

# Canada

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### General

- 1 What is the legislation applying specifically to the behaviour of dominant firms?

One statute governs all aspects of competition law, the federal Competition Act (the Act). The civil, reviewable practice of abuse of dominant position was introduced into the Act in 1986.

Under section 79 of the Act, the Competition Tribunal (the Tribunal) may make an order to remedy an abuse of dominance if it determines that one or more dominant firms have engaged in a practice of ‘anti-competitive acts’ that have resulted in a substantial prevention or lessening of competition. Anti-competitive acts are defined in section 78 of the Act by reference to a non-exhaustive list of examples, which includes practices such as buying up products to prevent price erosion, squeezing margins of unintegrated competing customers and pre-emption of scarce resources. The Tribunal has interpreted the provision broadly and expressed a willingness to find anti-competitive any behaviour that is engaged in for the purpose of having an effect on a competitor that is predatory, exclusionary or disciplinary.

- 2 Does the law cover conduct through which a non-dominant company becomes (or attempts to become) dominant?

No, the Act is concerned only with dominant firms engaging in anti-competitive acts. Attempts at dominance are not caught by the provision, although the Act contains a number of other provisions, such as those dealing with mergers, which may be invoked to address the creation and enhancement of market power.

- 3 Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The Act, and the abuse of dominance provision in particular, generally is applied and interpreted with the object of protecting competition and maintaining competitive, efficient markets. However, the Act contains a general purpose clause (section 1.1) that states that the purpose of the 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 recognising 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 Federal Court of Canada recently observed that “All of these purposes must be reflected in the methodology adopted by the

Tribunal to assess the existence of an actual or likely substantial lessening of competition for the purposes of [the Act’s abuse of dominance provision]”.

- 4 Are there any rules applying to the unilateral conduct of non-dominant firms?

The Act contains separate criminal offences and other reviewable practices for matters which do not require a finding of dominance, such as predatory pricing, price discrimination, price maintenance, refusal to deal, tied selling, exclusive dealing and market restriction. The non-price vertical restraint provisions such as tied selling require a finding of substantial prevention or lessening of competition, which in turn necessitates a finding of some market power (albeit not necessarily dominance).

- 5 Is there a sector-specific control of dominance?

The abuse of dominance provision (section 79) applies to all industries; there is no sector-specific, alternative approach. However, after the merger of Canada’s two largest airlines in 1999 the list of anti-competitive acts in section 78 was amended to include specific practices engaged in by domestic air carriers, such as denying or refusing to offer reasonable terms for the provision of facilities or services essential to the operation of an air service in a market. If the Tribunal makes an order against a dominant domestic air carrier, the Tribunal may impose an administrative monetary penalty of up to C\$15 million in addition to any other remedy. Although administrative monetary penalties (AMPs) for abuse of dominance may not currently be awarded in any other circumstance, recently proposed amendments to the Act would also permit monetary penalties in the telecommunications sector.

The Commissioner of Competition (the Commissioner) has issued sector-specific Enforcement Guidelines on the Abuse of Dominance in the Airline Industry and a sector-specific enforcement bulletin on the abuse of dominance provisions as applied to the retail grocery industry. In September 2006 the Commissioner issued a draft sector-specific enforcement bulletin on abuse of dominance as applied to the telecom industry. These guidelines explain how the Commissioner applies the general abuse of dominance provision in these industry sectors.

- 6 What is the relationship between the sector-specific provisions and the general abuse-of-dominance legislation?

The abuse of dominance provision (section 79) applies without exemption to all industry sectors. The airline-specific provisions

discussed above merely describe sector-specific examples of anti-competitive acts.

**7** How frequently is the legislation used in practice and what is its practical impact?

Notwithstanding the relatively few cases (eight in total since the abuse of dominance provision was enacted in 1986: five contested proceedings, two resolved on consent and one case withdrawn), the Commissioner regularly investigates cases of alleged abuse of dominance and vigorously pursues cases that meet the statutory elements. The legislation must be considered by any firm in a position of dominance that desires to take any action that could have a disciplinary, exclusionary or predatory effect in the marketplace.

**8** What is the role of economics in the application of the dominance provisions?

Economics play a key role in any abuse of dominance case. Proceedings (and submissions to regulatory agencies) typically include expert economic testimony on issues such as market definition and competitive effects of the allegedly abusive conduct.

### Scope of application

**9** To whom do the dominance provisions apply? To what extent do they apply to public entities?

Section 79 of the Act applies to all businesses that operate in Canada, including the commercial activities of all Crown agencies that are corporations.

### Dominance

**10** How is dominance (or its equivalent concept under national law) defined?

Dominance exists when one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. Both the Competition Bureau (the Bureau, which is headed by the Commissioner) and the Tribunal generally equate ‘class or species of business’ with a product market, ‘throughout Canada or any area thereof’ as a relevant geographic market, and ‘control’ with market power.

The Bureau’s Abuse of Dominance Enforcement Guidelines (ADEGs) considers market power to exist when prices can be maintained profitably above competitive levels for at least one year without being eroded by new entry. Market share and barriers to entry are key to establishing market power, but its existence also may be inferred (or refuted) from other qualitative factors such as technological change, entry or exit, extent of excess capacity and countervailing market power of customers and suppliers.

**11** What is the test for market definition?

The approach to defining relevant geographical and product markets in abuse of dominance cases and merger cases is largely similar. To define relevant product markets, the analysis focuses on whether there are close substitutes for the product(s) in question such that buyers would turn to these substitutes in the event that prices are raised above competitive levels by a significant amount for a non-transitory period (generally, five per cent for more than one year). Qualitative factors typically are quite important to

the analysis, in particular the views, strategies, behaviour and identity of buyers; the views, strategies and behaviour of other market participants; product end uses; the physical and technical characteristics of the products; switching costs and price relationships and relative price levels. Relevant geographic markets will be defined under comparable approaches, with transportation costs and shipment patterns playing an important role in the determination.

When defining both product and geographic markets, the Bureau will attempt to avoid the so-called ‘cellophane fallacy’: that is, the Bureau will assess the extent to which prices likely would have been lower than prevailing prices in the absence of the alleged anti-competitive acts and use those prices as the starting point of its analysis. As a result, current price levels may be discarded by the Bureau as an inappropriate tool to use in defining the relevant markets in which the alleged dominant firm competes.

**12** Is there a market-share threshold above which a company will be presumed to be dominant?

There is no statutory market share thresholds or safe harbour. Generally, a market share of less than 35 per cent will not give rise to concerns of market power or dominance. A market share of 35 per cent or greater generally will prompt further examination and the case law indicates that a single-firm market share in excess of 80 per cent prima facie will be regarded as dominant. In the ADEGs, the Commissioner suggests that in the case of alleged joint abuse of dominance, a combined market share of the parties to the alleged joint dominance exceeding 60 per cent generally will prompt further examination.

The ADEGs do not specify the manner in which market share will be measured, although the Bureau generally can be expected to employ the same flexible approach used under its Merger Enforcement Guidelines: dollar sales, unit sales, production output, capacity, or, in certain natural resource industries, reserves.

**13** Is collective dominance covered by the legislation? If yes, how is it defined?

The Act explicitly contemplates that firms may jointly possess and abuse a dominant position. There is no meaningful jurisprudence that defines the extent of connection required to support a finding of ‘joint dominance’ between otherwise independent firms. To date there have been only two cases of joint dominance under the Act, and in both cases the existence of dominance was supported by an explicit agreement. In the ADEGs, the Bureau indicates that a group of unaffiliated firms may jointly possess market power even if no single member of the group is dominant by itself.

Generally, the Commissioner requires something more than conscious parallelism before concluding that firms are participating in some form of coordinated activity that could be subject to a remedy under section 79. The ADEGs indicate that in the absence of an explicit agreement, the Bureau will consider the following factors when determining whether to infer control by a group of firms:

- whether the group of firms collectively account for a large share of the relevant market;
- whether there is any evidence that the alleged coordinated behaviour is intended to increase price or is for the purpose of engaging in some form of anti-competitive act;
- whether there is any evidence of barriers to entry into the group or barriers to entry into the relevant market;

- whether there is any evidence based on the particular facts of the case that members of the group have acted to inhibit intra-group rivalry; and
- whether there is any evidence of a significant number of customers who cannot exercise countervailing power to offset the attempted abuse.

**14** Does the legislation also apply to dominant purchasers? If yes, are there any differences compared with the application of the law to dominant suppliers?

There is no difference in the treatment of anti-competitive acts committed by purchasers as compared to those committed by suppliers, and some of the examples of anti-competitive acts provided in section 78 are specifically aimed at purchasers. For example, the acquisition by a customer of a supplier in order to limit supply, raise prices or otherwise weaken the position of competitors and/or deter potential new entrants is specifically identified as an anti-competitive act. The Act also deems as anti-competitive the bidding-up of input prices, buying-up inputs to prevent the erosion of prices, and inducing suppliers to limit supply.

### Abuse in general

**15** How is abuse defined?

The test for abuse is effects-based: Abuse will be found to exist if a dominant firm (or firms) engage in a practice of anti-competitive acts that has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market. There are no per se-type prohibitions of certain categories of conduct.

A ‘practice’ may be one occurrence that is sustained or systematic over a period of time, or a number of different acts that, when taken together, substantially prevent or lessen competition. There must be some element of anti-competitive design, purpose or object to the act that is predatory, exclusionary or disciplinary.

**16** Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, the concept of abuse covers a variety of practices. The abuse of dominance regime can be used to challenge tied selling, exclusive dealing, market restriction, refusal to deal and any other conduct by a dominant firm that is predatory, exclusionary or disciplinary.

**17** What link must be shown between dominance and abuse?

Once the Tribunal finds that a dominant firm has engaged in a practice of anti-competitive acts, the Tribunal must assess whether the effect was, is or will likely result in a substantial prevention or lessening of competition in a market.

The abuse must occur in the market in which the firm is dominant, although the leveraging of dominance in one market to obtain market power in a separate market could in appropriate circumstances form the basis of an abuse of dominance allegation.

The Tribunal looked at this question in the *Tele-Direct* case. Tele-Direct produced the Yellow Pages, a telephone directory advertising service for businesses, giving it 96 per cent of the telephone directory advertising-space market. In addition, Tele-

Direct offered advertising services for those wishing to purchase space in its Yellow Pages. When Tele-Direct used its position as the dominant space provider to increase its position in the advertising services market through anti-competitive behaviour, the Commissioner brought a complaint. The theory was that Tele-Direct was extending its market power into the services market through abuse of its dominant position in the space market. The Tribunal found that there was no violation of the dominance provisions because Tele-Direct occupied only 25 per cent of the advertising services market and so lacked the control required under the dominance provisions. Furthermore, there was no evidence that Tele-Direct’s behaviour was going to give it market power in the provision of advertising services. The Tribunal acknowledged that its conclusion might have been otherwise if Tele-Direct had enhanced its market power in the advertising services market by abusing its dominant position in advertising space market.

**18** What defences may be raised to allegations of abuse of dominance?

When considering whether an alleged abuse of dominance has prevented or lessened competition substantially, the Tribunal must consider whether the challenged actions and their effects are the result of the dominant firm’s superior competitive performance, which should not be considered an abuse of dominance. Also, while the Tribunal has noted that simply proving a legitimate business purpose typically will not preclude the finding of an anti-competitive act, both the Bureau and the Tribunal have implied that the creation of efficiencies may justify a practice of anti-competitive acts that are not pursued for an anti-competitive object. Efficiency claims have not been explicitly considered by the Tribunal in any abuse case and are not discussed in the ADEGs.

In addition, a specific exception is provided for the exercise of intellectual property rights, recognising that the very purpose of such rights is the ability of the holder to exclude others. The Bureau has issued Intellectual Property Enforcement Guidelines adopting the crux of an earlier Tribunal decision which determined that something more than the mere exercise of statutory intellectual property rights – even if exclusionary in effect – must be present before there can be a finding that the exercise of the rights constituted an anti-competitive act.

There is also a limitations period barring the Commissioner from applying to the Tribunal for an order more than three years after the alleged anti-competitive acts ceased.

### Specific forms of abuse

**19** Price and non-price discrimination

Selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor is an enumerated anti-competitive act under the legislation.

**20** Exploitative prices, terms or conditions of supply

In the *NutraSweet* case the Tribunal accepted that use of exclusive supply contracts could be an anti-competitive act because long-term exclusive supply contracts can foreclose the possibility of entry or expansion by other firms in the market.

**21** Rebate schemes

Rebate schemes are not an enumerated anti-competitive act in the Act, but the Tribunal held in the *NutraSweet* case that such schemes could constitute an anti-competitive act.

**22** Predatory pricing

Section 78 identifies certain types of predatory pricing as examples of anti-competitive acts. In *NutraSweet*, the Tribunal indicated that predatory pricing more generally could be an anti-competitive act for the purposes of the Act's abuse provision.

**23** Price squeezes

So-called 'price squeezing' is specifically enumerated as an anti-competitive act in the Act. Given the high level of complaints in this area, the Bureau has developed detailed guidelines in the ADEGs which describe the circumstances in which price squeezes could be an anti-competitive act.

**24** Refusals to deal and access to essential facilities

Pre-emption of scarce facilities or resources required by a competitor for the operation of a business – where the object of such conduct is the withholding of those facilities or resources from a market – is an enumerated anti-competitive act under the legislation.

**25** Exclusive dealing, non-compete provisions and single branding

Requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into or expansion in a market is an enumerated anti-competitive act in the legislation.

A recent Competition Tribunal decision in the 'Canada Pipe' case (see question 38), held that exclusivity agreements involving a party with market power did not violate the Act where that party had a bona fide business justification for entering into the agreements and the parties could consider other options and terminate the agreements at zero cost at the end of each year and at modest cost each quarter. It should be noted that the respondent was also able to show competitive entry during the term of the agreements. The decision is under appeal.

**26** Tying and leveraging

In the *Tele-Direct* case the Tribunal found that the respondent had engaged in an anti-competitive act by tying the sale of advertising space in telephone directories with various sales services, including advice, design and administration.

**27** Limiting production, markets or technical development

The adoption of product specifications that are incompatible with products produced by any other person, and that are designed to prevent entry into or eliminate others from the market is an enumerated anti-competitive act under the legislation.

**28** Abuse of intellectual property rights

Activities engaged in pursuant to the exercise of a statutory intellectual property right such as patents, copyrights, trademarks

and industrial designs are not per se anti-competitive acts. This was discussed in the *Tele-Direct* case, in particular with regard to trademarks. The Bureau subsequently introduced its Intellectual Property Enforcement Guidelines to clarify its approach in this area (see question 18).

**29** Abuse of government process

Threatening to litigate in an attempt to intimidate customers into remaining with a dominant firm was found to constitute an anti-competitive act in the *Laidlaw* case.

**30** 'Structural abuses' – mergers and acquisitions as exclusionary practices

The acquisition by a supplier of a customer – or vice versa – who would otherwise be available to a competitor is an enumerated anti-competitive act if the purpose of such acquisition is to impede, prevent or eliminate the competitor from a market. Acquisition of a competitor was judged to be an anti-competitive act by the Tribunal in *Laidlaw*. The Tribunal found that by acquiring its competitors, Laidlaw had, at times, attained almost 100 per cent of the relevant market share, with no legitimate business justification for the acquisitions.

The Act specifically provides that no application may be made to the Tribunal in respect of alleged abuse of dominance if conspiracy proceedings have been commenced against the dominant firm or an order sought under the merger provisions on the basis of the same or substantially the same facts.

**31** Other types of abuse

Because the list of anti-competitive acts contained in the Act is not exhaustive, any act that is engaged in for the purpose of having an effect on a competitor that is predatory, exclusionary or discriminatory can constitute abuse. For example, in *Laidlaw* the Tribunal found the use of meet-the-competition and most-favoured-customer clauses by the dominant firm to be anti-competitive because the clauses increased price transparency and thereby prevent pro-competitive, discrete price-cutting.

**Enforcement****32** Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The Tribunal may prohibit the continuance of the anti-competitive act and make the other remedial orders discussed below.

**33** Which authorities are responsible for enforcement and what powers of investigation do they have?

The Act is administered and enforced by the Commissioner who heads the Bureau, a unit of Industry Canada. The Civil Matters Branch of the Bureau leads abuse of dominance investigations. The Commissioner has broad powers of investigation, which include an ability to seek ex parte search warrants and subpoenas that require the production of documents, written returns under oath and sworn testimony. Although the Commissioner initiates most inquiries into an alleged abuse of dominance at her own discretion, the Commissioner must commence an inquiry when so directed by the federal Industry Minister or on the sworn application of six Canadian residents.

Typically, if the Commissioner believes grounds exist for the Tribunal to make an order in respect of abuse of dominance, she will attempt to resolve the matter informally before applying to the Tribunal for an order. If the matter cannot be resolved, the Commissioner's sole recourse is to initiate a proceeding before the Tribunal (only the Commissioner may bring a case; private rights of action are not available).

The Tribunal is a specialised adjudicative body composed of judicial members (appointed from the Federal Court Trial Division) and lay members. The Tribunal has exclusive jurisdiction to hear applications with respect to abuse of dominance and has all such powers, rights and privileges as are vested in a superior court for the enforcement of its orders. It does not have independent powers of investigation.

#### 34 Which sanctions and remedies can they impose?

If the Tribunal finds that abuse of dominance has occurred, it can issue an order prohibiting any or all respondents from engaging in the anti-competitive acts and, where it finds that such an order is not likely to restore competition in the relevant market, the Tribunal also may direct any or all respondents to take whatever actions the Tribunal deems reasonable and necessary to overcome the effects of the practice, including the divestiture of assets or shares. The Tribunal has imposed wide-reaching behavioural adjustments by way of restricting and/or modifying contractual provisions, pricing and billing practices, ongoing trade terms, memorandums of association, by-laws, shareholder agreements and various other aspects of operations for up to 10 years.

Where the Tribunal makes a remedial order against an entity which operates a domestic air service, it may also order the entity to pay an administrative monetary penalty of not more than C\$15 million. Monetary awards or penalties are not possible in any other circumstances.

#### 35 What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

The abuse of dominance provisions afford the Tribunal broad remedial powers, including the ability to revise contractual relationships. By way of example, in its *NutraSweet* decision the Tribunal prohibited the enforcement of exclusive supply terms and meet-or-release clauses and prohibited NutraSweet from entering into future contracts containing provisions requiring or inducing exclusivity. In the *Laidlaw* decision, the Tribunal's order nullified various provisions and amended others in supplier contracts with respect to rights of first refusal, non-compete clauses, exclusivity requirements and liquidated damages for early termination.

Nevertheless, the Act stipulates that the scope of Tribunal orders should not go beyond what is needed to restore competition and should not interfere with the rights of a person against whom an order is made. This restriction is intended to protect existing private contractual relationships between persons, and other proprietary property such as trade secrets, unless a breach of these contracts or secrets is absolutely necessary to restore competition.

#### Update and trends

The previous Liberal government proposed but did not pass legislation that would have permitted the Tribunal to award administrative monetary penalties of up to C\$10 million (and up to C\$15 million for subsequent proceedings) in addition to other remedies for abuse of dominance and repealed the airline-specific provisions in the Act. The current Conservative government has, as noted, introduced legislation that would allow AMPs in the telecommunications industry. The Commissioner is also on record as supporting AMPs generally for any abuse of dominance.

#### 36 To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Only the Commissioner has standing to bring an application to the Tribunal under the abuse of dominance provisions. There are no private rights of action to recover damages in respect of abuse of dominance until after a Tribunal order has been breached. The Act does permit the Tribunal to grant leave to a private party to intervene and participate (to the degree determined appropriate by the Tribunal) in a proceeding initiated by the Commissioner.

The issue of essential facilities has yet to be addressed in the jurisprudence. However, part of the consent resolution in the *Interac* case required the bank network to provide access to all potential participants on a non-discriminatory basis. Also note the Tribunal's ability to vary contracts (see question 35).

#### 37 Do companies harmed by abusive practices have a claim for damages?

No, there is no right under Canadian law for a firm harmed by abusive practices to claim damages against the dominant firm.

#### Practice

#### 38 What is the most recent high-profile dominance case?

In June 2006, the Federal Court of Appeal (FCA) set aside the Tribunal's decision that Canada Pipe's loyalty rebate programme did not have anti-competitive effects.

Notwithstanding Canada Pipe's significant market presence (market shares in the 80 per cent to 90 per cent range), the Tribunal determined that Canada Pipe had not engaged in anti-competitive acts and that its activities had not prevented or lessened competition substantially. Among other findings, the Tribunal determined that Canada Pipe's 'stock distributor programme' (SDP) was not anti-competitive because customers were not contractually bound to stay in the programme, and exit from the programme was relatively easy. The Tribunal determined that the programme allowed Canada Pipe to maintain a full product line because it encouraged greater volume of purchases of all products, with valid business justification. The Tribunal also determined that there was insufficient evidence to establish that the programme had had an exclusionary effect in the marketplace.

Among other findings, the FCA determined that the Tribunal had improperly focused on whether the absolute level of competition remaining in the market was substantial, rather than on

the relative difference in the level of competition that would have existed with versus without the SDP. It endorsed the 'but for' methodology and stated that, while this is not the only correct approach, the Tribunal must in every instance at least consider the following question: "Would the relevant markets — in the past, present or future — be substantially more competitive but for the impugned practice of anti-competitive acts?" The FCA suggested that this question could be answered by considering

more discrete components, such as whether entry or expansion might be substantially faster, more frequent or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater.

Canada Pipe has sought leave to appeal the case to the Supreme Court of Canada.

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