

COMPETITION BUREAU GUIDELINES ON ABUSE OF DOMINANCE

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Canada's legislative framework for dealing with abuse of dominance (monopolization) is generally well-designed and well-enforced. However, with only modest jurisprudence available, the Competition Bureau's publication last year of *Abuse of Dominance Enforcement Guidelines* was a welcome initiative.¹

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 is a non-criminal "reviewable practice" (as are other more specific types of monopolization activity: exclusive dealing, tied selling, "market restriction" – which encompasses exclusive distribution territories, and refusal to deal).³ Abuse of dominance 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 market.⁴

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 pending before the Tribunal.

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. 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.

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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*,⁶ which are generally accepted as reflecting modern industrial organization theory and practice:

- 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 may be 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.
- 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.

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,"⁷ such products or areas will be removed from the defined market as they would not be expected to discipline prices at competitive levels. The Tribunal recently accepted this type of analysis in the *Canadian Waste Services* case, although for reasons which are not entirely clear it dealt with the point as part of a post-market-definition competitive effects assessment rather than in defining the relevant geographic market.⁸

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.⁹ 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.¹⁰

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:

- The ADEGs utilize market shares both as "safe harbours" and as indicators of likely market power. 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.¹¹ 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 cases¹²). Unfortunately, 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 may be measured in terms of dollar sales, unit sales, production output, capacity or, in certain natural resource industries, reserves.

- Barriers to entry are accepted by the Tribunal and the Bureau as an essential pre-requisite in determining whether market power exists. 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).¹³

ANTI-COMPETITIVE CONDUCT

Unlike section 2 of the U.S. *Sherman Act*, the *Competition Act* identifies several types of “anti-competitive acts”.¹⁴ However, the list is not exhaustive: any conduct which has a predatory / disciplinary or exclusionary / entry-detering purpose or effect may constitute an anti-competitive act.

Predatory Conduct

While various types of predation are possible, most of the discussion of predatory conduct in the ADEGs focuses on predatory pricing.¹⁵ 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. 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.

The Bureau therefore uses a two-stage approach to analyse predation 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. (Interestingly, the Bureau is proposing to abandon this screening mechanism in respect of the criminal offence of predatory pricing.¹⁶)
- 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).

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.¹⁷ 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.¹⁸ 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.¹⁹

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*.²⁰ 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;²¹ 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;²² pre-emption of scarce facilities or resources required by a competitor for the operation of its business;²³ requiring suppliers not to sell to the customer's competitors; and buying up products to prevent the erosion of existing price levels. All but the latter include a requirement that the object or purpose is entry-detering or exclusionary.²⁴

Coordinated Conduct

The *Act* 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. 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. 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:²⁵

- 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.

While some of these may prove controversial in particular cases, the ADEGs serve a valuable function in setting out the criteria which will be used by the Bureau for assessing joint dominance.

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. This means that the anti-competitive acts must be likely to allow the exercise of market power to be continued or enhanced. However, the brief treatment of this issue in the ADEGs confirms that, in practice, when the first two elements are present, the third is normally likely to follow.

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."²⁶

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*.

DEFENCES

Aside from rebutting any of the three required elements discussed above, the principal substantive defence under the abuse of dominance provisions relates to intellectual property rights. There is not a formal efficiency defence.

Exercise of Intellectual Property Rights

Activities engaged in pursuant to the exercise of an intellectual property right derived under the various Canadian federal intellectual property statutes (*e.g.* patents, copyrights, trade-marks and industrial designs) are not anti-competitive acts. The Competition Bureau has previously issued separate *Intellectual Property Enforcement Guidelines* which 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.²⁷

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 voiding agreements or arrangements relating to such rights.²⁸ However, the special remedy has rarely been invoked and the Bureau has indicated that this policy will continue.²⁹

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. The Bureau's position is that this is not an efficiency defence and does not require the Tribunal to balance superior competitive performance against the effects of the anti-competitive

acts.³⁰ This is consistent with the recent hostility of the Bureau towards the efficiency defence for mergers in the *Superior Propane* case.³¹ 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.³²

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 – as it sometimes has been in inquiries prompted by especially tenacious complainants). Also, the ADEGs unfortunately do not acknowledge that the efficiency levels achieved by a leading firm often spur others to improve their efficiency in order to remain competitive.

REMEDIES

There are no fines or other penalties for abuse of dominant position or other reviewable practices. 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.³³ In other words, such orders are to be remedial and not punitive.³⁴

Interim Orders

Once a reviewable practice application has been filed with the Tribunal, pre-trial interim injunctions may be issued based on the principles ordinarily applied by courts when granting injunctive relief.³⁵ However, this provision has not played a significant role in cases to date.

In April 2001, the government tabled proposed amendments which include a pre-application temporary order regime in respect of abuse of dominant position. The amendments would give the Competition Tribunal the authority to issue a time-limited order prior to the commencement of litigation to prevent harm to competition or to a marketplace participant while an inquiry is undertaken by the Bureau.³⁶ Although it has not been demonstrated that this occurs with any significant frequency, the rationale is that 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 a competitor and entry barriers are present. Unfortunately, the inclusion of a test which focuses on harm to individual firms is excessively broad: vigorous pro-competitive activity often reduces a competitor's revenues and/or market share and should not be discouraged unless there is also expected to be a negative effect on competition.

Private Rights of Action

There are currently no private rights of action to recover damages in respect of abuse of dominance or the reviewable practices until after a Tribunal order is made and breached.³⁷ However, the Industry Committee of the Canadian House of Commons has added private rights of action to Bill C-23 in respect of four reviewable practices: refusal to deal, tied selling, market restriction and exclusive dealing.³⁸ 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.³⁹ Nevertheless, in a compromise designed to appease small business interest groups, the government accepted a limited regime which does not include abuse of dominance or recovery of damages.

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

⁷ See *United States v. E.I. Dupont de Nemours & Co.*, 351 U.S. 377 (1956).

⁸ *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (2001), 11 C.P.R. (4th) 425 (Comp. Trib.), at pp. 463-465.

⁹ See *R. v. Nova Scotia Pharmaceutical Society* (1992), 43 C.P.R. (3d) 1 (S.C.C.); as well as ADEGs, part 3.2.1(d) and Appendix II, including Tribunal jurisprudence cited therein.

¹⁰ 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.*, part 3.2.4. (Historically, the Bureau has used the same two-year time frame for market power analysis as for entry: see MEGs, part 4.6.2; and Director of Investigation and Research, *Predatory Pricing Enforcement Guidelines* (Ottawa: Supply and Services Canada, 1992), part 2.2.1.)

¹¹ When analysing the risk of interdependent behaviour in merger cases, the Bureau considers a CR₄ of less than 65% to be unproblematic (MEGs, part 4.2.1). There is no obvious reason for adopting a different standard for joint abuse of dominance cases.

¹² *Competition Act*, s. 92(2).

¹³ 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.

¹⁴ *Competition Act*, s. 78.

¹⁵ 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.

¹⁶ Competition Bureau, *Enforcement Guidelines for Illegal Trade Practices: Unreasonably Low Pricing Policies* (Draft – March 8, 2002).

¹⁷ *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 – Draft* (February 2001).

¹⁸ *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).

¹⁹ The initial hearing of this case was adjourned in the aftermath of September 11th, with resumption scheduled for April 2002. A recent Tribunal ruling has postponed the hearing until the fall of 2002, due to the illness of a member of the panel. The Bureau’s attempt to have the panel re-constituted was unsuccessful.

²⁰ 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).

²¹ 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.

²² 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.

²³ This is a statutory counterpart to the “essential facilities” doctrine in U.S. jurisprudence.

²⁴ 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* – yellow pages directory advertising); market allocation arrangements (*CANYPS* – national yellow pages advertising); and the acquisition of competitors using lengthy non-compete clauses as well as actual or threatened use of strategic litigation (*Laidlaw* – waste collection services).

²⁵ There have only been two Tribunal 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 (QL) (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.

²⁶ See ADEGs, part 3.2.3, quoting *Canada v. Tele-Direct*.

²⁷ Competition Bureau, *Intellectual Property Enforcement Guidelines* (Ottawa: Industry Canada, 2000) (the “IPEGs”), part 4.2. See also ADEGs, part 5.3.3.

²⁸ *Competition Act*, s. 32.

²⁹ See IPEGs, part 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 – 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.

³⁰ 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 monopolization situations as in merger cases.

³¹ In *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Comp. Trib.), the Commissioner established that a merger to near-monopoly in many relevant markets was likely to lessen or prevent competition substantially; however, 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, part 5.5 – which was subsequently rescinded). 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 (F.C.A.).

³² ADEGs, part 5.3.2.

³³ Tied selling and exclusive dealing are subject to similar remedial regimes: prohibition orders are the norm, but *Competition Act*, s.77(2) allows that other remedial orders may be made if necessary to restore competition. Non-price-related refusals to deal are normally remedied by a mandatory order to supply on ordinary trade terms: *ibid.*, s. 75(1).

³⁴ 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).

³⁵ *Ibid.*, s. 104(1).

³⁶ Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001. There is no justification for vesting such 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 stakeholder consultations undertaken by the Public Policy Forum in 2000.

³⁷ 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).)

³⁸ See *Should Reviewable Practices Be Turned Into Competition Torts?*, report prepared for the Competition Policy Group, October 2001, ISBN0-9730299-0-0, available from McMillan Binch. 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>>.