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**Cut-Throat Competition or Abuse of Dominant Position?
Challenges to the Conduct of Firms in a New
Technological Era – National Report for Canada**

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CUT-THROAT COMPETITION OR ABUSE OF DOMINANT
POSITION? CHALLENGES TO THE CONDUCT OF FIRMS IN A
NEW TECHNOLOGICAL ERA

**WS 13 National Report
for CANADA**

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1. INTRODUCTION

The purpose of this working session is to explore and discuss how the competitive behaviour of dominant companies, especially high technology companies, is being challenged by antitrust authorities, and whether companies should modify their behaviour because of such challenges. You should attempt to give concrete examples of abusive practices (both those found to be legal as well as illegal) whenever possible so that the reader may understand why (or why not) the conduct is challenged.

1.1 Recent Cases

Discuss in a few paragraphs whether there is a concept of abuse of dominant position in your jurisdiction. Is this concept contained in a statute, common law or both? Give two or three brief examples of recent cases of abuse of dominant position. If there are no recent cases, highlight why the antitrust authorities in your jurisdiction do not challenge dominant behaviour.

The current Canadian abuse of dominance law was enacted in 1986 as part of the federal *Competition Act*.¹ It is one of the non-criminal “reviewable practices” in Part VIII of the Act. (Prior to 1986 there was a criminal monopoly offence in the *Combines Investigation Act* which was difficult to enforce for a variety of reasons.)

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

Under the *Competition Act*, abuse of dominance occurs when the following three elements are found to exist by the Competition Tribunal (Canada’s court of first instance for many types of antitrust matters – see part 2.3):

- 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.

Since the civil abuse of dominance laws were enacted in 1986, there have been six contested cases. A brief summary of each of the cases was prepared by the Competition Bureau (Canada’s antitrust enforcement agency – see part 2.3) and

¹ For a more complete overview of Canada’s abuse of dominance laws, see Abuse of Dominance (ss.200.04) in Chapter 200: Canada, by J.F. Clifford and S.L. Walker, Vol. 9, Antitrust Laws and Trade Regulation, 2nd ed., Julian von Kalinowski et al. (New York, NY: Matthew Bender, 1996-).

included with the Bureau's draft *Abuse of Dominance Enforcement Guidelines* ("ADEGs").² A copy of this summary is attached as Appendix A.

Recent abuse of dominance enforcement activities have focused on Canada's airline industry. Since Air Canada became Canada's sole national airline in 1999, the Competition Bureau has paid close attention to its activities and the *Competition Act* was amended specifically to address potential abuses of dominance by participants in the airline industry. In the autumn of 2000, the Bureau obtained a temporary order from the Competition Tribunal preventing Air Canada from engaging in anti-competitive practices directed at two low cost air carriers.³ This spring the Bureau announced that it would be seeking a permanent order preventing the practices. The Bureau has also released a set of guidelines detailing its approach to enforcing the abuse of dominance provisions in the airline industry.

1.2 High Technology vs. Industrial Monopolies

Can and should laws designed to manage industrial monopolies be applied to high technology and intellectual property companies? In other words, are the core principles of antitrust in your jurisdiction still applicable in a fast paced world where monopoly power can be short-lived?

Canada's abuse of dominance laws are broad and flexible. There is a specific statutory defence in that acts engaged by persons solely pursuant to certain specified intellectual property rights are not to be considered anti-competitive acts. However, the Competition Bureau has indicated in both the ADEGs and in its recently issued *Intellectual Property Enforcement Guidelines* ("IPEGs") that it will apply the general *Competition Act* framework, including the abuse of dominance regime, to situations where a firm attempts to extend market power beyond the mere exercise of statutory intellectual property rights. In cases where monopoly power is short-lived, the issue would not be the substantive content of the abuse laws, but rather the substantial length of time required to conduct proceedings and obtain a remedial order from the Competition Tribunal.

2. CORE PRINCIPLES

The purpose of this section is to introduce the reader to the principles that form the basis of competition law in your jurisdiction.

2.1 Identification of Principles

What are the core principles of competition law in your jurisdiction? Is the prohibition against acquisition and maintenance of monopoly power a core principle? Why or why not?

² Comments on the draft ADEGs have been posted on the Competition Bureau's website at <http://strategis.ic.gc.ca/ssg/ct01250e.html>. See also, J.W. Rowley and J.P. Roode, "The Commissioner's Draft Abuse of Dominance Guidelines: A Brief Commentary" (Fall 2000) 20 *Canadian Competition Record* 2 at 9. A final version of the ADEGs is expected to be released in early summer 2001.

³ *Canada (Commissioner of Competition) v. Air Canada* (October 12, 2000) CT-2000/004 (C.T.).

The core principles of Canadian competition law are set out in the opening section of the *Competition Act* which states:

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.

The Competition Bureau states in the ADEGs that the *Competition Act's* abuse of dominance provisions, together with the merger and conspiracy provisions, form the “cornerstone” of Canadian competition policy legislation. 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.

2.2 Application to Mergers and Contracts

How is an abuse of monopoly power reflected in the analysis of mergers or to the formation of agreements between two or more firms?

The merger provisions of the *Competition Act* attempt to ensure that market power is not created or enhanced as a result of a merger. While completed mergers can be challenged for up to three years after closing, the Bureau's focus is on prior review of proposed transactions. Thus the merger provisions complement the abuse of dominance regime by seeking to prevent the attainment of dominant positions by acquisition. However, there is no need to find that the market power will be abused (*i.e.* that the merging parties are likely to engage in a specific practice of anti-competitive acts) before a merger may be prevented.

Abuse of dominance is relevant to contractual arrangements between firms in at least two ways. First, contractual arrangements can result in parties jointly abusing their dominant position (see part 3.2.2 below). Second, certain contractual provisions can constitute anti-competitive acts facilitating an abuse by a single dominant firm. For example, in the “Nielsen” case⁴, many of the respondent's contractual practices with suppliers and customers were found to constitute anti-competitive acts because they had exclusionary effects on A. C. Nielsen's potential competitors.

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 contact, but is potentially applicable to any agreement

⁴ *Canada (Director of Investigation and Research) v. D & B Companies* (1995), 64 C.P.R. (3d) 216 (C.T.).

between two or more persons which 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).

2.3 Government Oversight

What agencies regulate or enforce the abuse of a company’s dominant position? Does the public have a cause of action against such a firm?

Canada’s policy-making, investigative and enforcement agency for competition law is the Competition Bureau. It is a semi-autonomous unit within the Industry Canada department of the federal government. Cases alleging abuse of dominance under the *Competition Act* may only be brought by the Competition Bureau.

All reviewable practice proceedings, including abuse of dominance, are heard in the first instance by a specialized competition court known as the Competition Tribunal. It consists of judges and lay members with business or economic expertise. Its decisions are appealable to the Federal Court of Appeal.

Private litigants currently have very limited rights of action under the non-criminal sections of the *Competition Act* (which include the abuse of dominance rules). They may only bring an action under the non-criminal sections should they be harmed by a failure of another party to comply with an order of the Competition Tribunal. Proposals have been made to introduce private rights of action for at least some reviewable practices but the changes are controversial and have not yet been enacted.

3. MONOPOLY POWER

Provide a brief description of monopoly power.

In the ADEGs, the Competition Bureau equates “dominance” with 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. While it is sometimes difficult to measure market power, the Bureau generally considers it to exist when prices can be maintained 5% above competitive levels for at least two years without being eroded by new entry.

3.1 Market Power

How is monopoly or market power analyzed in your jurisdiction?

The Competition Bureau will consider a number of factors in determining whether market power exists including technological change, recent entry or exit, industry supply capacity and countervailing market power of customers and distributors. The most important factors, however, are market shares (and hence remaining competition) and barriers to entry.

The ADEGs prescribe the following guidelines in terms of the Bureau's approach to market shares:

- a market share of less than 35% will generally not give rise to concerns of market power or dominance;
- a market share of over 35% will generally prompt further examination; and
- a market share of over 50% in the case of a single firm will *prima facie* be considered dominant (the figure rises to 60-65% in cases where a group of firms is alleged to be jointly dominant).

The Bureau does not consider market share by itself to be sufficient to prove market power. Barriers to entry must also be considered (see part 3.1.2. below).

3.1.1 Relevant product and geographic markets

How are relevant product and geographic markets analyzed? How are market share and market concentration measured?

The Competition Bureau's approach to defining product and geographic markets is set out in the ADEGs. In defining 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 product price was raised above competitive levels by a significant amount (generally 5%) for a non-transitory period of time (generally one year). Supply-side substitutability may also be 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 characteristics, switching costs, price relationships and relative price levels.

In the *NutraSweet* case⁵, the Competition Tribunal stated that the relevant geographic market will encompass an area that is "sufficiently isolated from price pressures emanating from other areas so that its unique characteristics can result in prices differing significantly for any period of time from those other areas." In defining 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 and will also consider factors such as transportation costs, shipment patterns and foreign competition.

In defining both product and geographic markets, the Bureau will operate on the assumption that dominance may already exist, in which case prices may be higher than would prevail in a competitive market. Accordingly, the Bureau will consider whether there are competing products which appear to be part of the product or geographic market that would not be there if lower, competitive prices were to

⁵ *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1992), 40 C.P.R. (2d) 1 (C.T.).

prevail. Such products must be removed from the defined market as they would not discipline prices at competitive levels.

The ADEGs do not specify the manner in which market shares will be measured. However, the Bureau generally can be expected to adopt the same flexible approach used in its *Merger Enforcement Guidelines*. They contemplate that market shares can be measured in terms of dollar sales, unit sales, production capacity or, in certain natural resource industries, reserves. Usually the measurement approach is determined by the most readily available data and industry practices.

Overall market concentration is typically measured using a simple four-firm concentration ratio (“CR₄”). (The HHI measure used in the United States is occasionally looked at by the Bureau, but is not its primary method for analyzing concentration issues.) In merger cases, the Bureau considers a CR₄ of less than 65% to be unproblematic, however, concentration in excess of this level will generally prompt a more detailed investigation of whether merging parties and other industry participants could exercise market power interdependently. A similar approach would likely be followed in abuse of dominance cases.

3.1.2 Other factors

Discuss other factors affecting the analysis of market power, such as barriers to entry.

Barriers to entry are a key consideration in determining if market power exists. As mentioned above, the Bureau and the Tribunal will not conclude that market power exists on the basis of market share alone. Without barriers to entry, 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 attempt to determine whether entry is likely to be delayed or hindered by the presence of absolute cost differences between the incumbent and the new entrant and whether there are sunk costs to entering (*i.e.* the need to make investments which are not likely to be recovered if entry is not successful).

Examples of barriers to entry found in decided abuse of dominance cases include the existence of process patents (*NutraSweet* – artificial sweeteners), the contracting practices of the incumbent firm (*Laidlaw*⁶ – waste disposal) and the vertical relationship of an incumbent firm to related companies (*Tele-Direct*⁷ – yellow pages/telephone business).

3.2 Abuse of dominant position/predatory conduct

Explain what this concept is and how it is applied in your jurisdiction.

⁶ *Canada (Director of Investigation and Research) v. Laidlaw Waste Services* (1992), 40 C.P.R. (3d) 289 (C.T.).

⁷ *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (C.T.).

One of the anti-competitive acts listed in the *Competition Act's* abuse of dominance sections is selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor. The Act provides several other examples of anti-competitive acts, but the list is not exhaustive. According to the Tribunal and the ADEGs, any conduct which is predatory, exclusionary or disciplinary in nature may constitute an anti-competitive act for purposes of the abuse of dominance provisions. Most of the discussion of predatory conduct in the ADEGs focuses on predatory pricing, although other types of predation are possible.

Predatory pricing is described in the ADEGs as pricing below some measure of cost in order to harm a competitor. Such practices are profitable to the dominant firm if they enable the 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 key consideration is whether the firm engaging in the predatory conduct can raise prices after the predatory conduct is completed, which generally requires that barriers to entry exist.

The Bureau uses a two-stage approach in determining whether predatory pricing exists. 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 (such costs being the costs which the firm would avoid by not offering the product).

The Act also specifies a number of additional anti-competitive acts which apply only to the airline industry including predatory acts 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. The Bureau's recent enforcement activities against Air Canada allege that the foregoing types of acts have occurred. 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*.

In addition to predatory conduct potentially constituting an abuse of dominance, the *Competition Act* contains a separate 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). The Bureau's *Predatory Pricing Enforcement Guidelines* are similar to the analytical framework in the ADEGs described above. The Bureau tends to proceed under this offence only in clear and egregious cases. As a result, there have been few prosecutions in recent years. However, unlike abuse of dominance, a private right of action is available to victims of this offence.

3.2.1 Single firm conduct

When does the conduct of a single firm constitute an abuse of market power? Give specific examples.

A single firm will have abused its dominant position when it meets the three elements of the reviewable practice described in part 1.1 above (*i.e.* it is dominant, it has engaged in a practice of anti-competitive acts, and the practice has lessened or prevented competition substantially in a market).

Examples of anti-competitive acts listed in the Act include the use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor, pre-emption of scarce facilities or resources required by a competitor for the operation of its business and buying up products to prevent the erosion of existing price levels. Examples of anti-competitive acts alleged in the decided cases include contractual clauses requiring exclusivity (*NutraSweet*), denying competitors access to an essential input (*Nielsen* – scanner data), the acquisition of competitors and using lengthy non-compete clauses in acquisition agreements (*Laidlaw*) and tied selling (*Tele-Direct*).

3.2.2 Coordinated conduct

When does the conduct of two or more firms constitute an abuse of market power? Give specific examples.

The ADEGs take the position that the concept of joint dominance means that a group of unaffiliated firms may possess market power even if no single member of the group is dominant by itself. 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 coordinates their activities, the Bureau’s position is that such coordination may be inferred by considering the following factors:

- whether the firms collectively account for a large share the 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 marketplace;
- 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*.⁸ However, neither case provides much insight into the requisite degree of coordination required to constitute joint dominance since in both cases there was an explicit agreement among the relevant parties and both were resolved with consent orders.

3.2.3 Defenses

What are the defenses to an abuse of dominant position? Give specific examples.

Aside from repudiating any of the three required elements discussed in part 1.1 above, there is only one substantive defence under the abuse of dominance provisions. Acts engaged in pursuant *only* 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.⁹ The IPEGs indicate 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 rights holder 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.

The Act also 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 in the ADEGs 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; rather, superior competitive performance is merely a factor to be considered in determining the cause of a lessening of competition.

Procedurally, the Act provides that no action can be taken against a dominant firm more than three years after a practice of anti-competitive acts has ceased. The Act 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 set of facts.

3.3 Attempts to attain monopoly power

Explain what this concept is and how it is applied in your jurisdiction. Does your jurisdiction condemn attempts to attain monopoly power? If so, what are the elements? Give specific examples.

⁸ *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 68 C.P.R. (3d) (C.T.); and *Canada (Director of Investigation and Research) v. AGT Directory Ltd.* (1994), C.C.T.D. No. 24 Trib. Dec. No. CT9402/19.

⁹ In cases where an “undue” lessening of competition arises solely from the exercise of intellectual property rights, the Bureau may ask the Attorney General to seek a special remedy under another provision of the Act. However, this power has rarely been used.

Canadian abuse of dominance laws do not 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 actually occurred. This prospective approach to considering anti-competitive effects is also used in merger review cases under the Act.

3.4 Tying arrangements

Explain what this concept is and how it is applied in your jurisdiction.

Does your jurisdiction condemn attempts to condition the sale of one product upon the purchase of a second, separate product? If so, what are the elements? Give specific examples.

The *Competition Act* contains a non-criminal reviewable practice of tied selling which is separate from the abuse of dominance rules. As a reviewable practice, the conduct is not illegal and is not subject to penalties, but may be subject to a prospective remedial order.

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.¹⁰

Cases alleging tied selling may only be initiated by the Commissioner of Competition. (There have been proposals to introduce private rights of action, but to date they have not been enacted.) The Competition Tribunal can 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 practiced by a major supplier of a product in a market (or is widespread in a market) and 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 competition is or is likely to be lessened substantially. Note that 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.”

There have been relatively 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

¹⁰ 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).

for the provision of hardware services, resulting in a substantial lessening of competition for certain computer equipment end-users.¹¹

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.

3.5 Exclusive dealing

Explain what this concept is and how it is applied in your jurisdiction.

Does your jurisdiction condemn attempts to restrict the ability of firms to enter into exclusive distribution relationships? If so, what are the elements? Give specific examples.

Like tied selling, exclusive dealing is a standalone reviewable practice which is separate from abuse of dominance. It is lawful unless and until prohibited by an order of the Competition Tribunal.

The Act defines 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. The Competition Tribunal can make an order against exclusive dealing if it has the same effects set out above in respect of tied selling. (*i.e.* is engaged in by a major supplier or is widespread, has an exclusionary effect, and is likely to lessen competition substantially).¹²

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

3.6 Refusals to deal

Explain what this concept is and how it is applied in your jurisdiction.

Does your jurisdiction condemn attempts to restrict the ability of dominant firms to refuse to deal with others? If so, what are the elements? Give specific examples.

¹¹ See Consumer and Corporate Affairs Canada News Release “Director Receives Undertakings from Digital Equipment of Canada Limited” (October 30, 1992).

¹² For a more extensive discussion of the exclusive dealing reviewable practice, see A.N. Campbell, “Vertical Non-Price Restraints” in *Competition Law: Compliance in an Aggressive Marketplace* (Toronto: Insight, 1993).

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. It is a “*per se*” offence with 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. An example would be a high-end manufacturer of computer products which cuts off a retailer because the retailer has been discounting its products below suggested retail prices.

The non-criminal refusal to deal provisions in the Act allow the Competition Tribunal to order one or more suppliers of a product to supply a person on ordinary trade terms when the Tribunal finds that:

- 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;
- the inability to obtain supplies has resulted from a lack of competition among suppliers in the market;
- the person is willing and able to meet usual trade terms; and
- the product is in ample supply.

In the *Xerox*¹³ and *Chrysler*¹⁴ cases, the Competition Tribunal used the refusal to deal provisions to prevent the respondents, which were suppliers of unique replacement parts, from terminating long-standing relationships with small exclusive distributors. However, in the *Warner*¹⁵ case, the Tribunal held that the refusal to license music copyrights was not covered by the reviewable practice of refusal to deal.

4. PENALTIES/REMEDIES

4.1 Penalties

What types of penalties are there for violations of an abuse of dominant position?

There are no fines or other penalties for abuse of dominant position (or for tied selling, exclusive dealing or non-price-related refusals to deal). As with all reviewable practices under the Act, the focus is on preventing the continuation or emergence of anti-competitive conduct. If a prohibition or other remedial order is

¹³ *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.).

¹⁴ *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (C.T.).

¹⁵ *Canada (Director of Investigation and Research) v. Warner Music* (1997), 78 C.P.R. (3d) 321 (C.T.).

made by the Tribunal (see part 4.2 below), failure to comply is an offence punishable on indictment by a fine in the discretion of the court or to imprisonment for up to five years or to both.

Price-related refusals to deal are subject to a fine in the discretion of the court and/or imprisonment of up to five years. 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 offence.

4.2 Remedies

What type of remedies are there to prevent an abuse from occurring in the future? Give specific examples.

If the Competition Tribunal finds that there has been an abuse of a dominant position, it may make an order preventing the respondent firms 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 such actions, including the divestiture of assets or shares, as 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. In other words, such orders are to be remedial and not punitive.

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.

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

In April 2001, the Government tabled proposed amendments related to temporary orders. 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 investigation into abuse of dominance or other reviewable practices is undertaken by the Bureau.

5. ABUSE OF DOMINANT POSITION AND THE HIGH TECHNOLOGY SECTOR

The purpose of this section is to analyze whether abuse of dominant position principles should be abandoned or modified when applied to the high technology industries.

5.1 Application of Antitrust to High Technology

Outline whether there are one or more specific antitrust provisions in your jurisdiction covering only high technology industries.

There are no antitrust rules in Canada which apply solely to high technology industries.

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 orders in cases where a holder of an intellectual property right has used the right to injure competition in certain specified ways. Such orders can include mandatory licensing of the IP rights, restraining the use of such rights and declaring void agreements or arrangements relating to such rights. However, this special remedy has rarely been invoked.

The *Copyright Act* and the *Patent Act* also contain certain mechanisms for interested persons to request relief from the exclusive IP rights granted under each regime. The *Copyright Act* includes provisions respecting compulsory licences for retransmission rights, which are subject to royalty payments that are fixed under the legislation. Under the *Patent Act*, 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.

5.1.1 Government agencies

Which, if any, additional government agencies regulate high-technology industries' attaining or abusing monopoly power?

Companies in the telecommunications and broadcasting industries are subject to regulation by the Canadian Radio-television and Telecommunications Commission (the "CRTC") under the *Telecommunications Act* and the *Broadcasting Act*. Both these industries are in a stage of transition from regulated monopolies to competitive markets and there is some overlap between the mandates of the Competition Bureau and the CRTC. For further discussion, see the summary in Appendix B.

5.1.2 Recognised technology markets

Is there one or more recognized high technology relevant market(s), or are there different ways to define a technology or innovation market (versus a standard goods or services market)?

The Bureau's IPEGs provide some guidance as to its views on market definition for transactions or conduct involving intellectual property. 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.

5.1.3 Abusive practices in the high technology sector

Discuss the most recent abusive practices in the high technology sector(s) in detail.

Highlight whether the standards discussed in Section 3 are analyzed or applied differently when high technology industries are the target of investigation.

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

In *Nielsen*, the Competition Bureau alleged that A.C. Nielsen, which held 100% of the 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 also impeding competitors from entering the market. The Tribunal ordered amendments to A.C. Nielsen’s contracts to temper their anti-competitive aspects 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 onerous 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.

5.2 The Continued Value of Antitrust to High Technology.

Through the use of examples, examine whether the following arguments have value in your jurisdiction:

5.2.1 Monopoly power in the high technology sector is short-lived

Monopoly power in the high technology sector is short-lived and can be defeated more quickly and efficiently by market forces than by regulators.

There are no specific cases dealing with this issue. The Bureau would likely give careful consideration to such an argument in any case where it would be relevant. However, as the IPEGs indicate, the Bureau will also be attuned to the possibility of network effects facilitating the maintenance and enhancement of market power for an extended period of time depending on the facts of the case.

5.2.2 Monopoly power creates incentives for innovation

Monopoly power is a good thing in the high technology sector because it creates incentives for innovation.

Canada's intellectual property laws recognize the fact that certain kinds of innovation are deserving of monopoly protection, at least for a limited time period, 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 mergers or other conduct which is anti-competitive) in any industry. Thus they cannot be said to provide disincentives to innovate.

5.2.3 High technology industries do not follow traditional economic principles

High technology industries operate in ways that are unprecedented, for example, prices often fall rather than increase with market power, therefore traditional antitrust principles are totally inapplicable.

While the Bureau will be attentive to industry-specific characteristics, there is no clear indication that it or Canadian legislators regard the high-technology sector as being subject to significantly different antitrust principles than other industries. For example, the IPEGs demonstrate the Bureau's inclination to use traditional antitrust principles in cases involving overlaps between competition law and IP law.

5.2.4 Good high technology products become general standards

Monopoly is inevitable in the high-technology sector because products should, and do, become generally accepted standards.

Canadian competition law is unlikely to stand in the way of monopolies that arise "naturally" due to the efficiency benefits of standard-setting. Indeed the Act recognises that there may be welfare-enhancing effects in defining standards. For example, there is a specific exemption from the conspiracy provisions relating to agreements or arrangements that define product standards in an industry. However, sensitivities may arise if standards are exclusionary rather than open. One of the anti-competitive acts listed in the abuse of dominance provisions is the

adoption of incompatible product specifications with the goal of disciplining a competitor.

6. GUIDANCE AND RECOMMENDATIONS

What guidance would you give to high technology industries operating in your jurisdiction regarding abusive practices? What types of practices are particularly scrutinized in your jurisdiction? Are there “safe harbors” in your jurisdiction for high-technology companies? When, in general, does a firm cross the line between competitive practices and illegal behaviour? Give recommendations for mitigating penalties once illegal behaviour has been determined.

As a starting point, high-tech companies (or any other company) should begin to be conscious of possible abuses of dominance when their market share in any particular segment of their industry rises above the safe-harbours specified in part 3.1. Companies whose market shares exceed the safe-harbour thresholds must be careful when engaging in any practices which could be regarded as predatory, exclusionary or disciplinary in nature. The higher the share, the greater the need for caution. Contractual practices are a particular risk area if they require customers, suppliers or other contracting parties to behave in certain ways that affect the ability of competitors of the dominant firm to compete effectively.

There are no specific, safe-harbours in the Canadian abuse of dominance laws for high technology industries other than the defence which arises for conduct that constitutes the mere exercise of an intellectual property right. There is also no bright line one can point to as indicating the difference between permissible and impermissible behaviour by dominant firms since, like many other areas of competition law, a fact-intensive and economics-intensive analysis is often required to determine whether particular conduct is likely to be anti-competitive or pro-competitive.

As noted in part 4 above, abuse of dominance is not a criminal matter in Canada. As a reviewable practice, there are no penalties and such conduct is not illegal until an order is made by the Competition Tribunal.

7. CONCLUSION

Conclude your paper by showing how the examples given in your introduction support your guidance and recommendations.

High technology firms operating in Canada need to be as attentive to the general abuse of dominance regime in the *Competition Act* as firms in any other industry. There is no specific Bureau policy of enforcement deference or of targeting this sector for enforcement action. However, with the increasing governmental and media attention on knowledge-based industries and the new economy, it can be assumed that the Bureau will carefully scrutinize allegations of anti-competitive activity that relate to a high technology industry in order to ensure that enforcement and non-enforcement decisions are well-founded.

APPENDIX B
Regulation of the Telecommunications and Broadcasting Industries
by the Canadian Radio-television and Telecommunications Commission
(Prepared by Alyson N. D'Oyley, Macleod Dixon LLP)

Authority for competition matters in the telecommunications and broadcasting industries may be exercised either by the Competition Bureau or by the Canadian Radio-television and Telecommunications Commission ("CRTC") under the *Telecommunications* and *Broadcasting Acts*.

Telecommunications

Under the *Telecommunications Act*, the CRTC has authority to exempt classes of carriers from application of the *Telecommunications Act*. Exemption orders may be subject to conditions. The CRTC also has the power to forbear in whole or in part from most regulatory responsibilities where it finds, for example, that services or classes of services are subject to sufficient competition to protect the interests of users and that forbearance would not be likely to unduly impair the development or continuance of a competitive market. Forbearance orders may also be conditional, and can be varied or rescinded.

Although the *Competition Act* is a law of general application, it is generally accepted that during the transition to competitive markets, competition safeguards beyond those available under the *Competition Act* may be required. Thus, the CRTC continues to enforce regulatory safeguards to deal with issues such as bundling of services by telephone companies, contract and access issues for multi-dwelling buildings, and exclusive programming rights practices. During the transition to competition, the CRTC may be able to deal with these issues more efficiently than a case-by-case approach under the *Competition Act*. There is a "regulated conduct defence" under the *Competition Act* which is available when activity is supervised by a regulatory agency such as the CRTC.

One particularly difficult issue in the transition to competition is anti-competitive cross-subsidization. Until all telecommunications markets are subject to effective competition, the CRTC will likely continue to employ regulatory safeguards such as imputation tests and bundling restrictions. When the CRTC deems that markets have become sufficiently competitive to forbear from regulation, the *Competition Act* would then be used to address anti-competitive pricing issues should they arise.

Depending upon the specific circumstances, marketing practices can be addressed by the CRTC and/or the Competition Bureau:

- The CRTC continues to deal exclusively with issues related to interconnection and access because these issues require a high degree of technological and economic expertise, as well as flexible and timely dispute resolution. While the *Competition Act* applies to access and interconnection issues in unregulated network industries, they have been a primary focus of economic regulation in telecommunications by the CRTC.
- The Competition Bureau considers that the *Competition Act* will apply to exclusive dealing, tied selling and other trade restraints not covered by regulatory safeguards imposed by the CRTC.
- The CRTC will, for example, deal with slamming complaints in the telephone market. However, the Competition Bureau may act in cases where the slamming practice involves an element of false or misleading advertising because the *Competition Act* applies to all false or misleading advertising in any industry as well as to telemarketing fraud.

Prior approval of telecommunications mergers by the CRTC is not required under the *Telecommunications Act*. However, the CRTC has specific responsibility for ensuring compliance with foreign ownership and control rules and has broad regulatory authority over the Canadian telecommunications system. Under the *Competition Act*, all telecommunications mergers are subject to review in the same manner as transactions in other industries and those which exceed proscribed economic thresholds must be formally prenotified to the Bureau.

The Competition Bureau's seven month Internet Inquiry is a recent example of how the Bureau's jurisdiction over competition matters in the telecommunications industry complements CRTC regulation of the terms and conditions under which Internet Service Providers ("ISPs") obtain access to telephone company networks. In the Internet Inquiry, the Bureau investigated a complaint alleging that subsidiaries of Bell Canada ("Bell") were pricing high speed Internet service using Asymmetric Digital Subscriber Line ("ADSL") technology to residential customers at rates substantially below the tariffed rates available to ISPs for access to the network. The complaint included a request for an application to the Tribunal for a remedial order prohibiting Bell from selling its ADSL Internet service below cost.

The Competition Bureau addressed whether Bell had a dominant position in the market, whether Bell engaged in a practice of anti-competitive acts for the purpose of impeding competition and whether the effects of such practice resulted in a substantial prevention or lessening of competition. The Bureau found that there were no grounds to proceed with an application to the Tribunal because the Canadian retail Internet market is highly competitive and characterized by low barriers to entry as the cable industry competitors offer similar high speed Internet services at prices comparable to Bell. The Bureau concluded that an order

prohibiting Bell from selling its ADSL Internet service below cost would impede the introduction of this technology and deny consumers the benefits of price and service competition between alternative suppliers.

Broadcasting

As with telecommunications, either the CRTC and/or the Bureau may deal with marketing practices that raise competition issues in the broadcasting sector. There is also parallel jurisdiction in respect of mergers. Under the *Broadcasting Act*, prior approval of the CRTC is required for changes of control or ownership of licensed undertakings and mergers may also be subject to review under the normal *Competition Act* regime. The Competition Bureau's examination of mergers relates exclusively to competitive effects, primarily to the impact on advertising markets and, with respect to broadcast distribution undertakings, to the channel choices and prices available to consumers. The CRTC's consideration involves a broader set of objectives under the *Broadcasting Act*. This may encompass consideration of advertising or other competition issues in the context of a licensee's fulfillment of the objectives of the *Broadcasting Act*.

APPENDIX A
EXCERPT FROM COMPETITION BUREAU'S
DRAFT ENFORCEMENT GUIDELINES ON
THE ABUSE OF DOMINANCE PROVISIONS

SUMMARY OF COMPETITION TRIBUNAL DECISIONS

INTRODUCTION

This Appendix provides a brief summary of the six decisions rendered by the Competition Tribunal since the abuse of dominance provisions were introduced in the *Competition Act* in 1986.⁴⁵ Of these six cases, four, NutraSweet, Laidlaw, Nielsen and Tele-Direct, involved contested applications. The other two cases, Interac and CANYPS, involved joint abuse and were resolved by way of consent orders. All six of these cases have resulted in an order by the Tribunal.

This summary of the decided cases illustrates the Tribunal's position on the key elements of section 79. It also provides specific examples of the type of conduct and the circumstances in which the Tribunal has identified and defined anti-competitive acts and the scope and nature of remedies imposed under section 79.

NUTRASWEET

Key Facts

Product Market: the artificial sweetener aspartame

Geographic Market: Canada

⁴⁵ *Canada v. NutraSweet*, (1990), 32 C.P.R. (2d) 1 (C.T.); [hereinafter "NutraSweet"]; *Canada v. Laidlaw Waste Systems*, (1992), 40 C.P.R. (3d) 289 (C.T.) [hereinafter "Laidlaw"]; *Canada v. AGT Directory Ltd. et al*, (1994), C.C.T.D. N° 24 Trib. Dec. N° CT9402/19 [hereinafter "Canyps"]; *Canada v. D and B. Companies*, (1995), 64 C.P.R. (3d) 216 (C.T.) [hereinafter "Nielsen"]; *Dir. Of Inv. And Res. V. Bank of Montreal et al.*, (1996), 68 C.P.R. (3d) (C.T.) [hereinafter "Interac"]; and *Canada v. Tele-Direct (Publications) Inc. et al.*, (1997), 73 C.P.R. (3d) 1 (C.T.) [hereinafter "Tele-Direct"].

Market Share: 95%

Application Filed: June, 1989

Tribunal Order: October, 1990

Anti-competitive acts

- Contract clauses imposed by NutraSweet requiring or inducing exclusivity:
 - clauses obligating customers to purchase all their aspartame from NutraSweet;
 - discounts and price allowances granted to customers for use of the NutraSweet logo and name;
 - promotional allowances awarded where only the NutraSweet product was used;
 - meet-or-release and most favoured nation clauses.

“Substantially Lessening Competition”

- high market share enjoyed by NutraSweet;
- the contracts covered 90 % of the market;
- contract exclusivity prevented the entry of competitors;
- barriers to entry, including high customer switching costs, sunk costs, a two-year entry period and the economies of scale.

Order

- prohibited NutraSweet from enforcing the contractual terms requiring or inducing exclusivity;
- prohibited NutraSweet from entering into future contracts containing these provisions.

Other Issues

- allegations of advantages due to the nonpayment of income taxes and predatory pricing were not accepted by the Tribunal as anti-competitive acts;
- no order was made concerning allegations of selling below cost and rebates given to a party to take into account exchange differentials;
- defences raised by NutraSweet of a superior competitive performance, free rider (ie. other parties taking advantage of its investment) as well as efficiency and business justifications were rejected by the Tribunal;

LAIDLAW

Key Facts

Product Market: commercial waste services, collection and disposal

Geographic Market: four local communities on Vancouver Island

Market Share: 87%

Application Filed: March, 1991

Tribunal Order: January, 1992

Anti-competitive acts

- acquisition of competitors;
- lengthy non-compete clauses in purchase agreements of competitors;
- contracting practices:
 - long-term customer contracts with automatic renewal;
 - excessive liquidated damages;
 - rights of first refusal.
 - intimidation through litigation or its threat to inhibit customers from switching suppliers.

“Substantially Lessening Competition”

- the existence of high prices and increases of these prices indicated that Laidlaw possessed market power;
- contracts between Laidlaw and its customers restricted competition;
- high barriers to entry, including Laidlaw’s contracting practices which erected barriers to the development of the necessary client base for new entrants;
- acquisition of competitors created local monopoly.

Order

- Laidlaw was forbidden from further acquisitions in three affected markets for three years;
- amendments and deletions to Laidlaw's contracts with respect to rights of first refusal, non-compete clauses, exclusivity requirements and liquidated damages for early termination;
- customers no longer obligated to disclose bids by competitors;
- initial and renewal terms of contracts reduced to one year;
- termination on thirty days notice;
- notification and information requirements imposed on Laidlaw:
 - customers to be advised that contract clauses subject to the order were no longer to be applied;
 - Laidlaw required to explain any amendments of contracts to its customers;
 - the existence of the order was to be made known to customers and managers;
 - employees were to be given written instructions that compliance with the *Competition Act* was company policy;
 - copies of existing and future contracts were to be provided to the Competition Bureau.

Other Issues

- Laidlaw advanced economic and business justifications for several of the contractual clauses based upon its investments. The Tribunal found that these clauses could not be justified on the basis of efficiency or consumer benefit. The only effect of the acts was to ensure that customers remained with Laidlaw thus creating a barrier to entry;
- Laidlaw argued that the mergers were covered by section 91 of the *Competition Act* and as such could not be anti-competitive under section 78. The Tribunal rejected this proposition;
- The Tribunal condemned the use of litigation or Laidlaw's threats to do so as reprehensible and anti-competitive conduct.

NIELSEN

Key Facts

Product Market: scanner-based market tracking services

Geographic Market: Canada

Market Share: 100%

Application Filed: October, 1994

Tribunal Order: April, 1995

Anti-competitive acts

- the use of exclusive contracts to deny competitors access to scanner data:
 - long-term contracts (three years or longer);
 - most favoured nation clause to ensure that no competitor paid less for data than Nielsen;
 - strict conditions for termination including lengthy notification requirements and monetary penalties for early termination;
 - renewals structured to occur at different times so as to limit the available sources of data, creating a barrier to entry;
 - payment for exclusive access for data or financial penalties if a retailer supplied data to a competitor.

“Substantially Lessening Competition”

- 100 % control by Nielsen combined with the use of practices designed to bar entry allowed it to maintain and increase its market power;
- Nielsen’s practices raised barriers where they did not exist;
- the nature of the industry did not permit entry over time since the data needed for comparison was required from the outset;
- the intent of the contracts and the results of their operation were anti-competitive.

Order

- The Tribunal imposed amendments to the Nielsen contracts:
 - provisions preventing or limiting the supply of data to any party were declared to be null and void;
 - clauses promoting exclusivity of scanner data rendered unenforceable.
 - inducements to limit the supply of data were banned;
 - use of the most favoured nation clause was prohibited for twenty four months after the issuance of the order;
 - the same term was imposed on all future contracts signed within eighteen months of the date of the order;
 - Long term contracts for Nielsen's services were reduced.
- Nielsen ordered to provide fifteen months of data calculated from the date requested by a new entrant competitor, Information Resources, Inc.

Other Issues

- the Tribunal considered several arguments seeking to justify Nielsen's practices, but concluded that the denial of access could not be justified on business or efficiency grounds;
- in finding that the acts were anti-competitive, the Tribunal ruled that the existence of a valid business ground did not mitigate the conduct;

- Nielsen argued that its contracts were necessary to prevent a competitor from “free riding” on its investment. This proposition was also not accepted by the Tribunal.

INTERAC

Key Facts

Product Market: services associated with the electronic banking network on which transactions are made through automated banking machines and debit cards

Geographic Market: Canada

Market Share: 100%

Application Filed: December, 1995

Tribunal Order: June 20, 1996

Anti-competitive acts

- prohibition on new members;
- higher membership fees for competing financial services providers;
- onerous service fees were for entities which did not have a direct connection to the system but were obligated to go through another member;
- limitations on price competition and services.

“Substantially Lessening Competition”

- no alternative networks and high barriers to entry;
- limited access to the main system;
- limited service and price competition.

Consent Order

- required the respondents to amend the by-laws of Interac in order to:
 - remove restrictions on membership by other financial institutions;
 - allow indirect access by other commercial entities;
 - modify the governance of Interac with respect to the composition of its board;
 - modify pricing practices and procedures for approving new network services.

TELE-DIRECT

Key Facts

Product Market: telephone directory advertising

Geographic Market: local markets across Canada

Market Share: 96% advertising space

25% advertising services

Application Filed: December, 1994

Tribunal Order: February, 1997

Anti-competitive acts

- tied selling of space in Yellow Pages directories to sales services, including advice, design and administration;
- discrimination against independent directory publishers, advertising agencies and consultants as to accounts and commissions;
- targeted price reductions and other competitive strategies against competitive directories.
- refusal to license trade marks.

“Substantially Lessening Competition”

- telephone directory advertising is a distinct market with no close substitutes;
- Tel-Direct had an overwhelming share of the product market;
- entry to the market was not easy.

Order

- Tele-Direct to cease the practice of tying space and services;
- Tele-Direct to price space and service separately or offer an acceptable commission for the service function;

- Tele-Direct to cease discrimination against consultants and customers who use consultants.

Other Issues

- The Tribunal dismissed allegations with respect to:
 - targeted anti-competitive acts against publishers, which the Tribunal found to be legitimate competitive responses to entry;
 - anti-competitive acts directed against advertising agencies on the basis that Tele-Direct was not dominant in this sector of the market and there was no substantial prevention or lessening of competition;
 - the Tribunal concluded that withholding the “Yellow Pages” and “Walking Fingers” logo was a legitimate exercise of rights under the *Trade-Marks Act*.

CANYPS (CANADIAN YELLOW PAGES SERVICE)

Key Facts

Product Market: national Yellow Pages advertising

Geographic Market: Canada

Market Share: 90%

Application Filed: September, 1994

Tribunal Order: November, 1994

Anti-competitive acts

- restrictions imposed on the sale of national advertising known as the “head office rule” which required to customers to arrange all national Yellow Pages advertising with the publisher serving the province where its head office was located.

“Substantially Lessening Competition”

- the Bureau alleged that the arrangements among the members of CANYPS prevented competition between them and prevented the entry of independent sales agents into this market;
- the respondents controlled 90% of the market.

Consent Order

- Respondents prohibited from:
 - maintaining the head office rule;
 - maintaining exclusive selling arrangements;
 - refusing to deal with selling companies;
 - discriminating between selling companies;
 - refusing to license Yellow Pages trade marks to selling companies;
 - agreeing on commissions or account eligibility criteria for commissions;
 - denying selling companies access to rates and other data published by CANYPS.

- Respondents required to provide the Bureau with (a) minutes of all CANYPS meetings until July, 1998 and (b) a standard licensing agreement for trade-marks.

APPENDIX B
Regulation of the Telecommunications and Broadcasting Industries
by the Canadian Radio-television and Telecommunications Commission
prepared by Alyson N. D'Oyley
Macleod Dixon LLP

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Telecommunications

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resulted in a substantial prevention or lessening of competition. The Bureau found that there were no grounds to proceed with an application to the Tribunal because the Canadian retail Internet market is highly competitive and characterized by low barriers to entry as the cable industry competitors offer similar high speed Internet services at prices comparable to Bell. The Bureau concluded that an order prohibiting Bell from selling its ADSL Internet service below cost would impede the introduction of this technology and deny consumers the benefits of price and service competition between alternative suppliers.

Broadcasting

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