a competitor.

³³ This is a statutory counterpart to the “essential facilities” doctrine in U.S. jurisprudence.

³⁴ Competition Act, ss. 78(a)-(c) and (e)-(h).

³⁵ Examples of other anti-competitive acts alleged in the decided cases include denying competitors access to an essential input (D & B Companies – scanner data), discriminatory pricing and commissions (Tele-Direct B yellow pages directory advertising), market allocation arrangements (CANYPS B national yellow pages advertising), the acquisition of competitors along with lengthy non-compete clauses in acquisition agreements (Laidlaw) and actual or threatened use of strategic litigation (Laidlaw).

³⁶ Competition Act, s. 79(1).

³⁷ ADEGs, & 3.2.1(e).

³⁸ Ibid. There have only been two cases where joint dominance was alleged. Canada (Director of Investigation and Research) v. Bank of Montreal (1996), 68 C.P.R. (3rd) 527 (“Interac”); and Canada (Director of Investigation and Research) v. AGT Directory Ltd. (1994), C.C.T.D. No. 24 (Trib. Dec. No. CT-9402/19). However, neither provides much insight into the degree of co-ordination required to constitute joint dominance since in both cases there were explicit agreements among the respondents and both were resolved with consent orders.

³⁹ Competition Act, s. 79(1).

⁴⁰ ADEGs, && 3.2.3 and 3.2.4, as well as Appendix II and the Tribunal jurisprudence cited therein.

⁴¹ ADEGs, & 3.2.3, quoting Canada v. Tele-Direct.

⁴² Competition Act, s. 79(5).

⁴³ IPEGs, & 4.2. See also ADEGs, & 5.3.3.

⁴⁴ Competition Act, s. 32.

⁴⁵ See IPEGs, & 4.2.2; and commentary in A.N. Campbell, “The Application of Competition Laws to Intellectual Property in Canada,” American Bar Association Section of Antitrust Law and Canadian Bar Association Competition Law Section B International Antitrust Conference, Vancouver, June 2001. The Patent Act, R.S.C. 1985, c. P-4, ss. 65 and 66, also contains a mechanism for interested persons to request relief in certain circumstances. The Commissioner of Patents may grant compulsory licences in cases of anti-competitive activity. Exclusive patent rights are deemed to be abused if demand is not being met on reasonable terms; the trade or industry is prejudiced and it is in the public interest that a licence should be granted; the trade or industry is unfairly prejudiced by the conditions attached by the patentee to the purchase, hire, licence or use of the patented article; or a patent process has been utilized by the patentee so as unfairly to prejudice in Canada the manufacture, use or sale of any materials.

⁴⁶ Competition Act, s. 79(4).

⁴⁷ Cf. Competition Act, s. 96, which contains a comprehensive efficiency defence for merger cases. The omission of such a defence from the abuse of dominance regime is unfortunate since efficiencies may be as beneficial to overall economic welfare in monopolisation situations as in merger cases.

⁴⁸ ADEGs, & 5.3.2.

⁴⁹ In Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385, the Commissioner established that a merger to near-monopoly in many relevant markets was likely to lessen or prevent competition substantially, but a 2:1 majority of the Tribunal upheld the merging parties' efficiency defence based on a "total economic welfare" interpretation that is favoured by most economists but was vigorously opposed by the Commissioner (notwithstanding the endorsement of such an approach in the MEGs, & 5.5 B which was subsequently rescinded). However, the Commissioner persuaded the Federal Court of Appeal to overturn the Tribunal's interpretation in favour of the amorphous "distributional weights" approach advanced by the Bureau's expert: see Canada (Commissioner of Competition) v. Superior Propane Inc. (2001), 11 C.P.R. (4th) 289 (Fed. C.A.).

⁵⁰ ADEGs, ¶ 5.3.2.

⁵¹ See Competition Act, s. 36(1)(b). (There is a private right of action in respect of criminal offences such as predatory pricing and price maintenance, irrespective of whether there has been a government prosecution: see ibid., s. 36(1)(a).)

⁵² Ibid. ss. 79(2) and (3). Tied selling and exclusive dealing are subject to similar remedial regimes: prohibition orders are the norm, but other remedial orders may be made if necessary to restore competition under s.77(2). Non-price-related refusals to deal are normally remedied by a mandatory order to supply on ordinary trade terms: ibid., s.75(1).

⁵³ Once a prohibition or other remedial order is made by the Tribunal, failure to comply is an offence punishable on indictment by a fine in the discretion of the court and / or imprisonment for up to five years, and a private right of action is available to injured parties: see ibid., ss. 66 and 36(1)(b).

⁵⁴ Bill C-23, "An Act to Amend the Competition Act and the Competition Tribunal Act", 1st Session, 37th Parliament (2001). There is no justification for vesting this power in the hands of the Commissioner rather than an impartial adjudicator, and a proposal to do so (replicating the approach introduced in early 2000 for the airline industry) was rejected after massive opposition in the Public Policy Forum consultation process.

⁵⁵ A Similar proposal was put forward last year in a private member's bill: Bill C-472, "An Act to Amend the Competition Act (conspiracy agreements and right to make private applications), the Competition Tribunal Act (costs and summary dispositions) and the Criminal Code as a consequence," 2nd Session, 36th Parliament (1999-2000), s. 5 (which would have established a new s. 77.1 in the Competition Act).

⁵⁶ See J.W. Rowley, A.N. Campbell and O.K. Wakil, "[TITLE]", Antitrust Report [cite]. See also various stakeholder submissions to the Public Policy Forum Consultation Process on Bill C-472, available online: Public Policy Forum <<http://www.ppforum.com/english/competitionact/submissions.html>>.