

September 2001

CANADA'S WELL-BALANCED APPROACH TO MONOPOLIZATION

by Neil Campbell

Introduction

The central theme of this paper is that Canada's legislative framework for monopolization is generally well-designed and well-enforced. The paper focuses on the reviewable practice of "abuse of dominance" since it is the umbrella provision for addressing monopolization issues. Tied selling, exclusive dealing, refusals to deal and predation are dealt with as specific types of monopolization that are governed by similar but more detailed rules. I also comment briefly on the robustness of these rules for "new economy" industries.

The modern Canadian treatment of monopolization was introduced in the 1976 and 1986 amendments to what is now the *Competition Act*.¹ Abuse of a dominant position, exclusive dealing, tied selling, market restriction (which encompasses exclusive distribution territories) and refusal to deal are non-criminal "reviewable practices" in Part VIII of the Act.² While predatory conduct may be addressed under the abuse of dominance provisions, predatory pricing is also a criminal offence under Part VI of the Act.³

Abuse of dominant position occurs when three elements are found to exist by the Competition Tribunal:⁴

- 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 market.

¹ *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.)

² There is no Canadian common law concept equivalent to monopolization. However, various general common law causes of action could overlap with conduct potentially subject to abuse of dominance in particular situations (*e.g.* restraint of trade, interference with contracts or economic relations, unfair competition, *etc.*)

³ *Competition Act*, s. 50(1)(c). Price-related refusals to deal are also covered by the criminal price maintenance offence: *ibid.*, s. 61(1)(b).

⁴ *Competition Act*, s. 79(1).

The Competition Bureau has recently published *Abuse of Dominance Enforcement Guidelines* which provide very useful transparency regarding its approach to monopolization issues.⁵ The ADEGs state that abuse of dominance, together with the merger and conspiracy provisions in the *Competition Act*, form “the cornerstones of Canadian competition policy legislation”.⁶ These provisions are all focused on preventing the acquisition and exercise of market power, and thereby contribute to all of the purposes set out in the *Act*:

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign 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.⁷

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.⁸ Recent enforcement activities have focused on the airline industry. Since Air Canada became Canada’s principal national airline in 1999, new provisions have been 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.⁹

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.¹⁰ 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.

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*.¹¹ 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 would prevail 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,”¹² such products or areas will be removed from the defined market as they would not be expected to discipline prices at competitive levels.¹³

(i) Product Markets

In defining relevant product markets, the key question is whether there are close substitutes for the product(s) in question such that buyers would turn to those substitutes if the price of the product(s) was raised above competitive levels by a significant amount (generally 5%) for a non-transitory period of time

⁵ Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (Ottawa: Industry Canada, 2001) (the “ADEGs”).

⁶ *Ibid.*, &1.1.

⁷ *Competition Act*, s. 1.1.

⁸ A brief summary of each of the cases is contained in ADEGs, Appendix IV.

⁹ See the discussion under Predatory Conduct, below.

¹⁰ See ADEGs, & 3.2.1(d) and Appendix II, including references therein to Tribunal jurisprudence.

¹¹ Director of Investigation and Research, *Merger Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1991) (the “MEGs”).

¹² *United States v. E.I. Dupont de Nemours & Co.* (1956), 351 U.S. 377.

¹³ ADEGs, & 3.2.1(c).

(generally 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.¹⁴

(ii) *Geographic Markets*

In defining relevant geographic markets in abuse of dominance cases, the Competition Bureau will use 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.¹⁵

(iii) *Technology Markets*

The Bureau's recent *Intellectual Property Enforcement Guidelines* provide some guidance as to its views on market definition for transactions or conduct involving intellectual property.¹⁶ 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.

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.¹⁷ While it can be difficult to measure market power, the Bureau generally considers it to exist when prices can profitably be maintained above competitive levels for at least one year without being eroded by new entry.¹⁸

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 most important factors are market shares (and hence remaining competition) and barriers to entry.¹⁹

(i) *Market Shares*

As in merger cases, the ADEGs employ market shares primarily as "safe harbours". 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.²⁰ However, in abuse cases a single firm market share in excess of 50% will *prima facie* be

¹⁴ See ADEGs, & 3.2.1(a); and *cf.* MEGs, & 3.2 and commentary in A.N. Campbell, *Merger Law and Practice* (Toronto, Carswell, 1997), pp. 65-76.

¹⁵ See ADEGs, & 3.2.1(b); and *cf.* MEGs, & 3.3 and commentary in Campbell, *Merger Law and Practice*, pp. 76-84.

¹⁶ Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: Industry Canada, 2000) (the "IPEGs"), & 5.1.

¹⁷ 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.

¹⁸ 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.)

¹⁹ ADEGs, & 3.2.1(d).

²⁰ *Ibid.* When analyzing 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.

regarded as dominance (a presumption that is precluded by statute in merger cases²¹).

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. 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.²² 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 analyzing concentration issues.

(ii) *Barriers to Entry*

Barriers to entry are accepted by the Tribunal and the Bureau as an essential pre-requisite in determining whether market power exists.²³ 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). 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).²⁴

(iii) *High Technology Industries*

The *Microsoft* case in the United States has provoked an intense debate on the application of antitrust laws to high technology industries. In particular, it has been argued that monopoly power in the high technology sector tends to be short-lived and can be defeated more quickly and efficiently by market forces than by regulators. Also, monopoly power may be beneficial in the high technology sector because it creates incentives for further innovation.

There is no specific Canadian jurisprudence on these issues. The Bureau would likely give careful consideration to such arguments in any case where they would be relevant based on specific market facts and analysis. However, as the IPEGs indicate, the Bureau is also attuned to the possibility of network effects facilitating the maintenance and enhancement of market power for an extended period of time in technology markets.²⁵

ANTI-COMPETITIVE CONDUCT

The *Act* identifies several types of “anti-competitive acts” on an illustrative rather than exhaustive basis.²⁶ In general, any conduct which has either a predatory / disciplinary or exclusionary / entry-detering purpose or effect may constitute an anti-competitive act.

Predatory Conduct

One of the anti-competitive acts listed in the abuse of dominance provisions is “selling articles at a

²¹ *Competition Act*, s. 92(2).

²² MEGs, & 4.2.2.

²³ See ADEGs, & 3.2.1(d) and Appendix II, including references therein to Tribunal jurisprudence.

²⁴ See the summaries in ADEGs, Appendix IV.

²⁵ IPEGs, && 5.2 and 5.3. Canada’s intellectual property laws recognize the fact that certain kinds of innovation are deserving of monopoly protection for limited time periods in order to provide adequate incentives to innovators. While the abuse of dominance regime in the *Competition Act* does not encourage the creation of monopolies, it does not prohibit or penalise the acquisition of monopoly power (other than through conduct which is anti-competitive) in any industry. Thus it cannot be said to discourage innovation.

²⁶ *Competition Act*, s. 78.

price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor”.²⁷ 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. While various types of predation are possible, most of the discussion of predatory conduct in the ADEGs focuses on predatory pricing.²⁸

(i) *General Approach*

The ADEGs recognize 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. 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.²⁹

The Bureau uses a two-stage approach to analyze 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).³⁰

(ii) *Airline Industry*

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.³¹ More details on the Bureau’s approach to these types of anti-competitive acts can be found in its draft *Enforcement Guidelines on Abuse of Dominance in the Airline Industry*.³²

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.³³ The Tribunal hearing on the Commissioner’s application for a permanent order is now underway. Its decision 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 is not predatory, as well as challenges to the avoidable costs test being applied by the Commissioner to assess whether prices are predatory.

²⁷ *Ibid.*, s. 78(i). See also s. 78(d), which refers to the “use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor.”

²⁸ 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. (The two major contested prosecutions were *R. v. Hoffman-La Roche* (1980), 28 O.R. (2d) 164, aff’d (1981), 33 O.R. (2d) 694 (C.A.); and *R. v. Consumers Glass Co.* (1981), 33 O.R. (2d) 228 (H.C.).)

²⁹ ADEGs, & 4.3.

³⁰ *Ibid.*

³¹ *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 *Competition Act*) to include slots, gates, bridges and related airport facilities, baggage handling and maintenance services, and interline arrangements: *ibid.*, s. 2.

³² Competition Bureau, *Enforcement Guidelines on: The Abuse of Dominance in the Airline Industry B Draft* (February 2001).

³³ *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).

Exclusionary Conduct

Tied selling, exclusive dealing and refusal to deal are types of exclusionary conduct that have been addressed in customized reviewable practices under Part VIII of the *Act*. 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.

(i) Tying Arrangements

Tied selling occurs when the supplier of a product, as a condition of supplying the product to a customer, requires the customer to either (i) acquire another product from the supplier or the supplier's nominee, or (ii) refrain from using or distributing another product that is not of a brand or manufacture designated by the supplier. In addition to such contractual or coercive ties, any use of economic inducements to achieve the same result constitutes tied selling.³⁴

The Tribunal may make an order prohibiting tied selling (and include conditions necessary to overcome the effects of tied selling or to restore or stimulate competition) in situations where tied selling is (i) practised by a major supplier of a product in a market (or is widespread in a market), and (ii) is likely to have any exclusionary effect (such as impeding the entry or expansion of a firm or a product in a market), with the result that (iii) competition is or is likely to be lessened substantially.³⁵ However, the *Act* specifically prohibits the Tribunal from making an order in respect of tied selling which is "reasonable having regard to the technological relationships between or among the products to which it applies."³⁶

There have been few cases under the tied-selling provisions. One example involved Digital Equipment

Corporation which executed a series of undertakings to alleviate Bureau concerns about its "integrated service policy". The policy tied hardware servicing to software servicing, specific elements of which were only available from Digital. By offering better prices on certain software if customers also contracted for its hardware servicing, the Bureau believed that Digital was impeding the entry or expansion of third party competitors to Digital for the provision of hardware services, resulting in a substantial lessening of competition for certain computer equipment end-users.³⁷ Tied selling was also one of the anti-competitive acts found to have been engaged in by the respondents in Tele-Direct, which tied the sale of space in their Yellow Pages directories to the sale of additional advertising services.³⁸

(ii) Exclusive Dealing

The *Act* defines the reviewable practice of exclusive dealing as any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to either (i) deal only or primarily in products supplied by or designated by the supplier or his nominee, or (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or his nominee. Exclusive dealing also includes situations where the supplier induces a customer to meet either of these conditions.³⁹ The Tribunal may make a remedial order in respect of exclusive dealing if the same elements are met as for tied selling (*i.e.* it is engaged in by a major supplier or is widespread, has an exclusionary effect, and is likely to lessen competition substantially).⁴⁰

There is very limited jurisprudence on the practice of exclusive dealing. However, contractual

³⁴ *Competition Act*, s. 77(1). For a more detailed discussion of the reviewable practice of tied selling, see A.N. Campbell, "Vertical Non-Price Restraints," in *Competition Law: Compliance in an Aggressive Marketplace* (Toronto: Insight, 1993).

³⁵ *Ibid.*, s. 77(2).

³⁶ *Ibid.*, s. 77(4).

³⁷ See Consumer and Corporate Affairs Canada, "News Release B Director Receives Undertakings from Digital Equipment of Canada Limited" (October 30, 1992).

³⁸ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (C.T.).

³⁹ *Competition Act*, s. 77(1). For a more extensive discussion of the reviewable practice of exclusive dealing, see A.N. Campbell, "Vertical Non-Price Restraints," in *Competition Law: Compliance in an Aggressive Marketplace* (Toronto: Insight, 1993).

⁴⁰ *Ibid.*, s. 77(2).

exclusivity provisions have been found by the Competition Tribunal to be anti-competitive acts for the purposes of the abuse of dominance provisions of the *Act* and/or exclusive dealing if they impede other firms from competing effectively. For example, in *NutraSweet*, the respondent used contractual clauses obligating customers to buy all their aspartame from it and awarded certain “fidelity rebates” (logo display allowances and co-operative marketing funds) which acted as inducements for customers to deal exclusively with NutraSweet.⁴¹

(iii) *Refusals to Deal*

In addition to constituting an abuse of dominance, refusals to deal can be either a criminal offence and/or a non-criminal reviewable practice under the *Competition Act*.

The criminal “price maintenance” provision is limited to price-related refusals to supply. This “*per se*” offence has no competitive effects test. It is applicable in cases where any person who is engaged in a business of producing or supplying a product directly or indirectly refuses to supply the product to (or otherwise discriminates against) any other person engaged in business in Canada because of the low pricing policy of that other person.⁴²

The non-criminal refusal to deal provisions in the *Act* allow the Tribunal to order one or more suppliers of a product to supply a person on ordinary trade terms when the Tribunal finds that (i) the 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; (ii) the inability to obtain supplies has resulted from a lack of competition among suppliers in the market; (iii) the person is willing and able to meet usual trade terms; and (iv) the product is in ample supply.⁴³

In the *Chrysler*⁴⁴ and *Xerox*⁴⁵ cases, the Tribunal ordered the respondents, which were suppliers of unique replacement parts, to resume long-standing supply relationships with small distributors. However, in the *Warner* case, the Tribunal held that the refusal to license intellectual property (music copyrights) was not covered by the reviewable practice of refusal to deal.⁴⁶

(iv) *Other Single Firm Conduct*

Other types of anti-competitive acts which are specifically enumerated in the *Act* include squeezing of unintegrated customers by vertically integrated suppliers;⁴⁷ vertical integration by acquisition which forecloses existing or new competitors; freight equalization on a competitor’s plant, adopting product specifications that are incompatible with products produced by another firm;⁴⁸ pre-emption of scarce facilities or resources required by a competitor for the operation of its business; requiring suppliers not to sell to the customer’s competitors; and buying up products to prevent the erosion of existing price levels.⁴⁹ All but the latter include a requirement that the object, purpose or design is entry-detering or exclusionary. Examples of other anti-competitive acts alleged in the

⁴¹ *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (C.T.).

⁴² *Competition Act*, s. 61(1)(b).

⁴³ *Ibid.*, s. 75(1).

⁴⁴ *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (C.T.), aff’d, 38 C.P.R. (3d) 25 (Fed. C.A.), aff’d, 138 N.R. 319 (note) (S.C.C.).

⁴⁵ *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (C.T.).

⁴⁶ *Canada (Director of Investigation and Research) v. Warner Music* (1997), 78 C.P.R. (3d) 321 (C.T.).

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ *Competition Act*, ss. 78(a)-(c) and (e)-(h).

decided cases include denying competitors access to an essential input (*D & B Companies* – scanner data), discriminatory pricing and commissions (*Télé-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*).

Coordinated Conduct

A group of unaffiliated firms may jointly possess market power even if no single member of the group is dominant by itself.⁵⁰ The anti-competitive acts of a group of dominant firms could include exclusionary / entry-detering or predatory / disciplinary behaviour. However, mere “conscious parallelism” is not sufficient to demonstrate that firms are engaging in some form of coordinated behaviour. In cases where there is no explicit agreement among firms which coordinate their activities, the Bureau’s position is that such coordination may be inferred by considering the following factors:⁵¹

- 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.

There have only been two cases where joint dominance was alleged: “*Interac*” and “*CANYPs*”.⁵² However, neither provides much insight into the requisite degree of coordination required to constitute joint dominance since in both cases there were explicit agreements among the respondents and both were resolved with consent orders.

Contractual Arrangements

Abuse of dominance may be relevant to contracts between firms in two ways. First, contractual arrangements can allow parties to jointly abuse their dominant position.⁵³ Second, certain contractual arrangements can constitute a “practice of anti-competitive acts” by a single dominant firm. For example, in *D & B Companies* many of the respondent’s contractual practices with suppliers and customers were found to constitute anti-competitive acts because they had exclusionary effects on potential entrants.⁵⁴ Similarly, in *Laidlaw* several elements of standard form customer contracts were found to foreclose effective competition by existing fringe firms or new entrants.⁵⁵

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

⁵⁰ ADEGs, & 3.2.1(e).

⁵¹ *Ibid.*

⁵² *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) 527 (C.T.); and *Canada (Director of Investigation and Research) v. AGT Directory Ltd.* (1994), C.C.T.D. No. 24 (Trib. Dec. No. CT-9402/19).

⁵³ Contractual arrangements may also be subject to various other provisions of the *Act* including mergers (*e.g.* for certain types of joint ventures/strategic alliances); the general conspiracy in restraint of trade offence (which is most commonly used to deal with hard-core cartel conduct, but is potentially applicable to any agreement between two or more persons that is likely to lessen competition “unduly”); and exclusive dealing, market restriction and tied selling (specific types of monopolization activity that are dealt with separately from the general abuse of dominance framework B see discussion above).

⁵⁴ *Canada (Director of Investigation and Research) v. D & B Companies* (1995), 64 C.P.R. (3d) 216 (C.T.).

⁵⁵ *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (C.T.).

dominance cases involved the information technology industry: *D & B Companies* and *Interac*.⁵⁶

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. 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.

In *Interac*, the respondents 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 and point-of-sale terminals at many retail outlets. The association’s by-laws included 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.

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.⁵⁷ This means that the anti-competitive acts must be likely to allow the exercise of market power to be continued or enhanced.⁵⁸ In practice, when the first two elements are present, the latter requirement will normally not be difficult to establish.

The ADEGs contain a very important 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.”⁵⁹

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*.

⁵⁶ See also the discussion of Digital Equipment’s undertakings to discontinue tying software and hardware servicing under “Tying Arrangements” above.

⁵⁷ *Competition Act*, s. 79(1).

⁵⁸ ADEGs, §§ 3.2.3 and 3.2.4 as well as Appendix II and the Tribunal jurisprudence cited therein.

⁵⁹ ADEGs, § 3.2.3, quoting *D.I.R. v. Tele-Direct*.

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. The only procedural defences relate to limitation periods and double jeopardy.

Exercise of Intellectual Property Rights

Acts 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.⁶⁰ 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 of the *Act*.⁶¹

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.⁶² However, this special remedy has rarely been invoked and the Bureau has indicated that this policy will continue.⁶³

The *Patent Act* 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.⁶⁴

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.⁶⁵ The Bureau’s position in the ADEGs is that this is not an efficiency defence⁶⁶ and does not require the Tribunal to balance superior competitive performance against the effects of the anti-competitive acts.⁶⁷ This is consistent with the recent hostility of the Bureau towards the efficiency defence

⁶⁰ *Competition Act*, s. 79(5).

⁶¹ IPEGs, & 4.2. See also ADEGs, & 5.3.3.

⁶² *Competition Act*, s. 32.

⁶³ 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.

⁶⁴ *Patent Act*, R.S.C. 1985, c. P-4, ss. 65 and 66.

⁶⁵ *Competition Act*, s. 79(4).

⁶⁶ 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 are as beneficial to overall economic welfare in monopolization situations as in merger cases.

⁶⁷ ADEGs, & 5.3.2.

for mergers in the *Superior Propane* case.⁶⁸ 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.⁶⁹

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 mention that the efficiency levels achieved by a leading firm often spur others to improve their efficiency in order to remain competitive.

Limitation Periods and Double Jeopardy

Procedurally, the *Act* provides that no action can be initiated by the Bureau against a dominant firm

more than three years after a practice of anti-competitive acts has ceased.⁷⁰ It also contains double jeopardy protection in that no action can be brought under the abuse of dominance provisions if proceedings have been launched under either the criminal conspiracy offence or the merger provisions in respect of the same conduct (or *vice versa*).⁷¹

Remedies

Current Government Enforcement Regime

There are no fines or other penalties for abuse of dominant position (or for tied selling, exclusive dealing or non-price-related refusals to deal⁷²). There are also no private rights of action to recover damages in respect of reviewable practices until after a Tribunal order is made and breached.⁷³ As with all reviewable practices under the *Act*, 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 an 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

⁶⁸ 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 were subsequently rescinded). However, the Commissioner subsequently 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.).

⁶⁹ *Ibid.*

⁷⁰ *Competition Act*, s. 79(6).

⁷¹ See *ibid.*, ss. 78(7), 45.1 and 98.

⁷² Price-related refusals to deal are subject to a fine in the discretion of the court and/or imprisonment of up to five years: *Competition Act*, s. 61(9). However, in practice fines are much lower than for hard-core cartel activity and imprisonment is not normally sought or ordered for individuals who have violated the price maintenance provisions.

⁷³ 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).)

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.⁷⁴ In other words, such orders are to be remedial and not punitive.⁷⁵

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.⁷⁶ Non-price-related refusals to deal are normally remedied by a mandatory order to supply on ordinary trade terms.⁷⁷

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 irreparable harm being done to a business while an inquiry is undertaken by the Bureau.⁷⁸ 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. This is particularly relevant in technology-based or other dynamic markets where anti-competitive effects could occur quickly, although such effects may also be short-lived.

Private Rights of Action

(i) History of Private Action Proposals

In June 1995 the Competition Bureau proposed establishing private actions for the reviewable practices contained in Part VIII of the *Competition Act*.⁷⁹ The stated rationale was to overcome resource limitations on the Bureau's enforcement of these provisions of the *Act*. However, a Consultative Panel of experts (commissioned by the Bureau) concluded that the most appropriate way to achieve adequate enforcement of the *Act* was to ensure the Bureau is properly funded. The Panel also recommended that the private action concept should not proceed without a thorough analysis of all the costs and benefits to the Canadian economy⁸⁰ (which has not yet been undertaken).

In April 2000, a private member's bill proposed private rights of action in respect of four reviewable practices: refusal to deal, tied selling, market (*i.e.*, territorial or customer) restriction and exclusive dealing.⁸¹ The accompanying consultation paper issued by the Bureau (the "*2000 Discussion Paper*") indicated that the major reason for establishing private actions was to allow private parties to bring their own actions in cases where the Bureau has decided not to initiate a Tribunal proceeding because the conduct's "impact on competition is minimal and does not warrant public intervention."⁸² At the same time, the Bureau retained the Public Policy Forum to conduct a formal consultative process regarding the proposed amendments.

⁷⁴ *Competition Act*, ss. 79(2) and (3).

⁷⁵ 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 *Competition Act*, ss. 66 and 36(1)(b).

⁷⁶ *Competition Act*, s. 77(2).

⁷⁷ *Ibid.*, s. 75(1).

⁷⁸ 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.

⁷⁹ Bureau of Competition Policy, "*Competition Act Amendments*" (Industry Canada, June 1995).

⁸⁰ Report of the Consultative Panel on Amendments to the Competition Act" (March 6, 1996).

⁸¹ 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*).

⁸² Competition Bureau, "Amending the *Competition Act* B A Discussion Paper on Meeting the Challenges of the Global Economy" (Government of Canada, April 2000), p. 5.

The PPF consultation process revealed widespread concern in the business community that the proposal to introduce private actions for reviewable practices was based on benefits and rationales which were assumed but not demonstrated, that the risks of strategic litigation were being given inadequate attention, and that the litigation costs, compliance burdens and chilling effects of the policy change were likely to outweigh any potential benefits by a wide margin.⁸³

Given the lack of consensus, private rights of action were not included in Bill C-23 when it was introduced in April 2001. However, private action proposals appear to remain on the agenda of at least one member of Parliament and, apparently, the Competition Bureau. Thus they will likely resurface when the current Bill is reviewed by the Industry Committee in the autumn of 2001.

(ii) The Current Legal Framework for Reviewable Practices

The current reviewable practices regime, in which conduct is legal unless and until the Bureau obtains a prohibition or other remedial order from the Competition Tribunal, is widely admired for having given Canada one of the most modern and economically-enlightened frameworks for dealing with ordinary commercial activity that is only occasionally anti-competitive. The introduction of private rights of action for reviewable practices would represent a major change in approach.

The Bureau's Civil Matters Branch handled an average of 537 non-merger reviewable practices complaints per year between 1992-93 (when these statistics began to be reported) and 1999-2000.⁸⁴ Every complaint is reviewed, but only 5% were found to require a detailed "examination" (*i.e.*, two or more staff days of review). Less than 1% of reviewable complaints were ultimately found to be anti-competitive (by the Bureau, not the Competition

Tribunal).⁸⁵ The Bureau has only found it necessary to bring less than one non-merger case per year (and less than one merger case per year) before the Tribunal over the past 15 years.

Decisions not to initiate enforcement action where the public interest in competition has not been injured are a fundamental component of the Bureau's mandate. Identifying unmeritorious complaints early in the investigation stage minimizes the time and cost inflicted on marketplace participants which are engaged in activities that are competitively neutral or pro-competitive. The Bureau's annual reports and website summarize a few of the more significant complaints that have proven to be unfounded after detailed investigations were undertaken.⁸⁶

(iii) Analysis of the Rationales for Private Actions

The argument that private actions would "complement public enforcement" by allowing private parties to "deal essentially with private matters between buyers and suppliers" in situations where the Bureau has concluded that the "impact on competition is minimal and does not warrant public intervention" carries no weight when the distinction between a reviewable practice and an offence is understood and when the role of existing common law contract and tort rules are recognized. If there is no impact on the public interest in competition, there is no need or basis for a remedial order. Contract and tort law already provide an extensive legal framework in respect of private commercial matters.

Although the Competition Bureau has had to operate in an environment where government resources are carefully controlled over the past several years, it has never indicated in its annual reports to Parliament that resource constraints have prevented it from pursuing meritorious refusal to deal, tied selling, market restriction, exclusive dealing or other reviewable practice cases. Nor has the Bureau's

⁸³ The full text of all submissions is available online: Public Policy Forum <<http://www.pppforum.com/english/competitionact/submissions.html>>.

⁸⁴ Compiled from Director of Investigation and Research / Commissioner of Competition, *Annual Reports*, for the 1992-93 to 1999-2000 fiscal years.

⁸⁵ *Ibid.*

⁸⁶ See *ibid.*; and <http://strategis.ic.gc.ca>.

enforcement track record deteriorated since government fiscal restraint became a major concern in the early 1990s.

The third major rationale offered by some proponents of private actions (but not the Bureau!) is that entrusting law enforcement solely to a public official may give rise to accountability issues. However, there has been no demonstration that the Bureau has failed to enforce Part VIII of the *Act* in anything other than a thorough and objective manner. Nor has there been an assessment of the significant accountability which already exists from the combination of federal government management control systems, the specific statutory regime applicable to formal complaints to the Bureau,⁸⁷ the opportunities already available for private actions in respect of various conduct covered by either Part VI of the *Competition Act* or common law torts, and the high level of media scrutiny of the Bureau's activities.

(iv) The Risks of Strategic Litigation and the Inadequacy of Safeguards

Stakeholder submissions in the *Public Policy Forum* process underscored the widespread concern about strategic litigation, the numerous ways in which it can be manifested, and the inadequacy of safeguards for controlling it in the context of the broad reviewable practices in Part VIII of the *Act*.⁸⁸ Even the proponents of private rights of action acknowledge that strategic litigation is a serious risk.

Strategic litigation is most often brought or threatened by competitors who seek protection of their own self-interests rather than to protect the public interest in competition. Customers and suppliers may

also engage in strategic litigation, particularly when their business relationships have deteriorated (e.g. complaints regarding refusal to supply). Open-textured monopolization provisions offer vast scope for strategic litigation and make it problematic to design safeguards which would prevent such actions.

The *2000 Discussion Paper* asserted that four safeguards would be sufficient to address the acknowledged risks of strategic or frivolous litigation: the Tribunal would have no power to award damages; plaintiffs would have to obtain leave from the Tribunal to proceed with an action; the Tribunal would be empowered to award costs; and summary dispositions could be sought from the Tribunal at any time.⁸⁹ However, no analysis was provided to support the assumption that such measures would prevent strategic litigation.

Reliance on safeguards puts the cart before the horse: it makes no sense to construct an elaborate procedural infrastructure in support of a policy initiative that is not necessary and has not been shown to offer any significant benefits. Moreover, none of the proposed mechanisms would be sufficient to prevent strategic litigation:

- *Leave Mechanism B* The requirement that plaintiffs would have to obtain leave of the Tribunal to proceed with a case would be inadequate to prevent strategic litigation because the Tribunal can be expected to be reluctant to refuse leave for any case unless it is absolutely clear that it is devoid of merit. Capable competition law counsel will almost always be able to frame leave applications which appear to have some

⁸⁷ Individuals or firms who believe they have been affected by conduct which warrants a remedial order under Part VIII of the *Act* have three options for ensuring that their concerns are examined by the Bureau: informal complaints; requesting the Minister of Industry to order an inquiry (see *Competition Act*, s. 10(1)(c)); or making an application under oath by any six Canadian residents (which forces Commissioner to conduct an inquiry B see *Competition Act*, ss. 9 and 10(1)(a)). Proponents of private actions have not produced evidence to show that the six resident and Ministerial inquiry mechanisms are defective. Indeed, available evidence points to a system which appears to be operating effectively.

⁸⁸ The incentives of private plaintiffs to initiate or threaten legal proceedings for self-interested strategic purposes include: using the time, cost and disruptive effect of litigation to raise a rival's costs; deterring, delaying or pressuring the defendant to abandon pro-competitive business initiatives; creating or maintaining barriers to entry into the incumbent's market; acquiring information about the defendant through the discovery process; using actual or threatened litigation as a platform to advance employment, regional development or other non-competition interests; exposing the defendant to media scrutiny, public embarrassment and/or loss of goodwill; and, using the costs and risks of protracted litigation as leverage to extract an unwarranted settlement.

⁸⁹ *2000 Discussion Paper*, pp. 5-6.

plausibility even when the underlying factual case may be weak.

- *Summary Judgement B* Even if a “hard look” standard was employed (which has not been done in proposals to date), it is doubtful that a summary judgement process would provide a reliable safeguard against strategic litigation. Summary judgement procedures can be useful when there is a clear legal issue which may be determinative of the outcome of a case. They are not well-suited for making quick decisions at an early stage in proceedings where there are complex or disputed facts at issue, as there invariably are in reviewable practices cases.
- *Absence of Damages B* The unavailability of damage awards is a necessary but not sufficient condition for reducing strategic litigation incentives. Plaintiffs may have numerous other motives for engaging in strategic litigation aside from the recovery of a monetary award. The benefits of delaying, disrupting, deterring, embarrassing, obtaining information from or imposing costs on a defendant can easily justify the time and cost needed to threaten, commence and keep alive a piece of strategic litigation, even if it is not pursued to conclusion.
- *Cost Rules B* The traditional “loser-pay” cost rules proposed in Bill C-472 would also be necessary but not sufficient to deter strategic litigation. Cost awards do not fully compensate defendants even when successful in legal proceedings, let alone in cases where strategic litigation is threatened but not commenced, or is settled or abandoned. Moreover, a recovery of legal costs ignores distraction of management, damage to the firm’s goodwill / reputation and other

negative impacts which are difficult to quantify but may be substantial.

(v) *The Costs of a Private Actions Regime*

In the absence of any data from the Bureau demonstrating that there are worthy complaints not being pursued, it is reasonable to expect that most incremental private cases would be strategic rather than meritorious. If even a small percentage of the 537 complaints received by the Civil Matters Branch each year resulted in strategic litigation, the result would be a gigantic increase in the Competition Tribunal’s case flow. The total costs of such litigation (not to mention cases threatened but not pursued to litigation) to participants, the government⁹⁰ and the Canadian economy would be substantial.

In addition, while it would be difficult to quantify the potential compliance burdens for firms throughout the economy on even a rough basis, the possibility of time-consuming private actions will certainly cause firms to spend more resources on legal opinions before embarking on any activities which may constitute reviewable practices. Private rights of action will likely also deter some businesses from engaging in conduct which is reviewable. Given the scope of the reviewable practices in Part VIII of the *Act* and the risks and costs of strategic litigation, the potential for chilling effects on a wide variety of pro-competitive or competitively benign business activities is massive.

Neither the Commissioner nor other proponents of this policy change have quantified its purported benefits. It seems doubtful that they would be anywhere near the incremental private and public costs of such litigation, let alone the increase in compliance costs and the chilling effects on efficiency-enhancing activities. The result would undoubtedly be a serious negative overall impact on the Canadian economy.

⁹⁰ The Tribunal’s staff and other costs would be expected to increase significantly. The Bureau has not provided any analysis of (or commitment to) reductions in its costs as a result of this initiative B and none seems likely given that complainants will continue to have an incentive to ask the Bureau to address their concerns and the Bureau would likely also be monitoring private cases brought before the Tribunal.